Supplement to:

Sales and Leases

A Problem-Solving Approach

Third Edition

By

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Chapter One

***Page 9 (last paragraph)*:**

The District of Columbia enacted the revised version of Article 6 in 1996 (effective 1997). 1996 D.C. Laws 11-239 (Act 11–499). It then repealed Article 6 in 2014 (effective 2015). 2014 D.C. Laws 20-215 (Act 20-519).

***Page 10 (following the third paragraph)*:**

In 2020, the ALI and ULC established a Drafting Committee on the UCC and Emerging Technologies to recommend revisions to the entire UCC to deal with such things blockchain technology, crytocurrencies, and non-fungible tokens ("NFTs"). The Committee completed its work in 2022 and the sponsors approved a comprehensive set of amendments in May and July of 2022, respectively. The amendments cover every Article of the UCC except Article 6 and create a new Article 12 that covers "controllable electronic records."

As of August 10, 2023, the 2022 Amendments have been enacted in the following jurisdictions:

State	Enactment Date	Effective Date
Alabama	6/14/23	7/1/24
Colorado	5/1/23	8/6/23
Hawaii	6/29/23	6/29/23
Indiana	5/4/23	7/1/23
Nevada	6/15/23	10/1/23
New Hampshire	8/8/23	10/7/23
New Mexico	4/5/23	1/1/24
North Dakota	3/21/23	8/1/23
Washington	5/4/23	1/1/24

Updated information on enactments is available on the ULC's web site.

***Page 22*:**

The following table includes transactions involving controllable electronic records (*e.g.*, cryptocurrencies and NFTs) and replaces the table appearing on page 22:

THE LAW GOVERNING VOLUNTARY TRANSFERS OF PROPERTY RIGHTS

	Type of Property					
Type of Transfer	**Real Estate**	**Goods**	**Securities** (stocks & bonds)	**Notes and Drafts**	**Intellectual Property**	**Controllable Electronic Records**
Sale	real estate law	UCC Article 2 or CISG	UCC Article 8 & securities laws	UCC Articles 3 & 4	common law & federal law	UCC Article 12
Gift	real estate law	common law	UCC Article 8 & securities laws	UCC Articles 3 & 4	common law & federal law	common law
Lease or License	real estate law	UCC Article 2A	UCC Article 8 & securities laws	N/A	common law & federal law	UCC Article 12
Security Interest	real estate law	UCC Article 9	UCC Article 9	UCC Articles 3, 4 & 9	UCC Article 9 & federal law	UCC Articles 9 & 12
Bequest or Devise	real estate law & law of wills	law of wills	UCC Article 8 & law of wills	law of wills	law of wills & federal law	law of wills

***Page 27 (end of carryover paragraph)*:**

Although no court outside Maryland has expressly adopted the gravamen of the claim test, a few courts have done so implicitly by treating the nature of the claim

as the critical issue.[1] In addition, courts applying New Hampshire law have suggested that both the gravamen of the claim test and the predominant purpose test apply, but have never had occasion to determine which test controls if they lead to different answers.[2] And an Illinois court suggested, somewhat confusingly, that the gravamen of the claim can be relevant to determining the predominant purpose of the transaction.[3]

A few courts – either expressly or implicitly – deal with hybrid transactions involving goods and services under neither the predominant purpose test nor the gravamen of the claim test. Under what they sometimes refer to as the "bifurcation approach," they apply Article 2 to the sale-of-goods aspects of the transaction and apply other law to the services aspects of the transaction.[4]

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[1] *See, e.g*, J.O. Hooker & Sons, Inc. v. Roberts Cabinet Co., 683 So. 2d 396, 400 (Miss. 1996) (stating that the test in a mixed transaction – a construction contract – turned on the nature of the contract and "upon whether the *dispute* in question primarily concerns the goods furnished or the services rendered under the contract"); H. Hirschfield Sons, Co. v. Colt Indus. Operating Corp., 309 N.W.2d 714 (Mich. Ct. App. 1981) (the six-year statute of limitations under the common law, rather than the 4-year statute of limitation under Article 2, applied to a transaction for the sale and installation of a trucks scale because the agreement stated a separate price for the goods and the services and the claim dealt with defective installation). *But cf.* Neibarger v. Universal Coops. Inc., 450 N.W.2d 88, 91 (Mich. Ct. App. 1989) (refusing to apply *H. Hirschfield Sons* to the purchase an installation of a milking system because the agreement stated a single price).

[2] *See* In re Trailer & Plumbing Supplies, 578 A.2d 343, 345 (N.H. 1990) (but suggesting that the gravamen of the claim test was not relevant to an issue about ownership of the goods, which the court characterized as not arising out of the contract); Johnson v. Capital Offset Co., 2014 WL 2154255, at *1 (D.N.H. 2014).

[3] Heuerman v. B & M Constr., Inc., 833 N.E.2d 382, 389-90 (Ill. Ct. App. 2005) ("The fact that the dispute between the parties was based on services, however, could be seen as an indication that the contract was predominantly for services."); *see also* NewSpin Sport, LLC v. Arrow Electronics, Inc., 910 F.3d 293, 303 (7th Cir. 2018) (similarly indicating that a court applying Illinois law may consider a complaint's allegations to determine whether a contract was predominantly about goods or services).

