

THE ROLE OF ASSENT IN ARTICLE 2 AND ARTICLE 9

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From its earliest days, the Uniform Commercial Code (“UCC” or “Code”) has reflected the tension inherent in a statute that applies to both consumer and commercial transactions. Karl Llewellyn, the principal drafter of Article 2, and Grant Gilmore, the principal drafter of Article 9, each wrote of the desirability of different rules for the two transaction types.¹ Therefore, it should come as no surprise that the early drafts and final version of Articles 2 and 9 specify different rules for consumer and commercial contracts. Revision of other UCC Articles in recent years has also reflected the tension between commercial and consumer transactions. Many observers believe that these revisions have not struck a satisfactory balance.² The drafting committees currently revising Articles 2 and 9 have continued the struggle with this tension. Thus far, however, these drafting committees have done a better job than the revisers of other Articles of accommodating the needs of consumer transactions. After briefly reviewing the history of consumer protection in the UCC and its revisions, this Article analyzes the approaches of proposed revisions to Articles 2 and 9 with a focus on the assent necessary for apparent agreement to become binding on consumers in sales and secured transactions.

I. A BRIEF HISTORY

Karl Llewellyn repeatedly wrote of the importance of making legal rules reflect the commercial context in which they are to operate. Default rules, the gap-filling provisions that apply when the parties to a contract have not

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1. See, e.g., Grant Gilmore, *The Secured Transaction Article of the Commercial Code*, 16 LAW & CONTEMP. PROBS. 27, 44 (1951); Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 503-12 (1987).

2. E.g., Egon Guttman, *U.C.C. D.O.A.: Le Roi Est Mort, Vive Le Roi*, 26 LOY. L.A. L. REV. 625, 635 (1993); Gail K. Hillebrand, *Revised Articles 3 and 4 of the Uniform Commercial Code: A Consumer Perspective*, 42 ALA. L. REV. 679 (1991); Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743, 750-59 (1993); Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991).

addressed a particular matter, should reflect the commercial context of business transactions.³ He wrote of the need for special rules for business professionals.⁴ He also wrote of adhesion contracts, which occur in both the consumer and the commercial context.⁵

In one of the law's quainter descriptions, Llewellyn wrote:

I know of few "private" law problems which remotely rival the importance, economic, governmental, or "law"-legal, of the form-pad agreement; and I know of none which has been either more disturbing to life or more baffling to lawyers.

... It would be a heart-warming scene, a triumph of private attention to what is essentially private self-government in the lesser transactions of life or in those areas too specialized for the blunt, slow tools of the legislature—if only all businessmen and all their lawyers would be reasonable.

But power, like greed, if it does not always corrupt, goes easily to the head. So that the form-agreements tend either at once or over the years . . . into a massive and almost terrifying jug-handled character; the one party lays his head into the mouth of a lion—either, and mostly, without reading the fine print, or occasionally in hope and expectation (not infrequently solid) that it will be a sweet and gentle lion.⁶

This tendency for the terms in a form to become more and more one-sided certainly is true in the context of consumer transactions. As originally promulgated, Article 2 did not tackle this issue head on. It did not, however, leave the issue entirely unaddressed. In thirteen places Article 2 creates special rules or special standards for merchants,⁷ which it defines as a person "who deals in goods of the kind" or otherwise by his occupation or

3. *E.g.*, Karl Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 903-04 (1939).

4. *E.g.*, *id.*; *see also* Wiseman, *supra* note 1, at 503-19.

5. *E.g.*, KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 362 (1960).

6. *Id.*

7. *See* U.C.C. §§ 2-103(1)(b) (good faith standard), 2-201(2) (statute of frauds), 2-205 (firm offers), 2-207(2) (battle of the forms), 2-209(2) (modification and rescission), 2-314 (implied warranty of merchantability), 2-327(1)(c) (return of goods in sale on approval), 2-402(2) (rights of seller's creditors), 2-403(2) (entrustment), 2-509(3)(risk of loss), 2-603 (rightfully rejected goods), 2-605(1)(b) (failure to particularize reason for rejection), 2-609(2) (standard for adequate assurance of performance) (1995).

employment of a professional agent "holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction."⁸ The business professional is treated differently from the nonprofessional, and consumers are among the nonprofessional.⁹

Section 2-207 is perhaps the most notorious example of the drafters' recognition of the need for special rules for transactions between merchants. This section jettisons the common-law mirror-image rule when parties form a contract through the exchange of standard forms.¹⁰ Interestingly, that section is not limited to merchants. Because nonmerchants rarely exchange standard form documents, however, its drafters clearly had business professionals in mind.¹¹

In section 2-207 the Code recognizes that contract formation often does not adhere to the historic model in which two parties orally negotiate a transaction and then reduce to writing the exact terms they discussed. Some contracts, of course, still are formed in exactly this way. I refer to them as "negotiated contracts." For the most part, however, contracts are formed either by an exchange of standard forms or by an oral agreement on the major terms followed by a standard-form confirmation by one or both parties. In its most innovative step, Article 2 recognizes that neither party reads the boilerplate in the other party's document and also that neither party expects the other party to read it. Section 2-207 scraps the common-law mirror-image rule, under which variations in the forms would prevent the writings from forming a contract.¹² Under the common-law rule, a contract would arise only if the parties proceeded with performance and would be on the terms of

8. *Id.* § 2-104(1).

9. *See also id.* § 2-316 cmt. 8 (addressing disclaimers of implied warranties when the buyer has examined the goods and fails to discover a defect that should have been apparent). The Official Comment rejects any literal doctrine of caveat emptor and distinguishes between the professional and nonprofessional buyer. *Id.* The latter, according to the Official Comment, "will be held to have assumed the risk only for such defects as a layman might be expected to observe." *Id.*

10. *See id.* § 2-207. It reads:

(1) A definite and seasonable expression of acceptance . . . operates as an acceptance even though it states terms additional to or different from those offered . . .

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

Id.

11. Section 2-207 also applies to written confirmations of oral agreements. The principal application of the section, however, seems to be in the context of an exchange of standardized forms.

12. *Compare* *Poel v. Brunswick-Balke-Collender Co.*, 110 N.E. 619 (N.Y. 1915), with *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 380 N.E.2d 239, 241 (N.Y. 1978). *See generally* JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 48 (3d ed. 1990).

whichever party fortuitously sent the last form before the parties commenced performance.¹³

Though section 2-207 has proven difficult to apply and has been the subject of much commentary,¹⁴ it is a positive step in developing the doctrine of mutual assent. The drafters of Article 2 did not develop a similar new approach for dealing with adhesion contracts in the context of consumer transactions. This does not mean, however, that they completely neglected the problems posed by adhesion contracts. Though not literally confined to contracts of adhesion, several provisions operate primarily in that context. These include the provision on unconscionability¹⁵ and the provision on disclaimers of implied warranties.¹⁶ Neither of these sections establishes a special rule for adhesion contracts or for consumer transactions, but both apply with special force to contracts of adhesion in the consumer context. By imposing a conspicuousness requirement for the effectiveness of disclaimer language, section 2-316 attempts to ensure that buyers are actually aware of the seller's limitations concerning the quality of the subject matter of the transaction. Further, the unconscionability section provides a safety valve to ensure the most basic sense of fairness in a contractual exchange in which a merchant uses a standard form that contains harsh boilerplate, the contents of which are unknown to the consumer.

