Revised Article 1 and the Warranty Provisions of Amended Article 2

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BARRY CHATZ: In the handout is the information regarding Professor White. Sometimes you don’t even need to say anything about someone. It’s just looking forward to hearing his comments regarding the subject matter that this involves, which is the new warranty provisions in Article 2. It’s an honor to have Professor White here today, and we look forward to your comments.

JAMES J. WHITE: Thank you, Barry, Professor Livingston and all of the others that put this together.

We’re going to reproduce the materials and you’ll get them, but you don’t get them while I’m talking here. The materials have to do both with Article 1 and mostly with the warranty provisions of amended Article 2.

What I’m going to be speaking about today, I regret to tell you, is talking about the history of a failed statute. Revised or amended Article 2 of the UCC is like the proverbial goose that flew in ever concentric circles, or ever decreasing radius until it flew up its own ass and disappeared with a loud metallic clap. Well, I hate to tell you, but I’m afraid that’s what’s happened to the revision of Article 2.

The revision of Article 2 began with a study committee. I think it started in 1989. I can remember meetings here in Chicago. I was on the study committee. The committee was mostly law professors along with two practitioners. The study committee’s task was to decide if we should amend Article 2. Of course, when you get together a bunch of law professors, they always think they could make things better than they are and particularly when they’re unconcerned with the problems of the real world and with the difficulties of getting legislation adopted.

Eventually, with some uncertainty, we decided that Article 2 should be amended. As a consequence, around 1991, the National Confer-
ence of Commissioners on Uniform State Law ("NCCUSL") appointed a drafting committee.

The drafting committee produced a series of drafts and had many contentious meetings. Eventually the committee became like the king and his people inside the citadel being attacked by different people from the outside.

The first group to attack was the automobile manufacturers, who were very skeptical about many things in the early drafts. The auto companies were joined early on by General Electric, represented by a friend of mine, Charlie Keeton, a lawyer down in Louisville. Every letter we ever got from Charlie complained about "needless tinkering" in the revision. If today you say to a commissioner on uniform laws, "There's needless tinkering here," he will begin to laugh for no apparent reason. I was playing squash with a colleague one day, and he said, "You know, Amended Article 2 has a lot of needless tinkering." When I began to laugh he looked at me like I had lost my mind; I, of course, was thinking of Charlie's serious and often repeated objection.

Later, many other critics appeared. The advertising industry and eventually even Microsoft got into the act. So there were a series of drafts, lots of criticisms of the drafts, changes in the drafts, and so on. Finally the draft came up for a vote before the commissioners in 1999.

At that point, I was on the outside with the "car guys" and others attacking the people in the citadel. (That incidentally was a lot of fun, much better than being inside the citadel.) Because of the strong opposition, the draft was pulled at the last minute and there was no final vote in 1999.

The leadership of NCCUSL then decided to reconstitute the committee and do something now called an "amended" not a "revised" Article 2, i.e., a narrower and smaller thing.

To my later regret, I was then put on the drafting committee because they figured that they could silence the critics by bringing some of them inside the citadel. Foolishly, I thought the change was wonderful and that all my friends among the rebels outside the citadel would join us and we would live in peace ever after. Well, I was wrong. No sooner had I joined the committee than I felt like I was inside the citadel, with a new set of rebels on the outside shooting at us, namely Microsoft and others.

Ultimately, in 2002 and 2003, Amended Article 2 was passed by the American Law Institute and then by NCCUSL. At this point the draft of Amended 2 has been before a committee in the Nevada legislature, where it was put aside. It will be in front of the Kansas legislature, but
I don't know what will happen there. I think the odds are better than even that no part of Amended 2 will be enacted in any state for the next five years. That's not to say that Amended 2 will be totally wasted, but I think it will be a long time before any substantial part gets adopted in any state. I think the best hope for Amended Article 2 is that it will lie fallow for a year, or two, or three, or four and then that some parts of it will be adopted.

As I stand here and look back over these twenty years, the real problem for the revision of Article 2 is that there were no strong industrial or financial advocates of the statute. By contrast, the amendment to Article 9 passed in every state in about a year. Why did that happen? Because the bankers wanted Article 9, and they wanted it in every state and they could not tolerate to have it just in one or two states.

There was no such group advocating the Article 2 revision. The auto industry eventually became neutral on it. General Electric never was happy with it, and then a variety of other people, such as the advertisers, grudgingly went along, but there were no industrial or commercial advocates of the Code. When your only advocates are a bunch of law professors, you're going to lose. Even a single determined opponent, like Microsoft, can defeat law professors. Maybe I'm too skeptical, but I don't think so.

Article 1, which was revised between 1996 and 2001, is a different story. The revision to Article 1 has now been adopted in ten jurisdictions; I'm told it's going to be introduced in Illinois this year and it probably will pass. I predict that Article 1 will be adopted by almost all the states within two to three years.