[4] *See, e.g.*, Crystal Foods Corp. v. B & K Equipment Co., 2020 WL 2893432 (Ind. Ct. App. 2020) (a contract for the sale and installation of an underground tank, which provided that "[n]o . . . warranties are either expressed or implied, including the warranty of merchantability and fitness for a particular purpose," disclaimed only warranties associated with a sale of goods, not with the services provided, and thus did not entitle the seller/installer to summary judgment on a breach of contract claim for installing inappropriate backfill); TK Power, Inc. v. Textron, Inc., 433 F. Supp. 2d 1058 (N.D. Cal. 2006) (the

***Page 28 (end of carryover paragraph)*:**

The Drafting Committee on the UCC and Emerging Technologies was cognizant of the fact that each of the three judicial approaches for dealing with hybrid transactions – the predominant purpose test, the gravamen of the claim test, and the bifurcation approach – can be difficult to apply and sometimes produces an undesirable result. Operating on the assumption that, in part due to emerging technologies, hybrid transactions are and will continue to increase – in total numbers, in the dollar amount of their collective price, and as a percentage of number transactions involving a sale or lease of goods – the Committee concluded that more statutory guidance was needed on how to deal with hybrid transactions. The amendments the Committee proposed and the UCC sponsors adopted establish a two-tired test that combines the predominant purpose test with the bifurcation approach for both Article 2 and Article 2A.

Under the new rules, if the sale-of-goods aspects of a hybrid transaction predominate, then the Article 2 applies. If the other aspects of the transaction predominate (whether the other aspects involve services, real property, software or other intangible property, or even other goods that are leased rather than sold), then the provisions of Article 2 which relate primarily to the goods, but not to the transaction as a whole, apply. *See* § 2-102(2) (2022). *See also* § 2-106(5) (defining "hybrid transaction").

Revised comments provide guidance on how this works. Specifically, comment 3 to § 2-102 provides guidance on which aspect of the transaction predominates:

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common law governs the portion of the parties' contract dealing with the design of goods and production of a prototype; Article 2 governs the portion dealing with the manufacture and sale of many units); Frantz v. Cantrell, 711 N.E.2d 856 (Ind. Ct. App. 1999) (a lumber company that sold and installed a new shingled roof was liable for breach of the Article 2 implied warranty of merchantability when the shingles curled and failed to seal property; no discussion of whether the contract was primarily a sale of goods); Stephenson v. Frazier, 399 N.E.2d 794 (Ind. Ct. App. 1980) (Article 2 applies to the portion of the parties' contract dealing with the sale of a modular home; other law applies to the portion of the contract regarding the construction of a foundation and installation of a septic system); Foster v. Colorado Radio Corp., 381 F.2d 222 (10th Cir. 1967) (in connection with the sale of a radio station, Article 2 applies to sale of the office equipment and furnishings; other law applies to the sale of goodwill, the broadcast license, and the real property). *Contra* Sinclair Wyoming Refinery Co. v. A&B Builders, Ltd., 2019 WL 13177821 (D. Wyo. 2019) (describing as the bifurcation approach as an "inept approach" and instead using the predominant purpose test).

> Factors that may be relevant to that determination include, but are not limited to, the language of the agreement, the portion of the total price that is attributable to the sale of goods (as to which an agreed-upon allocation will ordinarily be binding on the parties), the purposes of the parties in entering into the transaction (when that is ascertainable), and the nature of the businesses of the parties (such as whether the seller is in the business of selling goods of that kind). Because the definition of "goods" expressly includes "specially manufactured goods," services involved in manufacturing goods are normally attributable to the sale-of-goods aspects of the transaction. Services in designing specially manufactured goods, however, would not normally be attributable to the sale-of-goods aspects of the transaction.

Comment 5 then provides guidance on what provisions of Article 2 apply when the sale-of-goods aspects of the transaction do not predominate:

> If the sale-of-goods aspects of a hybrid transaction do not predominate, under subsection (3), the provisions of this Article relating primarily to the sale of goods, as opposed to the transaction as a whole, apply. These provisions include those relating to warranties under Sections 2-212, 2-313, 2-314, 2-315, 2-316, 2-317, 2-318; tender of delivery and risk of loss under Sections 2-503, 2-504, 2-509, 2-510; acceptance, rejection, and cure under Sections 2-508, 2-601, 2-602, 2-603, 2-604, 2-605, 2-606; and remedies for non-delivery of the goods or for tender of nonconforming goods under Sections 2-711, 7-712, 7-713, 2-714, 2-715, 2-716. In contrast, the provisions of this Article dealing with the transaction as a whole do not apply. These provisions include those relating to: the requirement of a signed record, Section 2-201; contract formation, Sections 2-204 through 2-207; and whether consideration is needed to modify the agreement, Section 2-209.

One last point is in order. The 2022 Amendments define a "hybrid transaction" as "a single transaction involving a sale of goods and: (a) the provision of services; (b) a lease of other goods; or (c) a sale, lease, or license of property other than goods." § 2-106(5). For this purpose, it is implicit that the *seller* is the party providing the services, leased goods, or other property. *See* § 2-106 cmt. 4 (describing the non-sale-of-goods aspects of a hybrid transaction as "the seller providing services to the buyer, the seller leasing other goods to the buyer, or the seller transferring to the buyer rights to property other than goods."). If, in

exchange for goods, the *buyer* is providing services or property – rather than money or some other form of payment denominated in money – those services or that property is simply the "price" for the goods. *See* § 2-304. Accordingly, Article 2 applies to the contract. *See, e.g.*, *Lithuanian Commerce Corp., Ltd. v. Sara Lee Hosiery*, 219 F. Supp. 2d 600 (D.N.J. 2022) (Article 2 applied to transaction in which seller sold goods in return form in return for a settlement of legal claims).

