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## THE MERCHANT CLASS OF ARTICLE 2: FARMERS, DOCTORS, AND OTHERS

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### I. INTRODUCTION

By the early nineteenth century Anglo-American jurists had incorporated the law merchant into the common law.<sup>1</sup> The civil law nations of Europe preserved a separate code of commercial law applicable to merchants, but English-speaking courts applied the same general system of commercial law to all persons and abandoned the practice of applying different rules to different classes.<sup>2</sup> The Uniform Commercial Code, however, created an exception to this general principle by setting out special rules for a class which it designated "merchants."<sup>3</sup>

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1. In England the law merchant began in Medieval fairs and markets, where merchants themselves served as judges. In the fourteenth century the common law began to absorb the law merchant. See F. SANBORN, *ORIGINS OF THE EARLY ENGLISH MARITIME AND COMMERCIAL LAW* (1930). The law merchant remained separate, however, because merchants needed a body of law applicable in all nations, and a means of obtaining quick and final resolution of disputes. See W. BEWES, *THE ROMANCE OF THE LAW MERCHANT* 19 (1923); Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. CHI. L. REV. 427, 430-31 (1950). The law merchant still supplements modern commercial law. See U.C.C. § 1-103.

2. C. BUNN, H. SNEAD, & R. SPEIDEL, *AN INTRODUCTION TO THE UNIFORM COMMERCIAL CODE* 38 (1964); 3 NEW YORK REPORT OF THE LAW REVISION COMMISSION FOR 1955, *STUDY OF THE UNIFORM COMMERCIAL CODE* 2165 (1955) [hereinafter cited as N.Y. STUDY]; Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 572-73 (1950).

3. Fifteen Code sections refer to "merchant": U.C.C. §§ 2-103(1)(b), 2-201(2), 2-205, 2-207(2), 2-209(2), 2-312(3), 2-314, 2-327(1)(c), 2-402(2), 2-403(2), 2-

Courts find the merchant provisions troublesome. Decisions tend to blur the merchant distinction or to ignore it altogether and generally misunderstand the purpose of this distinction by class. Moreover, an overly protective attitude by some courts toward certain favorites of the law, and timidity at those times when the Code commands boldness, contribute to the confusion.

This Article holds that the merchant rules impose a modest burden on some individuals engaged in commercial activity; that the application of the burden must abide a determination that such commercial activity is involved; and that good sense and Code policy are best served by extending the definition of "merchant," and its concomitant rules of commercial activity, to a broad range of persons and situations. Courts and commentators, because of an unspoken belief that the merchant's burden is onerous, have generally adopted a different attitude from that proposed here, and have defined the merchant class too narrowly.

## II. THE CLASS

'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.<sup>4</sup>

A merchant may be one of only two classes of persons: first, one who "deals"; and second, one who "holds himself out," either by his own occupation or by the employment of certain others. The definition reflects the Code's policy of meeting the reasonable expectations of parties to a transaction. The Code assigns the burdens of the merchant rules according to objectively discernible facts out of which parties' expectations may arise.

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509(3), 2-603(1), 2-605(1)(b), 2-609(2), 7-210(2). U.C.C. § 2-103(1)(b), which defines the "good faith" required of merchants, may apply to all of the sections in Article 2. All citations to code sections and comments, unless otherwise indicated, refer to the Official Text of the 1972 version of the Uniform Commercial Code and the Official Comments prepared by the sponsoring agencies.

4. U.C.C. § 2-104(1). This definition appears in Article 2 but should be applied wherever the term is used. See U.C.C. § 7-210; note 74 *infra*. The definitions of "good faith", see U.C.C. §§ 1-203, 2-103, may make the merchant definition applicable to the entire Code. See note 54 *infra*.

“Knowledge” or “skill” peculiar to practices or goods are the primary indicators of the person who deals, as well as of the person who holds himself out.<sup>5</sup> The definition expressly requires these objective indicia in the case of one who holds himself out, and implies the same requirement by using the term “otherwise” in the case of one who deals. There is a secondary indicator in the terms “deals” and “occupation,” which requires that the activity subject to the definition be mercantile or business-like, rather than recreational or personal. This indicator is less strongly connoted by the term “deals” than by the term “occupation.”

Authorities enlarge on the definition by contrasting a “merchant” with a housewife,<sup>6</sup> a householder,<sup>7</sup> “mere” lawyers,<sup>8</sup> a yeoman farmer,<sup>9</sup> a school teacher,<sup>10</sup> casual sellers,<sup>11</sup> and “ordinary” persons,<sup>12</sup> and by characterizing the merchant above all as a “professional.”<sup>13</sup> The merchant definition therefore acknowledges reasonable commercial expectations. It encompasses a person involved in a business transaction who holds himself out to others (by dealing, by occupation, or by employing certain others) as having knowledge or skill as to certain practices or goods.

As the following analysis of the merchant sections suggests, some Code sections are “practice” oriented, others are “goods” oriented, and some are mixed.<sup>14</sup> Most of the controversy, however, centers on one

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5. Professor Nordstrom argues that “knowledge” and “skill” refer only to the person who “holds himself out.” See R. NORDSTROM, *LAW OF SALES* 408 n.25 (1970). Although grammatical precision supports that argument, it does not negate the strong implication of the term “otherwise” that the word “deals” connotes similar “knowledge” or “skill.” See U.C.C. § 2-104(1).

6. See 1 W. HAWKLAND, *A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE* 70 (1964); 1 NEW YORK REPORT OF THE LAW REVISION COMMISSION FOR 1954, *HEARINGS ON THE UNIFORM COMMERCIAL CODE* 108 (1954) (testimony of K. Llewellyn) [hereinafter cited as N.Y. HEARINGS]; R. NORDSTROM, *supra* note 5, at 204.

7. 1 N.Y. HEARINGS, *supra* note 6, at 125 (testimony of K. Llewellyn).

8. *Id.* at 108.

9. *Id.* at 108, 125. But see Iowa Code Ann. § 554.2403 (West 1967) and Iowa Comment (adopting U.C.C. § 2-403). See also Rabel, *supra* note 1, at 431.

10. See Williston, *supra* note 2, at 573.

11. See C. BUNN, H. SNEAD, & R. SPEIDEL, *supra* note 2, at 37.

12. See 1 N.Y. HEARINGS, *supra* note 6, at 122 (testimony of K. Llewellyn).

13. See U.C.C. § 2-104, Comment 1; 1 W. HAWKLAND, *supra* note 6, at 11; Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L.F. 321, 324.

14. See U.C.C. § 2-104 (Comment 2 classifies U.C.C. §§ 2-201(2), 2-205, 2-207, and 2-209 as “practice” sections, U.C.C. §§ 2-314, 2-402(2), and 2-403(2) as “goods” sections and the balance as applicable to either kind of merchant).

“practice” section<sup>15</sup> and one “goods” section.<sup>16</sup>

### III. THE FRAMEWORK

Many authorities have objected to the merchant definition.<sup>17</sup> Critics of the Code have pointed out the lack of consistency in the terminology of the merchant sections,<sup>18</sup> the novel use of conventional terms,<sup>19</sup> and the resulting vagueness of the boundaries of the class of merchants, and have expressed a distaste for the class or status notion of the definition.<sup>20</sup> Fears prompted by these weaknesses yielded some *ad terrorem* arguments.<sup>21</sup> The complaints are generally well founded; the fears are not.

The lack of consistency in terminology is evident in the “goods” sections<sup>22</sup> which variously refer to merchants “with respect to goods of that kind”;<sup>23</sup> a merchant “regularly dealing in goods of the kind”;<sup>24</sup> a “merchant-seller”;<sup>25</sup> and a merchant “who deals in goods of that kind.”<sup>26</sup>

15. U.C.C. § 2-201; see notes 90-117 *infra* and accompanying text.

16. U.C.C. § 2-314; see notes 172-94 *infra* and accompanying text.

17. See Beutel, *The Proposed Uniform Commercial Code as a Problem in Codification*, 16 LAW & CONTEMP. PROB. 141, 145-46 (1951); Duesenberg & King, *Sales & Bulk Transfers*, 3 BENDER'S U.C.C. SERV. § 2.04[2], at 2-64 (1974); Williston, *supra* note 2, at 572-73. See generally Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958); Newell, *The Merchant of Article 2*, 7 VAL. U.L. REV. 307 (1973).

18. See notes 23-26 *infra* and accompanying text.

19. See, e.g., Waite, *The Proposed New Uniform Sales Act*, 48 MICH. L. REV. 603 (1950).

20. See 1 N.Y. HEARINGS, *supra* note 6, at 93-94. See generally Hall, *Article 2—Sales—“From Status to Contract,”* 1952 WIS. L. REV. 209; Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185 (1967); Rabel, *supra* note 1, at 430-33; 17 U. CHI. L. REV. 427 (1950). *Contra*, Braucher, McCurdy, Sutherland, & Kaplan, *Report on Article 2—Sales by Certain Members of Faculty of Harvard Law School (Spring 1950 Draft and September 1950 Revisions)*, 6 BUS. LAW. 151, 154 (1951).

21. Some commentators were concerned that a farmer might be a merchant for purposes of the risk-of-loss provision of U.C.C. § 2-509(3). See 1 N.Y. STUDY, *supra* note 2, at 489-90; Hall, *supra* note 20, at 212. See generally Newell, *supra* note 17.

22. The warranty provisions and the fraudulent-retention and entrusting provisions are “goods” sections, see note 14 *supra*, and apply only to merchants whom, the drafters felt, buyers would believe to be familiar with certain goods. See U.C.C. §§ 2-312(3), 2-314(2), 2-402(2), 2-403(2). The fine-print sections discussed in this article are clearly “practice” sections. See notes 85-89 *infra* and accompanying text. The remaining merchant provisions apply both to those familiar with “practices” and to those familiar with “goods.”

23. U.C.C. § 2-314.

24. U.C.C. § 2-312(3).

25. U.C.C. § 2-402(2).

26. U.C.C. § 2-403(2).

The four different phrases suggest that each section refers to a different type of merchant.<sup>27</sup> The critics complained further that the reference in the definition of the term “between merchants”<sup>28</sup> to parties “chargeable with the knowledge or skill of merchants”<sup>29</sup> implies a category of parties different from merchants.<sup>30</sup> The courts have not been disturbed by these deficiencies in draftsmanship, however.

More accurate were the critics' predictions that the drafters' selection of the frequently used term “merchant” for special meaning would create difficulties. In fact, it has; but the blame for these problems may rest on the shoulders of the courts and their advocates, who have apparently ignored the definitional section. It is one thing to give special meaning to a common term, as the Code drafters did; it is another to quote *Words and Phrases*<sup>31</sup> or the *American Heritage Dictionary*<sup>32</sup> or refer to the law merchant<sup>33</sup> in determining the applicability of the merchant rules to litigated facts, when the Code itself provides a definition. The problem is not so much careless drafting as it is careless legal analysis.

By and large the courts have avoided the extreme results the critics feared, but they have done so in part at the expense of the underlying reasons of the merchant provisions. Rather than expanding the merchant definition beyond the limits of fairness, as these critics feared, courts have contracted it to the point of depriving commerce of the full benefit the merchant sections are designed to provide.

The fears of the critics, moreover, were based on the notion that a person who was a merchant for one “practice” section would be a

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27. They also suggest that a person who is a merchant for one of the “goods” sections is not necessarily a merchant for purposes of the others. See text at notes 190-94 *infra*.

28. U.C.C. § 2-104(3).

29. *Id.* (emphasis added).

30. NEW YORK REPORT OF THE LAW REVISION COMMISSION FOR 1956, REPORT AND APPENDICES RELATING TO THE UNIFORM COMMERCIAL CODE 366 (1956).

31. See *Cook Grains, Inc. v. Fallis*, 239 Ark. 962, 964, 395 S.W.2d 555, 556 (1965).

32. See *Lish v. Compton*, — Uiah 2d —, — n.3, 547 P.2d 223, 226 n.3 (1976). See also *Sand Seed Service, Inc. v. Poeckes*, 249 N.W.2d 663, 666 (Iowa 1977), where the court used BLACK'S LAW DICTIONARY and RANDOM HOUSE DICTIONARY.

