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The Experience of Article 2 of the Uniform Commercial Code in West Virginia

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## THE EXPERIENCE OF ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE IN WEST VIRGINIA

**Vincent P. Cardi***

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I. INTRODUCTION

West Virginia adopted the Uniform Commercial Code (hereinafter also referred to as "UCC" or "Code") in 1963, effective after

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1. The Uniform Commercial Code was drafted as a joint effort by the National Conference
July 1, 1964, following eighteen other states which had previously done so. The wording of the West Virginia UCC as originally passed was an almost verbatim reproduction of the 1962 version of the Official Text. The article and section headings of the West Virginia statute parallel those of the Official Text. For example, section 2-207 of the Official Text is identical to section 46-2-207 of the West Virginia Code. The Official Comments, appearing after each Code section in almost all printings of the Uniform Commercial Code, were written by the drafters of the Code to aid in the interpretation of Commissioners on Uniform State Laws and the American Law Institute. It grew out of a dissatisfaction with the variety and antiquity of state laws dealing with commercial problems, and as a reaction to a 1938 proposal by the New York Merchants' Association for a federal sales act to govern all interstate sales transactions. Funded by a $400,000 grant from the Falk Foundation of Pittsburgh, Pennsylvania, the two groups formed an editorial board and drafted a proposed code to govern commerce. This draft, and succeeding drafts, were circulated to, and criticized by, various legal organizations. In 1952, the first Official Text was finished and published with official explanatory comments. Circulated to state legislatures, it was adopted by Pennsylvania in 1954. The New York state legislature appointed a large body to study the Code, and after public hearings and debates, this body issued a report in 1956, entitled "Report of the Law Revision Commission of New York on the Uniform Commercial Code" (1956), urging the rejection of the Code. As a result, the editorial board redrafted the Code with the New York commission's criticisms in mind, and published a new version in 1957, and slightly modified versions in 1958 and 1962. By 1968, all of the states had adopted the Code with minor revisions (except Louisiana, which adopted some Articles of the Code). See Braucher, The Legislative History of the Uniform Commercial Code, 58 COLUM. L. REV. 798 (1958); Schnader, A Short History of the Preparation and Enactment of the Uniform Commercial Code, 22 U. MIAMI L. REV. 1 (1967).


3. There have been several amendments to the West Virginia UCC over the years. Most of these have been initiated as a result of changes made in the Official Text of the Code by the Permanent Editorial Board for the Uniform Commercial Code. The Board annually reviews developing case law and state legislative amendments to the various state versions of the Code. Based upon these and other considerations, the Editorial Board periodically changes the content of the Official Text, and urges states to follow suit. Most of these changes have been small. For example, sales of timber to be cut by the buyer were originally excluded from Article 2 under section 2-107, on the theory they involved an interest in realty. Upon realizing that commercial practice and several important timbering states treated such transactions as sales of personal property, the Editorial Board changed the Official Text and recommended states do the same. West Virginia amended its Code accordingly in 1974. See W. VA. CODE § 46-2-107 (1966 & Supp. 1990). Some changes have been major revisions of an entire article. This occurred in 1972 with Article 9, and West Virginia adopted the revisions almost in their entirety in 1974. In its most recent major work, the Editorial Board drafted a new article, Article 2A, to deal with leases of personal property. Only eight states, including California and Florida but not including West Virginia, had enacted Article 2A into law by 1990 as part of their UCC.


5. The "46" designates the West Virginia Code chapter in which West Virginia's UCC is found. References to the UCC sections in this article are intended to refer to both the West Virginia statute and its virtually identical Official Text counterpart and will usually be made by referring to the Official Text citation, dropping the Chapter 46 designation.
and construction of the Code. The Comments generally have not been officially adopted by state legislatures, and, since they are not products of legislative work, the Comments are not entitled to as much weight as is generally given to legislative history. As one might guess, courts frequently turn to them when a question arises. The West Virginia Supreme Court of Appeals gave the Comments a strong endorsement as persuasive authority when it stated, "the official commentary to the UCC is 'recognized by courts and commentators as an official source document for interpretation of the Code provisions . . . .' We must assume that the legislature was aware of this commentary when it adopted . . . [the Code]." The court then raised the Comments to a new level of authority when it stated, "The reason given for applying the UCC statute of limitations is contained in the official commentary to the UCC which we adopted as a part of our Code." No authority was cited for such a fundamentally important statement, and the editor's notes in the West Virginia Code do not suggest that the legislature adopted the Comments as legislation.

Article 2 of the UCC covers transactions in goods. Article 1 contains general rules which apply to transactions in goods, as well as to the major subdivisions of commercial law covered by the remaining Articles of the Code. In West Virginia, Article 2 replaces the common law relating to sales transactions, as West Virginia never enacted the Uniform Sales Act.

10. Id. (emphasis added).
11. See 13 W. VA. CODE 1-2 editor's note (1966 & Supp. 1990). The editors of this annotated code state that the editor's notes contain special information, including important or unusual features of a law that are not apparent from the law's text, or special circumstances surrounding passage of the law. 1 W. VA. CODE XV (1982) ("Editor's Notes").
12. Articles 3, 4, and 4A cover commercial paper and transfers of funds; Article 5 covers letters of credit; Article 6 covers bulk transfers; Article 7 covers documents of title; Article 8 covers investment securities, and Article 9 covers secured transactions.
Article 2 is intended to replace most of the traditional rules of contract law as to sales of goods, but many pre-existing contract rules have no Article 2 counterpart and often continue to apply. Section 1-103 so provides when it states "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." Duties set out in Code sections can be further supplemented by usage of trade, course of dealing, and course of performance.

The scope of this writing covers almost all West Virginia cases which cite Article 2, including cases covered by Article 2, cases not covered by Article 2 but which require application or consideration of Article 2 rules to reach that conclusion, and cases which use Article 2 for analogy or support for an existing or developing common-law policy. Also mentioned are cases in which the court should have applied Article 2, but failed to do so. A significant number of Article 2 rules or issues are addressed by the West Virginia cases without citation to the appropriate Code section or Code language. These rules and issues are discussed in this article. Specific Code sections and issues which are not addressed by post-1964 West Virginia cases are generally not addressed in this article.

There have been approximately twenty-five West Virginia cases citing Article 2 and either addressing issues covered by Article 2 or purporting to address them: Approximately three additional cases address Article 2 issues without citing the Code, and approximately nine cases do not address Article 2 issues, but cite the UCC as an example of policy or law making. The purpose of this article is to present a brief analytical summary of these cases, and to identify, and at times critically discuss, the courts' statements concerning issues covered by Article 2 of the Uniform Commercial Code.

14. Id. § 46-1-103.
15. Id. § 46-1-205.
16. Id. § 46-2-208.
17. These figures include cases decided by federal courts sitting in West Virginia.
II. SCOPE AND COVERAGE OF ARTICLE TWO

A. Generally

The scope of the transactions covered by Article 2 is set out in sections 2-102, 2-105, and 2-107. Unless the context otherwise requires, Article 2 applies to transactions in goods.18 "Transactions" is not defined by the Code. It does not apply to any transaction intended to operate only as a security interest.19 "Goods" means all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale including the unborn young of animals,20 growing crops and timber,21 and minerals including oil and gas if they are to be severed by the seller.22 In West Virginia, Article 2 has been applied to the sale of a cheese-burger,23 bricks,24 house siding,25 a front-end loader,26 fire sprinklers,27 cars,28 trucks,29 mining machinery,30 coal,31 and oil and gas.32 It has also been applied to a dealership agreement combined with a lease of realty,33 to the collection of the price for the sale of stone,34 to commercial sellers and nonmerchant sellers,35 to the determination

19. Id.
20. Id. § 46-2-105.
21. Id. § 46-2-107(2).
of whether a taxable sale occurred, and to the determination of when the risk of loss passes when the parties failed to insure the goods sold.

West Virginia courts have found that the Code is not applicable to the sale of blood when it was accompanied by professional services in a blood transfusion, to the sale of cement slabs to be installed in the building by the seller, or to implied indemnity in a product liability setting. However, the Code has been used by analogy in finding implied indemnity and in resolving product-liability actions. The court has used the Code for analogy in examining the fairness of a prenuptial agreement, to determine the validity of an arbitration clause in a contract, to support finding indemnity between tort feasors, to show that a choice of forum clause is not invalid, to determine conscionability of an oil and gas lease and of a coal lease, and in determining the fairness and conscionability of an escrow contract to transfer securities on the death of a promisee.

Among the first steps in analyzing a legal problem is to determine which body of laws applies to that problem. To determine whether the problem falls within the scope of Article 2, the lawyer must examine sections 2-102 and 2-105, and sometimes 2-107. In most cases the determination is clear and easy. A contract involving the sale of an automobile is easily seen as a "transaction in goods" under 2-102, and the automobile, being movable, is clearly goods

38. Foster v. Memorial Hospital Ass'n of Charleston, 159 W. Va. 147, 219 S.E.2d 916 (1975).
under 2-105. The conclusion is clear, Article 2 applies to the substantive contract problems arising out of the transaction.

There are transactions or problems where the applicability of Article 2 is not clear. For example, the Code leaves open the question of whether Article 2 applies to leases of personal property. Section 2-102 states that Article 2 applies to "transactions in goods," but nowhere does Article 2 define "transactions." A court will have to decide whether it will apply Article 2 as the appropriate law, whether it will apply the substance of Article 2 by analogy as the applicable common-law rule, ignore Article 2 and apply the traditional non-Code contract law of the jurisdiction, or use Article 2 in some other way. Some courts, viewing leases as very similar to sales, routinely apply Article 2 to warranty questions arising in a lease arrangement. A related question is whether the transaction under examination is really a lease. The transaction, while dressed up like a lease, may really be intended by the parties as a permanent transfer of the property from the transferor to the transferee, wherein the transferor keeps the title for security purposes until the end of the lease, at which time the transferee will be able to keep the goods either for no further payment or for a nominal amount. The Code gives some guidance to determining whether the transaction is a lease when it defines "security interests." If the court determines that the transaction is not a true lease, but is a permanent transfer made with the intent to retain a security interest, the transaction is treated as a sale of goods where the substance of the sale transaction is covered by Article 2, and the security issues are covered by Article 9.

In *Leasewell Ltd. v. Jake Shelton Ford Inc.*, the federal district court was called upon to decide whether a contractual forum se-

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50. Although the Permanent Editorial Board of the UCC has drafted a new article, Article 2A, to address leases of personal property, it has not been adopted by most states.
lection clause was valid. The court found that in order to determine the validity of this clause, it first had to apply West Virginia’s conflict-of-laws rules to determine which state’s laws applied. The UCC has its own conflicts-of-laws rule which applies to transactions in goods. *Leasewell* involved a contract under which a New York business agreed to lease auto repair equipment to a West Virginia auto dealer. The facts in the opinion do not reveal whether the transaction was a true lease, or whether it was a permanent transfer dressed up like a lease. For a true lease, West Virginia common-law conflicts rules could apply. But if it was a permanent transfer, then it was a “transaction in goods” covered by Article 2, and the Code conflicts rule of 1-105 would likely apply. The court neither raised the question nor examined the facts to determine the true nature of the transaction. Instead, it routinely applied the West Virginia common-law-conflicts rule. The outcome of the case was fair, and would likely have been the same whether it applied the common-law-conflicts rule or the Code conflicts rule, but a court’s loose methodology in approaching these legal questions greatly increases the chances for error, and teaches or reinforces bad habits among lawyers who look to court opinions to set the example for legal analysis.

Other situations which present the question of whether Article 2 applies include transactions in which the seller of goods also performs services for the buyer, transactions which involve the sale of property connected in some way with real estate, and transactions which result in personal injury or property damage which come under the description of product liability. These problems are addressed in more detail in the following pages.

It is important for the courts to carefully address the question of whether Article 2, or some other body of contract law, applies to the case before it. By carefully following the Code methodology in determining which body of law applies, a court is more likely to
choose the proper law and enable the parties and the attorneys who read its opinions to understand which law applies and why. In a number of West Virginia cases, it appeared that Article 2 did apply, at least at the time of the decision, but the courts failed to even mention the Code. For example, in McClung v. Ford Motor Company, the court decided a case involving injuries to a purchaser of a new car allegedly caused by design defects and breaches of warranties. In a detailed discussion of the alleged breach of warranties, the court never mentioned the Uniform Commercial Code, which of course, was the applicable law concerning warranties. In Whitington v. Eli Lilly and Company, a purchaser of birth control pills alleged an express warranty by the manufacturer and a breach thereof. The court devoted most of its opinion to a discussion of whether this warranty was created. The court made no mention of the Uniform Commercial Code, again the controlling law on the issue.

In other opinions, the court has cited the Uniform Commercial Code, and possibly even applied the Uniform Commercial Code, but did not make clear which body of law it was actually applying. In John Lodge Distributing Co. v. Texaco Inc., the court examined the validity of a termination clause in an oil distributorship contract. Among the issues addressed was an allegation that the termination clause was unconscionable. In deciding that it might be unconscionable and remanding the case, the court did not question whether the contract was covered by the Code, making the unconscionability question covered by section 2-302, but merely stated in its discussion of unconscionability "see also W. VA. CODE section 46-2-302 dealing with sale of goods." One result of this failure is that neither the attorneys nor the circuit judge upon remand could have known whether the UCC applied to the issues at hand. Another result is that attorneys who read the opinion are left without guidance as to whether all similar transactions are covered by the law of Article 2 or by the general common law of contracts.

60. Id. at 610, 245 S.E.2d at 161.
B. Sales of Goods and Services

Most transactions in goods include at least some services, if nothing more than the service involved in making the contract, receiving the payment, and handing over the goods. Many contracts involve much more in the way of services. The sale of a home air conditioning unit might require the seller to install the unit into an already existing forced-air-heating system. A truck repair might involve $4,000 in new parts and $3,000 in labor. The issue of whether a contract involving both the transfer of goods and the rendition of services should be covered by the Code or by non-Code contract law has been addressed by numerous cases throughout the country. Courts have designed a number of approaches to determine whether Article 2 should be applied as controlling law for these transactions, including the following:

1. Determine if any goods are transferred in the transaction and if they are, apply Article 2 to all of the contract issues. This test is rarely if ever articulated, but can explain the result in some cases.
2. Determine if any services are involved in the transaction, and, if the services are substantial, do not apply Article 2 to any of the contract issues. This is also an unarticulated test.
3. Determine if that part of the transaction involving the problem before the court involves the goods aspects or the services aspects of the contract, and then apply the Code only to problems involving the goods aspects.
4. Determine whether the goods or the services aspects of the transaction predominated, and then apply the law appropriate to the dominant element to all of the issues in the case. This test, referred to variously as the "predominating purpose" or "predominating element" test, is clearly the most widely used test for determining whether to apply Article 2 to a transaction. In determining which
predominates, the courts can take into account a number of considerations, the most important usually being the allocation of the contract price between the goods aspects and the service aspects.

5. Determine the policy objectives of the particular Code section asserted as possibly covering the problem, and determine whether the facts supporting those policy considerations are present in the case before the court. This test, called the "policy approach" test by White and Summers, is recommended by them as the best general approach.\(^{64}\)

The West Virginia Supreme Court of Appeals has addressed hybrid sales-service transactions in four cases,\(^{65}\) and a hybrid sale of securities and services contract in a fifth case.\(^{66}\) Of the four West Virginia cases involving the hybrid sale of goods and services, the court cited the Article 2 scope provisions (sections 2-102 and 2-105) in only two cases. In the other two, the court did not carefully examine the issue of whether Article 2 or the common law of contracts should apply. The court merely proceeded to apply Article 2.

In the first case, Jones v. W. A. Weidebusch Plumbing & Heating Co.,\(^{67}\) the seller contracted to sell and install sprinkler heads in an old building housing a department store, and to remove the old sprinkler heads in the process. The seller subcontracted the work to a third party who supplied and installed the sprinkler heads, billing the seller for the price of the heads and the labor. The seller then billed the buyer. Three months after the sprinkler heads were installed, they released water without apparent cause, resulting in damage to the store. The West Virginia Supreme Court of Appeals, without citation to or discussion of Code sections 2-102 and 2-105, and without raising the question of what body of contract laws

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66. Quinn v. Beverages of West Virginia, Inc., 159 W. Va. 571, 224 S.E.2d 894 (1976). The sale of securities aspect of this case was covered by Article 8 of the Uniform Commercial Code. In a sixth case, the court addressed a contract under which a trucking company agreed to transport goods for a shipper (apparently a service contract), but which was treated by the trucking company on its books as a purchase and resale contract because of an unusual Maryland statute. Accordingly, the West Virginia Supreme Court treated the contract as sale of goods transaction for purposes of West Virginia sales tax. See H.O. Anderson, Inc., v. Rose, 352 S.E.2d 541 (W. Va. 1986).
should apply, moved directly into a discussion of the plaintiff's theory of the case relating to implied warranties of fitness and implied warranties of merchantability under the Uniform Commercial Code. The court’s decision to apply Article 2 to this case could be explained by the third test, in that the facts demonstrated circumstantially that the defects were in the sprinkler heads themselves (the goods), and not in the manner in which they were installed (the services). The court could have chosen to apply the fourth test, determining whether the goods or the services aspects of the transaction predominated, by referring to the relative charges made for the sprinkler heads and for the labor. This is the usual, but not the only factor used in determining which aspect of the transaction predominates. By not discussing why the Code should govern this mixed sale of goods and services transaction, the court left lawyers without the guidance they would find useful on this question.

*Ashland Oil Co. v. Donahue* involved two separate written contracts executed the same day between the Ashland Oil Co. and a service station dealer. The first contract provided for a lease of real estate. The second was a franchise agreement covering mainly the sale of petroleum products. The issue before the court was whether a clause in the second contract providing for disparate termination rights was enforceable against the dealer. The court determined that the two contracts, both part of the same overall commercial transaction, were to be treated as one contract, and, because petroleum products were involved, both contracts were covered by Article 2 of the UCC.

Not only was *Ashland* a hybrid sale of goods and services case, but it also included a lease of real estate. The court did not explain why it applied Article 2 to the transaction, but simply stated:

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68. *Id.* at 265, 201 S.E.2d at 253. For a discussion of the warranty issues in *Jones*, see infra discussion at note 319.

69. The water apparently came right from the sprinkler heads, and not from a joint. After replacement with a new sprinkler head of the same 165 degree specifications, no further problem occurred. *Id.*, at 264, 201 S.E.2d at 252.

70. 159 W. Va. 463, 223 S.E.2d 433 (1976). For a more detailed discussion of the facts of *Ashland Oil*, see infra text following note 222.

71. *Id.* at 473-74, 223 S.E.2d at 440.
Having determined in this case that the lease agreement and the dealer contract should be construed together and considered to be one transaction, it is clear that what is involved is a transaction in goods (petroleum products) which is governed by the Uniform Commercial Code-Sales. See W. Va. Code §§ 46-102 and 46-2-105.72

In reaching its determination the court might have used the first test, that is, decided that because some goods were involved in the transaction, Article 2 should apply. Then again, the court might have used the third test, that is, noticed that the problem arose not in the real estate lease contract, but in the termination clause in the dealership sale of goods contract (and found the services aspect of the dealership contract incidental). Or the court might have operated under the fourth test, the "predominating factor" test, assuming that the amount of money paid by the dealer was most likely much greater for the petroleum products than it was for the services accompanying the dealership or for the lease of the building and property. Without the court’s explanation, we are again left to guess. There is nothing particularly unfair about applying Article 2 to the issue involved,73 but the court should have explained why it did so, identified the test it found appropriate, and in the process discussed the provisions of sections 2-102 and 2-105 enacted by the legislature to control this determination.