Similarly, Article 9 expressly recognizes that the differences between commercial and consumer transactions call for different rules. Consumer transactions attracted much attention in the process of drafting original Article 9.¹⁷ Several provisions of the Article relate solely to consumer transactions,

13. See MURRAY, *supra* note 12, § 49, at 160-62.

14. See John E. Murray, *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307, 1309 n.5 (1986) (citing articles).

15. U.C.C. § 2-302(1) (1995). It reads:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Id.

16. *Id.* § 2-316. It provides in part:

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in the case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.

Id.

17. According to the principal drafter of Article 9, "how much or how little Article 9 should do for the consumer, or about the special problems arising in the consumer field, has caused more debate

including a section that limits security interests in after-acquired property¹⁸ and a section that provides minimum statutory damages for the failure of a secured party to comply with certain statutory duties.¹⁹

Article 9 also contains some limited recognition of problems related to assent. Section 9-501 prohibits any attempt to waive certain duties,²⁰ and it validates a waiver of other duties only if the waiver is written and occurs after the debtor defaults.²¹ For the most part, these restrictions are not confined to consumer transactions.²² Nevertheless, they implicitly recognize that a consumer is unlikely to recognize and understand the risks involved when he or she is required at the time of contract formation to assent to a waiver of statutory protections.

This brief description of the drafting history and the originally enacted versions of Articles 2 and 9 reveals that consumer protection has been a part of the UCC since its inception. Subsequent revisions of the Code have continued to struggle with the dichotomy between negotiated commercial transactions and adhesion consumer contracts. In 1987, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Law Institute ("ALI") approved new Article 2A, which expanded the scope of the Code to include the lease of goods. Though the impetus for this effort came from persons concerned with commercial leases, Article 2A also applies to consumer leases. Indeed, it contains several provisions that

than any other single matter that has been considered in the course of drafting." Gilmore, *supra* note 1, at 44.

18. U.C.C. § 9-204(2) (1995) (limiting a security interest in after-acquired property to property that the consumer acquires within ten days after the secured party gives value).

19. *Id.* § 9-507(1) (minimum damages in the amount of the finance charge plus either 10% of the cash price of the goods or 10% of the principal of a loan). There are other provisions applicable only to consumer transactions. *Id.* §§ 9-307(2) (giving priority to consumers who purchase from other consumers goods that are subject to a security interest), 9-505(1) (prohibiting strict foreclosure when a consumer has paid 60% of the cash price or loan principal).

Early drafts of Article 9 contained provisions addressing several other aspects of consumer transactions: disclosure of credit terms, layaway plans, and abolition of the holder-in-due-course doctrine. Gilmore, *supra* note 1, at 45-47; Homer Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L.F. 321, 323.

20. U.C.C. § 9-501(3) (1995) (referring to sections 9-502(2), 9-504(2), and 9-507(1)).

21. *Id.* § 9-501(3) (1995) (referring to sections 9-504(3), 9-505(1)&(2), and 9-506). The first three of the referents contain the phrase, "if [the debtor] has not signed after default a statement renouncing or modifying his right," and the last contains the phrase, "unless otherwise agreed in writing after default."

22. *E.g.*, *id.* § 9-501(3) (speaking in general terms). *But see id.* § 9-505(1) (applying only to certain consumer transactions).

apply only to consumer leases.²³ The failure to include more provisions, however, delayed enactment in some states.²⁴

In 1985 NCCUSL and ALI undertook revision of Articles 3, 4, and 8, dealing with commercial paper and the banking and securities systems. The initial effort produced the New Payments Code ("NPC").²⁵ The NPC expanded the scope of Article 3 well beyond the checks, notes, and drafts that lay at the core of original Article 3. The NPC reconceptualized the entire field of payment instruments, included important consumer protection provisions, and met with overwhelming resistance.²⁶ A more modest revision of Articles 3 and 4 then occurred, with very little attention to consumer transactions in the final product.²⁷ This lack of attention was controversial and led to significant opposition to enactment on the part of consumer groups in some states, ultimately producing a lack of uniformity in the enacted versions in those states.²⁸

Largely because of the experience with enactment of revised Articles 3 and 4, NCCUSL sought a consumer presence at the drafting table to revise Articles 2 and 9.²⁹ Though no official representative of any consumer group is

23. *Id.* §§ 2A-106 (choice of law and forum), 2A-108(2) (unconscionable conduct to induce formation of a contract or to enforce a claim), 2A-108(4) (unconscionability and award of attorney's fees), 2A-109(2) (burden of proof for good faith), 2A-221 (casualty), 2A-309(5)(a) (rights to goods that become fixtures), 2A-406(1)(b) (excused performance), 2A-407 (independence of promises), 2A-504(3)(b) (liquidated damages), 2A-516(3)(b) (notification of litigation for infringement). *See generally* Fred H. Miller, *Consumer Leases Under Uniform Commercial Code Article 2A*, 39 ALA. L. REV. 957 (1988).

24. For example, West Virginia did not enact Article 2A until 1996 and then only with substantial modifications to address consumer transactions. 1996 W. Va. Acts ch. 160. California also modified Article 2A before enacting it. *See, e.g.*, 1B U.L.A. 671-72 (1989 & Supp. 1996).

25. UNIFORM NEW PAYMENTS CODE (P.E.B. Draft No. 9, 1983).

26. *See* Rubin, *supra* note 2, at 746.

27. *Id.*

28. For example, New York and Massachusetts have yet to enact them and 17 states modified section 4-406 before enacting it. 2B U.L.A. 398, 401-03, supp. 77 (1991 & Supp. 1996); *see also* Rubin, *supra* note 2, at 783-84 (citing California, Colorado, Michigan, Washington, and West Virginia). For systematic treatment of Articles 3 and 4, *see* Hillebrand, *supra* note 2.

29. A precursor of NCCUSL's recognition of the need to have the consumer voice at the drafting table was a program instituted by the Consumer Financial Services Committee of the American Bar Association's Business Law Section. This Committee is concerned with state and federal laws affecting the consumer credit industry. Until 1989, its membership consisted almost entirely of persons whose practice entailed representation of the interests of credit-granting institutions. Several members of this Committee were active in the revision of Articles 3 and 4. *See* Rubin, *supra* note 2, at 751-52, 776-79 (discussing the roles of Roland Brandel and David Goldstein, active members of the ABA Committee). Partially in response to the adverse reception given Articles 3 and 4, the ABA Committee sought to achieve a broader perspective at its meetings. To this end, in 1989 the Committee instituted a Consumer Fellows program, awarding fellowships to five persons representing consumer interests. The

a member of either drafting committee,³⁰ consumer representatives have been formally and informally invited to participate as Observers.³¹ This participation has taken the form of written and oral comments as the Drafting Committee considers the need for revision of the various provisions of Article 2. By contrast, in the Article 9 project, the Drafting Committee deferred consideration of consumer transactions until its general revision was complete. Initial involvement by consumer representatives consisted primarily of participation on a task force on consumer issues. This task force, which was composed of representatives of consumer interests and representatives of credit-granting institutions,³² met for two years, but could not reach consensus on most issues. Simultaneously, in the Article 2 revision, some of the Drafting Committee's preliminary decisions on consumer issues proved to be controversial. Consequently, NCCUSL's Executive Committee directed each drafting committee to establish a subcommittee to recommend resolution of the issues affecting consumer transactions that had arisen in the course of the work of the drafting committee. As this Article is being written, the subcommittees have reported to their respective drafting committees, the drafting committees have largely adopted the recommendations of the

fellowships provided for reimbursement of travel expenses and encouraged the fellows to become actively involved in the programming and leadership of the Committee. The first group of fellows were Mark Budnitz (of Georgia State University School of Law), Kathleen Keest (then of the National Consumer Law Center), Tang Thi Thanh Trai Le (of Notre Dame University School of Law), Michelle Meier (of Consumers Union), and the author.