***Page 29, n.43*:**

See also Ark. Stat. § 4-2-316(3)(d) (stating both that there is no implied warranty with respect to a sale of human blood, tissue, or organs, and that such commodities shall be considered medical services, not commodities subject to sale); Del. Stat. tit. 6, § 2-316(5) (same); Mass. Gen. Laws ch. 106, § 2-316(5) (same); N.D. Stat. § 41-02-33(3)(d) (same); Tenn. Stat. § 47-2-316(5) (same); Wy. Stat. § 34-1-2-316(c)(iv) (same).

Chapter Two

***Page 68, Problem 2-9)*:**

Add the following new part at the end of the problem:

C. How, if at all, would the analysis of Part B change if, instead of responding by email, Buyer called seller and orally accepted Seller's offer?

***Page 68 (after Problem 2-9)*:**

It remains unclear if any statute of frauds other than § 2-201 can apply to a contract for the sale of goods. For example, if a buyer and seller enter into an agreement to buy and sell goods fifteen months in the future, does the statute of frauds applicable to contracts that cannot be performed within one year apply? Although it is unlikely that such an agreement will be for less than $500, and hence § 2-201 is likely to apply to such a agreement, the application of another statute of frauds can matter because the other statute might require that the writing contain a more complete statement of the terms agreed to than § 2-201 does. It can also matter because the exception in § 2-201(3) for specially manufactured goods is unlikely to be included in a statute dealing with contracts that cannot be performed within one year.

Section 1-103 specifies that, "[u]nless displaced by the particular provisions" of the Code, principles of law and equity supplement the Code's provisions. Does § 2-201 displace a more general statute of frauds applicable to all types of transactions, perhaps on the theory that the general controls over the specific?

Courts do not fully agree. Most dealing with this issue have concluded that statute of frauds applicable to contracts that cannot be performed within one year does not apply to a sale of goods or is necessarily satisfied if § 2-201 is satisfied. *See, e.g.*, *Automated Cutting Techs., Inc. v. BJS North America E, Inc.*, 2012 WL 2872823, at *4 & n.8 (E.D. Ky. 2012); *T3 Micro, Inc. v. SGI Co., Ltd.*, 2010 WL 11597603, at *3 (C.D. Cal. 2010) (the statute of frauds for contracts that cannot be performed within one year does not apply to specially manufactured goods due to § 2-201(3)); *Regal Custom Clothiers v. Mohan's Custom Tailors*, 1997 WL 370595, at *4 (S.D.N.Y. 1997) ("where the UCC provision and the one-year provision

conflict, satisfying the UCC provision alone is sufficient."); *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 142 (6th Cir. 1983).

A few courts have ruled to the contrary, usually with little discussion. *See, e.g.*, *H.P.B.C., Inc. v. Nor-Tech Powerboats, Inc.*, 946 So. 2d 1108, 1112 (Fla. Ct. App. 2006); *Oskey Gasoline & Oil Co., Inc. v. Continental Oil Co.*, 534 F.2d 1281, 1283-84 (8th Cir. 1976). The Restatement of Contracts also assumes that a statute of frauds other than § 2-201 can apply to a contract for the sale of goods. *See* Restatement (Second) of Contracts §§ 110 cmt. b, 130, ill. 4 & cmt. f.

Note, the withdrawn 2003 amendments to Article 2 would have resolved this issue by adding a new subsection (4) to § 2-201 that would have declared the one-year stature of frauds inapplicable to a contract for the same of goods.

***Page 79 (first paragraph)*:**

The 2022 Amendments replaced the term "writing" in § 2-201 with the term "record." As a result, once the amendments are enacted and go into effect, signed electronic communications, such as e-mail, and can satisfy the Article 2 statute of frauds without the aid of UETA – that is, regardless of whether the parties previously agreed to conduct the transaction electronically.

***Page 79, n.41*:**

In 2020, the State of Washington became the 48th state to enact UETA. Only Illinois and New York have not adopted the Act.

Chapter Three

***Page 107 (after first full paragraph)*:**

3. Can parties modify a contact after the contract has been terminated? At least one court has ruled that they cannot. *See Morgan v. A. Frost, Inc.*, 2021 WL 212180 (Pa. Super. Ct. 2021).

Chapter Four

***Page 149 (after last full sentence)*:**

Apparently, in the automotive parts supply chain, it is customary to the parties to have a "blanket purchase order" to cover future goods, and courts interpret that document as a requirements contract even though it does not expressly so state. *See, e.g.*, *Magna Seating Inc. v. Adient US LLC*, 2021 WL 2026125, at *5 (Mich. Ct. App. 2021) (applying Canadian law); *MSS, Inc. v. Airboss Flexible Products Co.*, 979 N.W.2d 718, 723 (Mich. Ct. App. 2021), *appeal granted* (Mich. Jan. 26. 2022). *But cf. Circuit Solutions, Inc. v. Artglo Sign Co.*, 2001 WL 22258, at *3 (Ohio Ct. App. 2001) (a "Blanket Purchase Order for a minimum of 300 units" was ambiguous as to whether it was a requirements contract).

***Page 149, n.1*:**

See also MSS, Inc. v. Airboss Flexible Products Co., 979 N.W.2d 718 (Mich. Ct. App. 2021) (a term deemed by the court to be a requirements contract satisfied the statute of frauds), *appeal granted* (Mich. Jan. 26. 2022).