33. See U.C.C. § 2-104, Comment 2: “‘merchant’ as defined here roots in the ‘law merchant’ concept of a professional in business” (emphasis added). The *Cook Grains* court mistakenly read that language to mean that the term “merchant” is to be defined by the usage of this word in the law merchant. The Comment means only that the Code borrowed the concept of a professional in business from the law merchant to define the Code's own specialized term.

merchant for all "practice" sections, since there was no language in the sections to suggest the contrary. Nor was there anything in the Code to dispel the idea that a merchant under one of the "goods" sections would be a merchant for the "practice" sections.<sup>34</sup> Logic, however, does not compel the once-a-merchant, always-a-merchant rule. Despite the fact that there is only one definition of merchant, that definition is open-ended; and its openness and vagueness may well be its strength, by permitting courts to fashion the rule with the flexibility necessary to serve the reason of the merchant sections, which are independent in and of themselves.<sup>35</sup> Review of the cases reveals that trouble arises when courts ignore the underlying reason of a particular section and look to the definitional section as a kind of polestar, fixed outside the realm of commerce.

#### IV. THE BURDEN

##### A. *Risk of Loss*

Commenting on the rule that the Code is to be construed liberally and in accordance with its purposes,<sup>36</sup> the drafters remark that each section must be "limited to its reason."<sup>37</sup> This comment, which Professor Skilton calls the most important in the Code,<sup>38</sup> clearly requires that the single, general definition of merchant be applied in accordance with the varying reasons of the sections which employ the term. An analysis of the risk-of-loss section shows how important these fundamental guides to construction can be.

The Code's basic risk-of-loss provision<sup>39</sup> contains a special rule for merchants that requires them to bear the risk of loss even after tender (after the merchant gives the buyer any notice reasonably necessary and

34. See U.C.C. § 2-104, Comment 2; Kripke, *supra* note 13, at 325-26; Newell, *supra* note 17.

35. There is no necessary relation, for example, between the duty to dispose of rejected goods and the risk-of-loss provision. One puts risk on the buyer, the other on the seller. The "goods" sections invariably use different language from the "practices" sections in designating a merchant. See notes 23-26 *supra*.

36. See U.C.C. § 1-102(1).

37. U.C.C. § 1-102, Comment 1.

38. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 Wis. L. Rev. 597, 609.

39. U.C.C. § 2-509(3). Tender of delivery does not require receipt by the buyer. U.C.C. § 2-503(1). See, e.g., *Caudle v. Sherrard Motor Co.*, 525 S.W.2d 238 (Tex. Ct. App. 1975).

holds conforming goods at the buyer's disposition).<sup>40</sup> Tender by a non-merchant passes risk to the buyer. The Code drafters explain this different treatment by stating that the merchant "can be expected to insure his interests in [the goods]."<sup>41</sup> It should follow from this reason that sellers who cannot be expected to insure the goods they hold for buyers should therefore not be considered merchants in this context. Critics of the Code,<sup>42</sup> overlooking section 1-102 and its comments, saw the special risk-of-loss provision as an ill-advised attempt to reverse *Tarling v. Baxter*, a farm case in which the court held that the risk of loss does not pass to the buyer on tender but on delivery.<sup>43</sup>

During the New York Law Revision Commission's consideration of the Code, the Commerce and Industry Association's Task Group questioned the advisability of such a change.<sup>44</sup> Professor Llewellyn, official reporter for the Code and chief draftsman of Article 2, responded in a fashion that reflects his regard for the command of section 1-102 and its comment that the application of any section be limited to its reason.

I should have some hope that a court, seeing the reason for the rule announced in the comment [that merchants can be expected to insure the goods<sup>45</sup>], and knowing that farmers are not within that reason, might arrive at the conclusion that *for this purpose* the farmer who is so worrying the majority of the Commerce and Industry Association's Task Group would not be a merchant: *cessante razione, cessat ipsa lex*.<sup>46</sup>

Professor Llewellyn did not ponder whether farmers generally were or were not merchants, but asked the question: What conclusion does the reason of the section support? His statement clearly presupposes, moreover, that a person may be a merchant for some sections but not for others:<sup>47</sup> all sections must be *limited* by their reasons.<sup>48</sup> The policy

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40. U.C.C. § 2-503(1).

41. U.C.C. § 2-509, Comment 3.

42. See Hall, *supra* note 20, at 221; Waite, *supra* note 19, at 618; Williston, *supra* note 2, at 572.

43. 6 B. & C. 360, 108 Eng. Rep. 484 (K.B. 1827) (sale of hay by farmer).

44. The Commission itself also questioned the advisability of such a change. See 1 N.Y. STUDY, *supra* note 2, at 489-90.

45. U.C.C. § 2-509, Comment 3.

46. 1 N.Y. HEARINGS, *supra* note 6, at 124 (emphasis in original).

47. "[F]or *this purpose* the farmer . . . would not be a merchant . . ." *Id.* (emphasis in original).

48. See U.C.C. § 1-102, Comment 1.

and good sense of section 1-102 is further served by expanding each section in accord with the legislature's command to construe provisions liberally to serve their reasons. The varying purposes of the sections therefore delimit the application of each by restricting courts from applying any section beyond its reason and by commanding courts to extend the section in accordance with that reason.

The sections comprising the burden that the Code imposes on the merchant class fall into five categories: risk of loss, good faith, rights of third persons, fine print, and warranties. Risk of loss has already been discussed; analysis of remaining sections is necessary for complete understanding of the term "merchant."

### B. *Good-Faith Provisions*

Article 2 contains both subjective and objective standards of good faith,<sup>49</sup> and imposes the latter upon merchants.<sup>50</sup> The Code directs that "good faith" attend the performance or enforcement of any contract or duty within the Code,<sup>51</sup> and commercial lawyers may therefore argue that the good faith required of merchants in all instances must rise to the rigorous objective standard. The Official Comments support that argument.<sup>52</sup> Those familiar with the Code's early drafts contest that conclusion,<sup>53</sup> and the question remains unresolved.<sup>54</sup> Whether objective good faith is always required, several sections of Article 2 expressly impose that standard and several others impose it indirectly. The requirements contract section,<sup>55</sup> and the open-price term<sup>56</sup> and

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49. See generally Farnsworth, *Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963).

50. "'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." U.C.C. § 2-103(1)(b).

51. U.C.C. § 1-203.

52. See U.C.C. §§ 2-209, Comment 2; 2-607, Comment 4; 2-609, Comment 6; 2-612, Comments 3 & 7.

53. See Farnsworth, *supra* note 49, at 676; Summers, "*Good Faith*" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 212-13 (1968).

54. See, e.g., *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648 (Del. 1972). *Contra*, *National Car Rental v. Fox*, 18 Ariz. App. 160, 500 P.2d 1148 (1972); see *Couch v. Cockroft*, 490 S.W.2d 713 (Tenn. Ct. App. 1972). See generally Skilton, *Buyer in Ordinary Course of Business Under Article 9 of the Uniform Commercial Code (and Related Matters)*, 1974 WIS. L. REV. 1, 25-27.

55. U.C.C. § 2-306(1).

56. U.C.C. § 2-305(2).

open-terms-of-performance provisions,<sup>57</sup> contain express requirements of good faith that for merchants is measured objectively.<sup>58</sup> A number of other sections, without using the term "good faith," require such a standard of conduct from merchants. For example, two sections require merchant buyers to follow a seller's directions to sell goods in the merchant's possession.<sup>59</sup> Such directions must be carried out in good faith.<sup>60</sup> The Code's definition of "buyer in ordinary course of business" imposes a good faith standard,<sup>61</sup> and merchants who fall short of objective good faith lose the free-market protection afforded them by certain other Code provisions.<sup>62</sup>

The burden imposed by these good-faith sections varies. A merchant may have to expend considerable effort to dispose of perishable commodities,<sup>63</sup> but the obligation to specify defects is minimal.<sup>64</sup> The Code assumes that merchants as a class are capable of complying with even the more burdensome good-faith requirements. Courts should be aware of this assumption when deciding whether a person is a merchant under a section imposing good-faith obligations. The ability to carry out the good-faith requirement of a section does not, of course, make one a merchant; the reason of the section must still be consulted. Furthermore, the good-faith requirements themselves are limited to what is reasonable. A merchant buyer's duty to dispose of rejected

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57. U.C.C. § 2-311(1).

58. *See* Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283 (7th Cir. 1974); Columbus Milk Producers' Coop. v. Department of Agriculture, 48 Wis. 2d 451, 180 N.W.2d 617 (1970). *See also* § 2-305, Comment 3.

59. U.C.C. §§ 2-327(1)(c), 2-603.

60. *See* Gutor Int'l AG v. Raymond Packer Co., 493 F.2d 938 (1st Cir. 1974); Arkin Imports, Inc. v. Dorothy's Exclusive Fashions, Inc., 12 UCC REP. SERV. 871 (Civ. Ct. N.Y. 1973); *cf.* Mitchell Rubber Products, Inc. v. Hub Auto Supply, Inc., 28 Mass. App. Dec. 109 (1964) (buyer held duty-bound to sell goods in excess of order even though no instructions).

61. U.C.C. § 1-201(9).

62. *See generally* Skilton, *supra* note 54.

63. In *Traynor v. Walters*, 342 F. Supp. 455 (M.D. Pa. 1972), a New York City florist was required to dispose of Christmas trees which he received from a Pennsylvania seller but which were not satisfactory for his purposes. In *Gutor Int'l AG v. Raymond Packer Co.*, 493 F.2d 938 (1st Cir. 1974), the court penalized a dealer for failing to dispose of dictating equipment received from a foreign seller. In *Arkin Imports, Inc. v. Dorothy's Exclusive Fashions, Inc.*, 12 UCC REP. SERV. 871 (Civ. Ct. N.Y. 1973), however, the court did not require a retailer of non-conforming shirts to dispose of them, because the seller-manufacturer was located within the same market and the goods were not perishable.

64. A non-merchant may not arbitrarily refuse to provide such a list and thereby deprive the seller of the opportunity to cure defects. U.C.C. § 2-605(1).

goods includes the duty to follow only the seller's *reasonable* instructions or to make *reasonable* efforts.<sup>65</sup> A merchant's duty to provide another merchant with adequate assurance of performance is limited to what is "reasonable" according to "commercial standards,"<sup>66</sup> and the general good-faith definition requires only what is "reasonable" in the merchant's own trade.<sup>67</sup> These features of the good-faith provisions eliminate the harshness which would attend the application of an objective standard of fairness unconnected with commercial reality. The Code expects a merchant to do only what other similarly situated merchants of that trade or profession would do; courts and juries are not to make unfair demands.

Thus, even though a grocer is a merchant, he would not be bound to sell a defective furnace under the rejected goods section, because it would be unreasonable to impose that burden on him; the rejected goods section requires only reasonable efforts.<sup>68</sup> Similarly, although a college professor familiar with trade practices may, in a commercial endeavor, be a merchant, the Code tempers the professor's duties with the ubiquitous reasonableness modifier. Finally, if farmers and doctors are merchants, as this paper suggests they are in most instances, the Code measures their duties as merchants not against bankers or jobbers or factors but against other farmers and other doctors.<sup>69</sup>

### C. *Rights of Third Persons*

The Code states three special rules for creditors of merchants. First, a merchant's creditor cannot complain that he was fraudulently misled into extending credit by the merchant's retention, under certain circumstances, of goods already sold.<sup>70</sup> Second, a person who entrusts goods

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65. See U.C.C. § 2-603, Comment 2; *accord*, U.C.C. § 2-327(1)(c).

66. U.C.C. § 2-609(2).

67. U.C.C. § 2-103(1)(b).

68. Professor Hawklund avoids the problem by saying that a grocer is only a merchant with respect to groceries and not to furnaces. 1 W. HAWKLAND, *supra* note 6, at 238-39. That solution has the unfortunate effect of permitting the grocer to avoid the "practice" sections in corresponding with the manufacturer concerning that furnace.

69. Any other conclusion ignores the notion of "commercial standards," U.C.C. §§ 2-103(1)(b), 2-609(2), and "dealing in the trade," U.C.C. § 2-103(1)(b), which must relate to a "trade" or branch of commerce in which the "merchant" is engaged.