Today, I'm going to talk a little bit about Article 1, and then I'm going to talk about the warranty provisions in Article 2. Those, like many of the other provisions in Article 2, were contentious and remain so.

What about revised Article 1? What does it do and what doesn't it do? Article 1 has several important provisions that are easy to overlook unless you are involved in a lawsuit that brings them into play. One of the most significant provisions says that, "[u]nless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant, [etc. apply.]" 1

1. U.C.C. § 1-103(b) (2004). This section includes "the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause. . ." Id.
Well, in a lot of cases it is not possible to tell *a priori* whether the UCC applies or some other law applies.

For example, in some states a provision grants triple damages for conversion. But Article 3 of the UCC has a provision on conversion with respect to checks. If I get a judgment under Article 3 for a conversion because somebody converted my checks, do I then multiply it by three because there's another statute in Illinois, or in Michigan, or in New York that says I get triple damages? Well, hard to say. Was that provision "displaced" by Article 3 or not? The drafters of revised Article 1 wanted to build higher walls around the UCC to keep other legislation from coming in and distorting it.

Consumer advocates were doubtful because they wanted to make sure that the UCC did not foreclose consumers' use of consumer legislation. The effort to raise the walls came down to the removal of one adverb from the Code, and so instead of saying, "unless explicitly displaced", it now says "unless displaced." And there is a comment that prohibits bringing something from outside the Code, whether or not it's displaced, if the outside law conflicts with the purposes and policies of the Code. When and if you get to arguing on the question whether you can bring other law on treble damages into Article 3, you need to look at new 1-103(b) and at the comments which discuss this question about conflicting with the underlying policies and purposes of the Code. I believe that one of the good things the drafters of revised Article 1 have done is to build this wall a little bit higher so that other law will find it more difficult to pollute the Code.

In the materials I'm going to hand out to you there is a discussion of some of this drafting history. I reproduced drafts of earlier versions of 1-103 and of the comments that were rejected.

The new draft of Article 1 has a provision dealing with E-Sign. E-Sign is the Federal Uniform Electronic Transactions Act ("UETA"). E-Sign has a general exclusion that says it does not apply to most of the existing UCC except for Article 2. Since this rule appears to apply only to law in "existence" when E-Sign was passed, the drafters were worried that the general exclusion would not apply to revised Article 1. So they added a mysterious Section 1-108 that is designed to

5. U.C.C. § 1-103, Comments 1-3 (2004).
9. See id.
keep E-Sign out of Article 1.10 If E-Sign were to come into the Code through Article 1, it might change the Article 3 rule that negotiable instruments must be in writing.

There are some significant changes in the definitions in Article 1, and I want to talk about just two of them that will be important to you in practice. One is the definition of the word “conspicuous.” Conspicuous, of course, appears in 2-316 of Article 2 where it says that certain disclaimers of warranty must be “conspicuous.”11

The question what is and what is not “conspicuous” has been complicated by the fact that many transactions are electronic. It is easy to put writing in bigger print or a different font or different color or to have big headings. But if I send you a document by e-mail, I have no assurance that my format will come out on your screen with the qualities that made it “conspicuous” on my screen. I have no assurance that if I print it in red ink with black ink next to it that it will print out in your place with red ink.

The definition of “conspicuous” has been changed slightly in Article 1 and substantially in amended Article 2. At least revised Article 1’s definition of conspicuousness accommodates electronic documents.

The Article 2 definition — ironically in the part of the revisions that probably will not be adopted — is more extensive and more carefully done. It makes a term conspicuous if the “term in an electronic record intended to invoke a response by an electronic agent...is presented in a form that [will] enable a reasonably configured electronic agent to take it into account or react to it without review of the record by an individual.”12

If I am selling to you through your electronic agent and I put something in there that your electronic agent can’t respond to, it’s not conspicuous, right? So I’ve got to arrange it in some way that it can be dealt with by your electronic agent. And we are going to see litigation about this, I am sure.

The second, and I suppose more serious, problem is how do I make it conspicuous for an individual? Amended Article 2 says if I, as the seller, adopt a click-through provision where you’ve got to click “I accept,” that in and of itself is conspicuous.13 Article 1 doesn’t say that; probably the same rule would apply there. Although amended Article 2 is unlikely to be adopted soon, it may be worth your while to study some of the stuff that appears in it.

13. Id.
To some extent, we are all engaged in hypocrisy here. Consumer advocates will say to you, "Well, wait. You can't make that effective against the person just by putting it on your website. You've got to do a click-through arrangement." I say, "Okay. I'm happy to do a click-through because I know consumers (your people) aren't going to read the click-through." So why are the consumer advocates asking for me to do a click-through? I don't know. That's a story for another day, the idea of contract. We do business with one another today with form contracts that neither of us reads.