For a fuller discussion of the participants in the drafting process, see Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B and 9 Be Fair to Consumers?*, 75 WASH. U. L.Q. 69 (1997).

30. Nor was any consumer representative on either of the study committees that preceded appointment of the drafting committees. The closest was the presence on the Article 9 Study Committee of David Lander, who once headed Legal Services of Eastern Missouri, but who has since 1988 represented financial institutions as a partner at St. Louis's Thompson Coburn (then known as Thompson & Mitchell).

31. On the Article 2 project, these representatives include Gail K. Hillebrand (of Consumers Union) and Yvonne W. Rosmarin (formerly of the National Consumer Law Center). On the Article 9 project, they include Hillebrand, Rosmarin, Michael A. Ferry (of Legal Services of Eastern Missouri), David B. McMahon (formerly of West Virginia Legal Services Plan), and Norman Silber (of Hofstra University School of Law and chair of the Consumer Protection Committee of the New York City Bar Association). In addition, several academics with a special interest in consumer transactions have participated in each project.

32. Representatives of creditors included Edward J. Heiser Jr. (representing the American Financial Services Association, an organization of consumer finance companies and others in the consumer credit business), William B. Solomon and Thomas Buitewaite (both of General Motors), Tracy L. Hackman (of Chrysler Financial Corp.), Mary Price (of Bank of America, representing the California Bankers Association), and James M. Swartz (of Primus Automotive Services).

subcommittees, and NCCUSL's Executive Committee likewise has largely approved the positions taken by the drafting committees. The remainder of this Article compares and contrasts the different approaches of proposed Article 2 and proposed Article 9 with respect to the subject of assent in consumer transactions.

II. ARTICLE 9

One of the overarching objectives of the revision effort is the expansion of Article 9's scope by extending the rules of Article 9 to additional types of collateral. The premise is that the rules in Article 9 for creating and perfecting consensual liens are clearer and more efficient than the common-law rules applicable to types of property not currently within the scope of Article 9³³—e.g., payment intangibles, nonpossessory agricultural liens, insurance policies, and tort claims. The goal is to clarify and simplify the rules for acquiring and perfecting security interests in these types of assets. In addition, there has been a push to extend Article 9 to deposit accounts. Article 9 already reaches deposit accounts to the extent they consist of proceeds of other collateral; proponents of this proposal want the scope of Article 9 to include deposit accounts as original collateral, too. As with virtually every other proposal either in the Study Committee report or initially generated by the reporters, the rationale for the proposal is anchored in commercial transactions. When extended to consumer transactions, any expansion of the scope of Article 9 necessitates inquiry into the reality of assent in those transactions.

The draft of Article 9 retains, without substantive change, the freedom of contract position of section 9-201.³⁴ This means that Article 9 poses no limitations on the types of goods in which a creditor may take a security interest and pays no special attention to the process by which a consumer apparently assents to the creation of a security interest in his or her assets. A consumer who seeks a loan to finance the purchase of a tangible, such as a car

33. See PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 9 REPORT 44-45, 56-59 & app. J at 552-57, 582-86 (1992) [hereinafter PEB ART. 9 STUDY GROUP REPORT].

34. Draft, Uniform Commercial Code Revised Article 9, Secured Transactions; Sales of Accounts and Chattel Paper § 9-201 (Nat'l Conference of Comm'rs on Unif. State Laws, Oct. 1996) [hereinafter Oct. 1996 Draft, Art. 9], available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Jan. 10, 1997). Proposed section 9-201 reads: "(a) Except as otherwise provided by this Act, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors."

or a house, typically knows that the tangible will serve as collateral for the loan. The consumer who simply seeks a loan for intangibles, such as medical treatment, education, or a vacation, however, may not think about the need for collateral. The creditor may not call the matter to the consumer's attention. Instead, the creditor may simply use standard form documents that include a provision by which the consumer agrees to convey a security interest in generally specified assets, e.g., electronic entertainment equipment and art objects.³⁵

There is much force to the proposition that a person—even a consumer—should be able to use any of his or her assets to secure an extension of credit. Much can be said for making it easy and inexpensive to create security interests that creditors can perfect and enforce with the confidence that they will not be vulnerable to attack by third parties. On the other hand, several considerations counsel caution. One is a concern that consumers may become overextended, taking on more debt than they can afford to repay. One hopes that creditor vigilance precludes this, because it is not in a creditor's interest to extend credit beyond a consumer's ability to repay. Perhaps if the world of credit were confined to secured credit the system would operate this way. The availability of unsecured credit, including bank credit cards, however, forecloses this control against overextension. Further, even in the world of secured credit, the system does not operate to prevent overextension of credit. Every creditor knows that some of its customers will default, and the price of credit reflects these defaults. Even so, denying credit to every potential customer whom the creditor can accurately predict will default is a gain to the creditor. Unfortunately, the costs of identifying these customers increases at the margin. So long as the finance charge is set at a level that compensates the creditor for the risk of this loss, the incentives to vigilance are counterbalanced by the costs of exercising vigilance.

35. A Federal Trade Commission regulation makes it an unfair or deceptive practice for a creditor to take a nonpossessory, nonpurchase money security interest in household goods, which are defined to be

[c]lothing, furniture, appliances, one radio and one television, linens, china, crockery, kitchenware, and personal effects (including wedding rings) of the consumer and his or her dependents, provided that the following are not included within the scope of the term "household goods": (1) Works of art; (2) Electronic entertainment equipment (except one television and one radio); (3) Items acquired as antiques; and (4) Jewelry (except wedding rings).

16 C.F.R. § 444.1(i) (1996). As a result of this limitation, small loan companies now often take security interests in household goods that fall outside the federal definition. See KATHLEEN E. KEEST, *THE COST OF CREDIT, REGULATION AND LEGAL CHALLENGES* § 8.5.4.4 (1995); JONATHAN SHELDON, *UNFAIR AND DECEPTIVE ACTS AND PRACTICES* § 5.1.3.6, at 176 (3d ed. 1991).

The question then arises whether there are some assets that should be protected against an improvident pledge. Perhaps deposit accounts merit special protection against the temptation to pledge assets that are necessary for daily sustenance.³⁶ This protection seems analogous to exemption statutes, which seek to preserve against the claims of judgment creditors a minimum level of assets for an impecunious consumer.³⁷ The analogy fails, however, because typically those laws permit the debtor to give a security interest, even a nonpurchase money security interest, in exempt assets.³⁸ This suggests that there may be nothing sufficiently special about deposit accounts to warrant a ban on their use as collateral.³⁹

The critical need is ensuring that the consumer *truly* assents to the pledge of an asset that is essential for daily sustenance. The risk is twofold. One risk is that consumers will not realize that they are conferring a security interest in the deposit account because the grant appears in the fine print boilerplate. The other risk is that creditors will include deposit accounts in the boilerplate simply to gain access to another asset in the event of default, as opposed to making credit available because of *ex ante* reliance on the deposit account as an asset. After all, unless the account is put beyond the reach of the consumer, the creditor cannot count on its existence or size some months or years later.⁴⁰ Indeed, the possibility of withdrawal of funds from the account led the drafters to propose that, even in commercial transactions, the only way to perfect a security interest in a deposit account as original collateral is by taking control of the account.⁴¹ The likeliest context for security interests in

36. Deposit accounts include checking accounts and savings accounts, both of which might be the repository of a consumer's paycheck or social welfare benefit.

