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Resins, epoxies, SuperGlue and the Uniform Commercial Code

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Resins, Epoxies, Super Glue and the Uniform Commercial Code

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Super Glue is great stuff. Super Glue repairs china, leather, plastic and metal. Super Glue can also epoxy two fingers together, or one finger to china, leather, plastic or metal, or the other finger to the doorknob. Super Glue cements fabric to chairs and glue caps to surfaces. Great stuff, this Super Glue; please read the instructions before use.

The Uniform Commercial Code likewise dispenses an invisible Super Glue, which welds together a deal. A deal is a deal when the parties are intractably obligated to perform, such as sellers delivering products on time, and buyers taking delivery and paying invoices within terms. Commercial Code Super Glue also prevents parties from unwinding these deals. We'll label this stuff CodeGlue. CodeGlue illustrates its adhesive alloy in U.C.C. Section 2607(1) as follows:

> The buyer must pay at the contract rate for any good accepted.

Acceptance fuses the deal, creating the chemical derivative of U.C.C. Section 2709(1), a judicial resin, as follows:

> When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price (a) of goods accepted or of conforming goods lost or destroyed within a commercially reasonable time after risk of their loss has passed to the buyer; and....

Is CodeGlue capable of dissolving deals for cause? U.C.C. Section 2608 permits revocation, but only subject to a "non conformity" which substantially impairs the value of the lot or units. Note the language "substantially impairs." Dinks, dents, blemishes and black and blue marks will not undo the deal. U.C.C. Section 2702(1) unwinds the deal for insolvency. U.C.C. Section 2703(f) permits the seller to terminate upon default; U.C.C. Section 2711(1) permits the buyer to terminate similarly upon default.

Is CodeGlue important to the commercial community? You bet and to the credit community as well. CodeGlue allows buyers to borrow against contracts to finance deals, and CodeGlue engenders letters of credit, the holy epoxy of the Code. CodeGlue franchises banks, hard money lenders and factors to lend on receivables. CodeGlue lets the vendor display accounts receivable as assets on a balance sheet. Important stuff, this CodeGlue, creating bankable billion dollar assets.

This article explores CodeGlue and challenges the reader to accept the premise that CodeGlue comes in various strengths and is subject to limited thinners, solvents and reducing agents. The Uniform Commercial Code produces this commercial, high luster rubber cement to seal deals and preclude them from disintegrating. For the practitioner, particularly a creditors' rights attorney, Code Super Glue is the stuff advocated to win the collection case.

The classic argument is, "Judge, I know that you have your judicial pen, which you can use to re-write the deal and ink in a few words here and there. I know that you have a judicial eraser, which you can use to erase a few words from the contract. You even have some judicial 'white out;' that stuff will change the contract. The best tool you have is CodeGlue. Now, what I'd like you to do is apply a small dab to the seller's papers [or claims] and stick it to the buyer's papers [or defenses], and we have the deal." The concepts, cases and postulates in this article distillate the chemical forces which cause the deal to coagulate together.

Is CodeGlue important? If a vendor sells perishable product, CodeGlue is the kevlar which deflects the ricochet of returns. For example, computer software retailers deign to bounce back slow moving products. Catalog dealers perfect policies for RMA's (return material authorizations) for the tidal wave of returns generated by consumers who discovered the product and catalog photo lack a genetic connection. Large volume mass merchants, faced with depreciating stocks of personal computers, read the fine print on their purchase orders and pray that their attorneys inserted a "right of return," clause. What about outdated C.D.'s or Christmas merchandise on December 26? Today's treasures, collectibles and mementos are tomorrow's distress inventory, but only if the distributor will accept them for credit. Merchants have two Christmas fantasies: first, blow out the inventory, and if not, return it for credit to the distributor.

Is CodeGlue more important now, than earlier? Given dramatic market swings, such as the explosion of electronics accouterments in an expanding range of consumer products, reducing the value of "dumb products," or products which depreciate in the face of emerging lines that are better, faster and cheaper, retailers bounce back products based on any excuse. What's the value of a 286 personal computer when the 386's arrive? Answer: Not

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Editor's Note: According to our research, Super Glue is a generic term used by various adhesive manufacturers to emphasize the extra-strength quality of a particular bonding compound. CodeGlue is a term coined by the author and is entirely fictitious.

much.

CodeGlue rebuffs any attempt by the buyer to return the product to the seller. CodeGlue is therefore the rubber cement that sticks products to the loser, usually the buyer. CodeGlue is very sticky stuff.

For every adhesive, there is a solvent, reducer and thinning agent. The solvent for CodeGlue is U.C.C. Section 2326(1), which permits product returns (and shifts the risk of deteriorating inventory) as follows:

> Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is
> (a) A "sale on approval" if the goods are delivered primarily for use;
> (b) A "sale or return" if the goods are delivered for resale.

The statute of frauds ingredient in an "or return" portion is outlined in Section 2326(4), but the comments to this subsection express the Code drafters' disdain for the "or return" portion as follows:

> Subsection (4) resolves a conflict in the pre-existing case law by recognition that an "or return" provision is definitely at odds with any ordinary contract for sale of goods, that where written agreements are involved it must be contained in a written memorandum. The "or return" aspect of a sales contract must be treated as a separate contract under the Statute of Frauds section and as contradicting the sale insofar as questions of parol or extrinsic evidence are concerned.

The Code drafters abhor the "or return" term, unless written in very big words, such as "Seller shall accept for return and refund all goods described in this invoice subject to x, y and z terms." The rationale for such disdain is that the "or return" portion liquefies the CodeGlue which binds the buyer to pay for the goods and implicitly degrades receivables as a bona fide asset on the seller's books.

CodeGlue by the numbers; or, how to make a deal. Let's start with CodeGlue in making a deal. In the typical case, Bobbie, the buyer for a large department store, forwards a purchase order for 10,000 garments to a wholesaler on a bid basis, subject to typical specifications such as color, size, quantity and date of delivery. The enterprising wholesaler calls Bobbie and confirms the order according to specifications. Unfortunately, the purchase order confirmation, along with ensuing invoice, mistakes the specifications but does quote a quantity. Bobbie takes possession, sells some of the useful products and returns the nonconforming items due to wrong size, incorrect colors, excessive quantities and the inferior, but not defective, quality of some items. Other products are returned or bounced back because they are slow movers.

CodeGlue percolates through U.C.C. Section 2201(1) in these facts. Even though the purchase order confirmation misstates everything, it contains quantity terms, and so Bobbie is stuck. Since Bobbie took possession of the goods, CodeGlue under U.C.C. Section 2201(3)(c) cements the goods to the buyer. This is very elemental.