***Page 150, n.3*:**

But cf. Cadillac Rubber & Plastics, Inc. v. Tubular Metal Systems, LLC, 952 N.W.2d 576, 582 (Mich. Ct. App. 2020) (a requirements contract need not be exclusive to be enforceable).

***Page 175*:**

The shipment terms in a sales contract can be relevant to more than who is responsible for the shipping charges and who bears the risk of loss during transit. Because title passes when the seller completes its performance with respect to delivery, title passes to the buyer in a shipment contract when the goods are delivered to the carrier and makes an appropriate contract for their transportation. *See* §§ 2-401(2)(a), 2-504. Although the time when title passes has little import under Article 2, it can matter for other reasons. For example, if one of the parties

files for bankruptcy protection, the time when title passes can affect whether the goods are part of the debtor's bankruptcy estate or whether the transfer of title was an unauthorized post-petition transfer.[5]

[5] *See In re Hawaii Island Air, Inc.*, 622 B.R. 85 (D. Haw. 2020) (the debtor's shipment of parts to a buyer on the day the petition was filed was not an unauthorized postpetition transfer even though the buyer received the part days later because the sales contract contained a F.O.B. origin clause, and thus title passed when the goods were delivered to the carrier, not when the carrier delivered the goods to the buyer; although the parties by email had modified the agreement with respect to who was responsible for the cost of shipment, they had not modified the F.O.B. term regarding passage of title).

Chapter Five

***Page 193 (first paragraph)*:**

Several states have laws that limit the ability of a seller to disclaim the implied warranty of merchantability, the implied warranty of fitness, or both in a consumer transaction. Some of these laws are non-uniform language in the state's enactment of Article 2. Others are a statute outside of the UCC. The following chart lists some of these statutory rules.

Statute	Scope
Cal. Civ. Code § 1791.1(c)	The implied warranty of merchantability has a duration equal to any express warranty but not less than 60 days.
Cal. Civ. Code § 1792.4	No "as is" disclaimer of implied warranties is effective with respect to consumer goods unless, among other things, the seller in a conspicuous writing clearly informs the buyer that the entire risk as to the quality and performance of the goods is with the buyer and that, if the good proves defective after purchase, the buyer and not the manufacturer, distributor or retailer assumes the entire cost of all repairs.
Cal. Civ. Code § 1793	A manufacturer, distributor, or retailer that makes an express warranty in a sale of consumer goods may not limit, modify, or disclaim implied warranties.
Conn. Gen. Stat. § 42a-2-316(5)	Section 2-316 does not apply to sales of new or unused consumer goods unless the goods are clearly marked "irregular," "factory seconds," or "damaged." Any language by a seller or manufacturer of consumer goods that attempts to exclude or modify any implied warranty or to exclude or modify the consumer's remedies for breach of those warranties is unenforceable.
D.C. Code § 28:2-316.01(2)	Any language by a seller of consumer goods that attempts to exclude or modify any implied warranty or to exclude or modify the consumer's remedies for breach of those warranties is unenforceable.

Statute	Scope
Kan. Stat. § 50-639(c)	A supplier may limit implied warranties with respect to a defect in a consumer transaction only if the consumer had knowledge of the defect or defects, which became the basis of the bargain between the parties. The limit does not apply to liability for personal injury or property damage.
Me. Stat. tit. 11, § 2-316(5)	Any language by a seller or manufacturer of consumer goods that attempts to exclude or modify any implied warranty or to exclude or modify the consumer's remedies for breach of those warranties is unenforceable. A seller of a motor vehicle may exclude or modify implied warranties. A retailer cannot exclude or modify a consumer's warranty or remedy of reimbursement for a defect for which a prior seller or manufacturer is liable.
Md. Code § 2-316.1(2)	Any language by a seller of consumer goods that attempts to exclude or modify any implied warranty or to exclude or modify the consumer's remedies for breach of those warranties is unenforceable.
Mass. Gen. Laws ch. 106, § 2-316A	Any language by a seller or manufacturer of consumer goods that attempts to exclude or modify any implied warranty or to exclude or modify the consumer's remedies for breach of those warranties is unenforceable.
Minn. Stat. § 325G.18(2)	In a consumer sale, no "as is" disclaimer of implied warranties is effective unless, among other things, the seller in a conspicuous writing clearly informs the buyer that the entire risk as to the quality and performance of the goods is with the buyer.
Miss. Code § 75-2-316(3)	Any language by a seller of consumer goods that attempts to exclude or modify any implied warranty or to exclude or modify the consumer's remedies for breach of those warranties is unenforceable.
N.H. Stat. § 382-A:2-316(4)	No "as is" disclaimer of implied warranties is effective with respect to goods purchased primarily for personal, family or household purposes unless, among other things, the seller in a conspicuous writing clearly informs the buyer that the entire risk as to the quality and performance of the goods is with the buyer and that, if the good proves defective after purchase, the buyer and not the manufacturer, distributor or retailer assumes the entire cost of all repairs.