In any case, there's a new definition of "conspicuous" in Article 1, and there is a new and more elaborate definition of "conspicuous" in revised or amended Article 2. And if you're sitting down a year from now to draft a contract that's going to be used electronically, for sure you need to think about these things. If you're going to draft a contract that's going to be used in printed form, you also should look at these things to see what they have to say.

A second significant change in Article 1 is the change in the language from "honesty in fact" to "honesty in fact and the observance of reasonable commercial standards of fair dealing." Those of you who are familiar with Article 2 know that it has always had two standards. The basic rule said "good faith" means honesty in fact. But for merchants, it always said "honesty in fact and the observance of reasonable and commercial standards of fair dealing in the trade."

Now, the new Article 1 proposals are going to change it. That language has caused controversy for reasons somewhat mysterious to me. The American Bankers Association has opposed that language, and as a consequence, it has not been adopted in Alabama, Idaho and Virginia, but it has been adopted in Delaware, Minnesota, Texas and the Virgin Islands. So we will now have different definitions of good faith in Article 1 in different states. That may or may not be significant in the long run because Articles 3, 4, 4A, 8 and 9 already have this expanded definition. And so you say, well, what's left? I don't know the answer to that, but the bankers seem to think that there is something left for Article 1 because they have opposed the adoption of that language.

What's the difference? If the transaction is within Article 3, bills and notes transaction, or if it's in 4A as an electronic fund transaction

or if it’s in Article 9 as a secured transaction, you already have this
definition, so I’m not sure what they’re worried about. There might
be transactions that are within Article 2 but don’t deal with
merchants. They might be concerned about transactions that are re-
lated to Article 9 but not directly Article 9 transactions. If, for exam-
ple, I sign a loan contract with a bank and I also sign a security
agreement, clearly, Article 9 deals with the security agreement and
clearly the broader definition of good faith applies to that part of the
deal. Maybe the broader definition doesn’t apply to the loan agree-
ment. Maybe the bankers fear that the addition of the expanded defi-
nition to Article 1 will make the fair dealing in the trade somehow
apply to the loan agreement part of the transaction.

Everybody understands — at least on the intellectual level it’s easy
to understand — what the two definitions mean. Honesty in fact is
subjective. That’s what’s in my head, what I do. And observance of
reasonable commercial standards of fair dealing is to conform to the
standards of the trade I’m in, whether it’s banking or the sale of grain.
So there’s an objective and a subjective standard.

Once you get beyond that, deciding whether somebody’s in good
faith is very hard. I’m involved in a lawsuit now where one of the
arguments on our side is that the other side didn’t act in good faith. In
practice it’s not easy to figure out what good faith is.

You should note a couple of things. This observance of reasonable
commercial standards of fair dealing is not a duty of due performance;
this is not a negligence standard. As a bank, for example, I can be
grotesquely negligent and still not be in bad faith. Bad faith has to do,
not with my stupidity; it has to do with my favoring myself and disfa-
voring you. It’s a measure of fairness.

One of the definitions that I want to talk a moment about is the
definition of “signed.” Article 1’s definition applies only to inscrip-
tions on writings.\textsuperscript{16} UETA and E-Sign do not override that. Why do I
say that and why is that important? That’s important because, if they
did override it, UETA and E-Sign would enter Article 3 by the back
door and we would have authorized non-written negotiable notes with
electronic signatures. So the word “signed” in Article 1 is only on
writings.\textsuperscript{17} Amended Article 2, has a different and broader definition
of “signed,” which recognizes other symbols or sounds associated with
a “record an electronic sound, symbol or process.”\textsuperscript{18} So in amended
Article 2, “signed” is much broader than just an inscription on paper.

\textsuperscript{16} U.C.C. § 1-201(39) (2004).
\textsuperscript{17} Id.
\textsuperscript{18} U.C.C. § 2-103(1) (2004).
If I'm outside Article 1 and Article 3, UETA, which would apply in Article 2 transactions, would accept my typed name at the bottom on an e-mail as a signature even though that typing has no unique characteristic. Because the Article 2 amendment process took so long, from 1989 to 2003, UETA intervened and appropriated some of the things that amended Article 2 would have covered. UETA was proposed later, adopted earlier and passed by the states earlier so that the need for the kind of things that were going to be done in revised 2 for electronic commerce were mostly done by UETA. So be careful to look at the word “signed” in Article 1 and understand that the definition of signed in Article 2 of the UCC has been changed by UETA and by E-Sign.