A number of cases have addressed the issue of whether dealer contracts of the type involved in Ashland are covered by Article 2, and the results are mixed. Where the franchise agreement provided for the sale of goods under that agreement, and the sale was the dominant aspect of the agreement, the courts have had no trouble in finding that the transaction was covered by Article 2.74

Foster v. Charleston Memorial Hospital Association of Charleston75 was the first of two West Virginia opinions which ac-

72. Id.
73. For a criticism of the court’s determination that the clause was unconscionable, and of the court’s methodology in reaching this conclusion, see the discussion of section 2-302 and unconscionability in part IV infra.
75. 159 W. Va. 147, 219 S.E.2d at 916 (1975).
tually discussed the question of whether Article 2, or some other body of law, applied to the facts before the court.

In *Foster*, the plaintiff sued the defendant hospital for breach of warranties when she contracted serum hepatitis from a blood transfusion. The court stated that to merely characterize the transaction as a sale and apply the Code, or as a service and not apply the Code, would provide "a result without a reason." According to the court, the question should not be whether some personal property passed under the transaction, but whether the transaction is of the type contemplated under the law of implied warranty. Discussing blood transfusions, the court pointed out that the decision of whether to transfer blood to the patient and the actual transfer of that blood, both integral parts of the transfer of the goods, cannot be segregated from the exercise of the skill and judgement by the persons making the decision whether or not to transfer the blood. The important part of the transaction is the process of balancing the risks and benefits in deciding whether or not to give the patient blood, and the focus is on this decision-making process, not on the quality of the blood itself. The court then discussed various considerations underlying the development of a seller's liability for implied warranty. It noted that:

A hospital or doctor does not exactly fit into the mold of a 'merchant'... There is a... difference between a merchant... who is engaged in the active promotion and sale of his product such as Coca Cola bottles, ... and a doctor, dentist, or lawyer... who supplies medicine, blood, tooth fillings or legal briefs in the course of his professional relationship with a patient or client. ... [B]lood is not such a standardized product that its use can be segregated from the skill and judgement of the person prescribing it in the same way that an automobile wheel can be segregated from the skill and judgement of the mechanic installing that wheel on a vehicle. ... [T]he hospital has not undertaken to be an insurer... [U]nlike standard commercial products, however, blood is dispensed under a wide variety of circumstances which do not lead to the imposition of the type of uniform standard of care envisaged by the law of warranty ... [and goods] are amenable to quality control by the manufacturer while human blood is obviously not.  

76. *Id.* at 150, 219 S.E.2d at 919.
77. *Id.*
78. *Id.* at 152-54, 219 S.E.2d at 919-21.
The court went on to examine the product itself, noting that blood is not the type of standard mass-produced product for which the doctrine of implied warranties was created. The court pointed out that the majority of courts around the country have held that blood transfusions do not constitute a sale of goods under Article 2. Finally it noted that after Mrs. Foster received her transfusion, the West Virginia legislature enacted a statute providing that furnishing blood and other human parts for transplantation is a service and not a sale, and no warranties are applicable.

The court broadly held:

[W]here an individual contracts for professional services involving an incidental transfer of personal property as a necessary part of such service, and where the appropriate use of such personal property depends primarily upon the skill and judgement of the person rendering the service, such a transfer of personal property by the professional is not within the contemplation of West Virginia Code 46-2-314 (1963) or 46-2-315 (1963) and any injury or damage resulting from such transfer of personal property must be recovered by an action grounded in negligence....

A case could be made that this discussion is an exercise in the application of the “predominating purpose” test: the court looks at the transaction and determines whether the overriding features of the transaction focus on the provision of services or on the transfer and acquisition of the goods. But it is more likely that the court followed the “policy approach” of the fifth test. Focusing on the policies behind the Code's implied warranty provisions, the court determined that the factors underlying implied warranties, including making sellers liable for heavily marketed, mass-produced goods which are sensitive to quality control efforts, and purchased as a result of the exercise of buyer's choice, made without the accompanying advice and service of a trained professional, were simply not present in a transaction for a blood transfusion.

80. W. VA. CODE § 16-23-1 (1991). The court in Foster could have avoided the entire discussion by ruling that the recent statute embodied West Virginia's policy on such matters, and that the court was applying this policy as the common law governing the case at hand. Fortunately, the court did not, and shed some guidance on the scope of Article 2.
81. Foster, 159 W. Va. at 155, 219 S.E.2d at 921 (emphasis by the court).
82. Of course it is possible that the court might have been motivated by matters unrelated to
Foster is solid precedent in West Virginia for not applying Article 2 to hybrid sales-service contracts where the seller is a professional. It does not provide reliable precedent for the usual case where the seller is not such a professional. Will the court apply Article 2 to a transaction involving the replacement of part of an airplane engine where the parts were billed to the buyer at $6000 and the labor at $4000? The Foster analysis is relevant, but not dispositive.

The West Virginia Supreme Court of Appeals’ second direct examination of whether the Code should apply to a hybrid sales-service transaction occurred in Elkins Manor Associates v. Eleanor Concrete Works, Inc. In Elkins, the developer of a housing project, subsidized by the Federal Housing Authority (FHA), made a contract with the seller in which the seller agreed to manufacture, deliver and install precast, prestressed concrete planks for use as the floors and ceilings in the housing project. The contract, with a total price of $160,000, required the seller to deliver and install the planks and all grouting required, to furnish a crane to perform the work, to furnish all labor, tools, equipment, and material to perform all of the work, and to comply with the guidelines of the FHA. After the first floor of the project was installed by the seller, FHA inspectors discovered that the planks had not been anchored in accordance with the specifications and that several of the planks were cracked and warped and possibly did not comply with the standards of the American Concrete Institute (ACI) as required by the contract. Government agents then inspected the seller’s manufacturing plant, located 180 miles from the project, and determined that the plant’s manufacturing process did not comply with ACI standards. As a result, the government refused to allow any of seller’s planks to be used in the project until seller’s process was approved by the ACI. Approval was not obtained until January, 1980, at least four months after installation was to begin. After a delivery of planks during February, seller experienced financial difficulties and could not pro-

any of the five tests or methodologies. For example, the result might have been driven by the fact that the defendant was a non-profit organization (at least technically), transferring a necessity of life, and the defect (serum hepatitis) could not have been detected either by any laboratory test, or by any economically feasible test.

vide delivery to the site. The owner then hired its own trucks to pick up the planks, some of which could not be supplied with a full load. The owner also rented a crane and used its own personnel to install the planks. Installation required lifting the planks to the building, anchoring the planks to the outside walls, and grouting between the planks. The late deliveries caused late completion of the project.

After the December, 1980 completion of the project, the owner sued the seller for breach of contract. The seller countersued for the remaining amount owed on the contract. At the close of the plaintiff-owner's case, the trial court granted a motion for a directed verdict, finding the evidence insufficient to show that the seller had breached the contract, and, alternatively, found that if the seller had breached, it's nonperformance was excused under section 2-615(a) of the UCC. The court also ruled that the seller's counterclaim for the remaining amount due under the contract should be offset by the owner's cost in shipping, installing, anchoring, and grouting the concrete planks, duties that contractually were to have been performed by the seller.

The West Virginia Supreme Court of Appeals reversed the directed verdict, finding sufficient evidence to support a holding that the seller breached the contract. The court also held that the contract was a "construction" contract, that the Uniform Commercial Code did not apply to construction contracts, and, therefore, the Code excuse for failure to perform provided by section 2-615(a) was not available to the seller.

Although it is difficult to question the result reached by the Supreme Court of Appeals, there are serious problems with the methodology the court used in reaching that result. First, the court began its analysis by reviewing the evidence and the law to determine whether the plaintiff-owner presented sufficient evidence of the seller's breach. In this review, the court applied the common law of

84. Id. at 467. W. VA. CODE § 46-2-615(a) (1966) provides that: "delay in delivery ... is not a breach of ... a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made ...."
contracts to the issues of right to terminate because of delay where time is of the essence, waiver of damages for failure to terminate, and measure of damages for breach, all without even questioning whether the transaction was covered by Article 2 of the UCC. The court failed to mention either the scope sections of Article 2 — sections 2-102 and 2-105 — or the substantive provisions of Article 2. Only when the court examined the section 2-615(a) defense did the court raise the issue of whether the Code applied to the transaction.

The court began by stating that "most courts hold that the UCC does not generally apply to alter the terms of a construction contract." The court supplied no authority for this bold statement. It then went on to explain that the reason often used is that the UCC deals with the sale of goods, and services are not included in the definition of goods. "Consequently," the court continued, "a construction contract which involves the supply of labor and materials is not controlled by the UCC if the service component is the predominant factor in the contract." The court quoted the leading case of Bonebrake v. Cox as setting forth the test which many courts have adopted:

The test for inclusion or exclusion [under Article 2] is not whether they [goods and services] are mixed, but granted that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of services with goods incidentally involved (e.g. contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g. installation of a water heater in a bathroom).

The court then went on to give two reasons why the UCC should not apply to construction contracts. First, the court opined that the UCC evolved from commercial sales where goods were often bought.

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85. The Code supplies some rules governing the buyer's right to terminate in sections 2-601 and 2-711, governing waiver of damages in section 2-610, and for measuring damages where the seller breaches in sections 2-711 through 2-719. Generally speaking, issues surrounding "time is of the essence" and other "waiver" issues will be governed by common law rules. See section 1-103.
86. Elkins, 396 S.E.2d at 468.
87. Id. (citing W. VA. CODE §§ 46-2-102, -105 (1966)).
88. Id. at 468.
89. 499 F.2d 951, 960 (8th Cir. 1974) (S.D. Iowa).
90. Elkins, 396 S.E.2d at 469, (quoting Bonebrake v. Cox, 499 F.2d at 960).
and sold without any extensive contract document spelling out the rights and remedies of the parties, stating:

The UCC is derived from a variety of legal sources that were utilized to categorize the commercial rules, many of which were established by merchants dealing with each other. . . . The sales section of the UCC itself recognizes that specific contractual terms may supersedes its provisions. Thus, it would appear that the main purpose of the UCC is to fill in the gaps of the sales agreement which is either ambiguous or contains no express statement as to a particular right or duty. In contrast, a building construction agreement often contains detailed contract provisions and specifications. . . . Moreover, the ultimate "owner" of the facility does not directly buy the goods. These are supplied by contractors or subcontractors who in turn purchase the goods from third parties.

The thrust of the court's discussion, to the extent it can be determined, is that since (according to the court) the main purpose of the UCC is to supply terms of a contract which are not provided by the parties, there is little reason to apply the UCC to construction contracts because they often contain detailed contract provisions and specifications.

The second reason given by the court for not applying the UCC to this problem is that the Bonebrake test, providing for determination of the "predominant factor," is too subjective to provide any rational analysis of most business contracts. "In virtually any building contract," reasoned the court, "if the total cost of the project were considered, the 'predominant factor' would almost always be the cost of materials incorporated into the building." "Thus," concluded the court, "under Bonebrake, the UCC would control unless the 'predominant factor' were left entirely to the court's intuition." The thrust of this second reason seems to be that since the predominant factor, if determined by the relative allocation of the price for goods and price for labor, would always equal a sale of goods, we should not use that test.

The court then concluded with its rule for West Virginia: "[t]here is a presumption that the sales provisions of the UCC will not apply to a building construction contract unless the party seeking a UCC

91. Id. at 469. What these last two sentences have to do with the prior statements is unclear.
92. Id.
93. Id.
right is able to demonstrate substantial justification for its use."\textsuperscript{94}

There were a number of serious errors in the court’s analysis. First, it is no more true that the main purpose of the UCC is to provide terms missing from the parties’ contract than it is true that the main purpose of the common law of contracts is to provide these same terms. For example, in a service contract where a contractor hired by a building owner to paint a building quits in the middle of the job and leaves 200 gallons of paint on the site, if the contract is silent on the matter, the common law of contracts has no trouble determining what the building owner’s duties are with respect to the contractor’s paint. Similarly, in a sale of goods contract where a seller contracts to sell 200 gallons of paint to a buyer and ships 200 gallons of the wrong paint, if the contract is silent on the matter, the Code (2-603) determines what the buyer’s duties are with respect to the seller’s 200 gallons of paint. It is also true that under the doctrine of freedom of contract, incorporated by the UCC, the parties are free to specify most of their respective duties in the contract.\textsuperscript{95} But the same is also true at common law. More importantly, neither of these points are a reason to say that one body of contract law applies instead of another body of contract law.

Second, the court gave no reason why the \textit{Bonebrake} test is not a good test, or why, just because it would almost "always" result in the sale of goods aspect predominating, that it is not a good test. For one thing, the court misapprehended the range of factors that can be considered in the \textit{Bonebrake} predominating factor test. It is true that the majority of cases seem to allocate costs between goods and services and determine which is greater. But others do not and ask other questions, including "which predominated in the minds of the parties, the service part or the goods part?" The court might have done the same thing in \textit{Elkins}.

\textsuperscript{94} Id. at 470 n.13.

\textsuperscript{95} See, e.g., W. Va. Code § 46-1-102(2) (1966): “Underlying purposes of this Act are . . . (b) to permit continued expansion of commercial practices through custom, usage, and agreement of the parties;” (emphasis added), and § 46-2-301; “The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay \textit{in accordance with the contract}.” (emphasis added).
Third, the "predominating factor" test is not the only test used for determining whether Article 2 or other contract law covers the transactions, as mentioned earlier. If the court found the predominating factor test unsuitable, then it should have considered other tests.

Fourth, and most important, this court simply assumed the contract was a "construction" contract, without giving any basis for this determination. Why did it not simply assume the contract was a "sale of cement planks" contract? This initial process of labeling the contract as a "construction" instead of a "sale of goods" contract was what compelled the court to ultimately choose to apply the common law of contracts instead of Article 2. It was the test or methodology that the court used in concluding the contract was a "construction" contract and not a "sale of goods" contract that was most important. The court failed to tell us which test or methodology it used. To lay out a rule that the Code does not apply to "construction" contracts without explaining what constitutes a "construction" contract does not give sufficient guidance. What is needed are guidelines for determining when a hybrid goods-services contract is a sales contract subject to the Code, or a service (construction) contract subject to the common law. The court should have articulated these guidelines.

Finally, the court in Elkins might well have found that Article 2 did not apply to the issues simply as a way to avoid giving the trial court a chance to decide whether there was a basis in fact for finding an excuse for nonperformance under section 2-615 (Failure of Presupposed Conditions and Commercial Impracticability). This makes little sense. First, it is extremely unlikely that the lower court was justified in finding that an excuse existed, even under section 2-615. Second, the defense of excuse for nonperformance due to failure of presupposed conditions and commercial impracticibility is not avoided by simply finding that the Code and section 2-615 does not apply. This defense has a commonlaw counterpart as evidenced

96. See supra notes 61-64.
97. See infra discussion in text following note 498.
by the Restatement of Contracts, and the trial court would have to examine the issue again under common law even if Article 2 does not cover the issues.

In summary, except for hybrid goods-services contracts involving professional services, the West Virginia Supreme Court of Appeals has failed to develop a test for determining whether the UCC or the common law applies to a contract involving both sale of goods and of services, despite several clear opportunities. This leaves uncertain an important issue in the jurisprudence of contract law in the state.

C. Real Estate

Transactions in real estate are not included in the definition of "goods" in sections 2-105 and 2-107. Growing crops, timber to be cut, and other things attached to realty and capable of severance without material harm to the realty are considered "goods" under Article 2, as are minerals, oil, and gas, if under the contract for sale they are to be severed by the seller. Several West Virginia cases have considered the application of Article 2 to transactions having some relation to real estate and have either applied Article 2 as the controlling law or have cited provisions of Article 2 for use by analogy.

In Ashland Oil Co. v. Donahue, discussed earlier, the court examined a commercial transaction which involved a lease of real estate and a separate dealership agreement providing for the sale of petroleum products. The court, noting that the two separate documents were executed on the same day and finding that they were so interconnected that the parties would not have executed either without the other, held that the two contracts should be treated as one transaction. Further, because the transaction involved the sale of petroleum products, the court held that it was covered by Article

98. Id.
100. Id. § 46-2-107(1).
101. 159 W. Va. 463, 223 S.E.2d 433 (1976). For a detailed discussion of this case, see infra text following note 222.
2 of the UCC. The issue before the court was the validity of a termination clause in the dealership (sales) document. If the issue before the court had been covered by the real estate lease document, especially if it had been an issue traditionally covered by real property law, the court might well have refused application of Article 2, and applied the common law of real property to the problem.

In *Welch v. Cayton,* the surface owner of a tract of land, who thought he owned the mineral rights but in fact did not, leased the oil and gas rights to a producer who extracted the oil and gas and sold it to buyers. The true owner of the oil and gas rights later learned of the extraction and sale, and sued a number of the parties, including the buyers of the oil and gas, for the value of the oil and gas sold. The court applied property law to determine who owned the oil and gas rights in the real estate, but held that the rights of the buyers of the oil and gas were covered by Article 2 of the UCC under section 2-107(1). The court then held that the buyers did not take true title to the oil and gas as good faith purchasers under section 2-403 because the producing seller, having the same claim as a thief, had no power to pass good title.

*Troy Mining Corporation v. Itmann Coal Co.*, involved a contract mining agreement calling for the contractor to mine the owner's coal, and then apparently sell most or all of the coal to the owner (the facts are not clear on this latter point). After several years, the owner terminated the contract under a termination clause which the contractor asserted was unconscionable. The court held the agreement was a contract for services not covered by Article 2, not discussing the provisions of the contract or the facts surrounding the performance in any detail. There is some chance that the contract more closely approximated a sale of coal, and could have been held a transaction in goods covered by Article 2 of the UCC. As it was, the court did cite the unconscionability provision of the Code, using it by analogy in determining what law of unconscionability should be applied in the case. In *McGinnis v. Cayton,* the court

103. 346 S.E.2d 749 (W. Va. 1986).
examined the enforceability of a nineteenth century oil and gas lease. A concurring opinion stated that oil and gas leases are closer to sales of good than to a typical property lease, citing section 2-107(1)\textsuperscript{106} and discussing several Article 2 provisions in deciding what to do with the case.\textsuperscript{107}

Finally, beginning in 1979, the West Virginia Supreme Court of Appeals cited the Uniform Commercial Code as an example in a series of cases dealing with residential property. In \textit{Teller v. McCoy},\textsuperscript{108} the court cited sections 2-314 and 2-315 on implied warranties as it proceeded to establish a warranty of habitability in the lease of a dwelling. In \textit{Thacker v. Tyree},\textsuperscript{109} the court cited the same sections in holding the seller liable for defects which substantially affected the habitability of a house, where the defects were unknown to the buyer and difficult to discover, and which were known to the seller but not revealed to the buyer. In \textit{Gamble v. Main},\textsuperscript{110} the court cited section 2-315 on implied warranties of fitness for a particular purpose in establishing an implied warranty of fitness and habitability in the sale of a new house by a builder-vendor.

Although Article 2 does not apply to transactions in real estate, the foregoing cases show that, depending on the facts, Article 2 can and has been used to assist courts in deciding problems which arise in real estate transactions.