37. See, e.g., CAL. CIV. PROC. CODE § 704.020 (West 1987); N.Y. C.P.L.R. § 5205(a) (McKinney 1978), WASH. REV. CODE § 6.15.010 (1995). See generally William T. Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779 (1974).

38. See also, e.g., WASH. REV. CODE § 6.15.050(4) (1995). But see ME. REV. STAT. ANN. tit. 14, § 4401 (West 1980) (prohibiting security interests in exempt personalty); see also *Brooklyn Loan Corp. v. Gross*, 18 N.Y.S.2d 409 (App. Div. 1940) (public policy prohibits waiver of exemption).

39. It is noteworthy that we are not really talking about a ban on deposit accounts as collateral. The question is whether they should be brought within the scope of Article 9. Even if the answer is negative, it may still be possible for a creditor to obtain a security interest in a deposit account, albeit through the more cumbersome and less reliable non-UCC procedures for obtaining and enforcing consensual liens. See PEB ART. 9 STUDY GROUP REPORT, *supra* note 33, app. G at 330-33.

40. On the other hand, although the creditor may not be able to rely on the availability of any given deposit account, the creditor may be able to determine that over its entire base of defaulting customers it will be able to realize a predictable amount from deposit-account collateral. This could have the effect of lowering its loss from defaulting customers and lowering the price of credit for all customers of the creditor.

41. See Oct. 1996 Draft, Art. 9, *supra* note 34, §§ 9-109 (defining control), 9-310(a)(2) (control

consumer deposit accounts is in connection with extensions of credit by the depository itself, in which context the draft stipulates that the secured party has control.⁴² The depository, of course, already has a right of setoff.⁴³ Therefore, the existence of an Article 9 security interest may not add much security for the creditor.

Another way in which the draft permits a creditor to gain control of an account is to obtain an agreement by the depository that it will comply with the creditor's instructions concerning disposition of account funds. To the extent that control may occur by the depository's consent, the risk of inadvertent creation of a security interest through apparent assent to boilerplate continues. This could occur, for example, if the creditor forwards to the consumer's bank a copy of its loan contract with the consumer, conferring a security interest in the creditor, and the bank returns a form agreeing to comply with the creditor's instructions. The consumer might never be aware that he or she conferred the security interest on the creditor.⁴⁴ To deal with this risk, creation of the security interest should depend on compliance with special requirements designed to ensure that the consumer is aware that the deposit account is at risk. Indeed, the risk of inadvertently placing this asset at risk is so great that there is a strong case for the proposition that the creation of a security interest should require the immediate loss of access to the account. As it happens, however, the Drafting Committee agreed with the consumer representatives and abandoned the proposal with respect to consumer deposit accounts. The difficulties of ensuring true assent to placing this often critical asset at risk fully justify this

is the only means for perfecting a security interest in deposit accounts), 9-312 (perfection by control). Notably, taking possession of a certificate evidencing the existence of the account is not within the definition of taking control.

42. *Id.* § 9-109(a). It provides:

A secured party has control over a deposit account if:

- (1) the secured party is the depository institution with which the deposit account is maintained;
- (2) the depository institution with which the deposit account is maintained agrees in writing that, without further consent by the debtor, the depository institution will comply with instructions originated by the secured party directing disposition of the funds in the account; or
- (3) the secured party becomes the depository institution's customer (Section 4-104) with respect to the deposit account.

Id.

43. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 21-7, at 745-46 (4th ed. 1995).

44. The likelihood of this scenario is substantially diminished by virtue of the fact that the depository bank thereby jeopardizes its common law right of setoff.

apparently paternalistic decision.

Although proposed Article 9 does not do much to ensure assent to the substantive terms of a secured transaction, it is sensitive to problems of assent in connection with the procedures on default. This sensitivity is a carryover from current Article 9. The current version of section 9-501 provides that “[t]o the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in [seven subsections] . . . may not be waived or varied”⁴⁵ The proposed revision almost trebles the number of subsections that cannot be waived or varied, but this is largely the result of breaking the current subsections down into more numerous subsections.⁴⁶ The proposal retains the current statute’s concept that a debtor’s waiver of a statutory right at the time of formation of the contract is highly suspect. Especially in the consumer context, the typical debtor will not be focusing on the likelihood or consequences of default and, in any event, will not be aware of the debtor’s statutory rights. Coupled with the inevitable location of any such waiver, viz., in the small-print boilerplate, assent to a waiver is a fiction. Hence, both the current and the proposed Article 9 deny effectiveness to contractual waivers of statutory protections. On the other hand, some statutory protections may be waived after default, at a time when the debtor more properly may be expected to focus on the matter. For example, current section 9-504(3) permits post-default waiver of the consumer’s right to notification of the disposition of collateral.⁴⁷ The proposed revision retains this idea.⁴⁸ The risk remains, however, that a consumer who surrenders collateral to a secured party will be asked at the time of surrender to sign several papers and will do so without realizing that this apparent assent operates to waive some of these statutory rights. The draft therefore provides that a waiver “is ineffective . . . unless the secured party establishes by clear and affirmative evidence that the debtor . . . expressly agreed to its terms.”⁴⁹ This subsection appears in the draft in brackets, indicating that the Drafting Committee has not yet formally

45. U.C.C. § 9-501(3) (1995).

46. For example, current subsection 9-504(3), which specifies the rules for notification and disposition of collateral after default, is transformed into five sections, each with subsections, several of which add new requirements for the secured party to meet. See Oct. 1996 Draft, Art. 9, *surpa* note 34, §§ 9-610(b), 9-611, 9-612, 9-613, 9-614.

47. U.C.C. § 9-504(3) (1995); see also *id.* § 9-501(3) (exception to the nonwaiver rule for the secured party’s obligation to dispose of the collateral in the manner specified in sections 9-504 and 9-505).

48. Oct. 1996 Draft, Art. 9, *surpa* note 34, § 9-623.

49. *Id.* § 9-623(c).

approved the idea.

The draft also retains the waiver rules of current section 9-505, permitting the debtor to consent to the secured party's retention of the collateral in satisfaction of the debt.⁵⁰ This consent must be given only by a post-default writing,⁵¹ but the draft does not impose the higher burden of establishing express agreement by clear and affirmative evidence. Instead, it simply settles for a writing signed after default. The lack of any deficiency liability may be thought to justify this if the creditor accepts the collateral in full satisfaction of the debt. The flaw in this reasoning is the fact that the consumer is waiving any right to a surplus if the value of the collateral exceeds the debt. The creditor's incentive to offer taking the collateral in full satisfaction is, of course, highest in just this situation. Consequently, the higher burden of proof should apply here, too.