70. U.C.C. § 2-402(2). Professor Warren expresses relief that this rule sheds the influence of "the hoary doctrine of fraudulent conveyance law." Warren, *Cutting Off Claims of Ownership Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 469, 474 (1963).

to a merchant dealing in goods of that kind gives the merchant power to transfer all of the entruster's rights to a buyer in ordinary course of business.<sup>71</sup> Third, a warehouseman who stores a merchant's goods enjoys a wider range of choice in disposing of those goods upon the merchant's failure to pay storage charges than he would if the bailor were a nonmerchant.<sup>72</sup> The first two provisions apply to merchant sellers and demonstrate the Code's willingness to frame rules which reflect the expectations of the parties. The fraudulent-retention section assumes lenders know that many merchants make delivery after the time of sale. The entrusting section reflects the expectation of a buyer that he will take free and clear from a dealer in ordinary course of business.<sup>73</sup> The warehouseman section is not part of Article 2 but uses the term "merchant" and should be subject to the Article 2 definition.<sup>74</sup> This section displays the Code's assumption that business debtors in commercial dealings do not require all of the procedural safeguards extended to others.<sup>75</sup>

The fraudulent-retention and entrusting sections are neutral insofar as the merchants themselves are concerned. Any tendency the sections have to inhibit credit is offset by their tendency to facilitate sales. These sections burden not merchants but third parties dealing with merchants. The warehouseman section is something of a burden to the merchant himself, but the burden is modest.

The problems with determining the scope of the merchant definition as applied in these sections center on the farmer. Investors often acquire cattle and entrust them to a farmer for fattening or grazing purposes.<sup>76</sup> If a farmer sells his own cattle in various markets he may

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71. U.C.C. § 2-403(2).

72. U.C.C. § 7-210.

73. The Code defines "buyer in ordinary course of business" in U.C.C. § 1-201(9) and includes "good faith" as an element of that definition, a fact which may have significance for a "merchant" who desires the protection extended to the buyer in ordinary course.

74. See generally *First National Bank v. Crone*, 157 Ind. App. 665, 301 N.E.2d 378 (1973); *Mattek v. Malofsky*, 42 Wis.2d 16, 165 N.W.2d 406 (1969). Professor Hawkland argues: "[A]lthough the word 'merchant' has been used perhaps inadvertently outside of Article 2, clearly its Article 2 definition should be universally controlling." Hawkland, *Some Uses and Misuses of a Verbal Concordance to the Uniform Commercial Code*, 1974 U. ILL. L.F. 1, 5. *Contra*, C. BUNN, H. SNEAD, & R. SPEIDEL, *supra* note 2, at 38; cf. *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648 (Del. 1972) (Article 2 good-faith does not apply to secured transaction).

75. See, e.g., U.C.C. §§ 9-505(1) and 9-507(1).

76. See IOWA CODE ANN. § 554.1201 (37) (West 1967), Iowa Comment 37.

be a "merchant who deals in goods of that kind"; his unauthorized sale of the investors' cattle will then clothe the buyer in ordinary course with good title.<sup>77</sup> The same result obtains if farmer *A* gives his farm products to a neighbor, farmer *B*, for delivery for the account of *A*. If *B*, without authorization, sells *A*'s goods and pockets the proceeds, the buyer will prevail over *A*.<sup>78</sup> One state settles the problem with a non-conforming amendment to the Code<sup>79</sup> and another by applying its Livestock Brand and Anti-Theft Act.<sup>80</sup>

Where special statutory solutions are not available, two policies govern these cases. The first is the fundamental policy, expressed in the Code,<sup>81</sup> that a buyer in an open market takes his purchase free of any claims against the seller.<sup>82</sup> The second policy is the Code's general acceptance of the reasonable expectations of parties to a business transaction; one who entrusts his goods to another does not expect his goods to be sold in a way that defeats the owner's title.<sup>83</sup> The policies, of course, compete.

Cases in which there are competing claims for goods entrusted to farmers and sold by them can be resolved by deciding first whether the farmer in the case is a "merchant," and then applying the entrusting section in accord with this general determination. This approach ignores the underlying policy issues and is, in any case, incorrect. A farmer may be a "merchant" and yet not a "merchant who deals in goods of that kind." A far better approach would be to determine whether the farmer is a "merchant who deals," within the meaning of the section, by consulting its reason. That reason, of course, includes the policy of fostering a free market by satisfying the expectations of buyers in ordinary course of business that they are getting good title,<sup>84</sup>

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77. U.C.C. § 2-403(2).

78. See IOWA CODE ANN. § 554.2503 (West 1967), Iowa Comments at 428.

79. IOWA CODE ANN. § 554.2403 (West 1967).

80. See Pugh v. Stratton, 22 Utah 2d 190, 450 P.2d 463 (1969).

81. See U.C.C. § 9-307(1) (excluding farmers selling farm products from the market overt rule); cf. U.C.C. § 7-503, Comment 1 (title of a purchaser by due negotiation prevails over almost any prior interest if his possession derived from action by prior claimant which introduced goods into stream of commerce).

82. "[I]t is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end." 2 W. BLACKSTONE, COMMENTARIES \*449.

83. See, e.g., 2 W. BLACKSTONE, COMMENTARIES \*450-51 (statutes provided an exception to the rule of market overt when the goods consisted of a stolen horse).

84. This argument recognizes that the reason of U.C.C. § 2-403, as expressed in

while giving due regard to the expectations of those persons entrusting their goods to farmers. Courts should balance these competing interests when deciding whether to apply this merchant rule to farmers. To consider the farmer alone weights the scale on only one side of the fulcrum.

#### D. *Fine Print Sections*

Four Code provisions assume that merchants read contract documents more carefully than nonmerchants. The first provision,<sup>85</sup> a source of considerable controversy in this context, deprives a merchant of the Statute of Frauds defense if he receives, under certain conditions, a written confirmation and fails to reject it within ten days. The second provision<sup>86</sup> imposes on a merchant, under certain circumstances, additional terms in an acceptance or confirmation, so long as those terms do not materially alter the original agreement. The third section<sup>87</sup> protects only nonmerchants against a nonmodification provision. The fourth provision<sup>88</sup> denies merchants a lack-of-consideration defense if a firm offer is in writing and otherwise meets the section's requirements.

These sections relieve fast-moving commercial transactions from some of the formalities of common law contract principles. Their burden consists of requiring the merchant to read contract documents with care and to object to terms with which he disagrees. The most significant of these sections is that relating to the Statute of Frauds. This provision avoids the unfairness of letting one party use the Statute of Frauds defense while denying it to the other party.<sup>89</sup> It gives rise to frequent litigation of the issue of whether a farmer is to be classed as a merchant.

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Comment 2, turns on the function of "inventory," and further recognizes that agricultural products are usually not inventory. See U.C.C. § 9-109(3).

85. U.C.C. § 2-201(2).

86. U.C.C. § 2-207(2).

87. U.C.C. § 2-209(2).

88. U.C.C. § 2-205.

89. [T]he Code adds a purpose which the case-law now established has long forgotten: the Code adds both the desire and a reasonable machinery for a businessman *to be able to rely* on what both parties sign and on the fact that he has procured a memorandum signed by the other party.

1 N.Y. HEARINGS, *supra* note 6, at 109 (testimony of K. Llewellyn) (emphasis in original). Professor Nordstrom notes a hiatus in the application of the provision and a resulting frustration of that policy. The policy, however limited, nonetheless remains. See R. NORDSTROM, *supra* note 5, at 60 n.31.

## V. THE FARMER

### A. *Farmers As Merchants*

Farmers occasionally assert a Statute of Frauds defense denied to merchants who fail to reject a confirming memorandum within ten days.<sup>90</sup> The first and leading case, *Cook Grains, Inc. v. Fallis*,<sup>91</sup> got the courts off quickly and decisively on the wrong foot. The court in *Cook Grains* assumed that since the plaintiff grain company had sent a confirming memorandum, the defendant farmer would be liable if the court found him to be a merchant.<sup>92</sup> That assumption was incorrect. The statute did not make the recipient of the memorandum liable. It only deprived him of the Statute of Frauds defense, leaving the grain company with the obligation of proving there was a contract in the first instance to "confirm." The *Cook Grains* court, therefore, perceived a greater burden on merchants under the Code than it in fact imposed.

More dismaying was the court's analysis of the merchant definition. Adopting a conventional view of the term "merchant," it concluded that the merchant rules applied only to "professional traders."<sup>93</sup> The court relied on pre-Code cases that necessarily defined "merchant" without reference to the Code's definition; the court said that in "construing a statute its words must be given their plain and ordinary meaning."<sup>94</sup> In short, the opinion fell into the trap so many of the Code's critics envisioned. It gave conventional meaning to the word "merchant" which the Code uses unconventionally. In doing so the court ignored the underlying reason of the Statute of Frauds, the merchant definition sections, and the legislative command that courts construe the Code's provisions liberally.

Although the *Cook Grains* case prompted some criticism,<sup>95</sup> it

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90. U.C.C. § 2-201(2).

91. 239 Ark. 962, 395 S.W.2d 555 (1965).

92. "Thus, it will be seen that under the statute, if appellee is a merchant he would be liable under the alleged contract because he did not, within ten days, give written notice that he rejected it." *Id.* at 963, 395 S.W.2d at 556. The mistake is not an uncommon one. See *Loeb & Co. v. Schreiner*, 294 Ala. 722, 321 So.2d 199 (1975); *Campanelli v. Conservas Altamira, S.A.*, 86 Nev. 838, 477 P.2d 870 (1970); cf. *Nelson v. Union Equity Coop. Exch.*, 536 S.W.2d 635 (Tex. Ct. App. 1976) (written confirmation of sale by merchant wheat seller).

93. *Cook Grains, Inc. v. Fallis*, 239 Ark. 962, 395 S.W.2d 555, 557 (1965).

94. *Id.*

95. See 1 R. ANDERSON, ANDERSON'S UNIFORM COMMERCIAL CODE § 2-104:6, at

spawned a vigorous line of authority. The Alabama Supreme Court, repeating the same incorrect assumption that the Statute of Frauds makes the defendant liable when he is denied its defenses, ruled in *Loeb & Co. v. Schreiner*,<sup>96</sup> that a cotton farmer was not a "professional cotton merchant,"<sup>97</sup> stressing the fact that the defendant farmer sold only his own produce and not that of others. The Kansas Supreme Court<sup>98</sup> concluded that a defendant farmer who sold his own wheat was knowledgeable or skilled in raising that wheat, but not in selling it, and therefore was not a merchant.<sup>99</sup> The Supreme Court of Utah, relying in part on *The American Heritage Dictionary's* definition of "merchant," held that because a farmer sells crops only once a year he is not a merchant who, by definition, must sell more frequently.<sup>100</sup> Finally, the Supreme Court of Iowa<sup>101</sup> recently opted for the *Cook Grains, Inc.* position stressing the conventional meaning of the term "merchant." It concluded that a farmer is not a merchant when he sells his own grain.

Two other state supreme courts decided cases within the scope of the Article 2 Statute of Frauds rule but did not apply the Code at all. Montana declined to apply the Statute of Frauds provision even though the court acknowledged that, but for the merchant question, which the court did not decide, that section would apply.<sup>102</sup> In a South Dakota case,<sup>103</sup> the defendant pleaded the Statute of Frauds defense, but the court avoided the issue by holding the defendant liable on principles of equitable estoppel.<sup>104</sup>

These opinions demonstrate the courts' marked reluctance to bring agricultural commerce within the shadow of the Code's merchant rule

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221 (2d ed. 1970); Duesenberg & King, *supra* note 17, § 2.04[2] at 2-65 (1965); 65 MICH. L. REV. 345 (1966).

96. 294 Ala. 722, 321 So. 2d 199 (1975).

97. *Id.* at 725, 321 So.2d at 202.

98. Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 547 P.2d 323 (1976).

99. *Id.* at 177, 547 P.2d at 328. *Accord*, Sierens v. Clausen, 21 Ill. App. 3d 450, 315 N.E.2d 897 (1974), *rev'd*, 60 Ill. 2d 585, 328 N.E.2d 559 (1975); Sand Seed Serv., Inc. v. Poekes, 249 N.W.2d 663 (Iowa 1977).

100. Lish v. Compton, — Utah 2d —, 547 P.2d 223 (1976).

101. Sand Seed Serv., Inc. v. Poekes, 249 N.W.2d 663 (Iowa 1977).

102. Cargill, Inc. v. Wilson, 166 Mont. 346, 532 P.2d 988 (1975).

103. Farmers Elev. Co. v. Lyle, — S.D. —, 238 N.W.2d 290 (1976).

104. *See also* Robert Johnson Grain Co. v. Chemical Interchange Co., 541 F.2d 207 (8th Cir. 1976); Jamestown Terminal Elevator, Inc. v. Hieb, 246 N.W.2d 736 (N.D. 1976). *But see* Farmers Coop. Ass'n v. Cole, 239 N.W.2d 808 (N.D. 1976) (refusing

and may reflect doubts that farmers can cope with the burden that the Code imposes upon merchants, a burden that is lighter in fact than the courts in *Loeb* and *Cook Grains* assumed it to be.