\textbf{D. Product Liability}

The term "product liability" generally encompasses injury to person or property caused by defective goods. Traditionally, such

\begin{itemize}
\item \textsuperscript{106} Id. at 772.
\item \textsuperscript{107} The concurring opinion included an analysis of the use of the Code rules of commercial impracticability, W. VA. Code § 46-2-615 (1966) and unconscionability, § 46-2-302, as ways to avoid harsh contractual obligations in oil and gas leases. Another case, McMellon v. Adkins, 300 S.E.2d 116 (W. Va. 1983), also cites section 46-2-302 in examining alleged unconscionability in a coal lease.
\item \textsuperscript{108} 162 W. Va. 367, 378-79, 253 S.E.2d 114, 122 (1979).
\item \textsuperscript{109} 397 S.E.2d 885, 886 (W. Va. 1982).
\item \textsuperscript{110} 300 S.E.2d 110, 114 (W. Va. 1983). The holding was dictum in that the court found that the warranty did not extend to adverse soil conditions of which the builder-vender was unaware and could not have discovered by the exercise of reasonable care.
\end{itemize}

In finishing out this series, in 1988 the majority of the court extended the implied warranties of habitability and fitness to second and subsequent purchasers for a reasonable length of time, without reference to the UCC. Sewell v. Gregory, 371 S.E.2d 82 (W. Va. 1988) (Neeley, J., dissenting).
injury has given rise to a remedy for breach of contract under the Code, and additional remedies in tort for negligence and strict liability. But where the defect causes only economic loss and does not cause damage to person or to property, the majority of courts have held that the buyer's remedy is under the Code, and there is no cause of action in negligence or strict liability. West Virginia has considered product liability actions in a number of cases dealing mainly with the existence of a cause of action in strict liability.

In *Star Furniture Co. v. Pulaski Furniture Co.*, the buyer purchased a clock from the seller for retail display purposes. The clock malfunctioned, apparently causing a fire which damaged both the clock and the buyer's business establishment. The buyer sued in negligence, strict liability, and breach of warranty. The court held that the doctrine of strict liability is applicable where the damage to the purchased product itself results from a sudden violent event and not as a result of an inherent defect which merely reduced the product's value without inflicting physical harm to the product. The court illustrated the difference in the types of damages which give rise to a warranty cause of action on the one hand, and a tort cause of action on the other, with two Alaska cases. In the first, *Morrow v. New Moon Homes, Inc.*, the roof of the purchased mobile home leaked continually. Although it was unpleasant to live

111. See Tarwackiv v. Royal Crown Bottling Co., 330 So.2d 253 (Fla. 1976); Williams v. Fulmer, 695 S.W.2d 411 (Ky. 1985); Timsah v. General Motors Corp., 225 Kansas 305, 591 P.2d 154 (1979); Ilosky v. Michelin Tire Corp., 307 S.E.2d 603 (W. Va. 1983). "Product liability actions may be premised on three independent theories-strict liability, negligence, and warranty. Each theory contains different elements which plaintiffs must prove in order to recover. No rational reason exists to require plaintiffs in product liability actions to elect which theory to submit to the jury after the evidence has been presented when they may elect to bring suit on one or all of the theories." *Ilosky*, 307 S.E.2d at 605 syllabus point 6, 613. This is dicta in *Ilosky* as the plaintiff alleged causes of action in negligence and strict liability but not in warranty. *Id.* at 607, 613.

114. *Id.* at 858.
in the mobile home, the leaky roof did not pose a hazard to life or property. Accordingly, the Alaska court held that the buyer had no cause of action in strict liability against the manufacturer, but only an action for breach of warranty. In contrast, in Cloud v. Kit Manufacturing Co.,\textsuperscript{116} the heating unit in a newly purchased mobile home ignited the adjacent pipe insulation, causing a fire which damaged the mobile home. The court found that the sudden event which physically harmed the purchased product (mobile home) gave the buyer an action in strict liability against the manufacturer of the home.

The West Virginia Court of Appeals stated its rule as follows:

In West Virginia, property damage to defective products which results from a sudden calamitous event is recoverable under a strict liability cause of action. Damages which result merely because of a "bad bargain" are outside the scope of strict liability.\textsuperscript{117}

The court went on to hold:

Our decision not to extend strict liability to mere loss in value cases also means that strict liability cannot be used to recover lost profits . . . .

The proper relationship between tort law and the Uniform Commercial Code requires that lost profits be pursued under a warranty or contract theory cause of action rather than strict liability.\textsuperscript{118}

The court first affirmed Star Furniture in Capitol Fuels v. Clark Equipment,\textsuperscript{119} where the purchased front-end loader suddenly caught fire and consumed itself when a fuel leak dripped on the engine. There was no damage to personal property other than the purchased product itself. The court held that if the product defect is dangerous to users, and destroys the product itself in a sudden calamitous event, then the buyer may recover under strict liability. The court went on to state that "[d]amages which result merely because of a

\textsuperscript{116} 563 P.2d 248 (Alaska 1977).
\textsuperscript{117} Star Furniture, 297 S.E.2d at 859.
\textsuperscript{118} Id. at 859-60.
\textsuperscript{119} 382 S.E.2d 311 (W. Va. 1989).
'bad bargain' are outside the scope of strict liability,'" and must be recovered under breach of contract. The court affirmed Star Furniture again in Anderson v. Chrysler Corp., where a fire began burning under the dashboard of the plaintiff's three-month old car, destroying the car. The court affirmed an action in strict liability, allowing the buyer to make a prima facie case through circumstantial evidence.

Star Furniture and Capitol Fuels only addressed the question of whether a cause of action in strict liability could be maintained in product liability suits. Neither addressed the buyer's breach of warranty action under the Code. In 1973, the court allowed a breach of warranty recovery for property damage caused by defective fire sprinklers in Jones v. Weidebusch, discussed earlier. Decided six years before West Virginia adopted strict liability, Jones was clearly a product liability case. The West Virginia Supreme Court of Appeals next discussed the applicability of the Code to product liability cases in Hill v. Ryerson & Son, Inc.

In Hill, the eye of the buyer's employee was injured when a hydraulic cylinder split while the employee was working on it. The employee sued the seller of the cylinder in strict liability and breach of implied warranty of fitness. The seller sued the manufacturer in strict liability, implied warranty of fitness, and implied indemnity. The trial court awarded the employee $125,000. The manufacturer defended in part on the ground that it did not receive timely notice of the claim under section 2-607(3)(c) of the Code.

In holding that the notice requirements of the Code were not available as a defense in a product liability action on a related implied indemnity suit, the West Virginia Supreme Court construed the "bad bargain" concept of Star Furniture... the fact that the product may be flawed or defective, such that it does not meet the purchaser's expectations or is even unusable because of the defect, does not mean that he (buyer) may recover the value of the product under a strict liability in tort theory. The purchaser's remedy is through the Uniform Commercial Code. In order to recover, the damage to the product must result from a sudden calamitous event attributable to the dangerous defect or design of the product itself."

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120. Id. at 311 syllabus point 1. The court went on to state in syllabus point 2: "Under the "bad bargain" concept of Star Furniture... the fact that the product may be flawed or defective, such that it does not meet the purchaser's expectations or is even unusable because of the defect, does not mean that he (buyer) may recover the value of the product under a strict liability in tort theory. The purchaser's remedy is through the Uniform Commercial Code. In order to recover, the damage to the product must result from a sudden calamitous event attributable to the dangerous defect or design of the product itself." Id.


124. For a detailed discussion of this issue, see infra text accompanying note 448.
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of Appeals stated that there can be little doubt that the Uniform Commercial Code was not enacted to encompass product liability cases,\textsuperscript{125} that the Code's provisions cannot be deemed to restrict the judicially created doctrine of implied warranty of fitness in the product liability field, and that the Code has little relevance to the product liability field.\textsuperscript{126} The court did go on to state that the Code could be used for guidance in product liability cases where appropriate, particularly where express warranties or other features peculiar to commercial transactions are involved.\textsuperscript{127}

Three years after \textit{Hill}, in \textit{Ilosky v. Michelin Tire Corp.},\textsuperscript{128} the court stated that product liability actions may be premised on strict liability, negligence, and warranty, although the statement was dicta because the plaintiff did not allege a cause of action in breach of warranty. Finally, in the \textit{Anderson} case discussed above, the court confirmed that a buyer of a new automobile had a breach of warranty action for the sudden calamitous destruction of the automobile, in addition to a cause of action in strict liability.\textsuperscript{129} Clearly the \textit{Hill} court's comments must be limited to the facts of \textit{Hill}.

In most cases, strict liability provides the buyer with the primary advantages of a breach of warranty action, that is, defect plus causation plus injury equals recovery, without requiring the buyer to prove the contract and warranty and without subjecting the buyer to the seller's contract defenses.\textsuperscript{130} But in several unusual situations, such as where the two-year tort statute of limitations has run before the four-year Code limitation,\textsuperscript{131} or where there is difficulty in prov-

\textsuperscript{125} \textit{Hill}, 228, 268 S.E.2d at 302 (1980).
\textsuperscript{126} \textit{Id.} at 231, 268 S.E.2d at 305.
\textsuperscript{127} \textit{Id.} This is consistent with the West Virginia Supreme Court's holding in Valloric v. Dravo Corp., 357 S.E.2d 207 (W. Va. 1987) in which the court held that where the contract between the defendants contained a clause governing indemnity rights between the parties, this contract clause and not the common law of implied indemnity governed the indemnity rights between the parties. See also, Sydenstricker v. Unipunch Products, Inc., 169 W. Va. 440, 288 S.E.2d 511 (1982).
\textsuperscript{128} 307 S.E.2d 603 (W. Va. 1983).
\textsuperscript{129} \textit{Anderson v. Chrysler Corp.}, 403 S.E.2d 189, 194-95 (1991).
\textsuperscript{130} Contract disclaimers under section 2-316, requirement of timely notice under section 2-607(3), and privity of contract in those jurisdictions requiring privity.
\textsuperscript{131} See \textit{infra} Part XI.
ing the product was not reasonably safe, the Code cause of action in product liability cases is still a valuable tool.

E. Use By Analogy

The Code has been used by courts in non-Code cases as support for both the creation of a similar rule of common law, and as the embodiment of a common-law rule which is then adopted and used in the particular area as a rule of common law. As stated by the Idaho Supreme Court and reproduced in White & Summers,

We will look to the commercial setting in which the problem arises and contrast the relevant common law with Article 2. We will use Article 2 as “a premise for reasoning” only when the case involves the same considerations that gave rise to the Code provisions and an analogy is not rebutted by additional antithetical circumstances.133

The West Virginia Supreme Court of Appeals has cited the Code as support for continuing old law or developing new law on a number of occasions. In Orlando v. Finance One of West Virginia, Inc.,134 a non-Code case, the court stated, “The concept of unconscionability under the Uniform Commercial Code ‘has been applied to many other kinds of contracts, either by analogy or as an expression of a general doctrine.’ ”135 For example, in recognizing the doctrine of implied warranty of fitness in the sale of a new home by a builder-vendor, the court stated:

Courts and commentators have also commented on the irony that protection is afforded a purchaser of personal property under the Uniform Commercial Code

132. Apparently required to sustain a cause of action in strict liability. See Morningstar v. Black and Decker Manufacturing Co. 162 W. Va. 857 (1979). Several other West Virginia cases have made statements which could be relevant to the relationship between contract (including the Code) and tort law. These include statements that economic loss is recoverable under negligence, Sewell v. Gregory, 371 S.E.2d 82 (W. Va. 1988) (where the court examined the liability of the builder of a house to a non-privity subsequent purchaser), that a mere bad bargain did not give rise to recovering under torts Roxalana Hills Ltd. v. Masonite Corp., 627 F. Supp. 1194 (W. Va. 1986), and where there is merely economic loss, there is no tort, Basham v. General Shale, 377 S.E.2d 830 (W. Va. 1988) (involving deteriorating bricks on the exterior of new homes).


135. Id. at 885 (quoting E. FARNSWORTH, CONTRACTS § 4.28 (1982)).
by an implied warranty of fitness (W. Va. Code 46-2-315) no matter how modest the value, and yet without an implied warranty of habitability, the purchaser of a new home may have no protection.\textsuperscript{136}

As mentioned above, the court similarly cited the Code in its earlier extension of implied warranty of habitability to leased premises.\textsuperscript{137}

In another case, the court cited the Code conflicts-of-law rule as evidence that choice of law and forum selection clauses are not violative of West Virginia public policy.\textsuperscript{138} In \textit{Goldring v. Ashland Oil & Refining Co.},\textsuperscript{139} a case involving an implied right of indemnity between tortfeasors, the court cited section 2-607(5) of the Code stating, "The UCC acknowledges that one person in the chain of distribution may be answerable over to another."\textsuperscript{140} In \textit{Everett v. Brown},\textsuperscript{141} the court stated that all of the West Virginia statutes of fraud, including the four UCC statutes of fraud,\textsuperscript{142} display common characteristics and create similar problems, implying that the Code statutes of fraud case law has precedential value for cases arising under non-Code statutes of fraud. Finally, the court in seven non-Code cases involving transactions as disparate as prenuptial agreements and oil and gas leases has cited the Article 2 rule on unconscionability for guidance in applying some concept of unconscionability to the non-Code facts before the court.\textsuperscript{143}

III. FORMATION OF THE CONTRACT AND FORMALITIES

A. Generally

1. Formation

Part 2 of Article 2 provides the Code rules concerning the formation of a contract and the form the contract must take. With

\textsuperscript{136} Gamble v. Main, 300 S.E.2d 110 (W. Va. 1983).
\textsuperscript{140} \textit{Id}. at 490.
\textsuperscript{141} 321 S.E.2d 685 (W. Va. 1984).
\textsuperscript{142} Including the Article 2 statute of frauds, W. VA. CODE § 46-2-201 (1966), and § 46-1-206 (general), § 46-8-319 (sales of securities), and § 46-9-203 (1966 & 1990 Supp.) (secured transactions).
\textsuperscript{143} \textit{See infra} discussion of these cases in Part IV.
several exceptions provided by the Code, the common-law rules governing offer and acceptance, assent, agreement, interpretation, bargain, and consideration apply to the formation of contracts for the sale of goods.

Section 2-204 provides that "[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 contract." 144 Section 2-207(3) provides that "[c]onduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract." 145 Section 2-206(1) provides, "[u]nless otherwise unambiguously indicated by the language or circumstances . . . an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances." 146 In some situations, the Code requires the offeror to keep the offer open when the offeror has promised to do so in a signed writing, even if the offeree has given no consideration for that offer. 147

In its most radical deviation from the common law in the area of offer and acceptance, the Code provides that a contract can be formed by an acceptance which states terms not contained in the offer. Specifically, the Code provides in section 2-207(1) that "[a] definite and seasonable expression of acceptance . . . which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered . . . unless acceptance is expressly made conditional on assent to the additional or different terms." 148 This type of nonidentical "acceptance" response creates a contract under this section only, when read as a whole, it indicates that the offeree by her response is "definitely" accepting the offer notwithstanding the different or additional terms.

145. Id. § 46-2-207(3).
146. Id. § 46-2-206(1)(a).
147. This applies where the offeror is a merchant, who, in the signed writing, gives assurance that the offer will be held open. This "firm offer" must be held open for the time stated or for a reasonable time, but in no event exceeding three months. Id. § 46-2-205.
148. Id. § 46-2-207(1).
contained in the response. Finally, section 2-209 provides that the parties may modify their contract without consideration as long as the statute of frauds is satisfied.\(^{149}\)

2. Terms

The Code also provides some specific rules which help to determine what terms become part of the contract. Section 2-207 provides that a merchant may unilaterally bring some terms into the contract by including these terms in the acceptance or in a confirmatory memorandum if the terms do not materially alter the contract,\(^{150}\) the offer does not exclude the term,\(^{151}\) or notification of objection to the term has not already been given by the other party or is not given thereafter within a reasonable time.\(^{152}\) The Code also provides that the terms of the contract will be supplemented or qualified by usage of trade, by course of dealing between the parties,\(^{153}\) and by course of performance of the contract itself.\(^{154}\) The Code further provides, that “[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.”\(^{155}\)

Many Code sections provide contract terms to fill in needed provisions when the parties have themselves failed to provide the terms in their agreement. Among these are sections providing that the price shall be a reasonable price at the time for delivery,\(^{156}\) the place for delivery is the seller’s place of business,\(^{157}\) the merchant seller war-

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\(^{149}\) Id. § 46-2-209(1)(3).
\(^{150}\) Id. § 46-2-207(2)(b).
\(^{151}\) Id. § 46-2-207(2)(a).
\(^{152}\) Id. § 46-2-207(2)(c).
\(^{153}\) Id. § 46-1-205(3). “Usage of trade” is defined as “any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.” Id. § 46-1-205(2). A “course of dealing” is defined as “a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.” Id. § 46-1-205(1).
\(^{154}\) Id. § 46-2-208(1).
\(^{155}\) Id. § 46-2-204(3).
\(^{156}\) Id. § 46-2-305(1).
\(^{157}\) Id. § 46-2-308(a).
rants that the goods are fit for the ordinary purposes for which such goods are used, the seller in a shipment contract must take the goods to a common carrier and make a reasonable contract for their transportation, and the payment is due upon tender of delivery of the goods (which may be made by check if ordinarily done in the business, unless the seller demands cash and gives reasonable additional time for the buyer to secure the cash).

Finally, Article 2's parol evidence rule prevents the introduction of evidence of any prior agreement or of a contemporaneous oral agreement which would contradict a term set forth in a writing intended by the parties as the final expression of their agreement on such a term. This provision prevents the introduction of evidence of noncontradicting, consistent, additional terms where the court finds the writing to have been intended by the parties as a complete and exclusive statement of the terms of the agreement.

Surprisingly, few West Virginia cases have touched upon issues concerning the Code provisions relating to the formation of a contract or the formal requirements of such contract. Indeed, only one case has directly addressed a main issue of any of these Code provisions.

B. Statute of Frauds

Two West Virginia cases have involved issues relating to the statute of frauds contained in Article 2. Marion Square Corp. v. Kro-

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158. Id. § 46-2-314(c).
159. Id. § 46-2-504.
160. Id. § 46-2-511.
161. Id. § 46-2-202.


A fourth case, Quinn v. Beverages of West Virginia, Inc., 159 W. Va. 571, 224 S.E.2d 894 (1976), involved the application of the Uniform Commercial Code's Article 8 statute of frauds covering the sale of securities to an oral employment contract giving the employee an option to purchase shares of stock in the employer company. After making the oral agreement, the employee terminated his previous job, moved to the location of his new employer's business, and worked as a vice president of the employer for six months. The employer refused to make the stock available to the employee.
ger Co.\textsuperscript{163} involved an alleged contract for sale between Marion Square, the owner of a building, and Kroger, which leased the premises for a grocery store. Marion Square alleged that Kroger orally agreed to sell the grocery store equipment for $44,000 to Marion Square as part of a plan for early termination of the lease. Kroger thereafter wrote a confirmatory letter stating "This letter will confirm our understanding that you have agreed to purchase our existing equipment at $44,000. Such an agreement will be between Kroger and yourself and I expect this to be part of our verbal agreement with you."\textsuperscript{164} The letter also mentioned a cancellation of the lease, and a second letter from Kroger, sent the same day, further discussed the lease cancellation. During the negotiation of this sale, Kroger was aware that Marion Square was negotiating with another grocery store chain, Giant Eagle, for a new lease of the premises and a

In suing for breach of contract, the employee introduced a sheet of paper containing notations, or scribblings, as evidence of the contract. The court first found that the part of the contract providing for the option to purchase stocks was covered by the aforesaid Code statute of frauds applicable to the sale of securities. W. Va. Code § 46-8-319 (1966 Supp. & 1991). It then correctly found that the memorandum was patently insufficient to satisfy the statute, and held the stock option was therefore unenforceable. The court further found that the contract was primarily an employment contract and not a sale of stock contract, that the intention of the parties was to treat the stock option as severable, and that the elimination of the stock option was not fatal to the main purpose of the employment contract. The court remanded the case for consideration of the employer's additional defense that the remainder of the employment contract was barred by the statute of frauds applying to contracts which cannot be performed within one year. W. Va. Code § 55-1-1(f) (1981 & Supp. 1990).