But what about genuinely bad products, unordered products, products which really don't match the purchase order. Is Bobbie stuck? CodeGlue precludes the "pong" of ping in returning goods unless Bobbie gives notice of rejection under U.C.C. Section 2602(1). No notice means no return. U.C.C. Section 2607(3)(a) and Section 2608(2) notice requirements clasp the deal together unless Bobbie voices his objections very quickly. If the adage is "silence is golden," the updated version from the seller's point of view is "no news is great news."

Therefore, the starting (and ending point) is that notice requirements (or no notice, more precisely) solders the goods to the buyer, or better stated, silence is CodeGlue.

Glue by surprise. Are you stuck with the unsolicited offer from a current customer? Or, are you a very clever deal maker? Stealth bombers? Stealth fighters? Stealth submarines? What do they have in common? They are very expensive. Don't expect spring clearance sales, discounts, year end blowouts, white flower days or red tag specials.

How about stealth contracts? CodeGlue can be clear and difficult to spot, until it's too late to spot the coagulating process. We think that contracts originate with offers and acceptance, and in the commercial world, the offer is usually the purchase order. The case law is very consistent that a purchase order, at best, is only an offer to purchase products.

"Generally, the submission of a purchase order is viewed as an offer

A deal is a deal when the parties are intractably obligated to perform, such as sellers delivering products on time, and buyers taking delivery and paying invoices within terms.

A contract under the UCC mandates that the parties agree on a deal and that the parties need to document the deal, at least minimally.

which may then be accepted or rejected by the seller."[1] In *Bergquist Co v. Sunroc Corporation*,[2] the court stated the following:

> Placing an order is not the same thing as forming a contract. Placing an order may be nothing more than making an offer to buy. For example, *Step-Saver* "placed an order" which was "accepted" by TSL on the telephone. (*Step Saver*, at 95 to 96.) The written documents followed the conversation. It appears from the Third Circuit's language [*Step Saver Data Systems Inc v. Wyse Technology*, 939 F. 2d 91, 15 U.C.C. Rep. Serv. 2d 1 (Third Circuit, 1991)] that placing an order is something that needs an acceptance in order to blossom into a contract. (16 U.C.C. Rep. Serv. 2d, at page 1034.)

Case law is even more consistent that unilateral "sales confirmation," lacking any underlying agreement, does not bind any party. The District Court in *Triangle Marketing, Inc. v. Action Industries*[3] held that unsolicited purchase orders do not constitute a binding agreement. The court stated the following:

> Thus, the courts have uniformly held that a Section 2201(2) writing must follow formation of an oral agreement and must "indicate that the parties have already made a deal or reached an agreement." (1 U.C.C. Rep. Serv. 2d at page 39.)

The court continued as follows:

> Absent such prior agreement, the July 24 purchase orders were not in "confirmation of" anything, and Triangle cannot claim the benefit of Section 2201(2)'s exception to the Statute of Frauds. To say otherwise would mean that a seller is obligated to respond to every purchase order received out of the blue on pain of finding itself obligated to deliver on the order's terms. (1 U.C.C. Rep. Serv. 2d at page 40.)

In short, *Triangle Marketing Inc. v. Action Industries*, stated that purchase orders do not obligate the responding party to sell the product, due to the lack of the underlying agreement. Likewise, in accord is *R.S. Bennett & Co v. Economy Mechanical Industrial Inc.*,[4] where a letter to the defendant constituted an offer, not a contract, because the parties had not reached an agreement.

Making its appearance, *Litton Microwave Cooking Products v. Leviton*[5] states the following:

> Under Minnesota law of the sale of goods, where a manifestation by a party is "clear, definite and explicit, and leaves nothing open for negotiation," it constitutes an offer. *Short v. Sun Newspapers, Inc.*, 300 N.W. 2d 781, 786 (Minn. 1980) (quoting *Leftkowitz v. Great Minneapolis Surplus Store, Inc.* 86 N.W. 2d 689, 691 (Minn. 1957)).

Under this rule, price quotes and catalogs generally are not offers to form a contract.[6]

In *Litton Microwave Cooking Products v. Leviton*, the court focused on the fact that the seller's price quote letters and catalogs left open for negotiation the following:

> When and where might the part listed be delivered? Was Litton obligated to purchase all the parts listed in the quantities listed, or might they be able to purchase just what was necessary to fill their needs by picking and choosing from the parts listed? Could Litton feel justified, based on the quotation letters alone, in finding Leviton in breach of contract if Leviton were to be unable to fill any purchase order submitted?
>
> ...Without definite and affirmative answers to the foregoing questions, however, perhaps to some others Leviton's price letters and catalogs amount to no more than mere description of merchandise, coupled with the purchase terms... *Day v. Amax Inc.* 701 F.2d 1258 (35 U.C.C. Rep. Serv. 1416 (8th Circuit 1983)). As such they are not, under Minnesota law, "sufficient to constitute a legally valid offer." *Id.* Since Leviton's price letters and catalogs are not offers to form a contract, the "battle of the forms" doctrine embodied in U.C.C. Section 2-207 has no bearing on this dispute. (Pages 665 to 666.)

In short, Section 2201(2) only provides for an alternative mechanism to comply with the statute of frauds to confirm and memorialize a pending existing oral agreement, assuming an offer and acceptance. Contrary to some very enterprising merchants, Section 2201(2) is not the Frankenstein of deals. This is not a causal problem, although it may seem humorous, depending on your point of view. A Commercial Code contract mandates that parties agree on a deal (under Code any deal; we'll fill in the rest, say the Code drafters) and second, the parties need to document the deal, at least minimally. The court in *Triangle* emphasized that ingenious vendors cannot unilaterally forward "confirmatory" purchase orders, unless the parties actually agreed to the deal itself. Any contrary rule would legalize theft by contract in permitting

unscrupulous vendors to blanket the commercial community with phony purchase orders, claim a contract and threaten litigation to extort a settlement.

What! You didn't read the fine print? Remember the Memorex® commercials from the 70's? "Is it live or is it Memorex®?" I just remember a lot of breaking glasses. In this neck of the woods, the question is only slightly different. Is there a deal, or does the paper evidence the deal?

This question straddles these two competing concepts: (1) Is there an underlying agreement between the parties? (2) Does the paperwork evidence such an agreement? Although the courts distinguish between deals and papers which allegedly represent deals, this distinction fails at trial.