Former section 1-206 is omitted from revised Article 1. 19 Most of you have never heard of 1-206. It is a trap. It is called: “Statute of Frauds for Kinds of Personal Property Not Otherwise Covered.” 20 To what does it apply? I’ve been involved in two lawsuits involving the sale of TV stations. In each case, one group argued that an oral contract had been made and was binding. And the other group denied that and pointed to 1-206. The sellers escaped from oral contracts in both cases. You’re all sitting there with wrinkled brows. What is 1-206? So it is a big mystery; it was inserted in the Code right at the end of the drafting in the late 1950’s by Llewellyn when he was pressured by some New York lawyers. He put it in — probably against his wishes — because the Sales Act had something like that; it would have been better if he’d resisted. It is gone from revised Article 1; good riddance.

Let me talk for one minute or two about Section 1-301. 21 This is the most contentious part of revised Article 1. It replaces old 1-105 on choice of law. I don’t know about the last two jurisdictions, Montana and Arkansas, but all of the other eight jurisdictions that have adopted Article 1 have omitted revised 1-301 in their versions. One part of it authorizes two parties to adopt the law of a jurisdiction, even though they have no relationship to that jurisdiction. 22 So that if you and I are in Fort Worth, Texas and we want to use New York law, we can.

Under the conventional rules of choice of law — including the Restatement — we could not do that. We’ve all seen cases that disregard

20. Id.
22. Id.
a choice of law term in a contract because there is no sufficient contact with the state whose law is chosen. Revised 1-301 will change that.

Secondly Section 1-301 makes clear that Article 1 and the choice of law provisions in Article 1 are inapplicable unless the transaction is somehow under another Article of the UCC.\(^{23}\) So if you and I signed a contract for the sale of services not covered by Article 2 or any other article of the UCC, 1-301 doesn't apply and the choice of law provisions in Article 1 don't apply. But assuming that our transaction is for the sale of securities and under Article 8 or that it is for the sale of goods and so under Article 2, Article 1 would apply and 1-301 would apply, and it would allow us to choose the law of any state.

The principal controversy in 1-301 is 1-301(e).\(^{24}\) I was on the Article 1 committee late in the game, so I bear a small responsibility for this, and I apologize to you for not opposing it.

If one of the parties to a transaction is a consumer, first of all, you can only choose law of a state that has a relation to the transaction. But the controversial provision says “Application of a law of a state or country determined pursuant to subsection (c) or (d) may not deprive the consumer of the protection of any rule of law governing a matter within the scope of this section which both is protective of consumers and may not be varied by agreement.”\(^{25}\) What does that mean? It means that if I live in Minnesota and there is a non-variable consumer provision of Minnesota law that somehow affects something under the UCC, I carry that law with me when I deal with you over the internet in California. In other words, even though you include a choice-of-law provision choosing California law, and even though the seller is in California, I am not deprived of this right that I have under Minnesota law. Can you imagine what the internet merchants and catalog sellers thought of that rule? They said, “What are you talking about? Do we have to know the consumer law of every state?” And the answer was, “maybe yes.” One concession made to these sellers was to exclude certain face-to-face transactions; if you come to California and you buy a lawn mower from me and take possession in California, then you lose your right to the Minnesota statute.

The main answer of the drafters was that this won’t happen often. There is very little non-variable law that would apply to an Article 2 transaction. Non-variable rules are more likely to apply to consumer leases, or to notice requirements on repossession or things like that. That may be true, but this provision really got sellers excited, and the

\(^{23}\) U.C.C. § 1-301(b) (2004).
\(^{24}\) U.C.C. § 1-301(e)(2) (2004).
\(^{25}\) Id.
consequence of this particular language is that 1-301 has not, to my knowledge, been adopted in any of the states that have adopted revised Article 1.

Of course, this means that the salutary provision, which would have allowed businesses to choose unrelated law, is thrown out and the adopting states typically insert a form of old 1-105. So it's unfortunate that was lost, but so be it. In the materials that will be handed out, there is an elaborate discussion of 1-301. Because it is unlikely to be adopted, I am not going to talk more about it here today.

Let me talk about a couple of proposed changes that were originally in revised Article drafts but that were omitted from the final draft. At one point in the drafting of Article 1 the revision had an unconscionability section that would have applied to all parts of the UCC. Opposition by bankers and others caused its early omission.

Early drafts also had a choice of forum provision. I'm not sure why that was removed, and I'm also unsure what inference you draw from its inclusion and later omission about the validity of forum selection clauses.

The only virtue of studying amended Article 2 today is, I suppose, to draw inferences about the meaning of current law from what was tried there. To some extent the same is true of the things that were proposed but never adopted in Article 1. If you have a $1,000 case, you're never going to reach to things considered but never adopted. But if you have a $400 million case, it might be worth looking at what was proposed and rejected and at the reasons. You might find some arguments in all of that litter about the meaning of current law.

Early on, there was a provision about opting into the Code. The assumption was that, of course, one can opt in if he wants to; though, I've never seen anybody do that.