Statute	Scope
Or. Stat. § 72.8050(1)	No "as is" disclaimer of implied warranties is effective with respect to consumer goods unless, among other things, the seller in a conspicuous writing clearly informs the buyer that the entire risk as to the quality and performance of the goods is with the buyer and that, if the good proves defective after purchase, the buyer and not the manufacturer, distributor or retailer assumes the entire cost of all repairs.
R.I. Stat. § 6A-2-329(2)	In a consumer sale, no "as is" disclaimer of implied warranties is effective unless, among other things, the seller in a conspicuous writing clearly informs the buyer that the entire risk as to the quality and performance of the goods is with the buyer.
S.C. Stat. § 36-2-316(2)	Language to exclude an implied warranty must be specific.
Vt. Stat. tit. 9A, § 2-316(5)	Any language by a seller or manufacturer of consumer goods that attempts to exclude or modify any implied warranty or to exclude or modify the consumer's remedies for breach of those warranties is unenforceable.
Wa. Stat. § 62A.2-316(4)	A disclaimers of implied warranties with respect to consumer goods is not effective unless the disclaimer sets forth with particularity the qualities and characteristics which are not being warranted.
W. Va. Stat. § 46A-6-107	With respect to goods that are the subject of a consumer transaction, no merchant may exclude, modify, or otherwise limit any warranty.

***Page 194, n.11*:**

See also Hagerty Insurance Agency, LLC v. Luxury Asset Capita, LLC, 2023 WL 4112300 (Colo. Ct. App. 2023) (a pawn broker that sold a stolen luxury vehicle had not disclaimed the warranty of title by selling the car "as is").

***Page 222 (after Problem 5-12)*:**

The use of the parol evidence rule to exclude evidence of an express warranty is potentially very problematic, particularly when the signed writing is a standard

form that the parties did not negotiate. The Restatement (Third) of Consumer Contracts addresses the problem in § 8:

> **§ 8. Standard Contract Terms and the Parol Evidence Rule**
>
> A standard contract term that contradicts, unreasonably limits, or fails to give the reasonably expected effect to a prior affirmation of fact or promise by the business does not constitute a final expression of the agreement regarding the subject matter of that term and does not have the effect under the parol evidence rule of discharging obligations that would otherwise arise as a result of the prior affirmation of fact or promise.

Comment 1 then states, in part, that the parol evidence rule:

> might undermine the interest of consumers in enforcing their reasonable expectations as formed by affirmations of fact or promises made outside the standard contract terms. Since the standard contract terms do not result from a combined effort by both parties to draft a negotiated agreement, there is less justification to view them as a joint affirmative memorialization of a mutually designed agreement, and thus less reason to allow them to override affirmations of fact or promises made to the consumer. Accordingly, when standard contract terms are inconsistent with prior affirmations of fact or promises, this Section denies those terms the preclusive effect of the parol evidence rule. It accomplishes this by negating the prerequisite for finding an integrated agreement – the conclusion that the standard contract terms constitute a final expression of those terms.

Of course, the Restatement cannot – and does not purport to attempt to – override the effect of § 2-202. As stated in § 1(d):

> The Restatement applies to consumer contracts, except to the extent a matter is governed by . . . statute. . . . In particular, this Restatement neither interprets nor determines the scope or application of provisions of the Uniform Commercial Code.

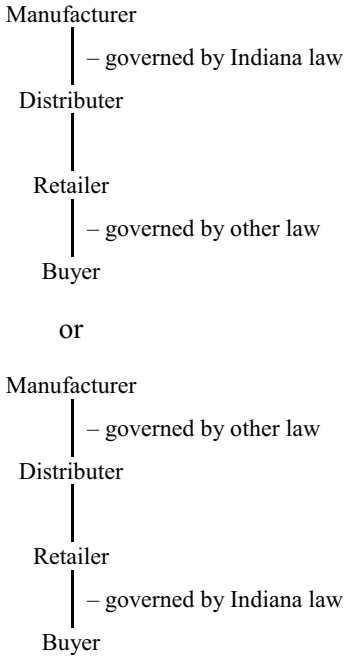
Chapter Seven

***Page 327, Problem 7-30(D)*:**

The date should be "April 2016," not April 2011.

***Page 342 (after the paragraph designated as "2")*:**

3. Which state's law applies when the manufacturer is located in – or the transaction between the manufacturer and its customer is governed by the law of – a state different from the state in which the retailer and consumer are located? This can be important if only one of the states has – like Indiana – abolished the need for vertical privity. Note, this question can arise in at least two different ways:



4. What if one of the contracts in the distribution chain was not governed by Article 2? This often occurs in connection with home construction and home renovation projects. Many such projects include installation and

> delivery of new appliances, lighting fixtures, furnaces, water heaters, and the like, which the contractor purchases from a manufacturer or distributor and then installs in the home. The contractor's purchase is usually a transaction governed by Article 2. In contrast, the home construction or renovation project is likely not an Article 2 transaction under the predominant purpose test, because it is principally about real property or services.

***Page 343 (end of first full paragraph)*:**

One argument in support of Amazon's contract liability for third-party's goods sold on Amazon's web site is grounded in the entrustment rule of § 2-403(2), which was explored in Chapter Three. That rule, which allows a merchant to whom goods are entrusted to transfer the rights of the entruster, arguably treats the merchant as the seller. Under that analysis, Amazon could make and breach implied warranties relating to the goods of third parties sold on Amazon's web site. There are, however, three potential problems with this argument.