The plaintiff, seeking to enforce the contract for products, claims that the parties orally agreed to the deal during telephone calls, etc. The buyer, seeking to avoid an onerous contract, denies the conversations ever took place or claims that the parties were just bargaining. Finding a conflict in the testimony, the court reads the papers and might conclude that the papers (letters, price lists, invoices, etc.) might represent the deal itself. The final quotation might be, "Well, if you didn't make a deal, why didn't you respond to the confirming letter?" We might throw into the cauldron Section 2208 (course of dealings, etc.), beloved by the courts, to divine the parties' intentions, assuming some dealings.

One deal might generate a whole generation of succeeding deals. Who said three generations of imbeciles is enough? From the outline of one deal, CodeGlue spawns many children and propagates one deal into many, a nuclear chain reaction. These are the salient facts. Bona fide sellers, seeking to expand sales (yes, it's true, 20 percent of the customers are 80 percent of the business), emboss a genuine sales confirmation of a valid purchase order in rather fine print:

> Our confirmation of your purchase order constitutes your continuing offer to buy product line of like quantity and quality when presented in our monthly sales confirmation at our standard catalog prices and in quantities listed on the sales confirmations. You may cancel subject to 90 days notice, Attn....: Sales Department, our corporate headquarters.

Is this a fraudulent practice? Not necessarily, because U.C.C. Section 2201(2) places the onus on the recipient to object. Of course, the buyer claims the parties did not contract for the additional products. The seller asserts otherwise and counters that the writing itself constitutes the offer. In other words, silence (golden in the ears of the seller) is the acceptance. Needless to say, there's a fine line between *Triangle* purchase orders as pseudo contracts, and bona fide sales confirmations which expand into ugly little product offspring.

Think this is arcane or bizarre? Think again; you might want to read the section in your law book on contracts carefully. It provides for a continuing obligation to buy renewals, replacements and subscriptions, subject to 90 day written notice. Just remember the sorcerer's apprentice when you read sales confirmations, or your Miracle-Gro® will go nuclear.

The buyer will complain the additional products are not the subject of a bona fide contractual discussion, and seller, no slouch either, lowers the boom with Section 2207 by replying that the additional terms for continuing product sales become part of the contract. (Section 2207(2), etc.) Avoid this trickery by inserting the following into the purchase order:

> This purchase order is the sole embodiment of all terms between the parties; and all prior written and contemporaneous oral terms are excluded; this purchase order is expressly limited to the stated terms herein; and all different, conflicting or other terms in any sales confirmation are disregarded and specifically rejected herein.

Or, if you don't like long-winded sentences, advise the client to insert the following language into his or her purchase order:

> This purchase order contains every word of our agreement. Don't add anything else. Got it?

I'm sure that you have your own variations of this theme. Remember, brevity is the soul of wit, but on the other hand, words are cheap, and lawyers aren't.

Equity replaces CodeGlue with tears; or, don't bother with the rules, just argue the facts. My favorite statute of frauds case is the story of the doddering mother and the good-natured daughter. Mother isn't well; in fact, Mom has been doing poorly for about 20 years or so. Mom solicits daughter (a ne'er do well?) to live with her, take care of her, clean up the house, run errands and otherwise substitute for today's licensed vocational nurse. Mom, seeking to prolong the relationship, promises the ranch upon her death. Ignoring the old saw about "getting it in writing," daughter takes Mom on faith. (Hey, can't you trust your Mom? Maybe, but not your brothers and sisters when she goes.) Without surprise, Mom dies. She leaves a will and bequeaths the property to somebody else. Daughter sues, and the California Court of Appeal in the 1962 case of *Hortsman v. Sheldon*[7] replaces the statute of frauds requirement (agreement upon death invalid, unless in writing) with equitable estoppel. Score one for the daughter, zero for certainty. Between parents and children, the court is willing to gloss over the statute of frauds to prevent the daughter from being victimized. Personally, I think the court overlooked the concept of certainty of title, testator's intent and certainty of transactions.

Does equitable estoppel displace CodeGlue? The California courts (along with the majority) will substitute CodeGlue for NoGlue, ultimately a very bad idea. In the sour grapes case of *Allied Grape Growers v. Bronco Wine Co.*[8] the California Court of Appeal invoked equitable estoppel to substitute a written agreement to prevent an unconscionable injury, which means that one party seriously alters its position, relying upon the oral agreement. The buzz words follow: "seriously change position, relying upon the oral agreement."[9]

Wait a second. Does equitable estoppel replace the statute of frauds because somebody plunges ahead based on an oral promise? Does equitable estoppel turn grape juice into fine wine, or fine wine into salad dressing? (Ask the California courts.) In equitable estoppel settings the promisee always changes its position, and such a change is always serious. That's the whole point of equitable estoppel; somebody spends money, buys something or gives up an opportunity, and in short, there is a loss afoot. It is a rarity, not the rule, that the promisee, receiving the oral promise of goods, sits idle. Business people with commitment of products make all sorts of adjustments, expend capital dollars,

Convenience clauses in purchase orders allow the commercial purchaser to void the contract when presented with competing products of a better price and quality, or to bail out when the products technologically degrade in the marketplace.

procure goods and supplies and generally "change their position on reliance." This happens in every case (or would appear to happen). Equitable estoppel would apply in any case other than that of a comatose party.

However, the real quandary is that equitable estoppel replaces certainty in purchase orders and sales confirmations and eschews contracts for wishful thinking, if the parties blindly trust each other. Although most courts readily impose equitable estoppel to avoid the statute of frauds used to victimize the underdogs, equitable estoppel corrodes documentary certainty in any commercial transaction. Lest we forget, Code drafters simplified all transactions, replaced nineteenth century formalism with twentieth century modernity and pared down documentary formality to the quantity terms under U.C.C. Section 2201(1). Even the quantity terms might be replaced in output-requirement contracts (Section 2306). Replacing bare bones requirements with equitable estoppel thins CodeGlue and comes back to bite everybody on the supposed return portion of the contract. From a commercial chronicler's vantage point, equitable estoppel replaces crisp commercial documents for forensic sympathies, such as the *"Ill-informed victim v. The mean spirited merchant."* Equitable estoppel therefore converts commercial juice into a lawyer's fine wine and denigrates a business deal into a jury's sympathy poll.