There is a second line of authority that rejects *Cook Grains* and its progeny. In *Campbell v. Yokel*,<sup>105</sup> an Illinois court concluded that "farmer" and "merchant" were not mutually exclusive terms and that a farmer "may be considered a merchant in some instances and that one of those instances exists when the farmer is a person 'who deals in goods of a kind . . . involved in the transaction.'"<sup>106</sup> The court found that a farmer who "regularly sells his crops is a person who 'deals in goods of that kind.'"<sup>107</sup> *Campbell* avoided the *Cook Grains* error of giving "merchant" a conventional construction. The *Campbell* opinion also examined the underlying reason of the merchant exception to the Statute of Frauds rule. The provision covers instances in which a buyer sends a written confirmation. The buyer cannot use the Statute of Frauds; and it is unfair, the authorities agree, to let a merchant receiving such confirmation hold it, waiting to see what happens to the price until the date of delivery, and then back out of his bargain if the price goes up.<sup>108</sup> The *Campbell* opinion, to prevent that unfairness, denied the Statute of Frauds defense to a farmer who had grown and sold grain to grain companies for several years. The Illinois Supreme Court adopted the *Campbell* reasoning,<sup>109</sup> saying, "[w]e know of no reason why under the circumstances shown here the defendant, admittedly a farmer, cannot at the time of the sale be a 'merchant.'"<sup>110</sup>

To the same effect are *Continental Grain Co. v. Harbach*<sup>111</sup> and *Currituck Grain, Inc. v. Powell*.<sup>112</sup> In *Harbach*, the farmer argued that he had sold some grains for many years but had sold soybeans, the sub-

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to invoke estoppel). This case sidesteps the merchant issue by finding that the seller failed to allege that the farmer was a merchant. See also *Farmland Serv. Coop., Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976).

105. 20 Ill. App. 3d 702, 313 N.E.2d 628 (1974). (Wags will be pleased to learn that Yokel was the farmer.)

106. *Id.* at 705, 313 N.E.2d at 630 (emphasis added).

107. *Id.*

108. See note 117 *infra*.

109. *Sierens v. Clausen*, 60 Ill. 2d 585, 328 N.E.2d 559 (1975) (farmer for 34 years had sold grain for present or future delivery for the past five years).

110. *Id.* at 589, 328 N.E.2d at 561.

111. 400 F. Supp. 695 (N.D. Ill. 1975).

112. 28 N.C. App. 563, 222 S.E.2d 1 (1976).

ject of the litigated sale, for only a few months. The court was unimpressed with this distinction. *Currituck* expresses a rationale implicit in other cases: “[t]he growing and marketing of corn and soybeans is an important part of the agricultural economy of this area. The procedures for marketing crops are well known.”<sup>113</sup> Other recent cases support this view and consider the merchant’s status to be a question of fact.<sup>114</sup> In short, these courts recognize grain farming and marketing as a business enterprise which should be subject to the rules established for commercial activity. The unfairness of doing otherwise is clear. In these cases the farmer-seller and a grain company confer orally about a sale. The company then confirms its purchase in writing and the farmer does nothing while the price goes up. In *Loeb* the price of cotton went from thirty-seven cents to “the middle 80 cents”;<sup>115</sup> the price of wheat in another case went from \$2.86 to \$3.46 per bushel,<sup>116</sup> in a third case there was only an increase from \$3.30 to \$3.45.<sup>117</sup>

Other cases involving farmers arise from warranty disputes. In these cases there has been little discussion of the merchant question, and the determination has been treated as one of fact. In *Fear Ranches, Inc. v. Berry*,<sup>118</sup> the court concluded that a single sale of livestock by a rancher to another rancher (even though the seller had previously sold to packers) did not render the seller a merchant with respect to goods of that kind. In other cases courts found sellers of calves,<sup>119</sup> hay,<sup>120</sup> and sod<sup>121</sup> to be merchants subject to the warranty provisions. Courts

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113. 28 N.C. App. 563, 566, 222 S.E.2d 1, 3 (1976).

114. See *Continental Grain Co. v. Martin*, 536 F.2d 592 (5th Cir. 1976); *Ohio Grain Co. v. Swisshelm*, 40 Ohio App. 2d 203, 318 N.E.2d 428 (1973); *Nelson v. Union Equity Coop. Exch.*, 536 S.W.2d 635 (Tex. Ct. App. 1976).

115. *Loeb & Co. v. Schreiner*, 294 Ala. 722, 723, 321 So. 2d 199, 200 (1975).

116. *Decatur Coop. Ass'n v. Urban*, 219 Kan. 171, 547 P.2d 323 (1976).

117. Rising farm commodity prices have yielded a number of cases in which farmer-sellers have sought to avoid a bad bargain. See *Bradford v. Plains Cotton Coop. Ass'n*, 539 F.2d 1249 (10th Cir. 1976); *R.N. Kelly Cotton Merchant, Inc. v. York*, 494 F.2d 41 (5th Cir. 1974); *Cone Mills Corp. v. A.G. Estes, Inc.*, 377 F. Supp. 222 (N.D. Ga. 1974); *Cox v. Cox*, 292 Ala. 106, 289 So.2d 609 (1974). In *Harris v. Hine*, 232 Ga. 183, 205 S.E.2d 847 (1974), the price of cotton rose from 30 to 70 cents per pound, increasing the value of the cotton sold by \$140,000. See generally 53 N.C.L. REV. 579 (1975).

118. 470 F.2d 905 (10th Cir. 1972).

119. *Martineau v. Walker*, 97 Idaho 246, 542 P.2d 1165 (1975).

120. *Azevedo v. Minister*, 86 Nev. 576, 471 P.2d 661 (1970).

121. *Barron v. Edwards*, 45 Mich. App. 210, 206 N.W.2d 508 (1973).

do not hesitate to find farmer cooperatives are merchants for the purpose of the warranty provision.<sup>122</sup>

### B. *The Myth*

Courts that refuse to accord merchant status to farmers may well be misled by the myth of the American farmer. The notion appears in the assumption that "farmer" and "merchant" are mutually exclusive terms.<sup>123</sup> The myth of the farmer who has nothing to do with the commerce of the cities has a long history. Thomas Jefferson said that "those who labor in the earth are the chosen people of God . . ." <sup>124</sup> Many political figures have exploited romantic notions of bucolic simplicity and urban evil.<sup>125</sup> In part as a result of this farmer myth,<sup>126</sup> state legislatures and Congress have enacted many statutes for the protection of farmers. The Uniform Commercial Code recognizes that body of legislation by stating that Article 2 does not implicitly repeal regulation of sales to farmers.<sup>127</sup> Other statutes protect the family farm by regulating corporation farming,<sup>128</sup> extending consumer protection to farmers,<sup>129</sup> providing less restrictive tax records requirements for

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122. See, e.g., *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 286 N.E.2d 118 (1972).

123. "The evidence in this case is that appellee is a farmer and nothing else. He farms about 550 acres and there is no showing that he has any other occupation." *Cook Grains, Inc. v. Fallis*, 239 Ark. 962, 964, 395 S.W.2d 555, 556 (1965).

124. 2 THE WRITINGS OF THOMAS JEFFERSON 229 (Mem. ed. 1907). "We have heard a lot, ever since our country was young, about the beneficial effects upon young men and women growing up close to nature and good, honest work. And it isn't a myth either." *Hearings on the Effect of Corporate Farming on Small Business Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business*, 90th Cong., 2d Sess. 113 (1968) (statement of Msgr. J. Weber) [hereinafter cited as *Senate Hearings*]. See generally R. HOFSTADTER, *THE AGE OF REFORM* (1955).

125. "Burn down your cities and leave our farms, and your cities will spring up again as if by magic; but destroy our farms and the grass will grow in the streets of every city in the country." W.J. BRYAN, *THE FIRST BATTLE* 205 (1896). "The mobs of great cities add just so much to the support of pure government as sores do to the strength of the human body." 2 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 124, at 230.

126. Effective farm lobbying has played a role as well. See E. HIGBEE, *FARMS AND FARMERS IN AN URBAN AGE* 118 (1963).

127. U.C.C. § 2-102.

128. See, e.g., KAN. STAT. ANN. § 17-2701 (1964); MINN. STAT. ANN. § 500.24 (West 1976); N.D. CENT. CODE § 10-06-01 (1960).

129. See, e.g., N.D. CENT. CODE § 51-07-07 (1960) (buyers of certain farm equipment have right to rescind, any disclaimer in the sale agreement notwithstanding). See also UNIFORM CONSUMER CREDIT CODE § 1.301(14), which defines a "consumer lease" as any lease of goods to a person who takes "primarily for a personal, family, household,

farmers,<sup>130</sup> and otherwise exempting them from government regulation.<sup>131</sup> These statutes reflect the idea, valid in many instances, that farmers are different from city dwellers, businessmen, record keepers, and commercial interests.<sup>132</sup>

The farmer myth of American politics has its counterpart in law. Before the common law absorbed the law merchant, commercial law and farmers were strangers.<sup>133</sup> Sales rules of the common law, that is, the law of chattels (whose Latin root is the same as that of "cattle"),<sup>134</sup> arose primarily out of farm transactions, the most common transactions in goods outside formal markets. Mercantile sales were subject to the rules of the law merchant. When the law merchant dissolved into the common law, commercial law took on aspects of "chattel" law that ill befitted it. Professor Llewellyn proposed that commercial lawyers and judges "unhorse" sales law<sup>135</sup> and rid it of rules designed for the yeoman farmer and not for the commercial businessman.<sup>136</sup> That distinction between farmer and merchant stayed with Professor Llewellyn when he served as chief draftsman of Article 2 and as official reporter for the National Conference of Commissioners on Uniform State Laws and the American Law Institute when they sponsored the Code; and

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or agricultural purpose." Congress may be changing its assumption that farmers are ordinary consumers. The Consumer Leasing Act of 1976, 15 U.S.C.A. § 1667(1) (Supp. 1977) excludes agricultural leases from its coverage; the Consumer Credit Protection Act § 104(5), 15 U.S.C. § 1603(5) (Supp. V 1975), gives narrower coverage to agricultural than to other consumer transactions.

130. See Lewis, *Farm and Hobby Losses After Tax Reform*, 23 S. CAL. TAX INST. 627 (1971).

131. See Gilmore, *Chattel Security II*, 57 YALE L.J. 761, 786 (1948). Many of these exceptions, of course, reflect that farming, although a business, differs from other commercial activity. See, e.g., Frazier, *OSHA and the Farmer: An Analysis and Critique*, 1972 INS. L.J. 439.

132. See, e.g., E. HIGBEE, *supra* note 126.

133. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 875-77 (1939).

134. 2 W. BLACKSTONE, COMMENTARIES \*385. The common source is the medieval Latin "capitale" or "capitalis." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 354, 380 (1967).

135. He was not, of course, entirely successful: "The sale of a horse is governed by the Uniform Commercial Code . . ." *Presti v. Wilson*, 348 F. Supp. 543, 545 (E.D.N.Y. 1972); *accord*, *Key v. Bagen*, 106 Ga. App. 373, 221 S.E.2d 234 (1975); *cf.* *Miller v. Kaye*, — Utah 2d —, 545 P.2d 199 (1975) (Statute of Frauds provision of the Code applies to transaction between "elephant merchants"). Early common law accorded special rules to the sale of a horse. 2 W. BLACKSTONE, COMMENTARIES \*450-51.

136. See Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939); Llewellyn, *supra* note 133.

it accounts for his opinion, stated on more than one occasion, that farmers (whom he lumped together with "backwoodsmen," "small towners," and "foreigners")<sup>137</sup> were not merchants.<sup>138</sup>

When this conventional image of the farmer is contrasted with the conventional notion of a merchant as a peddler or tradesman, *Cook Grains, Inc. v. Fallis* results. In fact, of course, neither farmers nor merchants conform to such conventional images.

### C. *The Facts*

Approximately 80% of agricultural sales in the United States come from the 20% of all farms with annual sales of \$20,000 or more and total assets averaging \$260,000 per farm.<sup>139</sup> Nearly one-quarter million farms sold \$40,000 or more in 1969 according to the most recent census;<sup>140</sup> more than 150,000 farms had at least \$30,000 invested in equipment.<sup>141</sup> Farms require more capital than in the past<sup>142</sup> and small farms find it difficult to obtain the needed investment.<sup>143</sup> During the 1960's the number of farms fell by more than 25%;<sup>144</sup> this trend continues<sup>145</sup> as will the trend toward larger farms with larger capital requirements.<sup>146</sup> Equipment costs are high<sup>147</sup> and land costs continue

137. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 720 (1936).