In another revision of this section, the Drafting Committee responded to the special needs of consumer transactions. Current section 9-505(2) permits the secured party, with the debtor's post-default consent, to keep the collateral in full satisfaction of the indebtedness.⁵² The Drafting Committee decided to modify this to authorize the secured party, with the debtor's consent, to keep the collateral in *partial* satisfaction of the indebtedness. Recognizing the high risk of ineffective communication in the consumer context, the Committee limited this authorization to commercial transactions; therefore, retention of collateral in partial satisfaction of the indebtedness is not a possibility in consumer transactions.⁵³

These provisions relating to post-default assent reflect the reality of assent in the context of consumer secured transactions far better than the predecessor provisions in current Article 9. Current Article 9 makes waivers ineffective if they are boilerplate in the original security agreement, but it implicitly accepts the traditional rule of viewing a post-default signature on a document as assent to everything within the document,⁵⁴ regardless of whether the signing party has any actual knowledge of the contents of the document. To a modest

50. Compare U.C.C. § 9-505 (1995) with Oct. 1996 Draft, Art. 9, *supra* note 34, § 9-618(b).

51. Oct. 1996 Draft, Art. 9, *supra* note 34, § 9-618.

52. U.C.C. § 9-505(2) (1995).

53. Oct. 1996 Draft, Art. 9, *supra* note 34, § 9-618(g) ("In a consumer secured transaction, a secured party may accept collateral only in full satisfaction, and not in partial satisfaction, of the debt it secures.").

54. *E.g.*, U.C.C. § 9-505(1) & (2) (1995) (imposing obligations on the secured party if the debtor "has not signed after default a statement renouncing or modifying his rights").

extent, the proposed revision attempts to ensure true assent to the post-default proposals of the secured party.

III. ARTICLE 2

Current Article 2 contains several provisions that recognize that parties to a transaction do not always read the written matter documenting the transaction. Foremost among these are sections 2-207 and 2-316. Because the focus of this Article is consumer transactions, I will not discuss the former, which rarely is implicated in the consumer context. On the other hand, the latter section is implicated in almost every purchase of high or moderately priced goods.

Section 2-316 is not confined to consumer transactions, and it exemplifies the pro-buyer orientation of Article 2's default rules. It seeks to enhance the likelihood that, even if the buyer has not read the entire document embodying the transaction, the buyer will be aware of a disclaimer of implied warranties. To be effective, subsection (2) requires a disclaimer of the implied warranties of merchantability or fitness to be conspicuous.⁵⁵ To be sure, subsection (3) of section 2-316 apparently permits a nonconspicuous disclaimer to be effective.⁵⁶ The Official Comment, however, drives home the point, "This

55. U.C.C. § 2-316(2) (1995). The section provides:

Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and *conspicuous*.

Id. (emphasis added). "Conspicuous" is defined by the Code as

so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals . . . is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. . . . Whether a term or clause is "conspicuous" or not is for decision by the court.

Id. § 1-201(10).

56. *Id.* § 2-316(3). It reads:

Notwithstanding subsection (2)

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

Id. The courts disagree on the question whether the conspicuousness requirement of subsection (2) also applies to subsection (3). See Julian McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 812-16 (1978). Compare *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 268 A.2d 345 (N.J. Super. Ct. 1970) with *Gilliam v. Indiana Nat'l Bank*, 337 So. 2d 352 (Ala. Ct. App. 1976).

section . . . seeks to protect a buyer from unexpected and unbargained language of disclaimer by . . . permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.”⁵⁷ There could not be a clearer recognition that many contracts are formed or governed by documents that one or both parties are unlikely to read.

Whether section 2-316 is effective to ensure that the consumer consents to the absence of warranties is, of course, an entirely different matter. For example, the statute requires the seller to use the word “merchantable,” presumably for the purpose of ensuring that the buyer knows what is being disclaimed. Unfortunately, consumers do not understand that the term means “fit for ordinary purpose.”⁵⁸ Instead, consumers apparently believe the term means “saleable.”⁵⁹ An express disclaimer of merchantability therefore does not effectively communicate that the goods need not be fit for their ordinary purpose. Further, whether or not the consumer understands the legal meaning of the term “merchantability,” section 2-316 makes the complying disclaimer effective even if the consumer has not actually seen it.

The other main provision in current Article 2 that attempts to assure that the contract tracks the actual assent of the parties is section 2-202. Section 2-202 embodies the Code’s version of the parol evidence rule.⁶⁰ This section, too, is not confined to consumer transactions. Rather, it applies to all transactions and liberalizes the “four corners” rule, under which the court looks only to the written contract document to determine if it is a complete integration of the parties’ agreement.⁶¹ Under section 2-202 noncontradictory agreements supplement the written agreement unless the court affirmatively concludes that the parties intended the writing to be the exclusive statement of the terms of the deal. According to the Official Comments, the court should reach this conclusion only “[i]f the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court.”⁶² Section 2-202 thus places greater emphasis on ascertaining the actual agreement of the parties than on the formality of the document. This

57. U.C.C. § 2-316 cmt. 1 (1995).

58. *Id.* § 2-314(2)(c).

59. For example, surveys of law students in my Consumer Transactions course at two law schools revealed that even after being exposed to 1½-2½ years of legal studies, 40% did not accurately understand its meaning.

60. U.C.C. § 2-202 (1995).

61. See MURRAY, *supra* note 12, at 385-86.

62. U.C.C. § 2-202 cmt. 3 (1995).

focus is especially appropriate in the consumer context where the document is prepared entirely on behalf of a corporate entity that wants to insulate itself from the promises and assurances of its sales people.

Section 2-302 also addresses the assent process by authorizing the court to deny enforcement of unconscionable contracts or contract terms.⁶³ Though not mentioning assent, section 2-302 permits courts to police contracts in which a consumer's assent has been procured by coercion,⁶⁴ manipulation,⁶⁵ or deception.⁶⁶

Proposed Article 2 goes further. The new approach is most evident in the sections dealing with warranty disclaimers and adhesion contracts. In commercial transactions a disclaimer of warranties is effective if it is conspicuous and uses appropriate language.⁶⁷ This is little changed from the

63. *Id.* § 2-302(1). Section 2-302(1) provides:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Id.

64. *See, e.g.*, *Gianni Sport Ltd. v. Gantos, Inc.*, 391 N.W.2d 760 (Mich. Ct. App. 1986) (commercial transaction); *American Home Improvement, Inc. v. MacIver*, 201 A.2d 886 (N.H. 1964); *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264 (Sup. Ct. 1969) (door-to-door sale).

65. *See, e.g.*, *Brooklyn Union Gas Co. v. Jimenez*, 371 N.Y.S.2d 289 (Civ. Ct. 1975).

66. *See, e.g.*, *Frostifresh Corp. v. Reynoso*, 274 N.Y.S.2d 757 (Dist. Ct. 1966) (referral sales scam and English-language document used in a transaction negotiated in Spanish with consumers who could not read English).

67. Draft, Uniform Commercial Code Revised Article 2 Sales § 2-407(c) (Nat'l Conference of Comm'rs on Unif. State Laws, Jan. 24, 1997) [hereinafter Jan. 1997 Draft, Art. 2], available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Feb. 20, 1997). Proposed section 2-407 reads:

(b) Except in a consumer contract, if language in an agreement is construed to disclaim or modify an implied warranty, the following rules apply:

(1) All implied warranties are disclaimed or modified by language [or expressions] that under the circumstances call the buyer's attention to the disclaim[e]r or modification of the warranties and states that the implied warranties have been disclaimed or modified.

(2) Subject to Section 2-206(a), conspicuous language contained in a record that disclaims or modifies an implied warranty is sufficient to satisfy paragraph (1) in the following cases:

(A) A disclaimer or modification of the implied warranty of merchantability is sufficient if the language mentions merchantability or states "These goods may not be fit for their ordinary purpose" or is of similar import.

(B) A disclaimer or modification of the implied warranty of fitness is sufficient if the language states "There are no warranties that these goods will conform to the purposes for which they are purchased made known to the seller" or is of similar import.