A strong dissent argued that the stock option was inextricably part of the employment agreement and was therefore not separable. The dissent would have affirmed a summary judgement for the employer on the entire agreement on the grounds that, since the stock option was not enforceable because of the Code statute of frauds, the entire contract was not enforceable. A sounder approach would have been to find that the stock option was part of the employment contract, and if the whole contract, including the stock option, was enforceable, either (1) because of part performance or (2) because the entire transaction was primarily an employment contract not covered by the statute of frauds, then find the whole contract enforceable, including the stock option. It clearly does not seem fair to exclude evidence of an integral part of the contract just because that part, standing alone, was covered by the statute of frauds, while the primary contract was not covered by the statute of frauds.

Quinn demonstrates the willingness of the West Virginia Supreme Court of Appeals to divide a contract performance into Code concerns covered by a Code statute of frauds (albeit the Article 8 statute of frauds, not the Article 2 statute of frauds) and non-Code concerns not covered by a Code statute of frauds, and enforce that part of the contract not covered by the Code. Quinn also examined the sufficiency of a writing not signed by the defendant and not indicating the contract was formed but simply containing rough notes of issues clearly related to the alleged contract, and held that if it was not a sufficient writing under Article 8's statute of frauds.

\textsuperscript{163} 873 F.2d 72 (4th Cir. 1989).

\textsuperscript{164} Id. at 73.
resale of the subject grocery store equipment to Giant Eagle as part of the new lease. "Indeed, the two letters . . . were written so that the availability of the premises could be demonstrated to Giant Eagle."165 Shortly after receipt of the letters, Marion Square contracted to lease the premises and sell the subject equipment to Giant Eagle. Kroger then informed Marion Square that it did not wish to cancel the lease.

Marion Square sued Kroger to enforce the lease cancellation and the sale of the equipment. The trial court held for Kroger on the statute of frauds. The Supreme Court of Appeals for the Fourth Circuit reversed, holding that Kroger's letter confirming the cancellation of the lease satisfied the applicable statute of frauds for cancellation of leases.166 As for the agreement to sell the equipment, the court implied without comment that the sale of the equipment was separately covered by the Article 2 statute of frauds. Kroger argued that the letter's reference to "our existing equipment" was not sufficient to satisfy the Code's requirement that the writing state "the quantity of goods."167 The court of appeals disagreed, finding the written description stating "our existing equipment" clearly referred to all the equipment located in the grocery store, and that either party could have visited the store to more specifically complete the identification of the equipment and make a detailed inventory. Referring by analogy to an earlier West Virginia statute of frauds case involving the sale of land, the court quoted "[in] description, that is certain which can be made certain."168 The court remanded

165. Id.
167. Section 2-201 Formal Requirements; Statute of Frauds:
   (1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
with instructions to assess damages and enter a judgement for Marion Square.

The court's holding the writing was sufficient to satisfy section 2-201's description requirement was sound, and consistent with the case law of other jurisdictions. But the court should have also addressed section 2-201's requirement that the writing be "sufficient to indicate that a contract for sale has been made between the parties."\(^\text{169}\) The idea is that there be some writing showing that the parties have already made a contract. A writing confirming that negotiations on a contract have, or still are, taking place should not be enough to establish a contract.\(^\text{170}\) The confirmatory letter did state "This letter will confirm our understanding that you have agreed to purchase our existing equipment," but went on to state "Such an agreement will be between Kroger and yourself and I will expect this to be part of our verbal agreement with you." The first sentence clearly confirms that an agreement has already been made, but the latter sentence indicates the agreement was still to be made in the future. In this, the letter is ambiguous, and the court should probably have remanded this question for jury determination.\(^\text{171}\)

In Mountaineer Contractors, Inc. v. Mountain State Mack, Inc.,\(^\text{172}\) the seller, as part of an oral contract to sell used mining machinery,

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170. Marion Square, 873 F.2d at 73.
171. The second letter, sent the same day, did refer to the lease cancellation, and the court could easily have determined the lease cancellation and the sale of equipment constituted one transaction. See Ashland Oil Co. v. Donahue, 159 W. Va. 463, 233 S.E.2d 433 (1976). The court indicated as much when it stated: "As part of the lease cancellation agreement, it was contemplated that Kroger would sell . . . the equipment . . . ." Marion Square, 873 F.2d at 73. Yet the court proceeded as if there were two separate contracts, each needing its own writing, or that there must be a writing evidencing each part of the transaction, or that the writing(s) must contain each of the elements required by both the lease statute of frauds and the sale of goods statute of frauds. In any case, the second writing also did not clearly confirm an already-concluded agreement. It stated "this letter shall serve as our company's intent to execute a cancellation agreement relative to the captioned store subject to receiving the same from you." Id. (emphasis supplied). "Intent to execute" is not the same as "already agreed."

It must be pointed out that the facts could have easily supported a finding that both statutes of frauds were satisfied by promissory estoppel, see Everett v. Brown, 321 S.E.2d 685 (W. Va. 1984), but again, this should be a jury determination.

agreed to pay for all repairs the buyer deemed necessary at the end of the first day buyer used the machinery. The court considered the oral promise of repair to be an express warranty. A subsequent written security agreement contained a clause excluding all express warranties. Upon the delivery of the mining machinery the buyer discovered serious defects (the machinery could not even be driven off the flat-bed-delivery truck) and refused to accept the machinery. The seller responded by again promising to pay for all the repairs needed. Relying on this promise, the buyer accepted the machinery. After paying to have the machines repaired, and not receiving reimbursement from the seller, the buyer was again told on several occasions by the seller that it would pay for the repairs. The court described these repeated promises to repair as "subsequent oral modifications of the contract as contained in the written agreement . . . [which] . . . promises of the seller constitute express warranties." 173 The court went on to say that even if the original oral promise to repair is excluded as a matter of law (by the exclusion clause in the written security agreement), the subsequent promises were modifications of the contract creating new express warranties. In upholding the subsequent oral promises as "modifications" of the contract, the court did not cite 2-209 of the Code which governs modifications, nor did it cite the 2-201 Code statute of frauds which is made applicable to modifications by subsection (3) of 2-209. 174

In light of the court's failure to cite the applicable Code sections, it would be difficult to say that Mountaineer is solid precedent for the proposition that oral modifications of sale of goods contracts for over $500 are enforceable. A later court should, and is likely to, hold that the Mountaineer court erred in overlooking the requirement that modifications satisfy the statute of frauds.

Even if the repair promises had been invalid as modifications because of the statute of frauds, the result in Mountaineer could have been justified on two separate legal grounds. First, the oral

173. Mountaineer, 165 W. Va. at 301, 268 S.E.2d at 892.
174. W. Va. Code § 46-2-209(3) (1966), providing "[t]he requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions."
promise to repair made in response to the buyer’s rejection could be characterized not as a modification of the original contract, but as a part of seller’s cure of the breach. Because such accommodations are commonly made without the formality accompanying the usual initial contract for sale, the statute of frauds under section 2-201 should not apply to these remedial agreements. Although the Code does not specifically address this process of readjusting the performance obligations of the parties following breach, it is certainly implied in sections 2-209(4) (change of contract through waiver), 2-208 (course of performance as altering the contract), 2-508 (cure by seller), 2-601 (accepting only some of the goods upon seller’s breach), 2-608(1)(a) (revocation of acceptance), 2-614 (substituted performance), 2-615(b) (duties when strict contract duties are excused), 2-616 (procedure when seller’s strict performance is excused, especially Comment 1 on waiver through acquiescence), 2-715 (consequential damages must be mitigated), 1-102 (liberal construction of the Code), 1-103 (supplemental legal principals applicable), and, in general, trade practices of responding to nonconforming tenders, as covered by 1-205(3).

Second, buyer’s decision to rely on the seller’s promise to repair and forego its right to reject, should constitute promissory estoppel. The court stated, “Where a seller promises to pay for repairs to goods delivered to the buyer in a defective condition and the buyer accepts the defective goods in reliance upon the promise to repair, such promises of the seller constitute express warranties.” The court could just have easily dropped the last clause of the sentence and substituted “the seller is bound to the promises under the doctrine of promissory estoppel.”

Four years after Mountaineer, the West Virginia Supreme Court discussed promissory estoppel in a non-Code case, alluding to the Code statutes of frauds in the process. In Everett v. Brown, the court enforced an oral agreement to extend a pre-existing but expired written real estate listing contract on the grounds of promissory estoppel as provided in section 139 of the Restatement (Second) of

175. Mountaineer, 165 W. Va. at 301, 268 S.E.2d at 892.
Contracts. In discussing the West Virginia statute of frauds applicable to a real estate listing contract, the court stated that the statute was just one of a number of statutes of frauds in West Virginia, and went on to refer to the four statutes of frauds contained in the Uniform Commercial Code, including section 46-2-201 on sale of goods. Importantly, the court stated that "[a]ll of these statutes display common characteristics and they all create similar problems (and) we hold that the decisional law that governs statutes of frauds in other areas applies as well to that code section." The import of Everett to the Code is the court's clear implication that the West Virginia case law concerning non-Code statutes of frauds also apply to the Code statutes of frauds.

C. Parol Evidence Rule

Article 2's parol evidence rule provides that a term set forth in a writing intended by the parties as a final expression of their agreement with respect to such term may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement, but may be supplemented by evidence of consistent additional terms unless the judge finds the writing to have been intended also as a complete and exclusive statement of all of the terms of the agreement. The rule always allows evidence of usage of trade, course of dealing, and course of performance to explain or supplement the writing. The rule also applies in cases where there is no single

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177. Section 139. Enforcement by Virtue of Action and Reliance:
(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.
178. W. VA. CODE § 47-12-17(c) (1986).
179. The other Code statutes of frauds include § 46-1-206 applying to contracts for the sale of certain types of personal property not including goods, § 46-8-319 applying to the sale of securities, and § 46-9-203 applying to security interests in personal property.
180. Everett, 321 S.E.2d at 689 (referring to W. VA. CODE § 47-12-17(c) (1986)).
182. Id. § 46-2-202(b).
183. Id. § 46-2-202(a).
writing intended by both parties as an expression of their agreement, but, rather, where there are two confirmatory writings, one sent by each of the two parties to the contract. In such case, "[t]erms with respect to which the confirmatory memoranda of the parties agree . . . may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement . . . ." 184

Two West Virginia cases have discussed the Code parol evidence rule. As discussed earlier, in *Mountaineer* 185 the court found that the oral promise, made by the seller sometime after the original contract was made, constituted an oral modification of the contract creating an express warranty. The seller argued that the oral promise was excluded by the 2-202 parole evidence rule. The court disagreed, stating, "[t]he code section clearly restricts evidence of oral terms only in the case of agreements made contemporaneously with the transaction embodied in the written instrument." 186 The subsequent oral promises were held not to be excluded by the parol evidence rule. This holding is consistent with the case law as the clear language of section 2-202 so provides when it states that written instruments "may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement (emphasis supplied)." 187

The parol evidence rule came up in the *Ashland Oil* case, discussed earlier, 188 where the court found the termination clause in the sale of oil products to be invalid because it was unconscionable. After making this finding, the court then had to determine how the trial court should fashion new termination rights of the parties under the contract. The court found that the trial court should hear evidence of the commercial setting and purpose of the transaction. It also held that the trial court should allow the buyer to testify that

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186. *Id.* at 300, 268 S.E.2d at 892.
the parties had orally agreed that there would be no termination without good cause as part of explaining or supplementing the written instruments, and cited the Code parol evidence rule. The court went on to say, "[t]his procedure also does no violence to the traditional parol evidence rule relied upon by Ashland [the plaintiff], because with its ten-day cancellation clause declared unconscionable, an element of vagueness and ambiguity exists which would make parol evidence admissible."\

Although the court’s conclusion was correct, the court did not need to rely on any perceived vagueness or ambiguity in order to admit the extrinsic evidence. The clear language of the Code keeps out evidence of prior agreements or contemporaneous oral agreements only where the evidence would contradict a term in the writing, or, where the evidence adds terms to the writing and the court specifically finds the writing was intended by the parties as a complete and exclusive statement of the terms of the agreement. In Ashland Oil, the evidence offered (to show that the parties at the time of the original contract had agreed that there would be termination only for good cause) clearly did not contradict any term in the written contract because the written contract termination clause was declared void by the court as unconscionable. The clause being voided, there was nothing left in the contract that would be contradicted by evidence of an alleged oral agreement providing for termination for good cause only. Likewise, after the court had thrown out the contract clause providing for termination, the court should not have been able to say that the parties had intended the remaining writing to be a complete and exclusive statement of the terms of the agreement. They clearly had no such intention, because they had intended part of the writing to cover the termination issues of the arrangement, and the contract was left without such terms. What was left was not intended by the parties as a complete and exclusive statement of the terms of the agreement.

D. Additional Terms in Acceptance or Confirmation Under Section 2-207

No West Virginia case has applied 2-207, but the facts of at least one case probably called for its application. In Hill v. Joseph T.
Ryerson & Son, Inc.,\textsuperscript{190} the product liability case discussed above,\textsuperscript{191} the defendant supplier of the defective steel pipe initiated its purchase of the pipe from the manufacturer by sending a form purchase order to the manufacturer. The purchase order contained boiler plate clauses providing for indemnification and for seller’s liability for defects.\textsuperscript{192} The manufacturer responded with its own order acknowledgement form containing an exculpatory clause limiting liability of the manufacturer to replacement of the pipe or return of the purchase price.

Although the court in \textit{Hill} stated that the Uniform Commercial Code was not enacted to encompass product liability cases,\textsuperscript{193} it later stated that the Code can be used “for guidance in product liability cases, particularly where express warranties or other features peculiar to the particular commercial transactions are involved.”\textsuperscript{194} The court first discussed whether the exculpatory clause was unconscionable without concluding whether it was or was not. Then, the court noted that there was no advance bargaining between the manufacturer and the supplier, that there was no signed formal contract, and that terms in the initial purchase order were inconsistent with the exculpatory language in the manufacturer’s acknowledgement form. The court concluded “[t]his fact [referring to the inconsistency between the two forms], when coupled with the absence of any evidence to demonstrate that there has been any bona-fide bargaining over the terms and conditions of the sale, compels us to conclude that the exculpatory language asserted by U.S. Steel was not an

\textsuperscript{190} 165 W. Va. 22, 268 S.E.2d 296 (W. Va. 1980).
\textsuperscript{191} See supra discussion at note 123.
\textsuperscript{192} It provided in part:
3. You agree to indemnify us and our successors and assigns, against all liabilities and expenses resulting from any claim or infringement of any patent in connection with the production of goods or the performance of services hereby or the use or sale of such goods.
2. Our inspector’s receipt does not release you from liability for any errors or defects discovered after delivery. Notwithstanding any provision to the contrary in any document or writing prepared or furnished by you, acceptance by us of delivery shall not constitute assent or agreement by us to any term or condition stated by you to be applicable to the transaction covered hereby.
\textit{Hill} at 39 n.9, 268 S.E.2d at 307 n.9.
\textsuperscript{193} \textit{Id.} at 35, 268 S.E.2d at 305.
\textsuperscript{194} \textit{Id.}
essential part of the sale."\textsuperscript{195} The court then disregarded the exculpatory clause.

In fact, section 2-207 was designed to apply to this kind of situation and the court should have used section 2-207, at least, "for guidance." The section provides that a response to an offer which contains terms not included in the offer, may work as an acceptance of the offer if, judged as a whole, the response is a "definite expression of acceptance" of the offer. If so, the additional terms in the response will be viewed as proposals for addition to the contract.\textsuperscript{196} If both parties are merchants, the proposed additional terms in the response automatically become a part of the contract unless (a) the offer limited acceptance to the terms of the offer, (b) the additional terms materially alter the bargain contained in the offer, or (c) objection to this additional term has been given or is given within a reasonable time.\textsuperscript{197} Similarly, if a contract already exists before the writing(s) (as when the contract is made over the telephone), a subsequent timely memorandum sent by one of the parties confirming the earlier agreement but containing terms additional to those contained in the agreement, is viewed as also proposing the additional terms to the contract, and, if both parties are merchants, can automatically bring those additional terms into that contract on the conditions stated above.

Section 2-207 also provides that where a written offer is followed by a written response which contains additional terms, different terms, or both, and the response, viewed as a whole, is determined not to be a definite expression of acceptance, but the parties have proceeded to conduct themselves as if a contract existed (as by their sending and accepting the goods), then a contract does exist. In this case, the terms of the contract are those upon which the written offer and the written response agree, supplemented with other terms supplied by the UCC.\textsuperscript{198}

The opinion in \textit{Hill} suggests that the contract might have been formed by the retail buyer's purchase order and the manufacturer's

\textsuperscript{195} \textit{Id.} at 39, 268 S.E.2d at 307.
\textsuperscript{196} W. VA. CODE § 46-2-207(1) (1966).
\textsuperscript{197} \textit{Id.} § 46-2-207(2).
\textsuperscript{198} \textit{Id.} § 46-2-207(3).
responsive acknowledgement form which, in spite of its containing different and/or additional terms, could be viewed as a definite expression of acceptance forming a contract under section 2-207(1). Alternatively, if the writings themselves did not form a contract, but the parties conducted themselves as if a contract existed by sending and accepting the goods, then a contract was formed under 2-207(3). In either case, the exculpatory clause contained only in the manufacturer’s acknowledgement form would not become a part of the contract under 2-207. If the contract was formed by the exchange of the two forms, 2-207(2) provides that only the “additional terms” in the response become part of the contract, not the “different,” exculpatory terms. If the contract was formed by conduct and not the exchange of the writings, then 2-207(3) states that only those terms agreed upon by both writings become a part of the contract as a result of the writings, and the exculpatory clause, present in only one writing, would not come into the contract.

Section 2-207 of the Code is a complicated statute which has caused great confusion among lawyers. The West Virginia Supreme Court of Appeals had an opportunity in Hill to clarify the application of this important section, and unfortunately passed it by.

E. Modification

The distinctive features of the Code provision on modification of contracts are its provisions discarding the requirement of consideration, and its requirement that a modification must still meet the requirements of the statute of frauds. West Virginia courts

199. Whereas subsection (1) of 2-207 refers to “additional” and “different” terms, subsection (2) only provides that the “additional” terms are added to the contract. The clear implication is that the “different terms” are not eligible for addition to the contract. Furthermore, subsection (2) allows additional terms into the contract unless “notification of objection to the term has already been given or is given within a reasonable time.” W. Va. Code § 46-2-207(2)(c) (1966). If a conflicting (different) term is in the first writing, it should be held to “object” to the “different” term in the second writing.

In Hill, the exculpatory clause in the manufacturer’s acknowledgement form was “different” from, and conflicted with, clauses in the earlier order form supplied by the purchaser providing for indemnification and liability for defects (see supra note 192). As such, the clause should therefore not come into the contract.

have addressed modification of a contract for the sale of goods in two inconsistent opinions, neither of which cited 2-209 as the relevant law.

As described above, the court in *Mountaineer Contractors, Inc. v. Mountain State Mack, Inc.*\(^{201}\) found that oral promises to repair the goods, made by the seller to the buyer at a time significantly after the contract was made, became part of the contract as an oral modification. In a later federal court case, *Roxalana Hills, Inc. v. Masonite Corp.*,\(^{202}\) the court considered seller’s statement made after the goods were delivered to, and used by, the buyer. The court held the statement could not have created an express warranty because it was made after the contract was formed, and therefore could not have been “a basis of the bargain” as required by the Code section on express warranties.\(^{203}\)

The *Roxalana* opinion was clearly questionable in that it was a federal court decision made after *Mountaineer* and should have followed the rule laid out in *Mountaineer* as the issue was clearly one of state law. If the court thought it could distinguish the two cases, which is clearly possible, the court should have done so. Because these issues more directly involve the elements of express warranty than the elements of modification, they will be discussed more fully later in this article.\(^{204}\) It should be pointed out that Comment 7 to the Code provision on express warranties states, “[i]f language is used after the closing of the deal (as when the buyer when taking delivery, asks and receives an additional assurance), the warranty becomes a modification, and needs not be supported by consideration if it is otherwise reasonable and in order (§ 2-209).”\(^{205}\) Yet, the majority of cases find that promises made after the original contract was made, and which are not part of a clearly negotiated new undertaking of the parties, do not create an express warranty because they do not “become part of the basis of the bargain” as required by 2-313 on express warranties.\(^{206}\)


\(^{203}\) *Id.* at 1200; *see* W. VA. CODE § 46-2-313 (1966).