CodeGlue as the reagent; or, when is a deal a deal? When is the deal made? The answer is found in the deal itself, which is very a Zen answer. (I am because I am a la Frank Sinatra.) Restaurants order food service products, usually through a sales person or telephone contact. The wholesaler fills the order and delivers the product via its own trucks to the restaurant owner. Upon tender, the customer returns some or even all of the products. Where's the CodeGlue? The answer is found in formation and course of performance. Assuming that the goods are generic (contra: specially manufactured, etc., under U.C.C. Section 2601(3)(a)), and absent a c.y.a. purchase memorandum (written confirmation under U.C.C. Section 2201(2)), the contract is formed at the time of tender.

CodeGlue shows its eclecticism in U.C.C. Section 2204(1): "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."

The offer is found in taking receipt of the goods under U.C.C. Section 2206(1): "Unless otherwise unambiguously *indicated by the* language or circumstances (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances."

The offer is the truck driver handing the goods to the buyer, and the acceptance is the buyer taking possession. CodeGlue sticks the products to the buyer upon tender. An old friend, course of performance, custom of trade, course of dealings under U.C.C. Section 2208 makes a cameo appearance and guides the trier of fact in fathoming which conduct constitutes an offer or acceptance, or potluck.

Tongue tied in making an offer? CodeGlue writes offers and makes acceptance a snap; just send the goods. Uniform Commercial Code Section 2206 writes the terms of an offer as follows:

> Unless otherwise unambiguously indicated by the language or circumstances
> (a) An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
> (b) An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by prompt promise to ship or by the prompt or current shipment of conforming or non conforming goods, but such a shipment of non conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as accommodation to the buyer.

Section 2206 epitomizes classic CodeGlue concepts. The drafter permits the parties to make their deals (the silk purse) out of the sow's ear; just ask for the goods and the seller has a deal upon delivery. This CodeGlue is so good that it will find deals in anything that looks, feels or sounds like a deal. CodeGlue in Section 2206 replaces the formality of offer and acceptance with anything in the hodgepodge of true participatory commercial democracy.

Deals are made sometimes when the truck fetches or delivers the products. An F.O.B. shipment (Section 2319(1)(a)) means that the tender is complete (and the money is due) when product is placed in the hands of the carrier, whose freight is paid by the buyer. F.O.B. destination (Section 2319(1)(b)) means that the tender is complete when delivered to the buyer (and purchase price is due), and the seller pays for the freight.

Therefore, depending upon the freight bill, the deal was consummated when the F.O.B. shipment was given to the carrier, or handed to the customer, the F.O.B. destination. If the arrangement provides that the tender of the goods is an offer to purchase, accepted by receipt and consumption (typical in the wholesale restaurant trade), the F.O.B. terms become the *sine qua non* of CodeGlue. Palming off products to the carrier, hired by the buyer, might well constitute the CodeGlue which makes the deal stick. Or, the offloading of the goods by the driver into the buyer's hands is the offer, and their receipt by the buyer is the acceptance.

CodeGlue as the caulking compound; or, no loose ends in a Code deal. When's a deal made? Upon order, tender to the common carrier F.O.B. destination, delivery, offloading and checking against the packing slip, signing the invoice or delivery receipt, or consumption of the products? The answer to this question: Why do you ask?

CodeGlue answers both questions. The answer to the first question ("When is a deal made?") should be rephrased "Did the parties make a deal?" It is only important that CodeGlue finally sets and binds the parties. It is not necessarily critical to fathom the exact date or time when the CodeGlue finally dries. U.C.C. Section 2204(2) lets CodeGlue bind the parties at any time in the following language:

> An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

Think this is inconsequential? It's not. Buyers who want out will claim no deal because they have not accepted the purported offer; sellers, on the other hand, will argue Section 2204(2) in asserting that offer and acceptance are not found in a flash, but incrementally, by the inch.

Think the buyer can weasel out of the deal because the parties left lots of unresolved issues? Think again. The Code drafters are CodeGlue crazy. Incorrect terms (Section 2201(1)), indefinite terms (Section 2204(3)), no price terms (Section 2305), no place for delivery (Section 2308), no time for delivery (Section 2309), no payment terms (Section 2310) will not stop CodeGlue. The Code will gladly supply all these terms.

Forgot about the warranties? CodeGlue supplies warranties of merchantability (Section 2314), along with express special purpose warranties for free (Section 2313, along with Section 2315). This CodeGlue is so good that the court could find a contract if the Beatles just sang, "All you need is love." All you need to sing is the quantity or delivery. Forgot about credit terms? Don't worry. Glue does not take much, as you can see. CodeGlue binds the parties to cash terms (Section 2310(a)).

Gapfillers, the Code drafters label this stuff. We call contracts tile grout. Forgot to remind the customer to pay when due? Don't worry, CodeGlue fills the gap by reminding the customer that tender of payment is conditional to the seller's duty to tender and complete any delivery (Section 2511). Failed to discuss the terms of delivery, such as date, time and place? No problem. Again, CodeGlue fills in the minutia, such as tender must be at a reasonable hour, buyer must furnish facilities to receive the goods. It even provides the details in the documents (U.C.C. Section 2503(1) and (2)). CodeGlue evens out terms left to a particular party (Section 2311(1)). CodeGlue provides its own statute of limitations of four years (U.C.C. Section 2725) and even outlines specific performance to reclaim the goods (U.C.C. Section 2716). Probably during the Cabbage Patch® doll craze, some disgruntled consumer who promised the toy to his kids sued for specific performance.

CodeGlue answers the second question: "Why do you ask?" Assuming a deal, the date and place may control venue. For example, a seller's performance is complete upon tendered F.O.B. shipment, enabling suit in the seller's venue. Conversely seller's performance under an F.O.B. destination contract, or acceptance by inspection, is complete upon delivery, placing venue in the buyer's locale.

Bad product or good papers? It doesn't matter. Fine print makes thin deals, no deals or unbelievable deals. I know I am getting older when I ask clients to provide a large blow-up of terms which appear on the reverse side of their invoices or purchase orders. This print is very tiny. They always use thin paper. Such print might pass muster under the rules of contractual unconscionability, but it's tough to read. Anyway, who drafted this stuff? Law schools need to teach bonehead English to attorneys.

Using the artifice of tiny print on thin paper, commercial purchasers on purchase orders invoke cancellation clauses for convenience. They usually read as follows:

> Purchaser reserves the right to cancel this purchase order any time up to final acceptance of product, and notice thereof posted first class mail. Purchaser shall only be liable for actual costs incurred in production, delivery, and manufacture, less any recovery based on resale to any other customer at competing prices, subject to an accounting thereof, upon presentment of charges within 10 days from date of notice of cancellation.