First, Amazon might not be an entrustee of third-party's goods sold on its web site. Some of the third-party merchants do not deliver the goods to Amazon or store the goods at an Amazon warehouse. Query whether there can be an entrustment if the merchant never has possession of the goods. Admittedly, § 2-403(3) begins by stating what entrusting "includes," not entrusting "means," delivery and retention of possession, leaving open the possibility that possession is not required or that constructive possession might suffice. Still, if Amazon never had possession of the goods, it is not clear that § 2-403(2) applies. Even with respect to goods that Amazon did possess, perhaps because the goods were stored in an Amazon warehouse, § 2-403(2) might not apply. The purpose of the entrustment rule is to protect a buyer who has no way of knowing that the merchant with whom the buyer is dealing is not the owner of the goods. But when goods of a third-party merchant are purchased on Amazon's web site, the identity of the third party (and the lack of ownership by Amazon) is disclosed. Perhaps many consumers pay no attention to that disclosure, but it is made. Although nothing in § 2-403(2) expressly limits the rule to situations in which the buyer is unaware of the entrustment, we might question whether the rule applies when it is not needed.

Second, even if Amazon is an entrustee of third party's goods within the meaning of § 2-403(2), it is not clear that fact makes Amazon the "seller" for the purposes of the warranty rules of Article 2. Certainly nothing in § 2-403 says the merchant/entrustee is the seller. Indeed, the word "seller" is noticeably absent from

the entire text of and comments to § 2-403. Perhaps the entruster is the seller and the merchant is merely the entruster's agent.[6]

Third, and most important, Amazon's standard terms purport to disclaim all implied warranties. Assuming that disclaimer is effective and that the disclaimer applies to transactions involving third-party goods, then whether Amazon is the "seller" of third-party goods under Article 2 is irrelevant. Even § 2-719(3) will not help the buyer recover in that situation. The buyer's only avenue of recourse against Amazon would be through tort liability.

***Page 343, n.54*:**

For additional rulings that Amazon does not have product liability in tort for defects in the goods sold by third-party vendors on Amazon's web site, see *Amazon.com, Inc. v. Miller*, 625 S.W.3d 101 (Tex. 2021) (answering question. *Stiner v. Amazon.com, Inc.*, 164 N.E.3d 394 (Ohio 2020).

In contrast, a few other courts have ruled that Amazon does or can have strict tort liability for damages caused by such products.[7] In addition, the Third Circuit

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[6] Under this view, an entrustment is analogous to a consignment, but created in part by law rather than wholly by contract. But in a consignment who is the seller, the consignor or the consignee? Article 2 does not clearly answer that question but there are good arguments that a consignee is, or at least should be, the seller (which would suggest that a merchant to whom goods have been entrusted is also a seller). After all, § 2-103(d) defines "seller" to include not merely a person who sells (passes title) goods but also a person who "contracts to sell" goods. Moreover, if the consignor were the seller, and were not in the business of selling goods of that kind, then the buyer would not be protected by the warranty of merchantability in situations in which the buyer would naturally expect to be. Still, the issue is not beyond dispute.

[7] *See Loomis v. Amazon.com LLC*, 277 Cal. Rptr. 3d 769 (Ct. App. 2021) (trial court erred in a dismissing products liability claim against Amazon arising from a defective hoverboard purchased from a third-party seller on Amazon's web site even though Amazon did not own, store, or ship the goods); *Bolger v. Amazon.com LLC*, 267 Cal. Rptr. 3d 601 (Ct. App. 2020) (trial court erred in a dismissing products liability claim against Amazon arising from a defective laptop computer battery purchased from a third-party seller on Amazon's web site because Amazon placed itself between the buyer and seller in the chain of distribution by storing the goods in an Amazon warehouse, attracting the buyer to the Amazon website, providing a product listing for the goods, receiving payment for the goods, shipping the goods to the buyer in Amazon packaging, and, through its relationship with the seller, controlling the conditions of the seller's offer for sale); *State Farm Fire and Casualty Co. v. Amazon.com Services, Inc.*, 137 N.Y.S.3d 884 (N.Y. Sup. Ct. 2020) (Amazon exercises

has certified the question to the Pennsylvania Supreme Court. *See Oberdorf v. Amazon.com Inc*., 818 F. App'x. 138 (3d Cir. 2020).

With respect to strict liability, it is worth noting that the current Restatement imposes liability not merely on "sellers," but also on persons "engaged in the business of . . . otherwise distributing products." RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (1998). The Restatement then adds that a person "otherwise distributes" a product:

> when, in a commercial transaction other than a sale, one provides the product to another either for use or consumption or as a preliminary step leading to ultimate use or consumption. Commercial nonsale product distributors include, but are not limited to, lessors, bailors, and those who provide products to others as a means of promoting either the use or consumption of such products or some other commercial activity."

Id. § 20(b). It is unclear whether a company such as Amazon "otherwise distributes" products sold by third-party retailers on Amazon's web site.

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Problem 7-31a

> Homeowner and Renovator have reached a tentative agreement for Renovator to remodel the kitchen of Homeowner's house. In connection with the project, Renovator will purchase and install a new refrigerator, oven, and cabinets. The house and both parties are located in a jurisdiction that has not abolished the requirement of privity of contract for a claim based on breach of an implied warranty. What, if anything, could Homeowner and Renovator put in their written agreement for the renovation project to ensure that the benefit of any implied warranty made to Renovator will run to Homeowner?

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sufficient control over a defective thermostat to be considered a retailer or distributor who can have strict liability in tort under New York law).

Chapter Nine

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Problem 9-0

Buyer contracted to buy 4,000 gallons of milk from Supplier, with payment due within 30 days after delivery. The milk was delivered on June 1, whereupon it was put in a 10,000 gallon vat that already contained 5,000 gallons from other sources. On June 7, Supplier discovered that Buyer was insolvent and demanded reclamation of the milk. By that time, Buyer had used half the milk in the vat to make ice cream. How much, if any of the milk or ice cream is Supplier entitled reclaim? *See Wheeling-Pittsburgh Steel Corp.*, 74 B.R. 656 (Bankr. W.D. Pa. 1987); *In re Charter*, 54 B.R. 91 (Bankr. M.D. Fla. 1985). In answering this question, what provision of Article 2, other than § 2-702, might be useful in determining whether and to what extent reclamation is appropriate in this case?