138. "[A]ll of these rest on a vital need for distinguishing merchants from housewives and from farmers . . ." N.Y. HEARINGS, *supra* note 6, at 108 (testimony of K. Llewellyn). "[N]on-land, non-farmer, non-consumer, as merchants' deals in very sooth." Llewellyn, *supra* note 133, at 877.

139. A. NELSON, W. LEE, & W. MURRAY, *AGRICULTURAL FINANCE* (6th ed. 1973) [hereinafter cited as A. NELSON].

140. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 11TH GENERAL REPORT, 1969 CENSUS OF AGRICULTURE 98 (June 1973) [hereinafter cited as CENSUS REPORT].

141. *Id.* at 123.

142. Doll, *Farm Debt as Related to Value of Sales*, 49 FED. RES. BULL. 140 (1963); Hines, *Special Problems in Planning the Agricultural Businessman's Estate*, 7 U. MIAMI INST. EST. PLAN. 11-1, 11-2 (1973).

143. The number of farms with sales of over \$20,000 per year is increasing. Smaller farms are decreasing. CENSUS REPORT, *supra* note 140, at 100. The number of farms smaller than 220 acres has declined since 1950. *Id.* at 55, 100-01.

144. *Id.* at 98; A. NELSON, *supra* note 139, at 6.

145. See, e.g., Harl, *Estate and Business Planning for Farmers*, 19 HASTINGS L.J. 271, 272 (1968).

146. Hines, *supra* note 142, at 11-2; see *Agriculture: Growth Industry in the U.S.*, BUS. WEEK, April 28, 1973, at 62. Capital requirements for the "typical" cash grain farm in the corn belt increased in just ten years from \$97,000 to \$203,000 and for the "typical" southwest cattle ranch from \$141,000 to \$205,000. *Senate Hearings, supra* note 124, at 93.

147. Hubert & Hauch, *How Andrew Tills the Soil with a Computer*, 1 SATURDAY REV.

to climb.<sup>148</sup>

A large modern farm<sup>149</sup> raises more livestock<sup>150</sup> and uses more equipment and chemicals,<sup>151</sup> and more fuel,<sup>152</sup> than the smaller farms of the past. The Census Bureau classifies as "farms" marginal operations by persons who derive their principal income from other sources;<sup>153</sup> the typical farmer is therefore the manager of an even larger enterprise than the foregoing figures suggest.

Not all courts labor under the farm myth. In one trial two farmers complained that they could not compare acreage production from year to year because they had failed to keep records. The judge responded with incredulity:

The plaintiffs would excuse their failure to have records upon the old saw that a farmer's work is never done and that they, therefore, have no time to keep records, but some fine farmers in this area who have appeared here as witnesses keep records, not only of the types of corn they plant, the fertilization program they follow, and the fields specifically into which both of such were injected, but they even go as far as to keep records of the ground temperatures and rainfall and the like, which they testified were of future value to them in their vast operations.<sup>154</sup>

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Soc'y, March 1973, at 52. Tractors can cost up to \$25,000; combines from \$35,000 to \$50,000; Harvestore Silos, \$25,000. Sheets & Killpatrick, *A Bumper Crop, But Don't Look for Cheaper Food Soon*, U.S. NEWS & WORLD REP., June 28, 1975, at 25. More than 250,000 farms in the United States have four or more tractors and more than 840,000 farms have two or three tractors. CENSUS REPORT, *supra* note 140, at 9.

148. In 1969 there were 500,000 farms in the United States with land and buildings valued at \$100,000 or more. CENSUS REPORT, *supra* note 140, at 56.

149. *Id.* at 56, 100; A. NELSON, *supra* note 139, at 6.

150. There are feed lots with capacity for 125,000 cattle, poultry processors with 3,750,000 broilers, and hog producers that feed 80,000 hogs in a year. These are generally corporate farms. See 1972 WIS. L. REV. 1189. See also *Senate Hearings*, *supra* note 124, at 43, 81.

151. See E. HIGBEE, *supra* note 126, at 25.

152. American farmers now consume far more energy than is contained in the food they produce. See Clark, *Big and/or Little? Search is on for Right Technology*, SMITHSONIAN, July 1976, at 44.

153. See E. HIGBEE, *supra* note 126, at 45.

154. *Bickett v. W.R. Grace & Co.*, 12 UCC REP. SERV. 629, 639 (W.D. Ky. 1972). In his oral opinion Judge Gordon also observed: "If there is a moral to this law suit, it is, it appears to me, if you can't plant corn early in a weather year like 1968, and you are unwilling to take the risk, plant beans." *Id.* at 641. Plaintiffs who dealt in corn and farmed as well, sued for breach of warranty. They had purchased seed corn for their own use as farmers and not for resale. The court, adopting an all-or-nothing approach, held that the farmers were merchants, because they were seed merchants, even though the transaction in question arose from their activity as farmers.

Other courts, recognizing the increasing penetration of corporate interests into agriculture,<sup>155</sup> have rejected the classic notion of the farmer as "simple tiller of the soil"<sup>156</sup> and have distinguished between "essentially commercial" farming and "bare, minimal subsistence agriculture."<sup>157</sup>

This last distinction between commercial and subsistence farming suggests the obvious: a farmer can be a poor, illiterate, dirt farmer, or a successful business person concerned with tax benefits,<sup>158</sup> incorporation,<sup>159</sup> and estate planning.<sup>160</sup> "Farmer" is a loose, vague term, that cannot aid courts in determining whether a person is a merchant and may, because of its mythical trappings, interfere with that determination.<sup>161</sup>

155. See, e.g., *Lish v. Compton*, — Utah 2d —, 547 P.2d 223 (1976) (concurring opinion).

156. *Ohio Grain Co. v. Swisshelm*, 40 Ohio App. 2d 203, 206, 318 N.E.2d 428, 430 (1973):

He would represent defendant as a simple tiller of the soil, unaccustomed to the affairs of business and the marketplace. Farming is no longer confined to simple labor. Only an agri-businessman may hope to survive. This defendant was clearly familiar with farm markets and their operation and followed them with some care. For example, he was familiar with the bean market in Cincinnati, as well as that in his local community. In his many years of farming, he knew that corn was sold for varying prices, depending upon its moisture, quality and condition, and admitted having some idea that the same was true of beans.

*Id.*

157. *Billings v. Joseph Harris Inc.*, 27 N.C. App. 689, 697, 220 S.E.2d 361, 367 (1975), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976).

158. See Harl, *supra* note 145; Lewis, *supra* note 130; Sharpe, *What the Taxpayer Should Do To Have The Courts Recognize His Farm As A Business*, 28 J. TAX 48 (1968).

159. Harl, *Considerations in Incorporating Farm Businesses*, 18 U. FLA. L. REV. 221 (1965); Israel, *Corporate Farming and the Money Tree*, 4 GA. ST. B.J. 335 (1967).

160. "Today's farmer is far removed from the popular image of a sturdy man of the soil, who toils in the open air with his plow and his pitchfork." Hines, *supra* note 142, ch. 73-11, at 11-1; see Harl, *supra* note 145.

161. Generic terms such as "hawker," "druggist," or "farmer" should not determine whether a person is a "merchant" under the Code. The term "farmer" itself best illustrates the failure of attempting to determine merchant status by the application of occupational terms. A farmer can be a laborer, a tenant, a rancher, a vintner, a grower, a shepherd, a corporation, or a "gentleman." See Durham, *Farmers and Farming: Gentleman Farmers, New Hobby Loss Rules, Holding Period, Etc.*, N.Y.U. 29th INST. FED. TAX. pt. 2, at 1527 (1971). Article 9 of the Code avoids the term "farmer" altogether. Farm products are defined not as products used or produced by a farmer but as products "in the possession of a debtor engaged in raising, fattening, grazing, or other farming operations." U.C.C. § 9-109(3); cf. § 9-401 2d & 3d alternative subsection (1)(a) ("equipment used in farming operations"). Article 9

Professor Llewellyn's disposition to the contrary notwithstanding, Article 2 is at least neutral on the question whether a farmer may be a merchant. Two comments appear to favor the notion that farmers may be merchants under some circumstances. The entrusting provision stipulates that one buying from a merchant who deals in goods of the kind takes free of a security interest in the entrusting party.<sup>162</sup> Comment 2 of this section notes that the rule is "limited" by the more specific provisions of section 9-307(1), which provides that a buyer in ordinary course of business buying farm products from a farmer does not take free of a security interest created by that farmer.<sup>163</sup> The allusion to the section 9-307 exception for farm sales suggests that a farmer can be a merchant dealing in goods of the kind under the entrusting section. The second comment which bears on this question is Comment 2 of the warranty of merchantability provision,<sup>164</sup> which applies only to merchants with respect to goods of the kind. The predecessor of that provision, section 15(2) of the Uniform Sales Act, contained reference to "grower"; Comment 2 says that omission of the term "grower" from the current provision "does not restrict the applicability of this section"<sup>165</sup>—implying that a grower, *i.e.*, a farmer, can be a merchant under the merchantability provision.

The 1972 revision of the Code acknowledged that farmers are businessmen rather than consumers by deleting the exemption from filing requirements for farm purchases of under \$2,500.<sup>166</sup> That provision had assumed that sales to farmers were akin to sales to consumers.<sup>167</sup> Its removal belies the assumption.

The effort to categorize "farmers" as a class ignores the imprecise nature of the term and the underlying reasons of the merchant sections.

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thereby avoids the perplexing problem of determining who is a farmer; the less difficult but still perplexing problem of determining what are farming operations, remains.

See *Sequoia Mach. Co. v. Jarrett*, 410 F.2d 1116 (9th Cir. 1969); *In re La Rose*, 7 UCC REP. SERV. 964 (Ref. in Bkcty, D. Conn. 1970); *In re Anderson*, 6 UCC REP. SERV. 1284 (Ref. in Bkcty, S.D. Ohio 1969); *In re Leiby*, 1 UCC REP. SERV. 428 (Ref. in Bkcty, E.D. Pa. 1962); *Citizens Nat'l Bank v. Sperry Rand Corp.*, 456 S.W.2d 273 (Tex. Ct. App. 1970).

162. U.C.C. § 2-403(2).

163. *Id.*, Comment 2.

164. U.C.C. § 2-314, Comment 2.

165. *Id.*

166. Compare U.C.C. § 9-302(1)(c) (1962 version), with U.C.C. § 9-302.

167. See Coogan & Mays, *Crop Financing & Article 9: A Dialogue with Particular Emphasis on the Problems of Florida Citrus Crop Financing*, 22 U. MIAMI L. REV. 13, 19 (1967).

The general Code policy to "modernize the law governing commercial transactions"<sup>168</sup> and provide "machinery for expansion of commercial practices"<sup>169</sup> would be carried out more effectively if courts would employ the flexible provisions of the Code, such as the merchant definition, to expand or contract Code application as circumstances change. As farmers become business people, and move away from Professor Llewellyn's haystack and barnyard metaphors, courts should feel free to bring farmers within the scope of the Code.

While farmers *can* be merchants, not all farmers *are* merchants. The farmer cases illustrate the error of *a priori* classification of occupations. Courts must classify individual farmers in accordance with the Code's merchant definition. A person who sells grain under a futures contract ought to be a merchant subject to the merchant good-faith rule. He or she should be bound to answer letters and read fine print. The futures transaction is essentially commercial, is an integral step in the distribution of agricultural commodities, and calls for the simplified principles the merchant rules provide.<sup>170</sup> Those who are concerned that large grain companies will take advantage of farmers who do not know the usages of the trade, can find solace in the fact that the merchant good-faith rules apply to grain companies too. Any attempt by such a commodity dealer to take advantage of a farmer who it knows, or reasonably should know, is unfamiliar with trade practices, would itself be guilty of bad faith conduct and subject to the Code's proscriptions.<sup>171</sup>

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168. U.C.C. § 1-102(2)(a).

169. U.C.C. § 1-102, Comment 1.

170. In the Statute of Frauds cases, courts have seldom mentioned that grain elevators which buy products from farmers for future delivery promptly resell to larger elevators or members of the Board of Trade. These resales are often made by telephone, and the trade in futures demands promptness and reliability. If farmers were permitted to renege on oral agreements confirmed in writing the trade in futures contracts would be upset. See *Continental Grain Co. v. Harbach*, 400 F. Supp. 695 (N.D. Ill. 1975); *Continental Grain Co. v. Brown*, 19 UCC REP. SERV. 52 (W.D. Wis. 1976).