A little oppressive perhaps? Do I hear murmurs of adhesive contracts from the audience? These clauses, however, are standard issue on most manufacturers' purchase orders, particularly in the high tech field. These convenience clauses permit the buyer to void the contract when presented with competing products of a better price or quality, or bail out when the products, subject to the purchase order, technologically degrade in the marketplace. What's the value of a 286 computer when the next generation has arrived? Answer: Freight charges to return the product.

CodeGlue for no products; or, are you stuck paying for phantom products? CodeGlue is so potent that this stuff creates a deal for products never delivered, such as phantom products. Even the word toxic describes CodeGlue, if inhaled. Watch this scenario. Seller ships product to buyer with a packing slip, which states:

> All shortages in quantity, quality, number or type must be reported within 48 hours

Many retailers, facing a highly competitive market, guarantee total customer satisfaction or "your money back." In fact, large department stores pride themselves on customer returns.

> from date of receipt; failure to provide notice waives any claim. Notice must be forwarded to shipping department, Attn....: Manager. All other notices are void.

The purpose of this notice is to shoulder the buyer with the responsibility to detect a "short shipment," or more precisely, pilferage by the driver, shipping dock personnel or other thieves along the way.

What happens if the product is short shipped, and the buyer fails to provide notice? The case law favors the seller (read U.C.C. Section 2607(3)(a) as a sword to oppress buyer to notify seller), not the buyer, in forcing the buyer to respond. Given Murphy's Law and receiving departments, unfamiliar with the draconian nature of notice, buyer may fail to communicate short shipments to the seller and may face liability for nonexistent goods. CodeGlue, so desirous of confirming the deal, seals the deal for nonexistent goods in the absence of notice of non-existent goods. It is uncertain (or so we think) that commercial vendors might intentionally send out short shipments to determine whether customers will object in time (or at all).

The Code drafters aren't suggesting that commercial vendors need an E.P.A. permit before they use CodeGlue, but some fine print contracts, which sport abusive notice provisions, spew off toxic notice fumes to asphyxiate any drowsy commercial participant.

CodeGlue thinners, reducers and acetates; or, how to unwind the deal and make the Code drafter nauseous. CodeGlue means that a seller is obligated to ship the goods (hopefully in conformity with the "contract") and likewise that the buyer is obligated to pay for the goods. What about retail customers of the buyer who bought the product on impulse and want to return the item? How about products returned by the buyer's customers based on personal customer dissatisfaction?

Many retailers, facing a highly competitive market, guarantee total customer satisfaction or "your money back." In fact large department stores pride themselves on customer returns. "It's okay, we'll accept the return, no questions asked, no receipt required."

What does, or can, the retailer do with all these returns, other than hold an annual sidewalk sale? Don't pity the retailer; their profit margin more than allows for any losses sustained by price mark downs at annual sidewalk sales.

Buyer's remorse might take a darker turn when the buyer recognizes that the product died in the marketplace, given the market or technological changes. Clearly laptop computer retailers, along with the entire P.C. market, wither in agony in view of each new product which embodies additional features, such as expanded memory, C.D. drives, color screens, built in modems, etc. Personal stereo equipment, with cassette players, have the same value as a vinyl record player these days. Color televisions which are not cable (or perhaps Internet) capable plummet in value. Retailers, burdened with inventory, sinking in value by the day, will seek any recourse to bail out of a bad product.

Catalog dealers manipulate "or returns" to the highest art. Claiming that the vendors agreed to accept product returns by dissatisfied consumers, dealers truck back massive customer returns. Given the market position of the catalog dealer, the vendor is either stuck or out. Smarter catalog dealers use their right of return to bounce back large quantities of unsold or stale, dated merchandise and clear out the warehouse. Clever catalog companies even excessively order products monthly by about 25 percent over average consumption rates and return continuous and prodigious quantities of product each month. If the product, as ordered and shipped from the vendor but returned by the catalog dealer, exceeds the continuing month's shipment, the catalog dealer never pays the bills. Sound like free goods? Not quite, because the goods as returned are credited against current invoice, but returns always exceed the monthly balance due.

A sale under the Commercial Code is final. No returns, no refunds. All sales are final. If the buyer does not pay on time, sue. (U.C.C. Section 2709(1)).

To prevent any "easy" returns, U.C.C. Section 2326(4) sets its own statute of frauds requirement as follows:

> Any "or return" term of a contract for sale is to be treated as a separate contract for sale, within the statute of fraud section of this division (Section 2201) and as contradicting the sale aspect of the contract within the provisions of this division on parol or extrinsic evidence. (Section 2202.)

Section 2326(4) imbues a separate statute of frauds requirement, mandating a requirement meeting the basic requirements of Section 2201(1). No surprise herein. Code drafters in the next phrase deliver a dire warning to buyers who wish to reduce CodeGlue and unwind an improvident transaction. Section 2326(4) specifically uses the following dire language: "and as contradicting the sale aspect of the contract within the provisions of this division on parol or extrinsic evidence. (Section 2202)." This language specifically informs the buyer that a "return provision" is a contradiction to the "sale aspect" of the contract and constitutes "parol or extrinsic evidence." By labeling the "or return" with the moniker of "parol or extrinsic evidence" immediately excludes the return from the original contract, subject only to two possible exceptions: (1) by course of dealings or usage of trade or course of performance; and (2) by evidence of consistent additional terms unless the court finds that the documents are a complete and exclusive statement of the agreement.

Key to this analysis are the documents. Most transactions usually commence with a purchase order, sometimes followed by a sales confirmation, and are inevitably concluded by invoices and final statements. In fact, in most cases the total document amounts to an invoice listing the names, products, amounts, interest rate, F.O.B. terms and maybe place of payment (i.e., remit to P.O. Box, etc.). Better drafted invoices contain detailed terms and conditions on the reverse side, such as limited warranties, attorney's fees, notice of defects and venue provisions. Given a generic invoice containing standard commercial terms (and omitting any right of return), the court uniformly excludes any right of return. The invoice is the final document.