\(^{204}\) *See infra* discussion in Part V(B).

\(^{205}\) W. VA. CODE § 46-2-313 comment 7 (1966).

\(^{206}\) *See infra* discussion in Part V(B).
IV. UNCONSCIONABILITY

The Code continues the slowly developing common-law practice of refusing to enforce contracts, or parts of contracts, when results of such enforcement would be so unfair as to be unconscionable. "In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract." West Virginia courts have refused to enforce contracts because the result would be unconscionable at least as early as 1899. In 1907, the court stated in syllabus point 1 in Starcher Brothers v. Duty,

Specific performance of an option contract will not be decreed ... if the actual result would be an inequality resulting from ignorance or inexperience, or where the terms of the contract are so indefinite, or assented to with such a lack of caution, that the enforcement of the contract would produce an inequality not foreseen . . . .

In addition to the Code provision on unconscionable contracts, the West Virginia Consumer Credit Protection Act allows a court to refuse to enforce a contract "unconscionable at the time it was made or to have been induced by unconscionable conduct." The Act does not define the term "unconscionable."

The Code provides that if the court as a matter of law finds the contract, or any clause therein, to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or take some other action as appropriate. It goes on to provide:

208. Eclipse Oil Co. v. South Penn Oil Co., 47 W. Va. 84, 34 S.E. 923 (1899).
209. 61 W. Va. 373, 373, 56 S.E. 524, 524 (1907). See also Lowther Oil Co. v. Guffey, 52 W. Va. 88, 91, 43 S.E. 101, 102 (1902) ("Or the contract is so unfair and uneven as to render its enforcement equivalent to the perpetration of a fraud.").
211. The drafters of the similar section in the Uniform Consumer Credit Code stated, "the relevant standard of conduct is ... that which measures acceptable conduct on the part of a businessman to a consumer. See Uniform Consumer Credit Code § 5.108 comment 1, 7 U.L.A. 811 (1985).
When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid a court in making the determination.213

The West Virginia Supreme Court of Appeals has applied Article 2-302 as the controlling rule of law in one important case, Ashland Oil Co., Inc. v. Donahue,214 and possibly in a second case, John W. Lodge Distributing Co., Inc. v. Texaco Inc.215 West Virginia courts have used the Code unconscionability section for guidance and support by analogy in at least seven other cases not covered by the UCC, including a termination clause in a contract to mine coal,216 an arbitration clause in a contract to excavate rock,217 an oil and gas lease,218 a coal lease,219 a waiver of exemptions in a loan agreement,220 an escrow contract for the transfer of stock upon death,221 and a prenuptial agreement.222

Ashland, discussed earlier, is an important early West Virginia Uniform Commercial Code case. The seller and the buyer entered into an arrangement whereby the buyer would operate an Ashland Oil service station. They executed two separate contracts on the same day, one a lease of the realty, and the other a dealer sales agreement calling for the buyer to purchase petroleum products from the seller. The lease agreement provided that either party could terminate the lease upon ten-days' notice. The dealer sales contract allowed termination by either party with notice given sixty days before the end of each year of the renewable lease, but also allowed the seller to terminate the contract upon ten-days' notice if the buyer defaulted or indulged in any practices which, in the opinion of the seller,

213. Id. § 46-2-302(2).
215. 161 W. Va. 603, 245 S.E.2d 157 (1978). The court cites the IJCC in John W. Lodge, but does not clearly state that the case, involving the termination of a distribution contract, is covered by Article 2.
would tend to impair the quality or reputation of the products or the good-will which had been built up by the seller. Seven years into the contractual relationship, and after yearly renewals, the seller terminated both the dealer contract and the lease agreement, effective ten days from receipt of the notice. Upon the buyer's refusal to vacate the premises, the seller instituted the lawsuit to recover possession of the property. Among other defenses, the buyer asserted that (1) the two contracts were part of an integrated business relationship, and should be treated as one, and (2) that the ten-day-cancellation policy in the sales agreement was void as against public policy because it was grossly unfair, and because the plaintiff was in a grossly superior bargaining position at the time of making the contract. The trial court struck these defenses, and granted the seller a motion for summary judgement. The case came before the West Virginia Supreme Court of Appeals on a certified question of law.

The court began by finding the contracts were so inter-related that the parties would not have made one without the other, and held that they should be construed together as one contract. The court then held that the contract provisions allowing the seller the right of ten-day termination in both documents, but giving the buyer inconsistent ten-day and sixty-day rights of termination, were "indeed incapable of being reconciled in such a manner as to be clearly expressive of an intention which can be said to have been within the reasonable contemplation of the contracting parties." The court said that these termination provisions could produce a "completely absurd" result. As an example, the court pointed out that, theoretically, Ashland could terminate the lease agreement by giving a ten-day written notice of cancellation, but still require the buyer to continue to purchase and accept deliveries of gasoline for the ensuing year in minimum and maximum quantities specified in the contract, until Donahue's once-a-year right to terminate upon sixty days' notice came about. The court then discussed an important New Jer-

224. Id. It is equally absurd to think that a seller could think that they could get away with such an action, or that a court would allow it. To use an absurd example to automatically strike down a contract clause that is applied by a party in an arguably reasonable manner is questionable indeed.
sey decision where similar contracts were found to be grossly unfair because of the significantly disproportionate bargaining power between the seller and the buyer.225

The court then made a second important determination when it held that the lease of real estate and the dealer contract, being considered one transaction, was clearly a transaction in goods (petroleum products) which is governed by the Uniform Commercial Code, citing sections 46-2-102 and 46-2-105 of the West Virginia Code.226 Then, without further discussion, the court held that the ten-day cancellation clause contained in the dealer agreement and available only to the seller was unconscionable on its face. The court did not clearly articulate the basis for its conclusion. The court did say that it was not necessary to base its holding on the disparity of bargaining power between the parties.227 The court went on to state that the rules governing the transaction are generally stated in the Uniform Commercial Code, and that the other defenses of the buyer must be considered, along with the good faith requirement of section 1-203 of the Code. It then said that it could not apply these rules further without more evidence, and that the lower court should examine buyer's remaining defenses. "Having determined that the ten-day cancellation is unconscionable, we cannot and do not leave the parties with an irrevocable relationship."228

On remand, the court directed the trial court to determine whether to refuse to enforce the agreement, to enforce it without the unconscionable clause, or to limit the unconscionable clause so as to avoid an unconscionable result, citing section 46-2-302(1). It then stated that for the purpose of making this determination the lower court should receive evidence regarding the commercial setting, purpose, and effect of the transaction according to section 2-302(2), and should allow the buyer a full opportunity to present its defenses.

226. Ashland, 159 W. Va. at 473-74, 223 S.E.2d at 440. See supra discussion in text accompanying note 70.
227. Id.
228. Id.
The serious error in the court’s determination was its failure to follow the clear rule laid out in section 2-302. After stating that the Uniform Commercial Code governed the transaction, the court went on to ignore subsection (2) of 2-302, which requires the court to consider the facts carefully before it decides whether or not a contract is unconscionable. Subsection (2) provides:

When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.229

This subsection clearly requires the court to allow both the seller and the buyer to present facts before a court determines the contract unconscionable. The court failed to do this. Surprisingly, after finding the contract unconscionable without a consideration of the facts, the court then cited this very section in determining that the case must be remanded to the lower court for a hearing of the evidence and determination of facts before the lower court could decide what to do with this unconscionable clause.

As Comment 1 to section 2-302 states: “The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”230 The court had before it no record of such background, needs, and circumstances. It might well have been that the seller gave something in return for the buyer granting a one-sided ten-day right of termination. At the end of its opinion the court recognized that the parties had dealt with each other under a lease for almost five years, that presumably they were knowledgeable with reference to the commercial requirements of the service station business as well as with credit arrangements, business arrangements, dealings, usages common to the trade, and customs of performance known and relied upon by each other, and were cognizant of the additional terms surrounding the integrated business relationship known and accepted

230. Id. at comment 1.
by both Ashland and Donahue. The problem with the Ashland decision is not the court's reversal of the lower court's summary rejection of the unconscionability defenses. That was clearly a correct decision. The real error, made so clear by the precise language of section 2-302(2) requiring that the parties be afforded a reasonable opportunity to present evidence as to the commercial setting of the contract, together with the court's detailed statement that the parties likely were acting with special knowledge of practices unknown to the court, is that the court went ahead and found the contract clause unconscionable on its face without hearing evidence of the surrounding facts. This part of the decision constitutes a gross error in the methodology of the court's analysis of the statute and in the substance of the result.

Does Ashland mean that parties to contracts may not have grossly disparate correlative duties? The answer should be no for at least two reasons. First, the parties could make it clear in the contract that in exchange for giving one party an advantage not given to the other party, a quid pro quo was given in return. Second, Ashland was followed by several cases which alter the hard result and erroneous methodology of Ashland. In John Lodge Distributing Co., Inc. v. Texaco Inc.,232 the seller terminated a distributorship agreement under a contract allowing termination by either party on five days' notice. The buyer alleged, among other things, that the contract was against public policy and unconscionable. The trial court granted a motion to dismiss which was reversed by the West Virginia Supreme Court of Appeals. The supreme court held that the trial court must decide, in light of all the material facts, whether the termination provision was so one-sided as to be unconscionable, and in doing so "should consider evidence regarding such things as the commercial setting under which the contract was made, any possible disparity in bargaining power, the purpose and effect of the contract and any common business practices or expectation upon which either party may have relied."233 As authority, the court cited the Re-
statement (Second) of Contracts,\textsuperscript{234} section 2-302 of the Code, and Ashland with the words, "[t]his court stated then and still agrees that, 'Evidence is required [and] the lower court is required to give both parties a reasonable opportunity to present it.'"\textsuperscript{235} Of course, the John Lodge termination clause gave each party a right to cancel with five-days notice while the Ashland clause provided sixty-day and ten-day respective termination periods. But these factual differences do not seem important in light of the court's emphasis on the requirement that the court hear evidence of the surrounding circumstances from both parties before making a determination of unconscionability.\textsuperscript{236}

Further support for the conclusion in Lodge came five years later in McMellon v. Adkins,\textsuperscript{237} a lawsuit to invalidate coal leases as unconscionable on their face because they were so one-sided. Applying the common law to mineral leases not covered by the Code, the court cited section 2-302 to show that there must be a detailed analysis of facts in each case before a determination of unconscionability can be made. The court stated that unconscionability cannot be declared in the abstract, and held that the lower court had to consider the circumstances surrounding the execution of the leases, general, accepted terms of such leases at the time they were executed, underlying economic justification for such terms, and the actual understanding and experience of the lessors.\textsuperscript{238}

A number of other cases have applied section 2-302 of the Code as a guide to determining unconscionability in non-Code cases. In

\textsuperscript{234} Restatement (Second) of Contracts § 234 (Tent. Draft No. 5, 1970).

\textsuperscript{235} John Lodge, 161 W. Va. at 608, 245 S.E.2d at 160 (quoting Ashland, 159 W. Va. at 474, 223 S.E.2d at 440).

\textsuperscript{236} Another possible difference between the cases might be that Ashland, in the eyes of the court, was clearly a Code case covered by 2-302, while the court never tells us what law it is applying to John Lodge. In John Lodge, the court quoted the Restatement of Contracts, evidence of common law contract rules, Ashland, (which applied section 2-302), and section 2-302 itself when it stated "See also W. Va. Code § 46-2-302 dealing with the sales of goods." Id. at 609, 245 S.E.2d at 161. There is no apparent reason to believe that this difference could explain the differing results.

\textsuperscript{237} 300 S.E.2d 116 (W. Va. 1983).

\textsuperscript{238} The lawsuit employed a creative way of attacking the validity of a number of coal leases by asking the supreme court to exercise original jurisdiction in mandamus to order the clerk of the county commission to strike from the land books all mineral leases containing the similarly oppressive terms. Of course, they failed.
Orlando v. Finance One of West Virginia, Inc., the court stated, "Although ... 2-302 applies only to 'transactions in goods' ... the concept of unconscionability under the Uniform Commercial Code 'has been applied to many other kinds of contracts either by analogy or as an expression of the general doctrine.'" In Orlando, the court refused to find loan agreements unconscionable in an attempt by a class of borrowers to collect statutory damages from a bank. The loan agreements contained a clause providing that the borrower waived all debtors' exemptions "[t]o the extent permitted by law." In denying statutory penalties under the West Virginia Consumer Credit Protection Act, the court noted that the exemptions were in fact not waived because the clause provided "to the extent permitted by law," there was no evidence that the borrowers did not understand the clause, and the lending bank never made an attempt to enforce the clause.

In Troy Mining Corp. v. Itmann Coal Co., a contractor operated a coal mine under a coal mining contract with the owner. The contract allowed each party to terminate upon seven-days notice, and after seven years, the owner terminated the contract upon such notice. The court held the contract termination clause was not unconscionable, using section 2-302 as a guide to the common-law concept of unconscionability, even though the court found the case involved services and not goods. The court stated that the common-law concept of unconscionability is largely the same as the UCC provision, citing the comments to section 2-302 and Code cases, including Ashland and McMellon. In finding the clause conscionable, the court pointed out that it was mutually beneficial, and that the contractor was not only familiar with the clause, but had itself used a similar clause to terminate an earlier contract with another party.

In McGinnis v. Cayton, the owners of realty sued to void a ninety-year-old oil and gas lease which paid a nominal sum for gas

239. 369 S.E.2d 882 (W. Va. 1988).
240. Id. at 885 (quoting E. Farnsworth, supra note 135, § 4.28).
241. Id. at 883.
and a market price for oil. At the time of the execution, leases were made primarily for the oil, and the gas had so little value it was often discharged into the air. The plaintiffs asserted the leases should be voided because they were no longer commercially reasonable, and the trial court dismissed for failure to state a cause of action. The West Virginia Supreme Court of Appeals reversed, holding that it was possible that a trier of fact could find that the parties might have been mutually mistaken in their belief that the value of gas would remain *de minimus* in the future. A concurring opinion took a more detailed look at several possible causes of action, including unconscionability. In citing section 2-302 as a guide to unconscionability in this non-Code case, the concurring opinion presented a detailed review of unconscionability, including section 2-302, and referred to the equitable principles contained in section 1-103 of the Code.\textsuperscript{244}

In *Board of Education v. W. Harley Miller Inc.*,\textsuperscript{245} the court examined the enforceability of an arbitration clause in an excavation contract. The court announced a new rule of law providing that where the parties "bargained for" an arbitration provision, arbitration is mandatory and a resulting decision enforceable. The court went on to state that an arbitration provision would not have been "bargained for" in a contract of adhesion, or whenever a party can bring the arbitration provision within the unconscionability provision of section 2-302 of the Uniform Commercial Code.\textsuperscript{246} In *Gant v. Gant*,\textsuperscript{247} the court validated a prenuptial agreement. But the court proceeded to state that such an agreement would not be enforced if it were so outrageous as to come within the unconscionability principles as developed in commercial contract law (citing section

\textsuperscript{244} W. Va. Code § 46-1-103 (1966) provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."

\textsuperscript{245} 160 W. Va. 473, 236 S.E.2d 439 (1977). The real question raised by this opinion is whether it is better known for its three-page footnote, or for its discussion of rabbits, foxes, and "wolfery," and the concurring opinion possibly prompted by an objection to this discussion of "animal law."

\textsuperscript{246} Id. at 486-87, 236 S.E.2d at 447.

\textsuperscript{247} 329 S.E.2d 106 (W. Va. 1985).
2-302). In *Newell v. High Lawn Memorial Park Co.*, the court examined an escrow contract providing for the transfer of stock upon the death of the original owner. The court discussed a challenge to the contract based on failure of consideration, and cited as its counterpart the Code provision on unconscionability as a guide to handling problems concerning the objective nature of the bargaining process.

The number of cases discussing section 2-302 indicate that attorneys have been made aware of the Code's unconscionability provision and its use in non-Code cases. The cases themselves suggest that in determining whether a contract is unconscionable, the court will consider circumstances surrounding the execution of the contract, generally accepted terms contained in contracts of the kind made by knowledgeable parties, underlying economic justification of the terms in the contract, the level and equality of the understanding and the business experience of each party, inequality of bargaining power, whether the parties read and understood the contract, and whether the contract was mutually beneficial.

V. WARRANTIES

A. Generally

The UCC lays out a number of rules relating to warranties in sections 2-312 through 2-318 and in section 2-719. In every transaction in goods the seller warrants that the title shall be good and its transfer rightful and that the goods shall be free from any security

248. 264 S.E.2d 454 (1980). This opinion should become best known for its inclusion of a twenty-one line poem by Robert Frost, which recommends that women who have the misfortune of living into old age should store up their resources so they may purchase friends in their later years.


252. *Id.*


interest or other incumbrance of which the buyer has no knowl-
edge.\textsuperscript{256} The warranty of title may be excluded or modified only by
language which gives the buyer reason to know that the seller does
not claim the title in the goods or that she is only selling such right
as she may have.\textsuperscript{257}

Express warranties may be created by any affirmation of fact,
promise,\textsuperscript{258} description of the goods,\textsuperscript{259} or sample or model,\textsuperscript{260} which
is made part of the basis of the bargain. The result is an express
warranty that the goods shall conform to the affirmation, promise,
description, sample, or model. Although there is no need to use
formal language, or to even have a specific intention to make a
warranty, a mere statement of the value of the goods or the seller’s
opinion or recommendation of the goods does not create a war-
 ranty.\textsuperscript{261}

An implied warranty of merchantability is given in every sales
transaction where the seller is a merchant with respect to the kind
of goods sold, unless it is effectively excluded.\textsuperscript{262} “Merchantable”
means the goods must, among other things, pass without objection
in the trade under the contract description, be fit for the ordinary
purposes for which such goods are used, be adequately packaged
and labeled, and conform to the promises of fact on the container.\textsuperscript{263}
An implied warranty of fitness for a particular purpose is created
where the seller at the time of contracting has reason to know of
any particular purpose for which the goods are required, has reason
to know that the buyer is relying on the seller’s skill or judgement
to select suitable goods, the seller does select the goods, and the
buyer relies on the seller’s selection.\textsuperscript{264} Unless excluded, this creates
an implied warranty that the goods shall be fit for such purpose.