171. See U.C.C. §§ 1-103, 1-203, 2-302. See also *Majors v. Kalo Laboratories, Inc.*, 407 F. Supp. 20 (M.D. Ala. 1975); *Oloffson v. Coomer*, 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973). But see *Billings v. Joseph Harris Inc.*, 27 N.C. App. 689, 220 S.E.2d 361 (1975). See also U.C.C. §§ 2-613 & 2-615, Comment 9. In short, the Code makes provisions for the unique hazards of farming. A merchant farmer must take care, however, to come within the scope of these protective provisions. See *Bunge Corp. v. Recker*, 519 F.2d 449 (8th Cir. 1975); *Dunavant Enterprises, Inc. v. Ford*, 294 So.2d 788 (Miss. 1974); *Semo Grain Co. v. Oliver Farms, Inc.*, 530 S.W.2d 256 (Mo. Ct. App. 1975).

## VI. THE WARRANTY PROVISIONS

The Code's two warranty provisions impose significant burdens on merchants who regularly deal in goods. The warranty of merchantability section,<sup>172</sup> a prolific source of litigation of merchant questions, obliges merchants to sell only goods that are generally acceptable in the trade. The warranty against infringement section<sup>173</sup> requires merchants, in most instances, to deliver goods free from third-party claims of infringement. Both sections assume that buyers from such merchants expect such warranties, and both sections reflect a policy that losses caused by unmerchantable or infringing goods should fall on the sellers who deal in such goods.<sup>174</sup>

Courts at one time imposed liability on sellers on the theory that sellers were familiar with their goods.<sup>175</sup> That rationale will no longer serve as a primary justification for an implied warranty of merchantability.<sup>176</sup> Later decisions hold a retailer liable for goods in unopened containers<sup>177</sup> or for products about which he otherwise had no knowledge.<sup>178</sup> The primary reason for finding such liability is a policy judgment that the seller should bear the loss from product defects;<sup>179</sup> a secondary justification is the buyer's expectation that goods will be merchantable.<sup>180</sup>

The warranty of merchantability applies only to one who is a merchant "with respect to goods of that kind."<sup>181</sup> Claims under this provision should hinge on a determination of whether the seller is a mer-

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172. U.C.C. § 2-314.

173. U.C.C. § 2-312(3).

174. U.C.C. § 2-312, Comment 3; U.C.C. § 2-314, Comment 11.

175. See, e.g., *McQuaid v. Ross*, 85 Wis. 492, 55 N.W. 705 (1893).

176. It retains vitality as a secondary rationale, however. See 1 W. HAWKLAND, *supra* note 6, at 70; Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 119 (1943).

177. See, e.g., *Gonzales v. Safeway Stores, Inc.*, 147 Colo. 358, 363 P.2d 667 (1961); *Ward v. Great Atl. & Pac. Tea Co.*, 231 Mass. 90, 120 N.E. 225 (1918).

178. See, e.g., *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. 1967).

179. See 1 W. HAWKLAND, *supra* note 6, at 70; RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965); 8 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 985, at 545 (3d ed. Jaeger 1964); Prosser, *supra* note 176, at 119.

180. "The warranty of merchantability, wherever it is normal, is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution." U.C.C. § 2-314, Comment 11.

181. U.C.C. § 2-314.

chant, but the cases in this area are badly confused, in part because of the separate common-law products liability issue that is often present, and in part because the courts have failed to fix correctly the merchant definition.

In some instances the merchant question is in sharp focus. Manufacturers, though not merchants under the law merchant,<sup>182</sup> clearly are merchants for purposes of Article 2,<sup>183</sup> as are retailers<sup>184</sup> and wholesalers in general,<sup>185</sup> dealers,<sup>186</sup> agricultural suppliers,<sup>187</sup> food processors,<sup>188</sup> and brokers.<sup>189</sup> A merchant in the traditional sense may not be a merchant in the Code sense, however. A bank that sells a repossessed boat<sup>190</sup> is not a merchant with respect to the boat for purposes of the merchantability section. This case is consistent with the buyer's expectations but perhaps not with the other policies embodied in the section.

A merchant may leave the merchant status by acting outside of the scope of that status, as when a food caterer gratuitously prepares a

182. 3 WORDS AND PHRASES (JUDICIALLY DEFINED) 360 (1944).

183. *See, e.g.*, *Chemico Indus. Applicators Co. v. E.I. du Pont de Nemours & Co.*, 366 F. Supp. 278 (E.D. Mo. 1973); *Hester v. Purex Corp.*, 534 P.2d 1306 (Okla. 1975); *Bell v. Harrington Mfg. Co.*, 265 S.C. 468, 219 S.E.2d 906 (1975).

184. *See, e.g.*, *Associated Hardware Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114 (3d Cir. 1966); *Campanelli v. Conservas Altamira, S.A.*, 86 Nev. 838, 477 P.2d 870 (1970); *Williams v. Western Sur. Co.*, 6 Wash. App. 300, 492 P.2d 596 (1972).

185. *See, e.g.*, *Hempstead Bank v. Andy's Car Rental Sys. Inc.*, 35 App. Div. 2d 35, 312 N.Y.S.2d 317 (1970).

186. *E.g.*, *Georgia Timberlands, Inc. v. Southern Airway Co.*, 125 Ga. App. 404, 188 S.E.2d 108 (1972); *Charney v. Ocean Pontiac, Inc.*, 17 UCC REP. SERV. 982 (Mass. Dist. Ct. 1975); *Litchfield v. Dueitt*, 245 So.2d 190 (Miss. 1971); *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 554 P.2d 349 (1976).

187. *See, e.g.*, *Jorritsma v. Farmers Feed & Supply Co.*, 272 Or. 499, 538 P.2d 61 (1975); *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968).

188. *See, e.g.*, *Safeway Stores, Inc. v. L.D. Schreiber Cheese Co.*, 326 F. Supp. 504 (W.D. Mo. 1971), *rev'd on other grounds sub nom. L.D. Schreiber Cheese Co. v. Standard Milk Co.*, 457 F.2d 962 (8th Cir. 1972).

189. *See, e.g.*, *John Thallon & Co. v. M & N Meat Co.*, 396 F. Supp. 1239 (E.D.N.Y. 1975); *Stratton Sale Barn, Inc. v. Reed*, 28 Agric. Dec. 1418, 7 UCC REP. SERV. 192 (1969); *David Pepper Co. v. Jack Keller Co.*, 28 Agric. Dec. 474, 6 UCC REP. SERV. 673 (1969); *S-Creek Ranch, Inc. v. Monier & Co.*, 509 P.2d 777 (Wyo. 1973). *But cf.* *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970) (customs broker acting as bailee for plaintiff not a merchant). One case reaches the questionable holding that even an auctioneer can be a merchant for purposes of U.C.C. § 2-314. *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858, 328 N.Y.S.2d 490 (Civ. Ct. 1972).

190. *See Donald v. City Nat'l Bank*, 295 Ala. 320, 329 So.2d 92 (1976).

church supper,<sup>191</sup> a banker buys fishing gear for himself,<sup>192</sup> or a saw mill operator sells an old saw.<sup>193</sup> In the two former cases the defendant clearly acted as a non-mercantile person rather than as a merchant as defined by the Code. In the last case, the seller is not holding himself out as one who warrants the goods to conform with trade standards, and the merchant definition should not be applied.<sup>194</sup>

## VII. NEOPHYTES

Commentators have asked whether a hobbyist who buys and sells,<sup>195</sup> or a lawyer<sup>196</sup> or professor<sup>197</sup> familiar with trade practices, "deals" in goods and is subject to merchant rules. Courts have found such questions difficult. Instead of looking to the purpose of the merchant rule at issue, they have examined the nature of the defendant or his primary occupation. Thus, courts have held, incorrectly it seems, that a testamentary trustee<sup>198</sup> and a municipality<sup>199</sup> were free from merchant duties although engaged in mercantile or proprietary activity. These cases, like some of the opinions concerning farmers, seem to rest on no more than a vague notion that trustees and cities are not merchants.

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191. See *Wentzel v. Berliner*, 204 So.2d 905 (Fla. Dist. Ct. App. 1967). Professor Nordstrom suggests, however, that if a church hires a professional caterer it may become a merchant for warranty purposes under the "employment of an agent" language of U.C.C. § 2-104. R. NORDSTROM, *supra* note 5, at 240. That conclusion is consistent with the reason of U.C.C. § 2-314 because it reflects the reasonable expectation of a buyer.

192. See U.C.C. § 2-104, Comment 2.

193. See *Siemen v. Alden*, 34 Ill. App. 3d 961, 341 N.E.2d 713 (1975); *accord*, *Balido v. Improved Mach., Inc.*, 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973); *cf.* 2 N.Y. HEARINGS, *supra* note 6, at 1124; U.C.C. § 9-307, Comment 2 (1952 version) (merchant not often "in the business of selling" his own old equipment). The question implicit in *Siemen* is whether the saw mill operator would be a merchant for purposes of the Statute of Frauds if the buyer had sent a written confirmation of an oral agreement to sell the old saw.

194. See *Samson v. Riesing*, 62 Wis.2d 698, 215 N.W.2d 662 (1974). "The Wauwatosa Band Mothers, although selling the food, were not merchants as contemplated by the statute." *Id.* at 711, 215 N.W.2d at 669.

195. Newell, *supra* note 17, at 321; See also Duesenberg & King, *supra* note 17, § 2.04[2], at 2-64.

196. Kripke, *supra* note 13, at 321-25.

197. See 3 N.Y. HEARINGS, *supra* note 6, at 2165.

198. See *Wilmington Trust Co. v. Coulter*, 41 Del. Ch. 548, 200 A.2d 441 (Sup. Ct. 1964) (sale of securities).

199. See *Coast Laundry, Inc. v. Lincoln City*, 9 Or. App. 521, 497 P.2d 1224 (1972). *But see* *Baker v. City of Seattle*, 79 Wash. 2d 198, 484 P.2d 405 (1971).

The courts' preoccupation with the primary activity or characteristic of the party<sup>200</sup> have led them into the related error of holding that one who would otherwise be a merchant leaves that status when engaging in a secondary or new activity, even though the enterprise is clearly mercantile.

Thus in *Rock Creek Ginger Ale Co. v. Thermice Corp.*,<sup>201</sup> the court concluded that a brewer's business was the selling of beer, not its carbon dioxide by-product, and that sales of more than 700,000 pounds of the gas over a five-month period did not render the defendant a merchant with respect to goods of that kind.<sup>202</sup> A holding of merchant status in *Rock Creek* would have fulfilled the reasonable expectations of the buyer and thereby better served the underlying purposes of the merchantability section. Similarly, in *Playboy Clubs International, Inc. v. Loomskill, Inc.*,<sup>203</sup> the court thwarted the reasonable expectation of the parties by holding that the club did not have to respond to its mail as a merchant must, because it was "an ultimate consumer" of the textiles involved in the transaction, not a merchant in the textile business. Nothing in the fine print sections suggests such a result.

Equally questionable are those cases which appear to give the merchant one free shot. In *Fear Ranches, Inc. v. Berry*<sup>204</sup> the court refused to find a warranty of merchantability in a rancher's first sale of livestock to another rancher. The court declined to consider the defendant's prior sales of livestock for slaughter. Those sales, the court argued, involved a "different classification of stock"<sup>205</sup> and were not sales of "that kind" of goods, as the merchantability section requires.<sup>200</sup>

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200. In the farmer cases, for example, the courts sometimes gave too much importance to the skill of cultivating crops and not enough to the skill in marketing them. See *Sierens v. Clausen*, 21 Ill. App. 3d 450, 315 N.E.2d 897 (1974), *rev'd*, 60 Ill. 2d 585, 328 N.E.2d 559 (1975); *Oloffson v. Coomer*, 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973) (dictum); *Sand Seed Service, Inc. v. Poeckes*, 249 N.W.2d 663 (Iowa 1977).

201. 352 F. Supp. 522 (D.D.C. 1971).