CHAPTER TWELVE

CONTROLLABLE ELECTRONIC RECORDS

The bulk of the 2022 amendments to the UCC are designed to deal with new technologies (such as blockchains and other distributed ledger technologies), new types of assets (such as cryptocurrencies and non-fungible tokens), and the possibility that one or more governments might issue electronic money. The amendments – if enacted and after the applicable effective date – do this in part through the adoption of a new Article 12. The discussion below assumes that amendments have been enacted and the effective date has passed.[8]

Article 12 applies to transactions involving a "controllable electronic record" ("CER"). CER is defined as a record in electronic form that is susceptible to a control, as that term is defined in § 12-105. *See* § 12-102(a)(1). To have control of a CER, a person must have:

- The power to avail itself of substantially all the benefit from record;
- The exclusive power to prevent others from availing themselves of substantially all the benefit of the record;
- The exclusive power to transfer control of the record; and
- The ability readily to identify itself (by name, number, cryptographic key, account number, or otherwise) as the person having these powers.

§ 12-105(a).

Before proceeding with this discussion further, it is vital to understand that Article 12 generally does not alter or dictate what rights come with ownership of a CER. In other words, it is essential to differentiate between the *record* and the *rights* evidenced by the record.

Some CERs have intrinsic value, in the sense that people are willing to pay for the CER itself. Bitcoin and other so-called cryptocurrencies are examples of CERs with intrinsic value. So too are many non-fungible tokens ("NFTs"). Other CERs evidence ownership of some tangible or intangible asset or right. In most cases, whether an assignment of the CER effects an assignment of that underlying asset is left to law outside the UCC. Consider the following scenarios:

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[8] Traditionally, substantial effort is needed to get states to enact uniform legislation, including amendments to the UCC. In an unusual twist, however, states have been exceptionally eager to enact legislation dealing with crypto currency and other digital assets, and several went so far as to enact portions of a preliminary draft of the amendments proposed by the Committee on the UCC and Emerging Technologies. A chart describing those enactments appears at the end this Supplement.

Illustration 1

Customer buys a lithograph, one of a limited-edition, from Art Dealer. In connection with the transaction, Art Dealer provides Customer with a written Certificate of Authenticity attesting to the genuineness of the lithograph and the total number of lithographs comprising the limited edition. If Customer sells the Certificate to Purchaser, Purchaser might or might not acquire ownership of or rights in the lithograph. Resolution of that question will depend on whether applicable law treats the sale of the Certificate as either an assignment of property rights in the lithograph or as a contract to sell the lithograph. Purchaser might become the owner of the Certificate but acquire no rights in the lithograph, and the Certificate itself may be of little or no value.

If the Certificate was instead issued as a CER, the same analysis would apply. Whether Purchaser acquires any rights in or to the lithograph by acquiring the CER is left to law outside the UCC.

Illustration 2

Seller and Buyer enter into a contract for the sale of specified property. The contract provides that, on a specified date, Seller is to deliver the property (or otherwise transfer title thereto) and Buyer is to pay the designated price. Assume that the contract is in writing. If Buyer sells to Purchaser the writing on which the contract is printed, Purchaser might or might not acquire the right to receive the specified property. Resolution of that question will depend on whether applicable law treats the sale of the writing as an assignment of the contract rights. Purchaser would become the owner of the writing, but the writing itself may be of little or no value.[9]

If, instead, the contract between Seller and Buyer was evidenced by a CER, the same analysis would apply. The right evidenced by CER (*i.e.*, Buyer's right to receive the property from Seller) would be the valuable asset, not the record itself. But whether that right travels with the record, so that Purchaser becomes the owner of the right by becoming the owner of the record, is left to law outside the UCC.

Assuming that a CER has value – either because the CER has intrinsic value as cryptocurrencies and NFTs do or because some other right travels with ownership

[9] This would almost certainly be the case if the time for Seller's performance had long passed and Seller had performed.

of the CER – Article 12 protects most purchasers who obtain control of the CER. In fact, the perceived need for such a rule was arguably the primary impetus for the creation of the Committee that drafted Article 12. To understand why, consider this following illustration based on the law prior to the 2022 amendments.

Illustration 3

Debtor, the owner of a bitcoin, borrowed funds from Lender and granted Lender a security interest in the bitcoin to secure the loan. Because the bitcoin was a "general intangible" under Article 9, the only way for Lender to perfect the security interest was by filing something call a financing statement, which is essentially a brief public notice of Lender's interest in the bitcoin. The financing statement must be filed in a public office in the jurisdiction where Debtor was then located, which Lender did. The filing office indexes filed financing statements by the identified debtor's name. But the blockchain on which bitcoin transactions are recorded is not organized by the names of bitcoin owners, and provides no way to identify the names of former owners. Moreover, there was no rule that permitted a transferee of general intangibles to take free of a perfected security interest. Consequently, if Debtor used the bitcoin to purchase property or services, the transferee would take subject to Lender's security interest, as would every subsequent transferee of the bitcoin.[10] This was true even though the transferee had little practical ability to discover the security interest. And even if the initial transferee knew of Debtor's name and could conduct a search for financing statements filed against Debtor, subsequent transferees would have no practical ability to do that.