\textsuperscript{256} W. VA. Code § 46-2-312(1) (1966).
\textsuperscript{257} Id. § 46-2-312(2).
\textsuperscript{258} Id. § 46-2-313(1)(a).
\textsuperscript{259} Id. § 46-2-313(1)(b).
\textsuperscript{260} Id. § 46-2-313(1)(c).
\textsuperscript{261} Id. § 46-2-313(2).
\textsuperscript{262} Id. § 46-2-314(1). “Merchant” is defined in 46-2-104(1).
\textsuperscript{263} Id. § 46-2-314(2).
\textsuperscript{264} Id. § 46-2-315.
Express warranties, once given, may not be excluded, although words of exclusion will be read wherever reasonable as consistent with words creating such warranty.\textsuperscript{265} Warranties of merchantability may be excluded by contract exclusion language which mentions the word "merchantability" or the words "as is," "with all faults" or other similar language, but if in writing, the exclusion must be conspicuous.\textsuperscript{266} The implied warranty of fitness may be excluded by similar language, but it must be in writing and be conspicuous.\textsuperscript{267} Implied warranties may be excluded with regard to defects which ought to have been revealed by the buyer's examination of the goods, if the buyer did examine them or has refused to examine them.\textsuperscript{268} Implied warranties may also be excluded by course of dealing, course of performance, or usage of trade.\textsuperscript{269}

Warranties shall be construed as consistent with each other and as cumulative. To the extent this is unreasonable, the intention of the parties shall determine which warranty is dominant.\textsuperscript{270} In ascertaining that intention, specifications displace an inconsistent sample, model, or general description,\textsuperscript{271} a sample displaces an inconsistent general description,\textsuperscript{272} express warranties displace inconsistent implied warranties of merchantability, and an implied warranty of fitness for a particular purpose displaces express warranties.\textsuperscript{273} The parties in their contract may limit the buyer's remedies to return of the goods and repayment of the price, or to repair, or to replacement, and may also exclude consequential damages if such an exclusion is not unconscionable.\textsuperscript{274} The seller's warranty extends to any natural person in the buyer's family or household, or who is a guest of the buyer, if it is reasonable to expect such person

\begin{itemize}
\item \textsuperscript{265} Id. § 46-2-316(1). Of course, a written exclusion of warranties will operate to keep out any evidence of oral statements creating express warranties under the parol evidence rule, id. § 46-2-202, and result in the exclusion of express warranties.
\item \textsuperscript{266} Id. § 46-2-316(2).
\item \textsuperscript{267} Id.
\item \textsuperscript{268} Id. § 46-2-316(3)(b).
\item \textsuperscript{269} Id. § 46-2-316(3)(c).
\item \textsuperscript{270} Id. § 46-2-317.
\item \textsuperscript{271} Id. § 46-2-317(a).
\item \textsuperscript{272} Id. § 46-2-317(b).
\item \textsuperscript{273} Id. § 46-2-317(c).
\item \textsuperscript{274} Id. § 46-2-719.
\end{itemize}
may be affected by the goods and who is injured in person by breach of the warranty. 275

B. Express Warranties

At least six cases have involved express warranties under West Virginia law. Two cases directly addressed the creation of express warranties under section 2-313 of the Code. 276 Of the other four, two addressed the creation of express warranties as a main issue in the case, but did not cite section 2-313 as the applicable law. 277 The remaining two involved statements by the seller which probably created express warranties under the Code, but the opinions focused on whether the statements constituted fraud and did not discuss issues of express warranties. 278

The West Virginia Supreme Court of Appeals has made it clear that the existence of a UCC warranty is a question of fact for the jury. 279 This is consistent with the comments to the Code. 280

In one of its first cases addressing the UCC, the West Virginia Supreme Court of Appeals examined the creation of express warranties by sample. In Sylvia Coal Co. v. Mercury Coal & Coke Co., 281 the buyer visited the seller's place of business and was shown a pile of coal to be sold. Although the evidence was contradictory, the buyer stated he was also shown a bag of coal and a written coal analysis prepared by a laboratory which showed the coal to have between nine and ten percent ash content. The seller agreed that he had shown the buyer the written analysis, but testified that he told the buyer that the analysis was of coal taken from another part of

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275. Id. § 46-2-318.


279. Sylvia Coal, 151 W. Va. at 825, 156 S.E.2d at 6; Mountaineer, 165 W. Va. at 301, 268 S.E.2d at 892.

280. See W. VA. CODE § 46-2-313 comment 3 (1966); § 46-2-315 comment 1; and § 46-2-316 comment 6.

the mine and that the coal pile to be sold was of substandard quality, containing considerable slate and rock. According to the seller, the written analysis was exhibited just to indicate the quality of the original seam, not of the pile of discarded coal that was for sale. In a suit for breach of warranty, the buyer asserted (among other claims) that the sale was a sale by sample, and that the delivered coal did not conform to the written coal analysis exhibited with the bag of coal.\textsuperscript{282}

To create an express warranty through the exhibition of a sample, the Code provides: "Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model."\textsuperscript{283} The court in \textit{Sylvia Coal} held that the exhibition of a sample during negotiations for a sale does not necessarily make it a sale by sample so as to thereby create an express warranty under section 2-313. "The contract must evidence intention to contract by sample."\textsuperscript{284} The court observed that there was credible evidence that the seller told the buyer that the written analysis referred to the original seam and not to the coal offered for sale, and therefore the jury was justified in finding the parties did not intend the written analysis (and the accompanying bag of coal) to be a sample of the coal contracted for. In Code language, the sample was not "made part of the basis of the bargain" as required by section 2-313(1)(c).

The opinion in \textit{Sylvia Coal} raises a number of questions. If the buyer examined the part of the actual pile of coal to be sold, that pile itself could be considered a sample, and, if it was patently inconsistent with the bag and the accompanying written analysis, the "sale by sample" express warranty should be the one created by the coal-pile sample, the actual goods to be sold, not the bag and

\textsuperscript{282} The opinion does not state whether the coal in the bag was examined by the buyer, or whether the buyer would be able to determine the characteristics of the coal, including ash content, from an examination of the coal. Later in the opinion, the court stated that the buyer's examination of the coal pile might well have revealed the quality of the coal to be sold, thereby excluding any express warranties that were inconsistent with the quality of the coal in the pile examined. \textit{Id.} at 827, 156 S.E.2d at 7.

\textsuperscript{283} W. VA. CODE § 46-2-313(1)(c) (1966).

\textsuperscript{284} \textit{Sylvia Coal}, 151 W. Va. at 827, 156 S.E.2d at 7 (citing American Canning Co. v. Flat Top Grocery Co., 68 W. Va. 698, 70 S.E. 756 (1911) (a pre-Code case)).
written analysis sample. Another way of looking at it is that if two inconsistent samples are shown, the ambiguity created prevents either sample from being a "part of basis of the bargain" between the parties. The Sylvia Coal court’s only mention of this fact is its statement that the buyer’s examination of the coal pile itself and subsequent order of delivery could have constituted an exclusion under section 2-316(3)(a) and (b) of any (implied) warranty that the coal would be of higher quality than that coal in the pile.285

It is also interesting that the court (and likely the buyer’s lawyers) did not discuss the written coal analysis as creating an express warranty. Section 2-313(b) provides: "Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."286 Clearly the written analysis creates an express warranty under this section if it was "part of the basis of the bargain." Additionally, if both the written analysis and the coal pile sample were part of the basis of the bargain, they both would have satisfied the section 2-313 requirements for creating express warranties. Yet the two were inconsistent with each other. If so, the written-analysis-description warranty would supersede the coal-pile-sample warranty under section 2-317, which provides: "Exact or technical specifications displace an inconsistent sample."287 This argument would have favored the buyer.

The court examined the "part of the basis of the bargain" requirement of section 2-313 again in Mountaineer Contractors, Inc. v. Mountain State Mack, Inc.288 In Mountaineer, the West Virginia Supreme Court of Appeals held that a promise made after the contract was made could create an express warranty as a modification, even though it might not constitute part of the "basis of the bargain" of the original contract. This issue, and the contrary state-

285. Id. at 827-28, 156 S.E.2d at 7-8. After receiving several deliveries, and not being satisfied with the coal, the buyer went to seller’s coal yard and after first stopping delivery, directed seller’s agents to load specific coal from specific parts of the pile.
287. Id. § 46-2-317(a) entitled "Cumulation and Conflict of Warranties Express or Implied.").
ments in a later federal court opinion, were examined in the earlier discussion of modification of contracts under the Code.

Not all promises or apparent statements of facts become express warranties under section 2-313, even if they were arguably part of the basis of the bargain. Section 2-313(2) provides: "An affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty." Such statements are sometimes referred to as "sales talk" or "puffing". Determining what statements constitute an express warranty and what statements merely constitute "puffing" is a question of fact for the jury. A West Virginia court examined this question in *Roxalana Hills Ltd. v. Masonite Corp.*

In *Roxalana*, the buyer purchased house siding which, after time, began to absorb moisture leading to decay and rot. The buyer sued the manufacturer for, among other claims, breach of express warranties. The buyer asserted three communications allegedly creating express warranties. First there was an advertisement published prior to the purchase stating that the siding was "specially formulated for weatherability and durability." Next, after the contract was made and the siding delivered and affixed to the building, and after problems developed with the siding, the seller wrote buyer a letter which recommended specific installation techniques for the siding and ended by saying if the recommended changes in construction technique were made, the board would perform "quite satisfactorily." Finally, after the siding was sold and affixed to the side of the buildings, and after the lawsuit was brought, two of the seller’s agents stated at depositions that if the siding were properly installed, it would last the lifetime of the building.

The trial court easily found that the two statements made after the contract, delivery, and use, were incapable of being "part of

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290. See supra text accompanying notes 201-06.
292. Roxalana, 627 F. Supp. 1194. For a further discussion of Roxalana and issues closely related to the issue discussed here, see infra text preceding and following note 618.
293. Roxalana, 627 F. Supp. at 1200.
the basis of the bargain” as required by section 2-313 because they were made after the sale. 294 The court found the advertisement statement “specifically formulated to provide durability and weatherability” to be merely a statement which “relates to the value of the product and falls short of the factual affirmation or description which forms the basis of the bargain.” 295 This statement indicates the court found the advertisement to be a mere seller’s commendation, “puffing,” incapable of being taken seriously enough by the buyer to constitute a part of the basis of the bargain. The court again referred to the statements made after the contract, delivery, and use, and characterized these also as “puffing” which “are easily dismissed as merely opinions.”

The thrust of the seller’s defense in Roxalana was that the lawsuit was brought after the Code’s four-year statute of limitations. The buyer attempted to show that express warranties were made as to the future performance of the siding, so as to toll the running of the statute. 297 The court was likely too liberal in deciding as a matter of law 298 that all of the statements made by the seller’s agents were mere opinions or statements of value of the product which could be easily dismissed. Certainly reasonable jurors could find that a written brochure describing house siding and stating “the siding is specifically formulated for weatherability and durability” is “an affirmation of fact” or “a description” 299 that is not met if the siding actually absorbs moisture and rots. Although it might be expected that many courts would let such a question go to the jury, it would have made no difference in this case because even if the statement did create an express warranty, the buyer’s action would still have been barred by the statute of limitations and thus the dismissal was justified on grounds independent of the creation of an express warranty.

294. Id.
295. Id. at 1201.
296. Id. at 1201.
297. For a discussion of the statute of limitations issues in Roxalana, see infra text following note 591.
Another West Virginia express warranty case which deserves some comment involved the sale of birth control pills. In *Whittington v. Eli Lilly & Co.*, the buyer's physician prescribed an oral contraceptive named "C-Quens" and gave the buyer a pamphlet prepared by the manufacturer. The pamphlet stated, "When taken as directed, the tablets offer virtually 100% protection." The buyer took the prescription to a pharmacy, purchased the drugs, and used them for a year during which time she became pregnant. The birth was normal and the baby healthy. The plaintiff sued the manufacturer for, among other things, a breach of an express warranty promising the absolute efficiency of the contraceptive tablets.

The opinion makes no mention of the UCC or of section 2-313 on express warranties—the law governing the issues presented. The court focused on the language of the alleged express warranty and cited Webster's Dictionary as defining "virtually" as "almost entirely." The court concluded that clearly the advertisement's statement that the tablets "offer virtually 100% protection" did not mean absolute protection, but "almost entire" protection. Therefore, there was no warranty, or at least no warranty of absolute protection. The trouble with the court's analysis, in addition to its failure to cite the clearly applicable statutes, was that it focused too narrowly on the language used in the pamphlet. The court focused on the word "virtually" and used the Webster's Dictionary definition of that word. In fact, the advertisement did not state "virtually." Instead, it said "virtually 100%." To the average consumer, "virtually 100%" might not have the same connotation or meaning as "virtually." In fact, the buyer testified that she did not know what "virtually" meant. If in fact it is common for buyers to think that "virtually 100% protection" means absolute protection, then the court at least ought to allow a jury decide whether that is the message conveyed by the seller's statement and determine whether the other requirements of section 2-313 were met.

None of this is to suggest that the plaintiff should have won the lawsuit. First, the opinion did not reveal any evidence that the state-
ment made was "part of the basis of the bargain" in the sense that the buyer was aware of the statement at the time of making the contract. Second, there was no evidence that the buyer played any role in choosing C-Quens over any other birth control method, as the tablets were prescribed by the physician and probably chosen by the physician. Finally, if the C-Quen tablets in fact offered about the same level of protection against pregnancy as any other birth control method, as a policy matter, it would seem unfair to hold the seller liable for the expected chance pregnancy unless it is clear that the seller intended to undertake that risk at the time of the contract.

A decision for the buyer might possibly be justified on punitive grounds. The facts of Whittington create a suspicion that the seller chose the figure "100%" to encourage whoever read the message to buy the product, yet added the word "virtually" for legal protection, confident that "virtually" would not seriously interfere with the connotation of absolute protection that accompanies the term "100%.”

C. Implied Warranties of Merchantability

The Code provides that in every sale by a merchant the seller warrants that the goods shall be merchantable, unless the warranties are effectively excluded in the contract. In West Virginia, a seller may not exclude or limit warranties in a sale of goods for under twenty-five thousand dollars where the purchase is made for a personal, nonbusiness use. The Code provides the general parameters of the substance of the implied warranty of merchantability.

304. (2) Goods to be merchantable must be at least such as:
(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; and
(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged, and labeled as the agreement may require; and
(f) conform to the promises or affirmations of fact made on the container or label if any.

W. VA. CODE § 46-2-314 (19660.)
Approximately seven West Virginia cases have involved implied warranties of merchantability. Of these, two assumed the warranties existed but did not discuss issues surrounding the warranties.\textsuperscript{305}

The determination of the existence of implied warranties is a question of fact for the jury.\textsuperscript{306} The existence of an implied warranty of merchantability may be proven by circumstantial evidence, and the buyer need not prove the breach by direct evidence, or exclude every possible cause for the defective condition of, or damage to, the goods.\textsuperscript{307}

In two cases involving goods related to health care, the West Virginia Supreme Court of Appeals has refused to find implied warranties of merchantability. In \textit{Foster v. Memorial Hospital Association of Charleston,}\textsuperscript{308} the court held that the sale or transfer of blood in a blood transfusion was not a sale of goods for which implied warranties apply. In \textit{Rohrbough v. Wyeth Laboratories, Inc.,}\textsuperscript{309} the buyer's child developed a seizure disorder after a diphtheria, tetanus, and pertussis vaccine was administered. The plaintiff sued the manufacturer in strict liability and on implied and express warranty theories, and the court granted the manufacturer a summary judgement on all three claims. The court found that Wyeth adequately warned the administering health-care professional (the physician), and the manufacturer's duty to warn was satisfied under the "learned intermediary" doctrine.\textsuperscript{310} In doing so, the court equated the warning to the learned intermediary with knowledge of the warning on the part of the consumer. It then went on to state:

furthermore, assuming that Wyeth adequately warned of the risks associated with its DTP vaccine, \textit{see infra}, it did not breach the warranty of merchantability. So long as the consumer accepts a product with knowledge of its dangers, the man-

\textsuperscript{306} Mountaineer, 165 W. Va. 292, 301, 268 S.E.2d 886, 892 (1980); Sylvia Coal, 151 W. Va. 818, 825, 156 S.E.2d 1, 6 (1967).
\textsuperscript{308} 159 W. Va. 147, 219 S.E.2d 916 (1975). For a detailed discussion of \textit{Foster, see supra} text accompanying note 75.
\textsuperscript{310} \textit{Id.} at 478.
The manufacturer cannot be held liable for impliedly warranting against injuries that it warned the consumer might occur.\textsuperscript{311}

The court also specifically found that the vaccine would pass without objection in the trade, as required by section 2-314(2)(a)\textsuperscript{312}. The section 2-314 implied warranty of merchantability is only created where the seller is a merchant. "Merchant" is defined as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction."\textsuperscript{313} In \textit{Sylvia Coal},\textsuperscript{314} the seller had no experience in the sale of coal, as his experience was only in the production of coal.\textsuperscript{315} In its discussion of the implied warranty of fitness under section 2-315, the court held the seller was not a merchant. Yet, when addressing the implied warranty of merchantability, the court proceeded to allow the jury to consider the existence and substance of any implied warranty of merchantability that might have been created. This inconsistency was clearly erroneous. First, the seller was selling coal commercially and was certainly a merchant of coal. No case has been found which excuses a business operator from the duties of a merchant under sections 2-104\textsuperscript{316} and 2-314 because of lack of experience. Furthermore, if the court found that the seller was not a merchant, the court should have found that no warranty of merchantability existed as a matter of law.

\section*{D. Implied Warranties of Fitness For a Particular Purpose}

Two West Virginia cases have addressed the creation of implied warranties of fitness for a particular purpose.\textsuperscript{317} The West Virginia

\begin{itemize}
\item \textsuperscript{311} \textit{Id.} at 478.
\item \textsuperscript{312} \textit{W. Va. Code} § 46-2-314(2)(a) (1966). The court also pointed out that West Virginia requires that goods fully comply with state and federal regulations. \textit{W. Va. Code} § 46A-6-102(c) (1986 & Supp. 1991). The court found that the vaccine was the only type of vaccine licensed for use in the country, and as such complied with all federal regulations.
\item \textsuperscript{313} \textit{W. Va. Code} § 46-2-104(1) (1966).
\item \textsuperscript{314} \textit{Sylvia Coal}, 151 W. Va. 818, 156 S.E.2d 1 (1967).
\item \textsuperscript{315} \textit{Id.} at 828, 156 S.E.2d at 7.
\item \textsuperscript{316} "'Merchant' means a person who deals in goods of the kind . . . ." \textit{W. Va. Code} § 46-2-104(1) (1966).
\item \textsuperscript{317} Jones, Inc. v. W.A. Weidebusch Plumbing and Heating Co., 157 W. Va. 257, 201 S.E.2d
\end{itemize}
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Supreme Court of Appeals has followed the Code Comment and held that the existence of an implied warranty of fitness for a particular purpose is a question of fact for the jury.318

In Jones Inc. v. W. A. Weidebusch Plumbing and Heating Co., the buyer-store owner relied upon the seller to select and furnish fire sprinkler heads suitable for operation in the buyer's store.319 After the seller's agent installed the sprinkler heads, they suddenly discharged water, damaging the contents of the buyer's store. The court held that the implied warranty of fitness for a particular purpose under section 2-315 and the implied warranty of merchantability under section 2-314 are not mutually exclusive and can coexist.320 In analyzing the seller's liability under section 2-315, the court laid out the elements of 2-315 as:

(1) The seller at the time of contracting had reason to know the particular purpose for which the goods were required; (2) the reliance by the plaintiff as buyer upon the skill or judgement of the seller to select suitable goods; and (3) that the goods were unfit for the particular purpose.321

To these elements should be added a fourth, a requirement that at the time of contracting the seller also had reason to know the buyer was relying on the seller's skill to select suitable goods,322 and a fifth, that the seller in fact selected the goods. The Jones court had no problem in finding that all of the elements of section 2-315 were present.

248 (1973). A third case, Foster v. Memorial Hosp. Assoc. of Charleston, 159 W. Va. 147, 219 S.E.2d 916 (1975), held that the implied warranty of fitness for a particular purpose did not apply to the transfer of blood in a blood transfusion, but there was no real discussion of § 2-315 in the court's opinion; Sylvia Coal, 151 W. Va. 818, 156 S.E.2d 1 (1967).