(C) Language like "as is" or "with all faults" is sufficient to disclaim or modify an implied warranty.

current law.⁶⁸ In consumer transactions, however, a disclaimer is effective only if the consumer expressly agrees to it: “[L]anguage in a consumer contract purporting to disclaim or modify the implied warranty of merchantability or the implied warranty of fitness for particular purpose is ineffective unless the buyer has expressly agreed to it.”⁶⁹

This provision represents an attempt to single out a critically important term and ensure that the consumer realizes that it is part of the deal. In most transactions the disclaimer will not be negotiable, and the requirement of express agreement is really a method of disclosure. In practice, it is likely to translate into a separate signature. The effectiveness of this section to make consumers aware that the seller does not stand behind the quality of the goods may depend on the number of separate signatures that are required, in addition to the signature used to obligate the consumer to pay. For many kinds of goods, this will be the only one; for others, however, this will be one of several additional signatures. For example, in connection with the purchase of a used car on credit, a consumer may be asked to sign or initial a credit application,⁷⁰ an odometer disclosure statement,⁷¹ an acknowledgment of receipt of the Truth-in-Lending disclosure statement,⁷² a credit life insurance disclosure,⁷³ a credit disability insurance disclosure,⁷⁴ a gap insurance disclosure,⁷⁵ a service contract, an affirmation that the consumer has and will maintain casualty insurance, and a promissory note. In this context, one may question whether a separate signature on a disclaimer-of-warranties clause will effectively communicate that the disclaimer is part of the deal. Further,

(3) If the buyer before entering into the contract has examined the goods, sample, or model as fully as desired or has declined to examine them, there is no implied warranty with regard to conditions that an examination in the circumstances would have revealed.

(4) An implied warranty may be disclaimed or modified by course of performance, course of dealing, or usage of trade.

Id. § 2-407(b) (first set of brackets in original).

68. U.C.C. § 2-316(2) (1995). For the full text of section 2-316(2), see *supra* note 54.

69. Jan. 1997 Draft, Art. 2, *supra* note 67, § 4-407.

70. Incredibly the signing of the credit application often does not occur until the final closing.

71. See 49 U.S.C. § 32705 (1994).

72. This is not required by law but is frequently used by creditors to insulate them against a later claim that they failed to provide the required disclosures.

73. Truth-in-Lending Act § 106(b), 15 U.S.C. § 1605(b) (1994); Regulation Z, 12 C.F.R. § 226.4(d)(1) (1996).

74. Truth-in-Lending Act § 106(b), 15 U.S.C. § 1605(b) (1994); Regulation Z, 12 C.F.R. § 226.4(d)(1) (1996).

75. See Truth-in-Lending Act § 106(c), 15 U.S.C. § 1605(c) (1994); Regulation Z, 12 C.F.R. § 226.4(d)(2) (1996).

one can expect consumers' attorneys to argue that, notwithstanding the separate signature, the consumer did not expressly agree to it. If the consumer can persuade the court that the seller did not provide a realistic opportunity to read all the documentation, but instead presented a stack of papers with a series of signature lines and said, "Sign here and here and here . . .," the disclaimer should be ineffective. I am skeptical, however, whether many courts will agree.

An alternative approach to dealing with warranties, at least for new goods, is to render disclaimers of implied warranties ineffective. This is the approach taken, as a practical matter, by the federal Magnuson-Moss Warranty Act.⁷⁶ Section 108 provides that if a supplier⁷⁷ of goods makes a "written warranty,"⁷⁸ it may not disclaim implied warranties.⁷⁹ The primary articulated rationale for this ban is the deception present when a manufacturer makes an express warranty that goods are free of defects and simultaneously disclaims the implied warranty that the goods are fit for their ordinary purposes.⁸⁰ Another rationale, albeit not anchored in any lack of assent, is that a person dealing in goods should stand behind them, at least to the extent of warranting that they are fit for their ordinary purposes.⁸¹ This rationale explains the laws of the several states that invalidate disclaimers of warranties in the sale of consumer products.⁸²

76. 15 U.S.C. § 2301-2312 (1994).

77. Under Magnuson-Moss, "[t]he term 'Supplier' means any person engaged in the business of making a consumer product directly or indirectly available to consumers." Magnuson-Moss Warranty Act § 101(4), 15 U.S.C. 2301(4) (1994).

78. Under the Magnuson-Moss Warranty Act, [t]he term "Written warranty" means—

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

Id. § 101(6), 15 U.S.C. 2301(6) (1994).

79. *Id.* § 108(a), (c), 15 U.S.C. § 2308(a), (c) (1994).

80. This section is designed to eliminate the practice of giving an express warranty while at the same time disclaiming implied warranties. This practice often has the effect of limiting the rights of the consumer rather than expanding them as the consumer might otherwise be led to believe. H.R. REP. NO. 93-1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7722.

81. See Kathleen F. Brickey, *The Magnuson-Moss Act—An Analysis of the Efficacy of Federal Warranty Regulation As a Consumer Protection Tool*, 18 SANTA CLARA L. REV. 73, 97-100 (1978).

82. See, e.g., CAL. CIV. CODE § 1792.4 (West 1985); MD. CODE ANN., COM. LAW I § 2-316.1

In most states, of course, current state law permits sellers to disclaim the implied warranty of merchantability.⁸³ Not all merchants, however, actually disclaim it. For example, many retailers use only sales receipts or other simple forms to document their transactions with consumers. The implied warranty of merchantability arises and is not disclaimed. On the other hand, retailers who use more elaborate written contracts typically include disclaimers in those documents. If the retailer does not make a Magnuson-Moss “written warranty”—and most do not—then the federal prohibition of disclaimers does not apply.⁸⁴ Unless a state statute prohibits disclaimer of implied warranties—and only a handful do—the retailer is free to disclaim them. A ban would accrue to the consumer when the manufacturer is out of business, when the manufacturer cannot or will not repair or replace the goods, and when the consumer finds it to be more convenient to deal with the retailer than with the remote manufacturer. Invalidation of disclaimers in connection with the sale of new goods has both an assent- and a nonassent-based rationale.

An assent-based case is also possible for invalidating disclaimers in transactions for the sale of used goods. The proposition that a person should be able to bargain for any lawful exchange is unassailable. The unassailability of the proposition depends, however, on the existence of sufficient knowledge on the part of the parties. Even if consumers are aware of the existence of a disclaimer—a doubtful proposition under current law—it is questionable whether consumers truly understand the meaning and significance of a disclaimer of the implied warranty of merchantability. A twenty-year old study by the Federal Trade Commission found that between twenty and forty percent of consumers did not understand that “as is” means that they bore all risk of quality in the goods they purchased.⁸⁵ Instead, many thought the expression applied to superficial or cosmetic defects rather than functional defects.⁸⁶ Perhaps the twenty years’ experience under the Commission’s Used Motor Vehicle Rule⁸⁷ has educated consumers about the meaning of “as is.”⁸⁸

(1992); see also Donald F. Clifford, *Non-UCC Statutory Provisions Affecting Warranty Disclaimers and Remedies in Sales of Goods*, 71 N.C. L. REV. 1011 (1993).

83. U.C.C. § 2-316 (1995).

84. See Magnuson-Moss Warranty Act § 108, 15 U.S.C. § 2308 (1994).

85. BUREAU OF CONSUMER PROTECTION, FED. TRADE COMM’N, *SALE OF USED MOTOR VEHICLES* 262-65 (1978) (recommending adoption of what ultimately became the Used Motor Vehicles Rule, 16 C.F.R. pt. 455 (1996)).