Turn to the warranty issues under Article 2.26 Section 2-312's warranty against infringement has been around for a long time. Amended Article 2 modestly expanded the warranty. The old language said the title conveyed shall be good and its transfer rightful.27 Amended Article 2 adds the following clause: "and shall not unreasonably expose the buyer to litigation because of any colorable claim or interest in the goods."28 Under the new formulation I suppose you're making a broader warranty to me than you would other-

28. Id.
erwise when you sell me goods. How is that? Well, first of all, what kind of cases do you see now in warranty of title and rightful use?

My student found forty-three appellate decisions dealing with 2-312. What do you think they are? Anybody got any ideas? They're mostly stolen car cases. A guy steals a car, somehow gets a clean title, and sells the car to me and I sell to you. In these cases, it is clear that the warranty is broken.

Where else is this warranty going to get play? As you all know, there's a lot of litigation about software copyright and patents. And people that know much more about this than I do believe that thousands of patents have been issued on software that are not valid because the people at the patent office don't understand software. To the extent that software contracts fall under amended Article 2, Section 2-312 will have considerable significance for commercial litigators, and one may be able to draw inferences from the language that was proposed but has not yet been adopted in 2-312. And I have some discussion of that in the outline.

A second change that was proposed and eventually lost in the revision to Article 2 dealt with the language: "basis of the bargain." Section 2-313 says a term in the contract and the description of the product which becomes "part of the basis of the bargain" is an express warranty. So warranty terms have a unique status. They are unlike other terms in a contract for they have additional requirements. There was a long, contentious battle about this. Dick Speidel, the original reporter for Article 2, believed that the language was an archaic reliance requirement that had no place in modern contract law.

The Uniform Sales Act required "reliance by the buyer to create a warranty." Basis of the bargain is a watered-down reliance requirement. And Dick's argument was: "That's crazy. These are just part of the contract. And if it's in the contract, you're bound by it. If it's not in the contract, you're not."

Think about it a minute. We are bound by all terms in a contract that you and I sign, even if we don't know about them, right? I sign a contract with Hertz and I later say to them, "Wait a minute. I'm not bound by this thousand mile radius limitation on where I can take this car." And Hertz will say what? It will get out the contract I signed and say, "Look. The contract says you're bound by the thousand mile radius." And I'm going to say, "Oh, well, I didn't know about that." And they're going to say what? "Tough. You signed all these things.

you are bound by them, whether you read the contract or not." So the basis of the bargain requirement makes warranties different than other terms. And Dick believed that there was no basis for distinguishing express warranty from any other term. I never agreed with him, but I would concede that he has a perfectly sound argument.

In the materials I'm going to give you, I have three or four iterations of substitutes for "basis of the bargain" that appeared in different drafts. At some point Dick proposed the following substitute language, "becomes part of the agreement." Of course, that language left not even a shred of a reliance requirement.

We went round and round and round looking for an agreeable substitute for basis of the bargain. When the rebels took over, we went back to basis of the bargain so that if you look at amended Article 2, it says, "basis of the bargain," just like existing Article 2.

What inference do you draw from that if you're arguing a case two years from now in Illinois where amended Article 2 hasn't been adopted? Well, you can argue that the drafters thought that the reliance requirement had meaning and importance and so refused to remove it.

As you may know, some courts pay no attention to the basis of the bargain language. The issue arises where I sell goods to you and I've got a term in the box or there is a label attached to the insecticide and it has certain warnings and statements on it. The farmer says, "I get the benefit of this warranty." And the response of the seller, often remote seller, is, "No, you don't, because it wasn't part of the basis of the bargain, because it wasn't before the parties when they signed the contract." Now that argument should lose but it doesn't always. And so where there is a term that is not part of the face-to-face transaction or internet transaction or telephone transaction, the argument is often made that it's not part of the basis of the bargain, therefore, not an express warranty. The drafters decided that we should keep the requirement, but not necessarily for the statement in the box or on the insecticide.

The most significant changes in the warranty provisions of amended Article 2 are the additions of 2-313A and 2-313B. 2-313A deals with the common case of terms in the box but no contract between the "remote" seller/manufacturer and buyer. Take an example. First, assume the Dell deals directly on the phone with a consumer/buyer. Second, assume Dell, the manufacturer, sells to Sears who sells to a

consumer, but when the consumer opens the box, there is a term inside from Dell.

In the first case, where Dell deals directly with the consumer and there's stuff in the box, this is a 2-313 case because the immediate buyer and the end user/buyer have a contract.

In the second case, there is a contract between Dell and Sears and another contract between Sears and the consumer, but no contract between consumer and Dell. Of course, Dell puts contract-like documents in the box (Here's your warranty. Here are disclaimers. Here are limitations of remedy.), but there is no contract. The question then is well, what do those terms do? Do they bind or not? Is it part of the basis of the bargain and so on? I've been involved in a couple lawsuits like that in which the lawyers want to claim that there's no basis of the bargain and they are shameless. And I keep saying to them, you know, when the CEO gets up on the witness stand, is she going to say, "Oh, yeah. These terms we put in the box which say, 'I promise you, the consumer, that this computer worked a certain way,' we're not bound by that"? No, they're not going to say that, I don't think, but their lawyers will. So 2-313A deals with that issue.