On the other hand, if Lender sought to enforce the security interest in the bitcoin, Lender would face considerable challenges identifying and locating transferees of the bitcoin. The only way Lender could prevent this problem was to have Debtor transfer the bitcoin to Lender or to an intermediary until the secured obligation was satisfied. In short, bitcoin, like other cryptocurrencies, was designed to be a store of value and a payment method that was both anonymous and non-intermediated. But to function as collateral it could not be both of those things.

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[10] They would unless and until the security interest became unperfected under § 9-316(a)(3) – generally, a year after a transfer of the bitcoin to someone located in a different jurisdiction – at which point a buyer without knowledge of the security interest could take free of the security interest under § 9-317(d).

Article 12 protects purchasers of CERs is a very significant way. It bestows on CERs something like the negotiability accorded to money, negotiable instruments, and certificated securities. Specifically, § 12-104(e) provides that a "qualifying purchaser" of a CER acquires its rights free of other property rights CER. "Qualifying purchaser" is defined as a purchaser that "obtains control of" a CER "for value, in good faith, and without notice of a claim of a property right" in the CER. § 12-102(a)(2). The filing of a financing statement does not provide notice of a claim of a property right in a CER. § 12-104(h). Consequently, a purchaser of bitcoin that obtains control of the bitcoin will generally take free of any security interest in the bitcoin, as well as any other claim of an ownership interest in the bitcoin.

Problem 12-1

Compare § 12-104(d) & (e) to § 2-403 and § 9-320(a). How are the rights potentially acquired by a purchaser of a CER different from – and more extensive than – the rights potentially acquired by a purchaser of goods? In answering this question: (i) which purchasers acquire more rights than the transferor had; and (ii) what rights, beyond those of the transferor, a purchaser can acquire.

Recent State Legislation Amending the State's Version of the UCC Affecting Secured Transactions				
State	**Legislation**	**Description**	**Date Enacted**	**Effective Date**
Arkansas	2021 Ark. Laws Act 1078	Added Chapter 11 to the state's commercial code. Modeled on selected provisions of a draft version of UCC Article 12 produced by the Committee on the UCC and Emerging Technologies, the act defines "virtual currency" and provides that a good faith purchaser that acquires control of virtual currency takes free of any adverse claim.	4/30/21	7/28/21
Idaho	2022 Idaho Laws ch. 284	Enacted the "Digital Assets Act," which, among other things: (i) defines digital assets to include virtual currency; (ii) provides that a security interest in virtual currency perfected by possession or control has priority over a security interest not perfected by possession or control; and (iii) provides that a good faith purchaser takes free of a claim of a property right to the currency.	3/28/22	7/1/22
Indiana	2022 Ind. Legis. Serv. P.L. 110-2022	Amended the state's UCC Article 9 and added a new Chapter 11 to the state's UCC, modeled on a preliminary draft the amendments and new Article 12 produced by the Committee on the UCC and Emerging Technologies. The act addresses "controllable electronic records," "controllable accounts," and "controllable payment intangibles." It defines "control," and provides that a good faith purchaser that acquires control of such property takes free of any adverse claim.	3/15/22	7/1/22
Iowa	H. 2445	Amended the state's UCC Article 9 and added a new Chapter 14 to the state's UCC, modeled on a preliminary draft the amendments and new Article 12 produced by the Committee on the UCC and Emerging Technologies. The act addresses "controllable electronic records," "controllable accounts," and "controllable payment intangibles." It defines "control," and provides that a good faith purchaser that acquires control of such property takes free of any adverse claim.	6/13/22	7/1/22
New Hampshire	2022 N.H. Laws ch. 281	Amended the state's UCC to adopt the 2022 amendments, based on the draft presented at the 2022 ULC Annual Meeting.	6/28/22	1/1/23

Recent State Legislation Amending the State's Version of the UCC Affecting Secured Transactions				
State	**Legislation**	**Description**	**Date Enacted**	**Effective Date**
Texas	2021 Tex. Sess. Law Serv. ch. 739	Amended the state's UCC Article 9 and added Chapter 12 to the state's UCC. The act: (i) defines "virtual currency"; (ii) provides for a security interest in virtual currency to be perfected by "control," the definition of which is taken from a draft of UCC Article 12 produced by the Committee on the UCC and Emerging Technologies; and (iii) provides that a good faith purchaser that acquires control takes free of a claim of a property right to the currency.	6/15/21	9/1/21
Utah	2022 Utah Laws ch. 448	Enacted the Digital Asset Management Act, which: (i) defines "digital assets"; (ii) defines "control" of a digital asset; and (iii) specifies that an owner may demonstrate ownership through control.	3/24/22	5/4/22
Wyoming	2021 Wy. Laws ch. 91 & 2020 Wy. Laws ch. 103	Collectively, these laws provide that: (i) a security interest in virtual currency may be perfected by possession, which is defined as the ability to exclude others from the use of property, and includes use of a private key, a multi-signature arrangement exclusive to the secured party or a smart contract; (ii) a security interest in digital securities may be perfected by control; (iii) a security interest in virtual currency or digital securities perfected by possession or control, respectively, has priority over a security interest not perfected by possession or control; and (iv) a transferee of a digital asset takes free of any security interest perfected by filing two years after the transferee takes the digital asset for value and without actual notice of an adverse claim.	4/5/21 & 3/13/20	7/1/21 & 3/13/20