86. *Id.* at 264-65.

87. 16 C.F.R. pt. 455 (1996).

Interestingly, proposed Article 2 takes the position—soundly in my opinion—that “as is” and “with all faults” are per se effective only in commercial transactions.⁸⁹ In consumer transactions there must be *express* agreement.⁹⁰

Another section establishing different rules for assent in consumer and commercial transactions deals with contract modification. It is common for a contract to provide that any modification of it must be by a signed writing. Courts applying the common law generally have been hostile to no-oral-modification clauses.⁹¹ Current Article 2 seeks to validate them, but it recognizes that different rules are appropriate: if the no-oral-modification clause appears on a clause presented by a merchant, it must be separately signed by the consumer.⁹² The requirement of a separate signature is designed to enhance the likelihood that the nonmerchant is aware of the need to get any modifications in writing. As previously discussed,⁹³ the effectiveness of this approach depends in part on the number of separate signatures that are required. In addition, one may question whether a consumer is likely to remember this type of information at the time of a subsequent modification. Therefore, instead of requiring a separate signature, the proposed revision simply exempts consumer contracts from the rule that validates no-oral-modification clauses.⁹⁴

This pro-consumer change actually may, in some instances, harm consumers. The change will help the parties when they have, in fact, orally modified their contract. Contrariwise, it will cause harm to one of them when the other falsely asserts an oral modification. Whether these adverse effects fall more on consumers or merchants depends on which of them more

88. I am skeptical, but an empirical study would be useful.

89. Jan. 1997 Draft, Art. 2, *supra* note 67, § 2-407(b)(2)(C). For text of subsection, see *supra* note 67.

90. *Id.* § 2-407(c).

91. See, e.g., *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378 (N.Y. 1919) (Cardozo, J.); *Wagner v. Graziano Constr. Co.*, 136 A.2d 82 (Pa. 1957) (Musmanno, J.).

92. U.C.C. § 2-209(2) (1995). The UCC provides:

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

93. See *supra* notes 69-75 and accompanying text.

94. Jan. 1997 Draft, Art. 2, *supra* note 67, § 2-210(c). It provides: “[e]xcept in a consumer contract . . . , an agreement that contains a term prohibiting modification or rescission except by a signed record may not be otherwise modified or rescinded.” The section, like the current Code, retreats somewhat from this by incorporating principles of estoppel and waiver. See *id.* § 2-210(b),(c); see also U.C.C. § 2-209(4), (5) (1995).

frequently has the accurate version of the facts. Although the change promises to effectuate the intent of the parties as it evolves over the life of the contract, perhaps here no special rule for consumer transactions is necessary. Even for nonconsumer transactions, the proposed revision states,

However, a party whose language or conduct is inconsistent with a term requiring a signed record to modify or rescind the contract may not assert the term if the language or conduct induced the other party to change its position reasonably and in good faith.⁹⁵

This provision, which protects reliance on an oral modification, may better balance the need for enforcing actual modifications with the risk of false allegations of modification.

Ease of judicial administration is a major justification for a number of common-law contract rules. One example, to be discussed below, is the rule that a person is bound by what he or she signs, whether or not he or she has read and understood it. It is trite to state that the formation of a contract requires the assent of the parties. Because of the difficulty of verifying the actual, subjective assent of one whose actions manifest assent, the courts have long applied a predominantly objective approach to determining whether the parties have assented to an exchange.⁹⁶ When the manifestation takes the form of a signature, the bound-by-what-you-sign rule avoids an inquiry into the subjective.⁹⁷

Another doctrine that seems designed primarily for ease of administration is the parol evidence rule. Under this doctrine prior or contemporaneous oral agreements are rendered unenforceable when the parties adopt a writing as the exclusive embodiment of the exchange.⁹⁸ The premise for the rule is that the parties have agreed that a written document embodies the entire deal. When the premise is true, the rule is unassailable. The difficulty, of course, is determining whether the premise is true: did the parties intend the writing as the exclusive embodiment of the exchange? Judicial attitudes have differed significantly, from giving conclusive effect to an integration clause,⁹⁹ to

95. Jan. 1997 Draft, Art. 2, *supra* note 67, § 2-210(c); *see also id.* § 2-210(d) (recognizing waiver of a no-oral-modification clause).

96. *See, e.g.,* Hotchkiss v. National City Bank, 200 F.2d 287, 293 (S.D.N.Y. 1911), *aff'd* 201 F. 664 (2d Cir. 1912), *aff'd* 231 U.S. 50 (1913) (Holmes, J.); *see also* Kabil Devs. Corp. v. Mignot, 566 P.2d 505 (Or. 1977).

97. For a critique of this position, *see* MURRAY, *supra* note 12, § 97.

98. *See id.* §§ 83-84.

99. *See, e.g.,* Tapper Chevrolet Co. v. Hansen, 510 P.2d 1091 (Idaho 1973).

conclusively inferring an integrated agreement from a complete-on-its-face writing,¹⁰⁰ to considering all proffered evidence of the parties' intent.¹⁰¹ Merchants who draft form contracts prefer the more restrictive applications because those applications allow the merchant, at the time of drafting, to control the terms of the transaction. This places on the consumer the risk that sales personnel will make unauthorized agreements. That risk should be on the merchant because the merchant is the entity that employs and trains the sales staff.¹⁰² The countervailing risk is that the consumer will lie about the negotiations and the salesperson's promises. The parol evidence rule in current Article 2, as elaborated by the Official Comments, liberalized the prevailing pre-UCC interpretation of the common law rule.¹⁰³ The proposed revision retains the main rule of the current statute, but it adds the following subsection to address the question of whether the parties intended the writing to be the exclusive embodiment of the exchange:

(b) In determining whether the parties intended a record to be final or complete and exclusive with respect to some or all of the terms, the following rules apply:

100. *See, e.g., Gianni v. R. Russel & Co.*, 126 A. 791 (Pa. 1924).

101. *See, e.g., Masterson v. Sine*, 436 P.2d 561 (Cal. 1968) (en banc).

102. Of course, one may argue that consumers should read before they sign and should get everything in writing. This is a grand ideal, but it ignores the reality of contract formation in the age of the standard form. Merchants do not expect consumers to read the documents and often put roadblocks in the path of consumers who would like to read them. *See supra* notes 60-66 and accompanying text.

103. U.C.C. § 2-202 (1995). It provides:

Terms . . . which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

...

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Id. Official Comment 3 adds:

Under paragraph (b) consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

Id. cmt. 3.

(1) The court shall consider all evidence relevant to the intention of the parties to integrate the record, including evidence of a previous agreement or representation or of a contemporaneous oral agreement or representation.