320. Jones, 157 W. Va. at 266, 201 S.E.2d at 254. See also W. Va. Code § 46-2-315 comment 2 (1966). In Jones, the particular purpose for the sprinkler head was to operate properly inside the buyer's store, which was likely the general purpose of sprinkler heads covered by the implied warranty of merchantability under § 2-314(2)(c), which provides: "are fit for the ordinary purposes for which such goods are used."

321. Jones, 157 W. Va. at 258, syllabus point 2, 267, 201 S.E.2d at 249, syllabus point 2, 254.

322. The first clause in § 2-315 reads "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgement to select or furnish suitable goods . . . ." W. Va. Code § 46-2-315 (1966) (emphasis supplied).
In *Jones*, the court compared the buyer’s lack of knowledge and the seller’s expertise with the facts of *Sylvia Coal*. The *Sylvia Coal* involved an experienced coke maker who visited the seller’s coal mine site and inspected the coal that seller was offering for sale. "[T]here was evidence that the seller knew nothing about the technical aspects of the use of coal for coke and that the buyer not only did not rely on this skill, but possessed more technical knowledge than the seller." The *Jones* court went on to point out that in *Sylvia Coal* there was conflicting evidence on the respective knowledge and reliance of the parties, while in *Jones*, the seller confirmed that the buyer had no skill or knowledge and in fact relied on the skill and knowledge of the seller. Consequently, the court stated that the issue of reliance was not even a jury question in *Jones*.

In *Sylvia Coal*, the court incorrectly characterized the seller as not a "merchant" for selling coal. The court went on to state that "[i]n such case, the implied warranty of fitness for a particular purpose is not ordinarily applicable." As support, the court cites Comment 4 to section 2-315 which provides: "Although normally the warranty will arise only where the seller is a merchant with the appropriate 'skill or judgement,' it can arise as to non-merchants where this is justified by the particular circumstances." The court appears to overstate the thrust of the Comment. In the usual case where an implied warranty of fitness is found, the seller certainly is a merchant. But that is not to say that the implied warranty of fitness is not "ordinarily applicable" where the seller is not a merchant. It would depend upon the conduct of the seller, the reliance of the buyer, the reasonableness of such reliance, and the seller’s perceptions of the existence of such reliance.

324. *Jones*, 157 W. Va. at 270, 201 S.E.2d at 255.
325. *Id.*
326. *Sylvia Coal*, 151 W. Va. at 828, 156 S.E.2d at 7. As stated above, the Code definition of "merchant" includes "a person who deals in goods of the kind." W. Va. CODE § 46-2-104(1) (1966). The seller in *Sylvia Coal* was a coal mine operator selling coal.
327. *Id.*
Finally, the court in *Jones* held that circumstantial evidence was sufficient to show a breach of the implied warranty of fitness for a particular purpose.329

### E. Exclusion of Warranties

An exclusion of warranties is generally valid if it meets the requirements of section 2-316 of the Code and complies with the requirements of the Magnuson-Moss Warranty Act if the Act applies,330 unless it is unconscionable,331 or is covered by the West Virginia Consumer Credit Protection Act.332 Warranties can be excluded by express statements, both oral and written, and by an examination of the goods or of a sample or a model of the goods, which ought to reveal the defect in the goods,333 and by course of performance and usage of trade.334 In construing written exclusions, all ambiguities will be resolved against the drafter.335 The court in *Sylvia Coal*336 stated that the buyer’s examination of the actual coal piles from which the coal was sold, and later actions in directing the seller’s loader to places in the coal pile from which to take coal, could “tend to prove the exclusion of implied warranties as allowed by [the] Code.”337

In *Mountaineer Contractors, Inc. v. Mountain State Mack, Inc.*,338 the seller offered the buyer the opportunity to inspect written service records concerning the equipment to be sold, but the buyer declined.

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329. *Jones*, 157 W. Va. at 270, 201 S.E.2d at 256.
332. See W. Va. Code § 46A-6-107 (1986 & Supp. 1991) (invalidating disclaimers in sales transactions where the purchase is under $25,000 and is made by a consumer for a personal, non-business purpose).
334. Id. § 46-2-316(3)(c).
337. Id. at 827-28, 156 S.E.2d at 8.
The court found that the issue of whether an inspection ought to have disclosed the defects was a question of fact for the jury, and that the evidence at trial tending to show that the defects in the goods arose after the opportunity to inspect the records was sufficient to support a jury determination that there was no exclusion. Significantly, the court went on to say that there is no indication in section 2-316(3)(b) that the refusal to examine records with respect to goods operates as a waiver of implied warranties, pointing out that "the Code clearly refers only to the buyer's refusal to inspect the goods themselves."

The seller in *Mountaineer* attempted to exclude all warranties by a clause in a written security agreement, executed apparently sometime after the original contract was made and maybe after the equipment was delivered, providing: "No oral agreement, guarantee, promise, representation or warranty shall be binding." The court did not determine whether this written provision constituted a valid exclusion under section 2-316, but limited its analysis to whether the written statement operated to exclude evidence of oral express warranties under the parol evidence rule. The real issue in *Mountaineer* was whether an express oral promise to repair the goods, which the court characterized as an express warranty, became part of the contract. Part of the issue was whether evidence of the oral promises were kept out by the later written statement that "no oral agreement, guarantee, promise, representation or warranty shall be binding." In the end, the court determined that it did not exclude at least those oral promises made after the written exclusion.

In *Davis v. Dils Motor Co.*, the buyer purchased a used truck-tractor. The sale was evidenced by an invoice (also referred to as a "purchase order") and a contemporaneously executed security agreement. The court found that the issue of whether an inspection ought to have disclosed the defects was a question of fact for the jury, and that the evidence at trial tending to show that the defects in the goods arose after the opportunity to inspect the records was sufficient to support a jury determination that there was no exclusion. Significantly, the court went on to say that there is no indication in section 2-316(3)(b) that the refusal to examine records with respect to goods operates as a waiver of implied warranties, pointing out that "the Code clearly refers only to the buyer's refusal to inspect the goods themselves."

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339. *Id.* at 297, 268 S.E.2d at 890.
340. *Id.*
341. *Id.* Although the court did not discuss it, there was also an issue as to whether a mere "failure" to examine proffered records constitutes a "refusal" to examine such records under the language of section 2-316(3)(b), "or has refused to examine."
342. *Id.* at 300, 268 S.E.2d at 891.
343. See *supra* discussion in text accompanying note 185.
agreement. The invoice contained a number of clauses providing among other things:

[Buyer has read all of the provisions of this invoice] including the reference to Warranty and NO WARRANTIES OF MERCHANTABILITY OR FITNESS. [This order] is the complete and exclusive agreement on the subject matters covered by this Order. . .SEE REVERSE SIDE FOR INFORMATION ON WARRANTIES. (continuing on the reverse side of the invoice) If said vehicle is delivered during said warranty to DILS FORD for . . .repairs. . .all parts . . .will be furnished by. . .dealer at a cost of 50% discount on parts and labor. . .The terms and conditions of this DILS USED CAR WARRANTY are only these stated herein. . .WARRANTY DISCLAIMER . . .consequential damages are not covered. . .any and all implied warranties of fitness and merchantability shall be limited to the duration of this warranty . . ..345

The contemporaneously executed security agreement also “conspicuously provided” a disclaimer which read:

DISCLAIMER: There are no warranties other than those made by the manufacturer of the Collateral. SELLER MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, AS TO THE QUALITY, WORKMANSHIP, DESIGN, MERCHANTABILITY, SUITABILITY, OR FITNESS OF THE COLLATERAL FOR ANY PARTICULAR PURPOSE, OR ANY OTHER REPRESENTATION OR WARRANTY WHATSOEVER, EXPRESS OR IMPLIED, unless such warranties are in writing and signed by Seller. Seller shall not under any circumstances by liable for loss of anticipatory profits or consequential charges.346

The court was called upon to decide whether the attempted disclaimers contained in the invoice and security agreement effectively excluded the implied warranty of merchantability under 2-314 and the implied warranty of fitness for a particular purpose under 2-315.347

The court began its analysis by determining whether the language in the invoice, standing alone, was effective to “waive or modify”

345. Id. at 1363. The language quoted is taken from five separate paragraphs of the invoice appearing in the court's opinion. The opinion itself did not reproduce all of the invoice, some language from the invoice referred to in the text of the opinion does not appear in the opinion.

346. Id. at 1364.

347. The court also ruled that the Secretary of Transportation's order excluding heavy trucks from the odometer requirement of the Motor Vehicle Information and Costs Savings Act, 15 U.S.C. § 1988 (1980) was void. Therefore, the seller was subject to the requirements of the Act. Id. at 1362-63.
the implied warranty of merchantability (2-314) or the implied warranty of fitness (2-315).\textsuperscript{348} Noting that there was no evidence indicating it was an "as is" sale, the court stated that it must apply section 2-316(2) to determine whether the attempted warranty exclusion was effective. Section 2-316(2) provides:

\begin{quote}
[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."\textsuperscript{349}
\end{quote}

First addressing the attempted exclusion of the implied warranty of fitness, the court focused on the invoice language "NO WARRANTIES OF MERCHANTABILITY OR FITNESS" and "The terms and conditions of this DILS FORD USED CAR WARRANTY are only those stated herein." Without further analysis, the court concluded that this language waived the implied warranty of fitness.\textsuperscript{350} The court did not clearly articulate precisely why it held the language sufficient to disclaim the implied warranty of fitness. The court could have reasoned that the invoice provision: "The terms and conditions of this DILS FORD USED CAR WARRANTY are only those stated herein," was similar to the sample exclusion specifically offered in section 2-316(3)(b): "Language to exclude all warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'"\textsuperscript{351} Or, the court might have found that the same invoice language invoked the parol evidence rule, effectively keeping out inconsistent evidence of facts necessary to the creation of an implied warranty of fitness.\textsuperscript{352} The court reached its conclusion that implied warranties of fitness were excluded by the invoice without considering the disclaimer in the security agreement.

\textsuperscript{348} Davis, 566 F. Supp. at 1363.
\textsuperscript{349} W. VA. CODE § 46-2-316(2) (1966).
\textsuperscript{350} Davis, 566 F. Supp. at 1364 & n.16A.
\textsuperscript{351} W. VA. CODE § 46-2-316(2) (1966) (emphasis added).
\textsuperscript{352} An unusual use of the parol evidence rule. The rule keeps out evidence of contradicting "agreements." Id. § 46-2-202. Yet the Code definition of "agreement" includes "The bargain of the parties in fact as found in their language or by implication from other circumstances." See id. § 46-1-201(3).
The court next examined the attempted disclaimer of the implied warranty of merchantability. It immediately concluded that the invoice only limited the implied warranty of merchantability to a period of thirty days on any subsequently replaced parts, and could not operate as a general waiver of the implied warranty of merchantability.\(^{353}\) It is not clear how the court reached this conclusion, as there is no mention of a thirty-day period in the portions of the invoice reproduced in the opinion. What is apparent, is that the court found the language in the invoice, that both attempted to exclude the warranty of merchantability and limited the exclusion to thirty days, to be "ambiguous"\(^{354}\) and ineffective as a general exclusion.

The court then considered the separate disclaimer contained in the security agreement. It viewed the security agreement disclaimer, standing alone, to contain "clear waiver language."\(^{355}\) It also rejected buyer's argument that the security agreement disclaimer should be ignored simply because it was in a security agreement and not in the contract of sale, holding that the terms of the invoice and security agreement "having been executed together...should be construed together" unless the terms conflicted.\(^{356}\) The court then found that the clear language of exclusion in the security agreement did conflict with the ambiguous language in the invoice, and held that the security agreement language must be disregarded.\(^{357}\)

It is difficult to see how the court found the waiver of the fitness warranty, while finding the waiver of the merchantability warranty

\(^{353}\) *Davis*, 566 F. Supp. at 1364 (text following n.16A).
\(^{354}\) *Id.* at 1365.
\(^{355}\) *Id.*
\(^{356}\) *Id.* at 1364. The Buyer argued that the security agreement disclaimer should be ignored, because of W. VA. CODE § 46-9-206(2) comment 3 (1966 & Supp. 1991), providing:

*It also prevents a buyer from inadvertently abandoning his warranties by a "no warranties" term in the security agreement when warranties have already been created under the sales arrangement. Where the sales arrangement and the purchase money security transaction are evidenced by only one writing, that writing may disclaim, limit or modify warranties to the extent permitted by Article 2.*

The court stated that the security agreement should be ignored when it is created after the contract for sale, but not where, as here, it was created contemporaneously with the contract for sale.

\(^{357}\) *Davis*, 566 F. Supp. at 1365. The court concluded by denying the seller's motion for summary judgement on the buyer's claim for breach of implied warranty of merchantability.
to be ambiguous. The invoice statement "NO WARRANTIES OF MERCHANTABILITY OR FITNESS" suggesting total exclusion, contrasted with "SEE REVERSE SIDE FOR...WARRANTIES" and "all implied warranties of...fitness and merchantability shall be limited to the duration of this warranty" which suggest no total exclusion. These inconsistent invoice statements referring to merchantability also refer to fitness. The *Davis* court failed to adequately articulate the reasons for its holding.

In the recent *Rohrbough* decision, a West Virginia federal court adopted the "learned intermediary" doctrine, holding that where a drug manufacturer warns the health care professional about the dangers and risks associated with a DPT drug, the warnings are effective against the consumer of the drug. Although the case was tried primarily as a product liability tort case, the buyer also asserted the drug was unmerchantable under the Code. The court, equating adequate warnings with a valid exclusion under section 2-316, held that as long as the consumer accepts a product with knowledge of its dangers, the manufacturer cannot be held liable for impliedly warranting against injuries it warned might occur.

**F. Privity**

"Privity" refers to a contractual connection between two parties. Traditionally, contract law has made privity a condition of contract liability. "Vertical non-privity" refers to a lack of contractual connection between two persons in the distributive chain of goods. For example, a buyer who buys a good from a retailer is not in "vertical privity" with the manufacturer of the good. "Horizontal non-privity" refers to a lack of contractual connection between a user or consumer of a good who did not purchase the good in the distributive chain and the last seller of the good. For example, the daughter using a power saw purchased by her mother is not in "horizontal privity" with the seller who sold the saw to the mother.

359. Always subject to some conditions, including third party beneficiary liability.
The West Virginia version of the Code privity provision, section 2-318, does not address the issue of vertical privity.\textsuperscript{360} It does provide that the seller's warranties extend to any natural person who is in the family or household of the buyer, or is a guest in the buyer's house, if it is reasonable to expect that such person may use or be affected by the goods and who is injured in person by breach of the warranty.\textsuperscript{361} The growth of strict liability in the United States during the time since the original drafting of the Code has made this Code privity section much less important than originally anticipated.\textsuperscript{362}

The West Virginia Supreme Court of Appeals addressed the question of privity in \textit{Dawson v. Canteen Corp.}\textsuperscript{363} where the buyer purchased a cheeseburger from a vending machine. The buyer suffered acute food poisoning from mice feces in the cheeseburger, and sued the non-privity bread bakery for breach of implied warranty. In determining whether the lack of privity barred the buyer's claim against the manufacturer, the court noted that the UCC eliminated the privity requirement as to horizontal non-privity users.\textsuperscript{364} The court also noted that the West Virginia legislature had recently eliminated the requirement of privity in the vertical chain of distribution for consumer transactions in the West Virginia Consumer Credit and Protection Act.\textsuperscript{365} Importantly, the \textit{Dawson} court held, "[i]t is sufficient merely to hold that lack of privity alone is no longer a defense to a warranty action in West Virginia."\textsuperscript{366}

The \textit{Dawson} court seemed to go well beyond the facts in the case, which concerned a non-vertical privity consumer who suffered

\textsuperscript{360} W. VA. CODE § 46-2-318 (1966). This was Alternative A of the 1962 Official Text of the Code. Alternatives B and C, adopted by a number of states, address both vertical and horizontal privity.

\textsuperscript{361} Id.


\textsuperscript{363} 158 W. Va. 516, 212 S.E.2d 82 (1975).

\textsuperscript{364} Id. at 519, 212 S.E.2d at 83.

\textsuperscript{365} W. VA. CODE § 46A-6-108 (1986 & Supp. 1991), providing "no action by a consumer for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall fail because of a lack of privity between the consumer and the party against whom the claim is made."

\textsuperscript{366} Dawson, 158 W. Va. at 519, 212 S.E.2d at 84.
personal injury, and hold that lack of privity is no longer a defense in any warranty action, presumably including both consumer transactions and non-consumer transactions, actions involving economic loss and those involving personal injury, and transactions including lack of vertical privity and those involving lack of horizontal privity. The issue arose again thirteen years after Dawson in Sewell v. Gregory, a non-sale of goods case. In Sewell, the contractor built a house and sold it to a first buyer. Three and a half years later, the first buyer sold it to a second buyer, and soon thereafter the house flooded, apparently because of defects in the construction. The second buyer sued the contractor (and the first buyer) in strict liability, negligence, and breach of warranties of habitability and fitness for a family residence. In holding that contractors can be liable for breach of an implied warranty of habitability and fitness for use as a family home to non-privity subsequent buyers, the court found that the lack of privity between the contractor and the second buyer was not a barrier in matters of implied warranty, citing Dawson as precedent. Interestingly, Justice Neely, who had written the sweeping opinion in Dawson, dissented vigorously to the majority holding on privity in Sewell. Arguing that the Dawson abolition of privity was restricted to goods which were mass produced and mass distributed, and lamenting that the majority had misconstrued Dawson, Justice Neely stated that privity should be a warranty requirement in actions involving non-mass marketed sales.

VI. Buyer's Rights Upon Seller's Nonconforming Delivery

A. Generally

The traditional choice of a buyer faced with a nonconforming tender was to either refuse to accept the nonconforming tender

368. Id. at 86.
369. Id. at 87.
370. Id. at 89. Justice Neely concluded by arguing that economic loss should not be recoverable under negligence, but should be recognizable only in an action for breach of contract (although acknowledging that the court had affirmed recovery of economic losses under strict liability in Star Furniture v. Pulaski Furniture Co., 297 S.E.2d 854 (W. Va. 1982)). Id. at 89-90, 89 n.6. Justice Neely closed by opining that the majority decision only provides an additional chapter in the "Lawyers Relief Act."
371. "Nonconforming" generally means the proffered goods did not fit the contract description,
or to accept the tender despite the inconsistency with the contract requirements. In either case, the nonconforming tender likely constituted a breach of the contract, and if the buyer suffered a loss as a result of the breach, the buyer had the usual range of breach of contract remedies. If the buyer first accepted the goods without discovering they were nonconforming and then discovered the non-conformity, buyer's choice was to either keep the goods and hold seller liable for any resulting loss, or if certain conditions were met, rescind the contract, return the goods, and recover any monies paid the seller.\textsuperscript{372}

The Code has a carefully developed scheme for dealing with these issues. The seller has an obligation to deliver goods in accordance with the contract,\textsuperscript{373} including tendering them at a reasonable hour\textsuperscript{374} and notifying buyer of the tender.\textsuperscript{375} If they are to be shipped, seller must also deliver the goods to an appropriate carrier, make a suitable contract for their delivery, and tender any document necessary to enable buyer to take possession of the goods.\textsuperscript{376}

The buyer has an obligation to accept the goods and pay according to the contract.\textsuperscript{377} But "if the goods or the tender of delivery fail in any respect to conform to the contract," the buyer has a choice of rejecting all of the goods, accepting all of the goods in spite of their nonconformity, or accepting any part of the goods

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\textsuperscript{372} In Shreve v. Casto Trailer Sales, Inc., 150 W. Va. 669, 149 S.E.2d 238 (1966), the court reviewed the pre-Code West Virginia case law concerning rescission of an executed contract. The court cited several pre-1921 cases which did not allow rescission for breach of warranty unless there was fraud or the parties otherwise agreed, and a later case, Kemble v. Wiltson, 92 W. Va. 32, 114 S.E. 369 (1922), apparently allowing the buyer to either keep the goods and sue for breach, or rescind and return the goods and recover the purchase price. *Shreve*, 150 W. Va. at 674-76, 149 S.E.2d at 242-43; see Donley, *Recession For Breach of Seller's Warranty*, 43 W. VA. L.Q. 134 (1936).