202. *Cf. Hempstead Bank v. Andy's Car Rental Sys. Inc.*, 35 App. Div. 2d 35, 312 N.Y.S.2d 317 (1970) (auto leasing company is in the business of leasing automobiles, not selling them, even though it customarily sells its used cars). *Contra*, *American Nat'l Bank v. Mar-K-Z Motors & Leasing Co.*, 57 Ill. 2d 29, 309 N.E.2d 567 (1974). The issue is whether the seller is a person in the business of selling goods of that kind under the buyer in ordinary course section. U.C.C. § 1-201(9). See also *Bruce v. Martin-Marietta Corp.*, 544 F.2d 442 (10th Cir. 1976).

203. 13 UCC REP. SERV. 765, 766 (N.Y. Sup. Ct. 1974).

204. 470 F.2d 905 (10th Cir. 1972).

205. *Id.* at 907.

206. U.C.C. § 2-314. The *Fear Ranches* court remanded with directions to impose

In *Victor v. Barzaleski*,<sup>207</sup> an early Code case, the court held that the sale by a "general handyman"<sup>208</sup> of a boiler was not subject to the merchantability section. More startling was the result in *Storey v. Day Heating and Air Conditioning Co.*,<sup>209</sup> in which the court refused to impose warranty liability on an air conditioning company which sold a defective condensate pump for an air conditioning system, because the plaintiff failed to marshal evidence to show that this was not the only such pump the seller had ever sold. These cases ignore altogether the reasonable expectation of a buyer, who usually cannot be charged with knowledge that this sale is the first by the seller or, even if so chargeable, should not reasonably expect less than merchantable quality from any person holding himself out as a professional.

The better reasoned cases so hold. In *McHugh v. Carlton*,<sup>210</sup> a service-station operator who customarily did not sell recapped tires was nonetheless liable for defects in such a tire he ordered specially. In *Blockhead, Inc. v. Plastic Forming Co.*,<sup>211</sup> a manufacturer of plastic parts that filled an order for parts of a kind it had never made before, unsuccessfully argued that it was not a merchant with respect to such goods; in *Mutual Services of Highland Park, Inc. v. S.O.S. Plumbing & Sewerage Co.*,<sup>212</sup> the court appears to have held the defendant to be a merchant with respect to a hammer and bit, even though the goods were not part of the general line of hammers and bits the defendant customarily sold. In these opinions the courts respond to the reasons of

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the warranty if "the finding relative to usage in such a transaction so dictates." *Fear Ranches, Inc. v. Berry*, 470 F.2d 905, 908 (10th Cir. 1972). It is difficult to understand how a seller of goods can be subject to trade usages and not be a merchant with respect to goods of that trade. Commercial standards, trade usage and trade customs are hallmarks of the merchant class. U.C.C. § 2-104 (referring to "deals" and "by his occupation"). Such prompting was not lost on the District Court which found on remand: "There is a usage of trade in the cattle industry in New Mexico that a knowledgeable buyer, relying entirely on his own judgment, in buying cattle from a knowledgeable seller, who makes no representations as to the condition of the cattle, takes the animals as he selects them . . ." *Fear Ranches, Inc. v. Berry*, 503 F.2d 953 (10th Cir. 1974) (quoting the trial court). Cf. *Jamestown Terminal Elevator, Inc. v. Hieb*, 246 N.W.2d 736 (N.D. 1976) (course of dealing between the parties and usage of trade in the particular vocation or trade may determine what is a "reasonable time" for delivery when such is not specified in the agreement).

207. 19 Pa. D.&C.2d 698, 1 UCC REP. SERV. 104 (Ct. C.P. 1959).

208. *Id.* at 700, 1 UCC REP. SERV. at 106.

209. 56 Ala. App. 81, 319 So. 2d 279 (Civ. App. 1975).

210. 369 F. Supp. 1271 (D.S.C. 1974).

211. 402 F. Supp. 1017 (D. Conn. 1975).

212. 93 Ill. App. 2d 257, 235 N.E.2d 265 (1968) (abs. dec.).

the merchantability section but seldom articulate them. In *Blockhead*, the court recognized that the defendant's argument would exempt all custom manufacturing from the merchantability provision;<sup>213</sup> in *McHugh*, the court stressed the profit motive of the seller.<sup>214</sup> Neither court came to grips with the problem—that the buyers reasonably expected to receive goods of merchantable quality and expected the sellers to stand behind that quality even though they might never have sold the goods before.<sup>215</sup>

### VIII. THE PROFESSIONS

The problem with the profession cases is best illustrated by a line of New York cases beginning with a mischievous pre-Code case, *Perlmutter v. Beth David Hospital*.<sup>216</sup> The court, to avoid imposing seller's liability on a hospital in a blood transfusion case, reached the "unrealistic"<sup>217</sup> conclusion that the sale of blood to a patient by a hospital is not a sale of goods. The *Perlmutter* case responded to a strongly felt need. Its progeny has been numerous. Legislatures, overturning cases to the contrary or heading off the possibility of such contrary results, have enacted statutes to the same effect.<sup>218</sup> The passion of *Perlmutter's* defenders gives rise to questionable reasoning and puzzling dicta. In *Lovett v. Emory University, Inc.*,<sup>219</sup> for example, the court argued that the Code implicitly excludes other services from the warranty section by singling out the serving of food and drink for in-

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213. "The implication of this suggestion is that manufacturers who produce a variety of goods and would never fall within the broad scope intended for [the merchantability section]. That contention must be rejected where unmerchantability results from defects in the production process with which the manufacturer is familiar." 402 F. Supp. at 1025. *Contra*, *LTV Aerospace Corp. v. Bateman*, 492 S.W.2d 703 (Tex. Ct. App. 1973).

214. "Defendant retailer cannot have it both ways—make a profit from the sale of recaps but deny liability if they are defective." 369 F. Supp. at 1277.

215. A seller can argue that the first sale of an item does not make him a "merchant with respect to goods of that kind." U.C.C. § 2-314. The court in *Storey v. Day Heating & Air Conditioning Co.*, 56 Ala. App. 81, 319 So. 2d 279 (Civ. App. 1975), accepted that reasoning. The court in *Mutual Serv. Inc. v. S.O.S. Plumbing & Sewerage Co.*, 93 Ill. App. 2d 257, 235 N.E.2d 265 (1968) did not. The latter holding is more consistent with the reason of the merchantability section.

216. 308 N.Y. 100, 123 N.E.2d 792 (1954).

217. *Cunningham v. MacNeal Memorial Hosp.*, 47 Ill. 2d 443, 450, 266 N.E.2d 897, 901 (1970).

218. See statutes collected in *Heirs of Fruge v. Blood Serv.*, 365 F. Supp. 1344, 1350 n.3 (W.D. La. 1973). See also N.H. REV. STAT. ANN. § 507:8-b (Equity Supp. 1975).

219. 116 Ga. App. 277, 156 S.E.2d 923 (1967).

clusion.<sup>220</sup> In fact, the merchantability section's reference to food and drink is in response, as the Comment indicates,<sup>221</sup> to an ancient line of cases holding the contrary; the *Lovett* opinion's construction is wholly unjustified.<sup>222</sup> In another opinion<sup>223</sup> relying on *Perlmutter*, the court said that hospitals supply a great variety of items and no purveyor should be responsible for the quality of so many products. The court failed to explain why the same argument should not apply to a department store or supermarket,<sup>224</sup> both of which clearly fall within the purview of the merchantability section.<sup>225</sup> In another hospital case, the court concluded that "legal principles" should not apply to a "purely non-legal exchange";<sup>226</sup> still another case<sup>227</sup> suggested that it would be "socialistic" to hold hospitals liable for defects in the goods they sell.<sup>228</sup>

Not all service professions have escaped seller liability. Hairdressers who do not enjoy the same status as doctors in the nation's psyche, are liable for defective products dispensed in connection with their services, although the courts' attempts to distinguish them from medical practitioners have not proved convincing.<sup>229</sup>

In the transfusion cases the courts may be concerned about the impossibility of detecting serum hepatitis in a donor's blood, and may wish to protect charitable activity from rules fashioned for the business sector.<sup>230</sup> Neither of these latter considerations apply to doctors dis-

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220. U.C.C. § 2-314(1)

221. U.C.C. § 2-314, Comment 5.

222. See *Jackson v. Muhlenberg Hosp.*, 96 N.J. Super. 314, 232 A.2d 879 (Super. Ct. Law Div. 1967), *rev'd on other grounds*, 53 N.J. 138, 249 A.2d 65 (1969). See generally 31 OHIO ST. L.J. 580, 582 (1972).

223. *Schuchman v. Johns Hopkins Hosp.*, 9 UCC REP. SERV. 637, 647 (Md. Super. Ct. 1971).

224. See *Waite*, *supra* note 19, at 619 (criticizing the rule as to retailers on the same grounds).

225. See authorities cited note 177 *supra*.

226. *Hoffman v. Misericordia Hosp.*, 6 UCC REP. SERV. 779, 785 (Pa. Ct. C.P. 1969), *rev'd and remanded*, 439 Pa. 501, 267 A.2d 867 (1970); cf. *Virginia Citizens Consumer Counsel, Inc. v. State Bd. of Pharmacy*, 373 F. Supp. 683, 686 (E.D. Va. 1974), *aff'd on other grounds*, 425 U.S. 748 (1976) ("Instantly, the actual suitors are consumers; their concern is fundamentally deeper than a trade consideration. While it touches commerce closely, the overriding worry is the hinderance to a means for preserving health or even saving lives.").

227. *Dorfman v. Austenal, Inc.*, 3 UCC REP. SERV. 856 (N.Y. Sup. Ct. 1966).

228. *Id.* at 857.

229. See *Newmark v. Gimbel's, Inc.*, 54 N.J. 585, 258 A.2d 697 (1969); *Ellibee v. Dye*, 64 Pa. D.&C.2d 158, 15 UCC REP. SERV. 361 (Ct. C.P. 1973).

230. "Consideration of hospital, doctor, dentist, and other medical services cases brings confusing results because of the desire of the courts to protect those who are rendering

pensing other goods; yet courts have readily extended *Perlmutter's* protection to physicians supplying pacemakers,<sup>231</sup> surgical pins,<sup>232</sup> and intrauterine devices.<sup>233</sup> Most legislation is not similarly broad.<sup>234</sup> The true basis of the health-care cases therefore seems to be the courts' somewhat irrational belief that the relations between doctor and hospital on the one hand and patients on the other should not be governed by commercial rules. In effect the courts have determined that doctors and hospitals are not merchants, but this holding is never made explicit because of the confusion between warranty claims under the Code and the strict liability<sup>235</sup> claims with which they are usually associated.<sup>230</sup>

If the irrational element in the health-care cases is rejected, there is no good reason to refrain from applying the merchant rules to all service professionals. If *Perlmutter's* distinction between services and sales is faulty, and well considered authority supports the view that it is,<sup>237</sup> the delivery of health goods is a sale subject to Article 2. Doctors, dentists, hospitals, and the practitioners of any service profession may be merchants whenever they fall within the Code's definition, as all of them often do. Service professionals not only "deal" in goods, but they most assuredly hold themselves out by their occupation or by their employment of others as possessing knowledge and skill peculiar to the goods involved in the transaction. The universal agreement of the authorities<sup>238</sup> and the Comments<sup>239</sup> that the "professional" as opposed to the "casual" status of the seller is the hallmark of the merchant, and

health and life saving services to the public." *Ellibee v. Dye*, 64 Pa. D.&C.2d 158, 160, 15 UCC REP. SERV. 361, 363 (Ct. C.P. 1973).

231. See *Cutler v. General Elec. Co.*, 4 UCC REP. SERV. 300 (N.Y. Sup. Ct. 1967).

232. See *Cheshire v. Southampton Hosp. Ass'n*, 53 Misc. 2d 355, 278 N.Y.S.2d 531 (Sup. Ct. 1967).

233. See *Ruybe v. Gordon*, 18 UCC REP. SERV. 889 (N.Y. Sup. Ct. 1976). See generally 11 CAL. W.L. REV. 347 (1975).

234. The statutes protect doctors but usually relate only to blood or tissue transplants. See note 218 *supra*.

235. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

236. The confusion of the two causes of action is evident in *Parish v. B.F. Goodrich Co.*, 395 Mich. 271, 235 N.W.2d 570 (1975), where on a breach-of-warranty claim the Supreme Court of Michigan rejected the Code's statute of limitations for warranty claims (U.C.C. § 2-725) in favor of a general statute of limitations for personal injuries. *Contra*, *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550 (1974).