Tough section this U.C.C. Section 2326(4). Some courts are downright hostile to the "or return" provision of the contract. Stated most succinctly, the court in *Consolidated Foods Corporation v. Roland Foods etc.*[10] blasts away at the "or return" provision as follows:

> The Uniform Commercial Code is unequivocal in its requirement that a "sale or return" agreement be evidenced in writing. It is the stated opinion of the Code's authors that "an 'or return' provision is so definitely at odds with any ordinary contract for sale of goods that where written agreements are involved, it must be contained in a written memorandum," and "the 'or return' aspect of a sales contract must be treated as a separate contract under the Statute of Frauds section and as contradicting the sale insofar as questions of parol or extrinsic evidence are concerned." (Comment 3 to Section 2-326.)
>
> Roland Foods, however, attempts to skirt the above statute of frauds requirement by raising the issue of trade custom and partial performance. As to trade custom, the court believes that even if the affidavit is accurate as to the common practice of food wholesalers selling their goods upon the understanding that the purchasing retailer may return the goods if he cannot resell them, such practices would not obviate the necessity for written evidence of a particular "or return" agreement. Bender's *Uniform Commercial Code*, Vol. 6B, at page 2-417, comments on the applicability of Section 2-326 in the following manner:
>
> > Although the statute of frauds and the parol evidence rule have generally been relaxed in the Code to conform with general commercial practice, the rules governing a "sale or return" are strict....
> >
> > Subsection (4) of Section 2-326 is designed to protect the seller from the buyer's fraudulent insistence on a right to return goods purchased under an ordinary contract of sale....
> >
> > Thus, when a sale is within the statute of frauds, an "or return" term will not be enforced unless it is evidenced by a signed writing, even though there is a writing sufficient to satisfy the statute in other respects or even though the contract has been taken out of the statute by full performance except for the "or return" term. And when... a writing evidences no more than an ordinary sale, parol evidence that the transaction is a "sale or return" will be excluded as contradicting the ordinary sale term.
>
> Thus, Roland Foods erroneously places its reliance upon Section 2-208(2) of the U.C.C., which provides:
>
> > The express terms of the agreement and any such course of performance, as well as any course of dealings and usage of trade, shall be construed whenever reasonable as consistent with each...
> >
> > A "sale or return" agreement is specifically considered as inconsistent with the ordinary contract of sale and it is apparent that the liberal features of Section 2-208(2) do not obviate the strict requirement that a "sale or return" agreement be evidenced by a written memorandum. (Pages 249 to 250.)

Bender hates the purported "or return," and demands strict compliance with the statute of frauds for good reason. From the stern face of Section 2326(4), Code drafters despise product returns and force buyers to assume the market forces of risk for unsold merchandise whose losses are factored into profit margins.

The Minnesota Court analyzed the facts in *Bib Audio Products v. Herold Marketing Associates, Inc.*,[11] in which the court held an alleged agreement for "stock rotations" would be excluded under the Parol Evidence Rule found in U.C.C. Section 2202. In that case, the court found that the sales were final, based on the invoices themselves and the fact that the parties did not incorporate the "stock rotation agreement." The Minnesota Court also cited with approval a New York case, *Matthew Bender & Co., Inc. v. Jaiswal, etc.*,[12] in which the court excluded an alleged right of return based on the satisfaction that the final invoice did not contain such a term.

Better document; or, the parol evidence rule is alive and well scenario. What about the parol evidence rule? Afflicted with Parkinson's disease? Nope. The typical fact pattern is the salesperson's classic pitch: "Don't worry about the product; if you can't move it, we'll buy it back." This is the best incentive to close the deal for high risk merchandise. Given the burden borne by the seller in accepting the return of shop worn, dated, tired, dog-eared or obsolete product, or the advantage of the buyer in exonerating itself of inept merchandising, the "or return" provision ("we'll buy it back") contradicts the CodeGlue concept and attacks the finality of the transaction. To carry the theme of this article to its ultimate conclusion, the "or return" claim asserted by any buyer is the super-solvent to liquefy the CodeGlue that binds the buyer to the seller. The right of return literally dissolves the obligation to pay for goods as accepted under U.C.C. Section 2607(1) ("The buyer must pay at the contract rate for any goods accepted."). The antidote to CodeGlue thinners, reducing agents, solvents and liquefiers is the parol evidence rule.

According to *Wolpert*, the measure of damages, in the absence of Section 2706 compliance, is the difference between the contract price and the market price at the time and place of tender.

The Minnesota courts have fairly explicated the parol evidence rule in this context. In the fairly recent case of *Apple Valley Red E Mix Inc v. Mills Winfield Engineering Sales Inc.*,[13] the appellate court reversed the trial court in that the court admitted parol evidence on the description of the equipment along with warranties. The appellate court in analyzing U.C.C. Section 2202 laid out the Minnesota Parol Evidence Rule as follows:

> (1) the agreement must in form be a collateral one; (2) it must not contradict express or implied provisions of the written contract; (3) it must be one that parties would not ordinarily expect to be embodied in the writing ...[o]r, again, it must not be so clearly connected with the principal transaction as to be part and parcel of it. Citing *Taylor v. Moore*, 195 Minn. 448, 453, 263 N.W. 537, 539 (1935).

In this Minnesota case, the court excluded a claimed warranty, among other grounds, because the issue of warranty would normally have been included in the contract. Inferentially, the court held that the issue of a warranty was "part" and "parcel" of the transaction. The better paraphrasing is whether the right of return would not be connected with the principal transaction under the parol rule. Needless to say, permitting the right to revoke the entire transaction and bounce back product, subject to entire right of refund, contradicts the entire transaction. Under the *Taylor v. Moore* test of "it must not be so clearly connected with the principal transaction as to be part and parcel of it," the answer is found in the fact that the right by buyers to return product for a full refund (without cause) would be an *essential covenant* to the relationship between any buyer and seller.

Furthermore, the "or return" provisions give the buyer an option at the buyer's unabridged discretion to return product, imbuing in the contract a provision that performance (i.e., the obligation to pay) is dependent upon the personal satisfaction of the parties. In *Travelers Indemnity Company v. Hayes Contractors*,[14] the court stated at page 260 the following:

> In construing contracts, the law does not presume that parties have intended to create a condition precedent to a contractual duty, particularly a condition requiring the satisfaction or consent of a party. (3A *Corbin on Contracts*, Section 635 (1960)). *See also Steller v. Thomas*, 232 Minn. 275, 283, 45 N.W. 2d 537, 542, note 8 (1950). (If doubtful, contract should be construed as requiring satisfaction of reasonable person rather than of the party to the contract.)

The answer is found in *Steller v. Thomas*[15] which stated the following in a footnote:

> Restatement, Contracts, Section 265, provides:
>
> A promise is terms conditional on the promisor's satisfaction with an agreed exchange giving rise to *no duty of immediate performance until such satisfaction*; but where it is doubtful whether words mean that a promise is conditional on the promisor's personal satisfaction with an agreed exchange, or on the sufficiency of that exchange to satisfy a reasonable man in the promisor's position, the latter interpretation is adopted. (Italics supplied.) *See also*, 3 Williston, *Contracts*, Rev. Ed. Section 675A.