(2) Except in a consumer contract, a contractual term indicating that the record completely embodies the agreement of the parties is presumed to state the intention of the parties on the issue.¹⁰⁴

At the meetings of the Drafting Committee, representatives of businesses that enter negotiated transactions expressed a very strong need to have some way of ensuring that the writing that results from extensive negotiations is insulated from any attack that the writing does not represent the entire contract. Hence, subsection (b)(2) creates a presumption that an integration clause is effective. In standard form contracts, especially in the consumer context, however, the presumption is not appropriate: a party who does not read the document and is not expected to read the document does not even know that the integration clause is in the document. Nevertheless, many courts have failed to get the message of current section 2-202 and the *Restatement* section 214 to look beyond the four corners of the document to determine the parties' intent with respect to complete integration.¹⁰⁵ Because the effectiveness of the parol evidence rule depends on the intent of the parties to embody the entire contract in a single writing, the proposed revision of section 2-202 deprives boilerplate language in a standard form consumer contract of any presumptive effect that the intent exists. This is not as strong as an earlier proposal that declared that an integration clause should have no effect in a consumer contract.¹⁰⁶ The Drafting Committee rejected this proposal at its meeting in October 1993.¹⁰⁷ The rejected proposal directly recognizes that an integration clause in a consumer contract will almost never

104. Jan. 1997 Draft, Art. 2, *supra* note 67, § 2-202.

105. See, e.g., *Redfern Meats, Inc. v. Hertz Corp.*, 215 S.E.2d 10 (Ga. Ct. App. 1975); *Noble v. Logan-Dees Chevrolet-Buick, Inc.*, 290 So. 2d 14 (Miss. 1974); see also *RESTATEMENT (SECOND) OF CONTRACTS* § 214 (1979). The *Restatement* provides: "Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish (a) that the writing is or is not an integrated agreement; [and] (b) that the integrated agreement, if any, is completely or partially integrated . . ." *Id.*

106. See Draft, Uniform Commercial Code Article 2-Sales § 2-202(b) (Nat'l Conference of Comm'rs on Unif. State Laws, Sept. 10, 1993) (on file with author).

107. See Draft, Uniform Commercial Code Article 2-Sales (199_) § 2-202 (Nat'l Conference of Comm'rs on Unif. State Laws, July 12-19, (1996)), available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Jan. 10, 1997).

be a product of the intention of the consumer. Unfortunately, by merely denying an integration clause presumptive effectiveness, the current proposal stops short of this position.

The primary innovation with respect to assent appears in section 2-206. This section has been something of a moving target because the Drafting Committee has struggled with the question of how to deal with assent in the context of standard forms. Until recently, the draft of section 2-206 encompassed commercial as well as consumer transactions.¹⁰⁸ At the November 1996 meeting, however, the Drafting Committee voted to confine the section to consumer transactions. Under the January 1997 draft, section 2-206 establishes the baseline rule that a consumer is not bound by a term in a standard form document if the reasonable consumer could not have expected it in the form.¹⁰⁹ In the context of commercial transactions in which the parties exchange standard forms, section 2-207 has long recognized that the parties do not read the form of the other and do not expect each other to read the forms. It adopted new rules of mutual assent for this set of commercial transactions.¹¹⁰ Proposed section 2-206 recognizes that in consumer transactions typically the merchant neither expects nor desires the consumer to read the contract document. It places a limit on the common-law rules, under which a party is bound by what he or she signs. Unconscionability is a safety valve that guards against outrageous terms; proposed section 2-206 establishes a more appropriate standard against which to measure whether

108. Under the November 1, 1996 draft, section 2-206 stated:

(a) Subject to subsection (b) and Section 2-207(a), if all or part of an agreement is contained in a standard form and the party that did not prepare the form manifests assent to it, that party adopts all the terms contained in the form as part of the contract except those terms that are unconscionable.

(b) Where a consumer has manifested assent to a standard form, a term contained in the form which the consumer could not have reasonably expected is not part of the contract unless the consumer expressly agrees to it.

(c) A term adopted under subsection (a) becomes part of the contract without regard to the knowledge or understanding of individual terms by the party assenting to the standard form, whether or not the party read the form.

(d) A term of a standard form which is unenforceable under other provisions of this article, such as a provision that requires conspicuous language or express agreement to a term, does not become part of the contract unless those other provisions are satisfied.

Draft, Uniform Commercial Code Article 2 Sales § 2-206 (Nat'l Conference of Comm'rs on Unif. State Laws, Nov. 1, 1996), available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Apr. 17, 1997).

109. Jan. 1997 Draft, Art. 2, *supra* note 67, § 2-206(a).

110. U.C.C. § 2-207 (1995) (quoted in relevant part in *supra* note 10).

terms in a standard form document are part of the contract.

The UCC actually laid the basis for this position a long time ago. Section 1-201(3) defines "agreement" as a "bargain of the parties in fact."¹¹¹ This definition invites attention to the actual intent of the parties regarding assent to any particular matter. Proposed section 2-206, in effect, accepts this invitation and implements it to reflect the nature of contracting in consumer transactions.

The question remains whether the section establishes the right rule. At one extreme is the view that if the consumer is not aware that the provision is in the document, the consumer does not assent to it. This view amounts to a complete rejection of the objective theories of mutual assent. As a means of arriving at the intent of the parties when they have not considered various contractual matters, this view might be perfectly appropriate. Of course, it would undermine altogether the usefulness of standard form contracting.¹¹²

A less extreme view focuses on presumed expectations rather than actual intent. Even if a person has not thought about the terms of a contract, it is possible to identify consumers' reasonable expectations about those terms. For example, the fine print should not eviscerate the negotiated terms¹¹³ and should not circumscribe the remedies for breach to such an extent that the seller's undertaking is almost illusory.¹¹⁴ Examples of terms ordinarily beyond presumed expectations are total disclaimers of quality standards and clauses specifying a distant forum for any litigation.¹¹⁵

111. *Id.* § 1-201(3). It provides:

"Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205, 2-208, and 2A-207). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Section 1-103). (Compare "Contract" [in Section 1-201(11)].)

Id. Subsection (11) defines "contract" as "the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." *Id.* § 1-201(11).

112. See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1175 (1983).

113. LLEWELLYN, *supra* note 5, at 370.

114. See U.C.C. § 2-719 cmt. 1 (1995). It provides that

it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract.

Id.

115. See *Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976) (distant forum abuse); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 77, 90-93 (N.J. 1960) (warranty).

Under an approach focusing on presumed expectations, it is necessary to determine whether to key on the presumed expectations of the party to the contract, the presumed expectations of a reasonable person in the position of that party, or the presumed expectations of reasonable persons who form contracts with that merchant. This again presents the question of how subjective or objective the test should be. A purely subjective approach may be too much of a jolt to the jurisprudence of the last century. Proposed section 2-206 is an innovation, and a cautious approach is warranted. I would favor an objective standard that focuses on the customer base that the merchant serves and seeks to serve. This would neglect the presumed expectations of some customers of the merchant while protecting the expectations of the mass. It is likely that adoption of proposed section 2-206 will increase the number of disputes concerning the enforceability of terms in standard form documents. An objective standard should alleviate phenomenon, which is likely to be short run, in any event. Over time, the courts will establish the content of the "reasonable expectations" standard. In the meantime, merchants can minimize their litigation risk by not drafting close to the edge.

IV. CONCLUSION

In the process of revising Articles 2 and 9, the Drafting Committees have followed different paths. The Article 2 Drafting Committee has considered consumer and commercial transactions simultaneously. That is, the Committee's discussion of a given section of Article 2 has encompassed its applicability and impact on both commercial and consumer transactions. The Committee has strived to ensure that its proposed revision of a section accommodates both kinds of transactions. Sometimes it has done this by creating exceptions or adopting special provisions for one or the other. This contrasts with the approach of the Article 9 Drafting Committee, which deferred consideration of consumer transactions until virtually completing its initial consideration of commercial transactions. Only then did the Committee consider adding specially crafted rules, or exceptions to commercial rules, for consumer transactions. This different approach, in my opinion, reflects different familiarity with, and sensitivity to, the needs of consumer transactions on the part of the two Drafting Committees and their reporters. When all is said and done, however, both Drafting Committees have incorporated provisions to enhance the likelihood that there is genuine assent by consumers.