2-313A says that where new goods are sold,

[T]he seller makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise, and the seller reasonably expects the record to be, and the record is, furnished to the remote purchaser, the seller has an obligation to the remote purchaser that: (a) the goods will conform...

I think this is good law. Don't you? When Dell puts something in the package that says, here's what the computer will do and here are your remedies and so on, there ought to be an obligation and Dell ought to be able to limit it in appropriate ways. By elevating certain cases to a statutory obligation, Section 2-313A is doing what is right.

Now, 2-313A is an elaborate statutory provision. It authorizes restriction of remedies and it limits the remedies to some extent and it also has provisions about whether these terms become effective and when the statute of limitations runs. Although some sellers may not like the provision, sellers will find it difficult publicly to oppose it because what they really are saying, if you listen to them carefully is, "we put lots of promises in our boxes to which we don't want to be legally bound."

Section 2-313B is different; there's much more limited justification for it. It applies to the case in which I advertise my product and the buyer purchases the product in reliance upon the advertisement.

Now, nobody in this room ever relies on an advertisement, right? Or only in the most remote way would you rely on an advertisement. And as you know, there are a few cases where buyers have successfully argued that advertisements are express warranties, and that sellers can be sued on those advertisements.

When you tell that to advertising agencies and advertisers, they go bananas. The people at the auto companies know liability is possible, but it was news to the advertising industry. So one of the big fights early on was with the advertisers. It was as though one kicked a beehive and all the bees went crazy because they said, "What? You mean our ads can produce liability?" Yes.

So 2-313B is the result of an arduous negotiation:

If in an advertisement or similar communication to the public a seller makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise, and the remote purchaser enters into a transaction of purchase with knowledge of and with the expectation that the goods will conform. \[\text{33}\]

In my view 2-313B never should have been put in the revision. In my view it inappropriately extends an inherently tenuous seller liability for warranties found in advertisements. But at least it has some important protections for sellers. One, the buyer had to buy with knowledge of the advertisement and with the expectation that the goods would conform. (Early drafts would have made a seller liable to someone in Omaha for a statement made in a Chinese language ad made to Chinese residents in remote China.) The statement also has to meet the normal standards for warranty and affirmation of fact or promise, so the advertisement can't be mere "puffing."

What is the line between puffing and affirmation or promise? Nobody knows. But most ads are puffs; few would be specific and direct enough to rise out of the puff category to the level of warranty. So we're probably dealing with a really narrow spectrum. But, of course, when you say "narrow spectrum" to the advertisers they respond: "Well, if it's really a narrow spectrum, why should we adopt this?" So 2-313B got grudging agreement but it's not something that anybody in the manufacturing or advertising industries ever liked, and I think it was unwise for the drafters to propose it.

\[\text{33} \text{. U.C.C. § 2-313B (2004).}\]
Sections 2-313A and 2-313B are important changes. If they ever get adopted anywhere, they will be really significant. I think when and if amended Article 2 gets cut down to what can be adoptable, at least 2-313B and maybe 2-313A will disappear.

How can knowledge of these sections be useful to you? If you represent a defendant who is being sued by somebody who’s relying on an advertisement or something in the box or if you are representing the plaintiff in such a case, you might look at these sections because they will tell you the kind of things that the drafters thought should be part of this mix. To the extent your case would have been affected by A or B, you can use the thinking of the drafters to support your claim.

Instead of dragging you through this stuff when you don’t have the language in front of you, let me address a couple of other things that are important in the warranty sections.

If amended 2-316 gets adopted, everybody who drafts a disclaimer needs to read it because the safe harbor language changes in the amended version. Let me read it to you. The new language says, “subject to subsection three, to exclude or modify an implied warranty of merchantability or any part of it in a consumer contract, the language must be in a record;” 34 (that is, it’s got to be in writing or be in electronic form that constitutes a record), be conspicuous and state, “the seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract.” 35

I believe that the new language is an improvement over the old. I think that it tells the consumer more than the old language on “merchantability.” Merchantable is not a term in common use and it is probably not well understood by lay persons. The language in the final draft was a retreat by the consumer advocates from earlier language: "Unless we say otherwise in this contract, we make no promises about these goods." That’s okay. But what about: "They may not work. They may not do what you want them to. If they don’t, it’s your problem." Well, you can imagine the auto guys, like a bunch of chickens, got up and started flying around the room, when it was suggested that they would have to use language like that to disclaim. They complained that such language would require them to denigrate their products. And they had a good point, and eventually the consumer people retreated to the language in the final draft. That language is probably an improvement over the current law.