237. See generally *Farnsworth, Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

238. See authorities cited note 13 *supra*.

239. U.C.C. § 2-104, Comment 1.

the significant fact that professions, by definition, observe standards, custom, and usage, all support the position that such professionals as doctors may indeed be merchants when they sell goods. Certainly a patient or client expects goods he receives from a professional to be merchantable, and to deny that expectation frustrates an underlying reason of the merchantability section.

In brief, emotional freight has tended to exclude the professions from the merchant class. Common sense and the policy of the Code require their inclusion.

### IX. OTHER "SERVICE" CONTRACTS

The distinction between services and sales has also troubled courts in construction contract cases. In *Schenectady Steel Co. v. Bruno Trimpoli General Construction Co.*,<sup>240</sup> for example, the court declined to apply the adequate assurance of performance section, because, it said, Article 2 did not apply to the transaction. The plaintiff agreed to supply the defendant with steel for a bridge and to prepare and erect the steel. The court, citing *Perlmutter*, held that this contract was for services and the Code, therefore, did not apply.<sup>241</sup> Similarly, in *Nitrin, Inc. v. Bethlehem Steel Corp.*,<sup>242</sup> the court held that a construction contract to supply labor and materials was outside the scope of the merchantability section, because the contract language evidenced a service and not a sale transaction. In *Busch v. United Metal Aluminum Products Corp.*,<sup>243</sup> the court characterized a contract to remodel a kitchen as a service contract despite the defendant's obligation to furnish appliances, cabinets, and other materials.

Although these cases represent the general trend, other courts have refused to base decisions on the service/sales distinction. *Storey v.*

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240. 43 App. Div. 2d 234, 350 N.Y.S.2d 920, *aff'd*, 34 N.Y.2d 939, 316 N.E.2d 875, 359 N.Y.S.2d 560 (1974).

241. *Id. Contra*, *Kellogg Bridge Co. v. Hamilton*, 110 U.S. 108, 117 (1884) (a bridge-construction contract: "The transaction, if not technically a sale, created between the parties the relation of vendor and vendee."). A bona fide service-sale distinction can be confusing in other settings. In *Lewis v. Big Powderhorn Mountain Ski Corp.*, 69 Mich. App. 437, 245 N.W.2d 81 (1976), the court refused to impose implied warranty liability because there was no sale of a product when a skier sustained injury while using a rope tow. *Cf. Gulask v. Stylarama*, 33 Conn. Supp. 108, 364 A.2d 1221 (C.P. 1975) (contract to supply labor and materials and construct and install a swimming pool not a transaction in or sale of "goods").

242. 35 Ill. App. 3d 577, 342 N.E.2d 65 (1976).

243. 8 UCC REP. SERV. 335 (N.Y. Sup. Ct. 1970).

*Day Heating and Air Conditioning Co.*,<sup>244</sup> and *Victor v. Barzaleski*,<sup>245</sup> both included substantial services. The courts refused to impose warranty obligation on the sellers, not because of the service distinction but because the courts were not satisfied that the sellers were merchants with respect to the goods sold. Other courts, however, have held contracts to install bowling lanes,<sup>246</sup> a heating system,<sup>247</sup> a gas system,<sup>248</sup> and to fabricate a mast<sup>249</sup> subject to merchant rules.

These construction-contract cases resemble the professional cases. Admittedly, the construction contractors do not fall into the traditional notion of merchant; but placed against the parameters of the merchant definition, they lie well within it. Contractors "deal" in construction materials, and by their occupation they hold themselves out as possessing knowledge and skill peculiar to these goods. Their buyers, moreover, expect, no less reasonably than other buyers, that goods they receive will be merchantable.

A liberal construction of the merchant definition is better than any attempt to weigh the services against the sale aspect of a contract. That distinction is arbitrary<sup>250</sup> and is contrary to the trend in other contexts of imposing warranty liability on landlords and builders.<sup>251</sup> Regrettably, the overwhelming majority of courts faced with this issue do not discuss the merchant question at all.

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244. 56 Ala. App. 81, 319 So. 2d 279 (Civ. App. 1975); cf. *Gable v. Silver*, 258 So. 2d 11 (Fla. Dist. Ct. App.), *aff'd*, 264 So. 2d 418 (Fla. 1972) (seller of condominiums furnished with defective air conditioning units not a merchant because not dealing in goods).

245. 19 Pa. D.&C.2d 698, 1 UCC REP. SERV. 104 (Ct. C.P. 1959).

246. See *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974).

247. See *Aced v. Hobbs-Sesack Plumbing Co.*, 55 Cal. 2d 573, 360 P.2d 897, 12 Cal. Rptr. 257 (1961).

248. See *Worrell v. Barnes*, 87 Nev. 204, 484 P.2d 573 (1971). The court relied on strict tort liability notions to reach the result.

249. See *Mercanti v. Persson*, 160 Conn. 468, 280 A.2d 137 (1971).

250. The service-sale distinction sometimes taxes the ingenuity of counsel. In *Texsun Feed Yards, Inc. v. Ralston Purina Co.*, 447 F.2d 660 (5th Cir. 1971), counsel for Ralston argued that the feed lot operator to whom Ralston had sold feed supplement could not maintain an action for breach of warranty because Ralston provided its technical experts to advise the operator on which feed supplements would be best for his herd. The attorney contended, unsuccessfully, that his client had provided a "service" and that a claim of breach of warranty therefore could not arise.

251. See, e.g., *Schipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965); *Seabrook v. Commuter Housing Co.*, 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. 1972), *aff'd*, 79 Misc. 2d 168, 363 N.Y.S.2d 566 (App. Term 1973); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968). See also *Levine, The Warranty of Habitability*, 2 CONN. L. REV. 61 (1969); 28 STAN. L. REV. 357 (1976).

## X. LEASES

Lease transactions have greatly increased in volume and sophistication since the adoption of the Code.<sup>252</sup> There are three general kinds of lease: a classic true lease, a tax avoidance lease, and a lease purchase. The first is the traditional arrangement made by *A* who owns goods and leases them to *B* for a definite period of time, usually shorter than the life of the goods. The tax avoidance lease is used to save the lessor taxes and finance purchases by the lessee;<sup>253</sup> the lease purchase is simply a financing arrangement by the lessee. In the tax avoidance lease, the lessor is usually an investor or a credit institution, who knows little if anything about the leased goods, which the lessee himself may have selected or even purchased and resold. The lease-purchase lessor may be a third party lending institution or may be a seller providing credit to his buyer.

While Article 2 applies to "transactions in goods"<sup>254</sup> and, therefore, arguably extends to leases,<sup>255</sup> other sections indicate that the Article applies only to contracts relating to the "sale of goods."<sup>256</sup> The merchantability section specifically applies to goods and "a contract for their sale."<sup>257</sup> Courts, nonetheless, have applied that section by analogy in what they see as appropriate lease situations. The lease most

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252. Gritta & Lynagh, *Aircraft Leasing—Panacea or Problem?* 5 *TRANSP. L.J.* 9 (1973); Hawkland, *The Impact of the Uniform Commercial Code on Equipment Leasing*, 1972 *U. ILL. L.F.* 446.

253. The tax-avoidance lease customarily involves a lessor (a partnership, individual, or bank holding company) with high income and a corresponding capacity to use accelerated depreciation and investment credits, and a lessee with a low profit margin (an airline, for example). Because of the tax shelter such a lease creates, the lessor is willing to lease at lower rental payments than would otherwise be profitable. The device uses the vagaries of the Internal Revenue Code to facilitate acquisition of equipment by enterprises which might otherwise not be able to afford that equipment. The leveraged lease, often referred to in the literature, is simply a tax-avoidance lease with a third party, the lessor's financier, involved. See generally Javaras & Nelson, *The New Leveraged Lease Guidelines*, 53 *TAXES* 388 (1975). The 1976 Tax Reform Act limits the tax benefits of these shelters. See I.R.C. § 465(c)(1)(C).

254. "Unless the context otherwise requires, this Article applies to transactions in goods . . ." U.C.C. § 2-102.

255. See Hawkland, *supra* note 252, at 459. Professor Hawkland suggests that if U.C.C. § 2-102 does not bring true leases within the scope of Article 2, they may still be subject to the Article's rules by analogy. *Id.*

256. U.C.C. § 2-106 (emphasis added); cf. U.C.C. § 2-103(1)(a) & (d) (In the context of Article 2, a buyer and seller are only those who buy or sell or contract to buy or sell goods.).

257. U.C.C. § 2-314(1) (emphasis added).

closely analogous to a sale (in fact it may well be a sale) is the lease-purchase transaction, to which courts have readily applied the merchant rules.<sup>258</sup> The true lease, which arguably falls outside the letter of Code coverage, is more difficult. In *Cintrone v. Hertz Truck Leasing & Rental Service*,<sup>259</sup> however, one court argued persuasively in favor of extending coverage where the expectations of the lessee (and the lessor) are better served by imposing the merchantability warranty.

A more perplexing problem is posed by tax avoidance or third-party lease finance situations. Should the warranty extend to a group of lawyers or doctors who form a partnership to purchase an aircraft specified by and to be leased to a commercial airline?<sup>260</sup> This question is analogous to the controversy over the right of consumers to assert defenses against third party financiers.<sup>261</sup> A finance company that is a cognate of the seller should bear the warranty burden. A more distant lender probably should not.

Section 2-102 exempts from the coverage of Article 2 those transactions which are in the form of a sale but which are intended "to operate *only* as a security transaction."<sup>262</sup> One commentator suggests that since the Code sets out rules for determining whether a lease is intended as security,<sup>263</sup> that Code provision should determine whether warranties arise.<sup>264</sup> Some leases intended as security, however, may raise the lessee's reasonable expectations that the goods are merchantable and that the lessor stands behind them. If the transaction out of which the lease arises has no sale aspects, however, and operates *only*

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258. See, e.g., *Quality Acceptance Corp. v. Million & Albers, Inc.*, 367 F. Supp. 771 (D. Wyo. 1973); *Morris Plan Leasing Co. v. Bingham Feed & Grain Co.*, 259 Iowa 404, 143 N.W.2d 404 (1966). See generally Farnsworth, *supra* note 237; Hawkland, *supra* note 252; Murray, *Under the Spreading Analogy of Article 2 of the UCC*, 39 *FORDHAM L. REV.* 447 (1971).

259. 45 N.J. 434, 212 A.2d 769 (1965); *accord*, *W.E. Johnson Equip. Co. v. United Airlines, Inc.*, 238 So. 2d 98 (Fla. 1970); *Glenn Dick Equip. Co. v. Galey Constr., Inc.*, 97 Idaho 216, 541 P.2d 1184 (1975); *Baker v. City of Seattle*, 79 Wash. 2d 198, 484 P.2d 405 (1971). In one case the court imposed warranty liability without discussing that there was a lease rather than a contract of sale. *Murray v. Kleen Leen, Inc.*, 41 Ill. App. 3d 436, 354 N.E.2d 415 (1976).

260. Two commentators think not. See Hawkland, *supra* note 252; 1974 U. ILL. L.F. 154.

261. See generally 2 R. ANDERSON, *ANDERSON'S UNIFORM COMMERCIAL CODE* § 3-302:14, at 826 (2d ed. 1971); J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* § 14-8, at 479 (1972).

262. U.C.C. § 2-102 (emphasis added).

263. See U.C.C. § 1-201(37).

264. Murray, *supra* note 258.

as a security transaction, section 2-102 should exclude it from the Article and there should be no warranties. The lessee in such a case should not reasonably expect them. A lender who buys equipment selected by the lessee, as is often the case in the tax avoidance lease situation, or a lender who acquires equipment leases, does not "deal" in that equipment or otherwise hold itself out as possessing knowledge peculiar to it. The lessee in these cases should not expect its lessor to answer for the quality of the leased goods. The rule ought not be rigid, however. Instances where a course of dealing raises contrary expectations should yield contrary results. Courts, moreover, must accord due weight to the Code's obvious policy in favor of buyers. If reasonable expectations of lessor and lessee differ, the rule should satisfy the lessee.

## XI. CONCLUSION

Controversy over the merchant definition has centered on the Statute of Frauds and the merchantability sections. Consideration of the scope of the definition, however, should extend to the good faith sections and to the professional, service, and lease situations.

The Code's general definition of "merchant" allows courts to determine flexibly the limits of the merchant class to which each of the Code's specific merchant burdens applies. The underlying reasons of the merchant sections require a broad reading of that definition and its application to persons whose conventional images often do not fit the traditional notion of "merchant." Courts should evaluate the reasonable expectations of the parties in the disputes before them and avoid *a priori* categorization that may defeat the purposes of the provision they are asked to apply.