Contracts, Revised Edition, at Section 675A, citing in a footnote for a source, *Luther v. Standard Conveyor Co.*,[16] is even more unequivocal on this subject as follows:

> As to the third class of cases: While it is quite true that the parties may make personal satisfaction a specific condition to the obligation to pay even in cases of mechanical installation, the courts are reluctant to interpret contracts in such a manner, and the great majority of the cases hold that an objective standard will be employed in the absence of an absolute unequivocal requirement of subjective satisfaction with no alternative, as will be seen shortly.

In citing *Williston*, the Minnesota courts ruled that if a contract conditions performance upon the personal satisfaction of the other party (much less a third party consumer), such a condition of personal satisfaction must appear "absolute[ly] unequivocal[ly]."

Section 2326(4) is just crazy about the parol[e] evidence rule. A fairly typical case, *Recreatives Inc v. Travel-On Motorcyles Co. Inc.*[17] precluded the "or return" oral promise in the face of typical invoice documentation, construed as the final embodiment of the deal. "This tendered oral testimony [return of product, substituting for payment], if admitted, would change the basis meaning of this contract and

produce an agreement wholly different…[from the] writing."

Course of performance, course of dealings, usage of trade and stuff which makes this area of law so unpredictable. Or, why do you keeping bring up bad memories? What about buyers who regularly return products for credit to the seller who gladly accepts the returns for credit? One fine day, the seller refuses and demands full payment for the outstanding invoices. Can the buyer absolve itself of liability with tender of returned goods? The initial question is whether Section 2208 conduct (course of performance, course of dealings, etc.) would substitute for the written agreement required under Section 2326(4). Would the court find sufficient prior returns for credit an equivalent to the statute of frauds and an exception to the parol evidence rule for an "or return" provision of the contract? By its qualification, this question ignores whether Section 2208 might augment a standard sales agreement, or add or subtract terms, or whether Section 2208 might add a new, different or even slightly inconsistent gloss to terms in a written contract. The inquiry focuses on whether Section 2208 overcomes the hostile Code attitude toward the "or return" by eviscerating both the statute of frauds and parol evidence rule.

The answer is found in antipathy (unbelievable hostility) toward "or return" which by force of Section 2326(4) demands both a written and specific exclusive to the pervasive effect of the parol evidence rule. *Bib Audio Products v. Herold Marketing Associates, Inc.*, expresses the Code allergy to "or return" in the statement: "…the alleged agreement may not be admitted under usage of trade exception to the parol evidence rule. Usage of trade is only allowed to explain or supplement the written terms; it may not contradict such terms." The written terms were, again, standard commercial documents, with specific disclaimers against returns.

Bungling the avenues of escape; or, read the pedestrian crossing signals for once. Assuming the buyer emerges into the role of the seller under Section 2326(4) and overcomes the statute of frauds and parol evidence rule, the buyer faces the next hurdle: the hostile seller. It is fair to state that the seller's business is selling, not buying products. "What!" says the seller to counsel. "You mean I have to accept the return of the goods and, worse, pay for them? How can I get out of it?" The answer is found in the difference between the clever and smart.

Clever sellers, to secure payment of their potential accounts receivable, write into their contracts, credit applications, statements and invoices a security interest, purchase money or otherwise. The language reads: "Buyer grants to seller a security interest in product provided by seller to buyer to secure its purchase price and any other indebtedness." Standard issue language. Buyer, facing unsold product, tells seller to accept product returns, and even offers to pay the seller a commission, say, about 35 percent on the dollar, generous by any standards. Suspecting a coup in a double sale of the same product, the seller happily complies, dumps the product at 40 percent on the dollar and looks to the original buyer for the difference.

Is the buyer stuck? Depends on the state, but probably not. If the state under U.C.C. Section 9504 requires notice of sale as a condition precedent to any recovery, the debt is discharged completely. Other states impose the burden of proof of reasonableness upon the seller; some states presume that the sales price equals the debt, etc. In any event, a seller who fails to provide notice has an uphill battle.

What about the buyer who wishes to return product to the seller, balking at the prospect of both receipt of unwanted (and probably stale, dated and shopworn) product and payment of a refund? The seller balks and refuses.

What are the remedies for the aggrieved buyer, now in the posture of the aggrieved seller whose "pseudo buyer" has refused to take delivery. The starting place is U.C.C. Section 2706(3), which provides as follows:

> (3) Where the resale is at private sale the seller must give the buyer reasonable notification of the intention to resell.

One possible point is *Wolpert v. Foster.*[18] In that case, the plaintiff, as vendor, brought an action on the price under Minn. Stat. 336.2.709(1)(b), which provides as follows:

> (1). When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section the price…
>
> (b). ….of goods identified to the contract if the seller is unable after reasonable efforts to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

In *Wolpert*, plaintiff only sought damages for goods which plaintiff could not resell. ("It should be noted that plaintiff is not seeking damages with respect to that part of the inventory which has been resold."[19] Therefore no claim would arise under U.C.C. Section 2709(1) as alleged. The *Wolpert* court stated the following:

> An action for the price arises in this situation only when reasonable resale efforts do not dispose of the goods. It is a remedy distinct from an action for damages under Section 336.2-706 or Section 336.2-708, and thus we hesitate to incorporate the requirements of Section 336.2-706 with respect to the goods that have been sold as a prerequisite for maintaining an action under Section 336.2-709 for the price of the remaining goods. (21 U.C.C. Rep. Serv. 521.)

According to *Wolpert*, the measure of damages, in the absence of Section 2706 compliance, is the difference between the contract price and market price at the time and place of tender. If the seller complies with Section 2706, the measure is the difference between the contract price and resale price.

Wolpert gives the seller two remedies: Do it yourself, to heck with the buyer and prove your loss through a marketplace analysis; or do it correctly and measure your damages as the difference between the contract and re-sale price.

Is *Wolpert* correctly decided? Probably in Minnesota, but not in California. Under the doctrine of strict notice in California, typically found in such cases as *Atlas Thrift v. Horan*,[20] the court would rule that the omission of notice vitiates any right of recovery.

What about the seller, seeking to dispose of the goods rejected by the buyer? Instead of providing notice of the breach of the agreement to accept the return, the buyer sells the product at a distress sale. Is the original seller (now putative buyer) off the hook and scot free? Maybe. The seller as breaching party, and obligated to accept for a refund its own product, is exonerated based on U.C.C. Section 2607(3)(a). (Notice of breach, a precondition to suit.)