34. U.C.C. § 2-316(2) (2004).
35. Id.
So, if you're going to write a new disclaimer and the amendments get passed, you need to look at 2-316 because the old language will no longer put you in the safe harbor.

Remedial promise. Some courts have had difficulty with clauses like the following: "I warrant these goods. They're free from defects for one year after sale. And if they are defective, I promise to repair or replace them." What is the promise "to repair or replace?" Is that a promise about the goods? Is it a "warranty," or is that a separate promise? And if it's a separate promise, when does the statute of limitations run? A warranty speaks at the moment of the sale. I sell you goods. I hand them across the counter. Under the UCC, I make a warranty right then, and the statute of limitations begins to run at that moment. Under the current law, the statute runs out at the end of four years. Discovery of the defect is generally irrelevant.

But what about this promise to repair? Let's assume in year two or year three you brought the car in, you said, "It's got this funny sound and it wobbles a little bit at 60 miles an hour on the highway. I'd like you to look at it." The dealer does something to the car, but five years after the sale I have an accident and I want to sue in warranty. Well, the statute of limitation has run on the warranty, but can I now sue for breach of the contractual promise to repair or replace because the dealer failed to repair? Or is the repair and replace promise merely part of the warranty that expires after four years?

To resolve that problem the amended draft now contemplates a "remedial promise," and it treats such promises as something different from the warranty. The statute of limitations for breach of a remedial promise starts to run at the time when the seller fails to repair, not from the date of sale.\textsuperscript{36} If you represent sellers, you will need to re-draft your documents because you will want to deal with the remedial promise in a way that does not allow claims for breach of that promise to run forever.

There is one way to interpret the remedial promise language to say that the statute of limitations never runs unless there is a demand and a failure, so then it might go well beyond the time when the warranty would be actionable. Under the amended statute (which allows five years for warranty suits in some cases) there are some readings of remedial promise language that would get you well beyond five years, and there are some applications that would clearly get you somewhat beyond five years if there is a failed attempt to repair.

\textsuperscript{36} U.C.C. § 2-725(c) (2004).
Consider a final point on warranty liability. Ironically, the part of amended Article 2 that got the grudging support of the auto companies is not even in the statute; it’s in the comments. It’s Comment 7 to 2-314.37

In the ‘90s there was an auto accident in New York State where Mrs. Denny was driving a – I think it was a Ford Explorer, in the summertime.38 She had the sunroof open. A deer ran across the road, she swerved and the car rolled.39 Her hand came out through the sunroof and her arm was badly injured. She had to have many operations, and she sued in tort and she sued for breach of the implied warranty of merchantability.40 She claimed that the car was inherently unsafe, and that it shouldn’t have rolled over.41 You can imagine Ford’s position: it’s a merchantable car; under certain circumstances, all cars roll over.42

The judge gave a risk/reward instruction to the jury on the tort cause of action.43 (E.g. if you find that the roll over risk was a necessary part of other qualities of the vehicle—its ability to go through snow and off road—then you find no tort liability.) And then on the warranty cause of action, the Court authorized the jury to find liability if the vehicle violated the “consumer’s expectations.”44 In other words, no risk/reward or cost/benefit analysis need be done to determine whether the implied warranty of merchantability had been breached.

The jury found no liability in tort, but held Ford liable for breach of the warranty of merchantability.45 Well, that drove Ford bananas, and it also bothered the ALI who was just then redrafting the Restatement of torts. The ALI had spilled a lot of blood getting an articulation of the standards for strict tort liability. The New York decision was a potential end run around the carefully drafted ALI language if any plaintiff could avoid that language simply by pleading his case in warranty.

38. Denny v. Ford Motor Co., 42 F.3d 106, 107 (2d Cir. 1994). The vehicle involved in the accident was a Ford Bronco II. Id.
39. Id. at 108.
40. Id.
41. Id. at 107.
42. See Id. at 108.
43. Denny, 42 F.3d at 109.
44. Id.
45. Id. at 110.
So the drafters put a comment in the amended 2-314, which essentially overrules the *Denny* case. It's known as the Denny Comment.\[46\] And let me read you part of it, at least:

This opportunity [to sue in warranty] does not resolve the tension between warranty law and tort law where goods cause personal injury or property damage. The primary source of that tension arose from the disagreement over whether the concept of defect in tort and the concept of merchantability in Article 2 are coextensive where personal injuries are involved, i.e., if goods are merchantable under warranty law, can they still be defective under the tort law? And if goods are not defective in the tort law, can they still be unmerchantable under warranty law? The answer to both questions should be no, and the tension between merchantability and warranty defect in tort where personal injury or property damage is involved should be resolved as follows:

When recovery is sought for injury to person or property whether the goods are merchantable is to be determined by applicable state products liability law.\[47\]

So whatever standard the jury must use under the state product liability law must also be used for the merchantability claim.