Assuming the buyer has the writing in hand obligating the seller to accept the goods and refund the purchase price (for shopworn and tired goods), but the seller defaults by declining to give refunds or accept the goods in return, what is the real measure of damages in a sale? The buyer (qua putative) bought the product with an eye towards resale at a great profit, hopefully. If the seller declines, wouldn't the buyer be left in exactly the same position as at the inception of the sale process? Absent freaks of nature (poison in the aspirin bottle, bugs in food), the product would not substantially change, and presuming the buyer is a skilled merchant, the sales price would be no greater nor less in the absence of a breach. It is inconceivable, at best, to perceive the expert merchant dumping at a distressed price merchandise acquired presumptively at a premium, which would have sold at a profit.

The argument is therefore simple. Absent intervening circumstances, the sales price generated by the buyer would be the same, either selling the product for its account or the account of the seller. It would be inconceivable that the buyer would have license to dump the product at distress prices simply because the seller intended to indemnify the buyer for the losses. Certainly the "or return" portion of the contract does not authorize the disgruntled buyer, stuck with the seller's product, to create a loss.

Does CodeGlue work in reverse in making deals out of unwanted returns? Remember that dreary discussion about contracts by default? Buyer returns products to seller, who receives the nonconforming goods but fails to provide "notice of rejection," or "notice of breach," or worse, consumes the stuff by use or resale. Is the seller holding distressed goods stuck? Yes, according to U.C.C. Sections 2201(3)(a) and (c), 2606(1), 2607(3)(a), 2607(1), etc.

This same maxim applies to the buyer, proffering a right of return, who returns the goods to the seller, as a putative buyer. What happens? Answer: CodeGlue. Under a return contract, the seller stands in the shoes of the buyer and bears the same Code duties of notice and rejection in managing the product. Experience indicates that most sellers, in responding to product returns, grossly mishandle the product, fail to reject or provide notice and thereby forfeit viable defenses. Upon this forfeit, the buyer, as putative seller, claims that the returned goods at their invoice price are a complete credit against the outstanding charges and extinguish the debt. Worse, an excessive return of product at the invoice price creates a "credit balance" on the original seller's books and flips over the debtor creditor relationship from money owed by the original buyer to the seller, to money owed for a credit balance by the original seller (now putative buyer) to the original buyer (now putative seller). Remember alchemy? (Not chemistry.) This process of product returns, bungled by the original seller, turns shopworn products into money. We warned you about this in a prior article. (*See* Cook, "Road Map Through Fraud," *Commercial Law Bulletin*, Vol. 10 No. 6, pp. 11-20.)

What about the buyer as putative seller (remember "original buyer"), who, instead of returning the goods, sells the stuff for salvage value but fails to provide notice to the original seller, as putative buyer? Without notice, and depending upon the jurisdiction, the original buyer may have immolated its claim as a product return and refund. Some courts reach this result on these theories: (1) that the resale price equaled the contract damages unless proven otherwise, or (2) that the absence of notice destroyed any deficiency, or (3) the buyer, as putative seller, is left with damages between the market price and contract damages; or (4) presumptively the resale price equaled the contract damages, unless proven otherwise, or (5) any, all or some combination of the above.

When in doubt, read the instructions which accompany the product. Remember when we started this article with the metaphor about Super Glue and that a sloppy person might inadvertently glue two fingers together or glue the cap to a surface? Product returns follow this metaphor. Products, returned by disgruntled buyers under a putative right of return, might stick to the seller who fails to reject the stuff. Watch for the returns; they are covered with a bonding agent called CodeGlue.

CodeGlue is very sticky stuff. The careful seller and crafty buyer apply CodeGlue to fabricate deals by sticking together disparate units which bond. Sometimes the inattentive seller (or buyer) fails to recognize the adhesive strength of this product and finds himself bound (and bonded) to a deal in an unexpected and surprising manner. Sloppy sellers or buyers, who mishandle product returns, glue themselves to their product returns if they fail to quickly reject product and provide ample notice. The moral of the tale: Read the instructions on the CodeGlue tube. These instructions are called, you guessed it, the Uniform Commercial Code. □

1. 8 Ohio App. 3d 223,456 N.E. 2d 1295, 37 U.C.C. Rep. Serv. 687 (Ohio Court of Appeals 1982).
2. 777 F. Supp. 1236 16 U.C.C. Rep. Serv. 2d 1013 (E.D. Pa. 1991).
3. 630 F. Supp. 1578, 1 U.C.C. Rep. Serv. 2d 36 (D. Ill. 1986).
4. 606 F.2d 182, 186, 27 U.C.C. Rep. Serv. 345 (Seventh Cir. 1979).
5. F.2d, 22 U.C.C. Rep. Serv. 2d 660 at page 664 (Eighth Circuit 1994).
6. *W. H. Barber Construction, Inc. v. McNamara-Vivant Contracting Co., Inc.*, 293 N.W. 2d 351, 355 (27 U.C.C. Rep. Serv. 899 (Minn. 1979)); *see also, Day v. Amax, Inc.* 701 F.2d 1258, 1263 (35 U.C.C. Rep. Serv. 1416).
7. 202 C.A. 2d 184, 20 C.R. 735.
8. 203 C.A. 3d 432, 249 C.R. 872 (1988).
9. For an excellent survey of equitable estoppel, *see* Bellomy, *Estoppel and Section 2201 of the Uniform Commercial Code*, COMM. LAW J., Vol. 100, No. 4, pp. 536-539 (Winter 1995).
10. 13 U.C.C. Rep. Serv. 245 (District of Columbia, Superior Court 1973).
11. 517 N.W. 2d 68, 24 U.C.C. Rep. Serv. 2d 455 (1994).
12. 35 U.C.C. Rep. Serv. 1414 (New York Supreme Court, Appellate Division 1983).
13. 436 N.W. 2d 121, 8 U.C.C. Rep. Serv. 2d at 21 (Minn. Court of Appeals 1989).
14. 389 N.W. 2d 257 (Court of Appeals 1986).
15. 232 Minn. 275, 283, 45 N.W. 2d 537, 542, n. 8 (1950).
16. 252 Minn. 135, 889 N.W. 2d (1979).
17. 29 N.C. App...727, 225 S.E. 2d 637, 19 U.C.C. Rep. Serv. 1076 (1976).
18. 254 N.W. 2d 348, 21 U.C.C. Rep. Serv. 516 (Minn. Supreme Court 1977).
19. 21 U.C.C. Rep. Serv. at p. 520.
20. 27 C.A. 3d 999, 104 C.R. 315, 11 U.C.C. Rep. Serv. 417 (1972).