Of course a different rule would apply if the plaintiff were suing for breach of an express warranty or for the breach of the implied warranty of fitness for a particular purpose. If amended Article 2 gets adopted, the Denny comment will be important both for plaintiffs and for defendant sellers of goods.

All right. It is four minutes to 12:00. Are there questions?

AUDIENCE MEMBER: Not really a question, but sort of a philosophical thing. If the passage of some of these provisions is really politically motivated or industry motivated, what credence can you give to making an argument about the inclusion if it's not a legal decision; it was a political decision or a pressured decision?

JAMES J. WHITE: Well, I think that's fair and in the debates, it is very hard to divide politics or a party's selfish interest from a dispassionate interest in better law.

To the extent that you were able to get the committee to go along with a particular provision, I think that gives it some credence, even if they were — I mean, for example, the committee early on was, I think it's fair to say, philosophically aligned with consumers and sellers. And the extent that you got something done that was contrary to their interest certainly was significant, I think.

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47. *Id.*
First anything that was adopted by the drafting committee had the approval of a group that was not directly beholden to anyone.

The fact that even a conservative committee made up of the rebels stood fast with 2-313A is an argument that it states a legitimate basis for recovery. The fact that people who are not generally well disposed to plaintiffs’ claims voted for that, I think, is an argument that that’s a legitimate, or at least not a crazy idea.

AUDIENCE MEMBER: In your example of the Hertz contract and the click-through issues, I have a question I’d just like you to address briefly.

Within the Hertz contract, they still have to have a different font or put it in bold or in some way make it look different. That’s the only agreement. The click-through is also the only agreement.

Do you think there will be a requirement that in the click-through it will have to somehow show up more than the rest of the boilerplate because I don’t see any real difference between that Hertz contract that you talked to and the click-through contract on my software.

JAMES J. WHITE: In other words, the click-through doesn’t add anything because I’m not going to read it anyway, just like I’m not going to read the Hertz contract in hard copy.

AUDIENCE MEMBER: I mean, I would print it out, and then those sections aren’t going to be conspicuous.

JAMES J. WHITE: In my opinion a click-through will be treated as *per se* conspicuous. You can lead a horse to water but you can’t make him drink. The click-through surely brings the buyer to watering trough.

AUDIENCE MEMBER: I’m curious if click-through is enough, in that click-through, do we suddenly have a lesser standard?

JAMES J. WHITE: My recollection is that if you’ve got to move your curser up there and click on it, *ipso facto*, that’s conspicuous.

AUDIENCE MEMBER: Okay.

JAMES J. WHITE: But you make a good point. I’ve heard consumer advocates argue for the click-through. I do not think that the click-through is any better than making stuff available on a web site or than giving the consumer a hard copy. Most of these things you and I and every other consumer disregard and neither a click through nor any other process will change that. So your argument, I think, can be made.

But if you tell me that a click-through won’t work for me as the seller, then what you’re saying is that I have no way, if I’m going to deal over the internet, of protecting myself against a buyer’s claim.
Maybe we should give up on these attempts to make non readers read. Maybe we should just say the only question is whether the term in unconscionable or not. If yes, unenforceable; if not, enforceable. Perhaps we should give up the pretense that consumers really read form contracts.

AUDIENCE MEMBER: On a similar vein, I had an experience with a California contractor that puts this kind of provision in their multitude of ridiculous terms and conditions.

What they said was “if we don’t pay, you have six months to sue us for breach of contract.” So if the Seller doesn’t sue for nonpayment within six months, they have lost their right to sue.

Now, if I recall in the Code, there is a provision that —

JAMES J. WHITE: The one-year limit, I think.

AUDIENCE MEMBER: The one-year limit.

Is there anything in the revised proposed changes that addresses that?

JAMES J. WHITE: Only for consumers as I recall.

AUDIENCE MEMBER: Now, the argument we made in this case was that the provision was unconscionable. It is unconscionable to buy goods and not pay for them and then argue that if the buyer sues at the end of the nine months, the buyer is precluded by a private statute of limitations.

JAMES J. WHITE: Well, did you win?

AUDIENCE MEMBER: We settled the case. They said that before trial, they raised it in pleadings and so forth and they argued it, but in the final analysis, they didn’t.

JAMES J. WHITE: There are some examples of quite short statutes of limitation and, at least in some cases, I indorse those. For example in Article 5 on letters of credit, there’s a one-year statute of limitations. Where witnesses will be testifying about an accident or defect, I think we should force a buyer to sue pretty quickly. Now, nonpayment—where there will be no factual dispute and where the seller is making an interest free loan to the buyer—should be different.

Other questions?

Okay. Thank you.