\textsuperscript{373} "The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract." W. VA. CODE § 46-2-301 (1966).

\textsuperscript{374} *Id.* § 46-2-503(1)(a).

\textsuperscript{375} *Id.* §§ 46-2-503(1), 46-2-504(c).

\textsuperscript{376} *Id.* § 46-2-504.

\textsuperscript{377} *Id.* §§ 46-2-301, 46-2-507(1), 46-2-607(1).
and rejecting the rest.\textsuperscript{378} This "perfect tender rule" requires the seller to perform to the letter of the contract.\textsuperscript{379} This requirement is subject to a number of rules ameliorating the seller's strict obligation. There is no such obligation if the parties are held to have agreed otherwise by express terms in their contract,\textsuperscript{380} by usage of trade,\textsuperscript{381} by course of dealing,\textsuperscript{382} or by course of performance.\textsuperscript{383} Buyer's good faith obligation to observe "reasonable commercial standards of fair dealing in the trade"\textsuperscript{384} could prevent him from rejecting where the nonconformity is minor or the motivation for rejecting is unrelated to the nonconformity.\textsuperscript{385} The equitable concept of \textit{de minimus} could prevent buyer from relying on a trivial nonconformity to reject.\textsuperscript{386} Finally there are two statutory exceptions to the strict rejection standard. It does not apply to installment contracts,\textsuperscript{387} and, if the nonconformity consists of a failure to make a proper shipping contract or to notify the buyer of shipment, the resulting loss must be material in order to justify rejection.\textsuperscript{388}

\textsuperscript{378} \textit{Id.} § 46-2-601.

\textsuperscript{379} Intermeat, Inc. \textit{v.} American Poultry, Inc., 575 F.2d 1017 (2d Cir. 1978). First stated by Judge Learned Hand in Mitsubishi Goshikaisha \textit{v.} J. Aron & Co., 16 F.2d 185 (2d Cir. 1926), the rule reasons that the buyer is not required to complete delivery of his performance obligation (pay the price) until seller tenders full performance. Because of the numerous exceptions noted in the text following this note, some commentators, including White and Summers, have concluded that 2-601 is a "substantial performance rule, not a perfect tender rule." \textit{See J. White & R. Summers, supra} note 7, at 357.

\textsuperscript{380} \textit{West Virginia Code} § 46-2-601 (1966). This would include an agreement limiting buyer's remedies under § 46-2-719(1).

\textsuperscript{381} \textit{Id.} § 46-1-205(3); \textit{see also} \textit{W. Va. Code} § 46-2-508 comment 4.

\textsuperscript{382} \textit{Id.} § 46-1-205(3).

\textsuperscript{383} \textit{Id.} § 46-2-208(1).

\textsuperscript{384} "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." \textit{Id.} § 46-1-203. Under Article 2, "good faith" in the case of a merchant includes "the observance of reasonable commercial standards of fair dealing in the trade." \textit{Id.} § 46-2-103(b).


\textsuperscript{386} "De minimus [non curat lex] means the law does not care for small things and has always been taken to mean trifles, that is, matters of a few dollars or less . . . ." Coakley \textit{v.} Marple, 156 S.E.2d 11, 16 (W. Va. 1967), \textit{aff'd on rehearing}, 152 W. Va. 68, 159 S.E.2d 378 (1968); \textit{see also} 338 Cartons, More or Less, of Butter \textit{v.} United States, 165 F.2d 728, 730 (4th Cir. 1947); Annotation, \textit{De Minimis Non Curat Lex}, 44 A.L.R. 168 (1926); D. Dobbs, \textit{Remedies} § 3.8 (1973). For its application to 2-601, \textit{see R. Nordstrom, Law of Sales} 308 (1970).


\textsuperscript{388} \textit{Id.} § 46-2-504.
When the buyer has the right to reject, he must do so within a reasonable time, seasonably notify the seller of the rejection, including, in some cases, describing the particular defect, refrain from exercising ownership of the goods or doing any act inconsistent with seller’s ownership, and take care not to signify “to the seller that the goods are conforming or that he will take them in spite of their nonconformity.” When the buyer already has possession of the goods after a rightful rejection, the buyer has the duty to hold the goods with reasonable care at the seller’s disposition, exercise good faith, follow the seller’s instructions in dealing with the goods if seller has no agent at the market of rejection, and to sell the goods if they threaten to decline in value speedily, retaining a right to expenses and a commission. Otherwise, if no instructions are received within a reasonable time, the buyer has the option to store the goods for seller, reship them to seller, or resell them for seller’s account.

Once the buyer effectively rejects, the seller has a right to cure the nonconformity if the contract provides, or if the time for performance has not expired and the seller seasonably notifies buyer of his intention to cure. If the time for delivery has expired, seller has a further reasonable time to cure with a conforming delivery if, at the time of her tender, the seller had reasonable grounds for

389. Id. § 46-2-602(1). What constitutes a “reasonable time” depends on the nature, purpose and circumstances. Id. § 46-1-204(2).
390. Id. § 46-2-602(1). “Notice” is defined in § 46-1-201(27). Notice is given “reasonably” if given within the time agreed or within a reasonable time. Id. § 46-1-204(3).
391. The buyer must particularize any defect ascertainable by reasonable inspection in cases where the seller could have cured if stated seasonably, or where both seller and buyer are merchants and seller has requested in writing a written statement of defects. If the buyer fails to do so, he may not rely on the defect to reject or claim breach. Id. § 46-2-605(1).
392. Id. § 46-2-602(2)(a).
393. Id. § 46-2-606(1)(c).
394. Id. § 46-2-606(1)(a). Telling the seller that the goods are conforming eliminates the right to reject (and constitutes acceptance) only if done after the buyer has had an opportunity to inspect the goods. Id. §§ 46-2-606(1)(a), 46-2-513(1).
395. Id. § 46-2-602(2)(b).
396. Id. § 46-2-603(3).
397. Id. § 46-2-603(1)-(2).
398. Id. § 46-2-604.
399. Id. §§ 46-2-601, 46-2-719(1).
400. Id. § 46-2-508(1).
believing the goods would be acceptable to buyer, with or without a price discount for the nonconformity. 401

When the buyer has effectively rejected the goods and the seller has not cured, buyer has the right to monetary damages402 if he has suffered a loss. 403 Where the buyer has accepted the nonconforming tender, buyer has a similar right to monetary damages, 404 but only if he notifies the seller of the breach within a reasonable time. 405

Once the buyer has accepted the goods, buyer loses his § 2-601 right to reject for "failing in any way" to conform to the contract. 406 Buyer must, in the usual case, settle for keeping the goods and suing for any damages resulting in the ordinary course of events from the seller's breach. 407 A major exception is the buyer's right to revoke the prior acceptance where the buyer has accepted the goods without discovery of the defects, either induced by the difficulty of discovery or by seller's assurances, 408 or, has accepted the goods with knowledge of the nonconformity but on the assumption that the nonconformity would be cured. 409 However, this right to revoke acceptance and return the goods to buyer is limited to cases where the nonconformity substantially impairs its value to buyer. 410 In such a case, the buyer must notify the seller of the revocation within a reasonable time after discovery of the defects, and before any substantial change has occurred in the condition of the goods not caused by the defects. 411 Finally, a buyer who revokes acceptance under

401. Id. § 46-2-508(2).

402. In a proper case, the buyer would also have a right to specific performance. Id. § 46-2-716.


404. Id. §§ 46-2-714(1), 46-2-715.


408. Id. § 46-2-608(1)(b).

409. Id. § 46-2-608(1)(a).

410. Id. § 46-2-608(1).

411. Id. § 46-1-608(2).
section 2-608 has the same rights and duties as if he had rejected under section 2-601.412

Six West Virginia cases have addressed the Uniform Commercial Code law on acceptance, rejection, cure, and revocation of acceptance.413 Of these, two are personal injury cases citing the notice or indemnity provisions of section 2-607.414

B. Buyer’s Rejection Under Section 2-601 Through Section 2-606

Unfortunately, no West Virginia case has examined the section 2-601 right of the buyer to reject for just any nonconformity in seller’s tender, so we cannot predict how closely the court will follow the perfect tender rule. In Kesner v. Lancaster,415 a case involving a buyer’s attempt to return the goods shortly after purchase and discovery of the defects, the court did not discuss the buyer’s opportunity to reject under section 2-601, apparently because the buyer’s inspection, taking possession, and beginning use, constituted acceptance, thus depriving buyer of his right to reject. In the same case, the court also noted that a buyer who justifiably revokes acceptance under section 2-608 has the same rights “as one who had rejected the goods originally” under section 2-601.416

To date, no West Virginia case has addressed either the elements of a buyer’s proper steps for rejection under section 2-602 or what acts of a buyer constitute acceptance under section 2-606, although there have been several references to section 2-602. In Shreve, et al v. Casto Trailer Sales, Inc., the court stated that “under the Uniform Commercial Code, the rejection or rescission must be within a reasonable time after the delivery thereof, and . . . is ineffective

412. Id. § 46-1-608(3).
416. Id. at 653 & n.6. This paraphrases the language in W. VA. CODE § 46-2-607(3) (1966).
unless the buyer seasonably notifies the seller. Code, 46-2-602.1

The court was clearly quoting the language of section 2-602(1) and, on its own, adding the word "rescission" to the Code language. The facts of the case show that the court was dealing with an attempted revocation of acceptance (under section 2-608) and not a section 2-602 rejection. This is made clear by the court's use of the word "rescission," which is the traditional contract term denoting cancelling the contract and returning the goods after accepting them. The court erred in treating the situation in Casto as a section 2-602 rejection instead of a section 2-608 revocation, an error common during the early transition from the common law to the Uniform Commercial Code. The court made a similar error in Reece v. Yeager Ford Sales, Inc.,418 where it again referred to section 2-602(1) when discussing "rescission" in the context of a section 2-608 revocation. Taking a step in the right direction, the court also referred to section 2-608 in the same citation.419

The United States Supreme Court referred to West Virginia's section 2-602 in Patterson v. Warner,420 but the case concerned the constitutionality of West Virginia's Justice of the Peace fee system, and there was no discussion of Code-related issues. In Kesner, the court cited section 2-602(2)(6) in a reference to the buyer's duty to preserve goods, but there was no discussion of the issue or the Code section.421 In this same note, the court made its only reference to date to the Code's section 2-603 buyer's duties and rights as to rightfully rejected goods. There apparently has been no reference in West Virginia case law to section 2-604 concerning buyer's duties and duties as to rightfully rejected goods or to section 2-605 concerning buyer's duty to describe the particular defect or risk the loss of remedies.

C. Seller's Right to Cure Under Section 2-508

After the buyer has rightfully rejected the goods before accepting them, the seller has a conditional right to cure the nonconformity

419. Id. at 460, 184 S.E.2d at 726.
420. 415 U.S. 303 (1974). (The buyer of an automobile attempted to reject the automobile under section 2-602, stopped payments, and was sued by the seller.)
421. Kesner, 378 S.E.2d at 653 n.6.
under section 2-508. The West Virginia Supreme Court of Appeals has yet to address the parameters of these conditions.\footnote{22} The court has, on three occasions, discussed the question of whether section 2-508 gives the seller a right to cure after acceptance and a revocation of that acceptance, and has appeared to answer yes, generally no, and no.

In \textit{Reece}, a consumer bought a new car on July 5. While driving it from Coalwood, West Virginia to Chicago, Illinois and back, the buyer noticed white specks of paint on the car, ill-fitting chrome along the rear window, rolls (irregularities) on the top of the car, a broken seat catch, and a fallen dashboard panel. On July 23, the buyer returned the car for repairs and picked it up the next day. It was then driven an additional 1,800 miles. On August 14, the buyer told the seller it was not fixed properly. It was inspected by the seller on that day, and then by the manufacturer on September 19. The manufacturer said it would pay for the repairs, which by all estimates would cost between $35 to $80. The following day the buyer saw his attorney, and shortly after returned the car to the seller’s lot. He then wrote the seller and the manufacturer “of his intent to rescind the contract.”\footnote{24} The seller refused to rescind the contract and take back the car, and the buyer sued both for rescission. The evidence at trial revealed a contract clause promising repair, excluding all other warranties, and limiting buyer’s remedies to such repair.\footnote{25} The court found the exclusion and limitation valid.\footnote{26}

In finding that seller had a right to cure the minor defects, the court cited section 2-508(1).\footnote{27} Yet, it would be a mistake to interpret

\footnote{22} Although the court appears to have done so in \textit{Reece v. Yeager Ford Sales, Inc.}, 155 W. Va. 453, 184 S.E.2d 722 (1971), the court was in fact not dealing with the right to cure after rejection (and before acceptance), but rather the right to cure after an attempt to revoke acceptance. See the discussion in the following text.

\footnote{23} \textit{Id.} There are two \textit{Reece} opinions. The first opinion, \textit{Reece (I)}, involved the appeal of the selling car dealer, defendant seller. The second opinion, \textit{Reece (II)}, involved the separate appeal of the manufacturer, the Ford Motor Company. The issue in \textit{Reece (II)} was the ability to rescind a contract against a nonprivity manufacturer. See \textit{Reece v. Yeager Ford Sales, Inc.}, 155 W. Va. 461, 184 S.E.2d 727 (1971).

\footnote{24} \textit{Reece (I)}, 155 W. Va. at 456, 184 S.E.2d at 724.

\footnote{25} \textit{Id.}

\footnote{26} After 1975, all such exclusions and limitations of remedies have been void under the West Virginia Consumer Credit Protection Act. W. Va. Code § 46A-6-107 (1986).

\footnote{27} \textit{Reece (I)}, 155 W. Va. at 459, 184 S.E.2d at 726.
Reece as authority for the position that a seller has a section 2-508 right to cure after acceptance to prevent or counteract a buyer's revocation of acceptance. As clearly shown by the facts and the court's reference to "revocation of acceptance" and to section 46-2-608(1), Reece involved an offer to cure made after buyer's acceptance. But the court seemed to confuse revocation with rejection. This is demonstrated by the court's reference to the law on "where the buyer rejects," its citation to a much-cited case involving rejection before acceptance, Wilson v. Scampoli, and to section 2-602(1) covering how to reject before acceptance. Furthermore, the court cited subsection (1) of section 2-508 and subsection (1) by its terms could not have applied to the facts of Reece, because it only gives the seller a right to cure before "the time for performance has not yet expired." This means before the contract delivery date, which in Reece had passed months before the attempted revocation and promise to cure. Finally, there was no need to find a statutory right to cure, as the seller had that right under the remedy limitation terms of the contract.

In Kesner v. Lancaster, the court mentioned Reece and its discussion of section 2-508(1) noting "This section is generally not applicable where the buyer accepts the goods and then wishes to revoke because of after-discovered defects." Kesner itself did not involve the issue of a right to cure as seller made no attempt to cure.

In City National Bank of Charleston v. Wells, the court addressed the seller's right to cure after the buyer had first accepted the goods and then attempted to revoke that acceptance. In City

428. Id.
429. Id. at 459-60, 184 S.E.2d at 725-26. In Wilson v. Scampoli, 228 A.2d 848 (D.C. 1967), the newly purchased television would not work when first plugged in upon delivery. The seller promised to repair it but the buyer refused, demanding another "brand new" replacement television. The court held the seller had a right to cure the nonconforming tender under section 2-508(2) by making minor repairs. Wilson is less a case questioning the right to cure under section 2-508, but rather more a case questioning whether the cure may be effectuated through repair of the defective tendered goods, rather than a substitution of different new goods.
430. Reece (1), 155 W. Va. at 459, 184 S.E.2d at 726.
432. Id. at 652.
National, the buyer purchased a pick-up truck on September 29, and it began to "miss" and emit smoke during October. It was returned for repair three times and the seller treated buyer rudely the last time. A further repair at another dealer in March of the following year failed to solve the problem. In June, after the truck had been driven 12,000 miles, the buyer left it with the second dealer who said it could not be repaired in the near future, as it would take time to obtain parts and authorization (apparently from the manufacturer's distributor) for further repair. In June, the buyer purchased a new vehicle and notified the bank that he would not make further payments on the truck. In August, the second dealer repaired the truck by rebuilding the engine. In September, the bank repossessed and sold the vehicle and, in November, brought suit for the deficiency. The buyer responded by suing the bank, the seller, the manufacturer, and the distributor. The seller's first notice of revocation from the seller was the December filing of the cross-complaint. All but the seller settled before trial.

434. The seller sued the bank under the West Virginia Consumer Credit and Protection Act W. Va. Code § 46A-2-103 (1986 & Supp. 1991). This section provides that a bank's right to collect on a loan it made directly to a consumer buyer is subject to defenses the buyer has against the seller, when the bank participated in, or was connected with, the sales transaction. The opinion does not state what connection the bank had with the sales transaction, but statutory examples of such participation or connection include, among others:

(i) The lender and the seller have arranged for a commission or brokerage or referral fee for the extension of credit by the lender;
(ii) The lender is a person related to the seller unless the relationship is remote or is not a factor in the transaction;
(iii) The seller guarantees the loan or otherwise assumes the risk of loss by the lender upon the loan other than a risk of loss arising solely from the seller's failure to perfect a lien securing the loan;
(iv) The lender directly supplies the seller with documents used by the borrower to evidence the transaction or the seller directly supplies the lender with documents used by the borrower to evidence the transaction;
(v) The loan is conditioned upon the borrower's purchase of the goods or services from the particular seller, but the lender's payment of proceeds of the loan to the seller does not in itself establish that the loan was so conditioned;
(vi) The seller in such sale has specifically recommended such lender by name to the borrower and the lender has made ten or more loans to borrowers within a period of twelve months within which period the loan in question was made, the proceeds of which other ten or more loans were used in consumer credit sales with the seller or a person related to the seller, if in connection with such other ten or more loans, the seller also specifically recommended such lender by name to the borrowers involved . . . .

One of the seller's defenses to the buyer's UCC breach of warranty claim was that the notice of revocation was so late that seller was deprived of its rights to cure the nonconformity within the meaning of section 2-508.

In response, the court quoted Kesner as stating section 2-508(1) "is generally not applicable where the buyer accepts the goods and then wishes to revoke because of undiscovered defects." The court went on to state:

Thus, the rights of the seller with respect to revocation of acceptance are controlled by the provisions of W. Va. Code, 46-2-608. Because this statute does not expressly give the seller the right to cure nonconformities in the goods, it is often held that where the buyer justifiably revokes his acceptance, he is not required to afford the seller the opportunity to cure or repair the defects . . . . This is especially true where, as here, the seller has previously been given the opportunity to correct the defect and has either failed or refused to do so.

The court concludes that the rights of the parties were clearly controlled by section 2-608(1)(b), and that having failed to avail itself of the opportunity to repair, the defendant could not complain that it had been deprived of its right to cure.

The court's conclusion is consistent with the apparent majority of cases, and the commentators agree. Of course the seller has a

435. City National, 384 S.E.2d at 380.
436. Id. at 380-81.
437. Id. at 381.

But see Guerdon Industries, Inc. v. Gentry, 531 So.2d 1202 (Miss. 1988) (buyer must allow seller to cure before revoking acceptance); Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802, cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976) (no right to cure where seller is unable to say how long repair would take); Erling v. Honera, Inc., 298 N.W.2d 478 (N.D. 1980).

See generally J. White & R. Summers, supra note 7 at 378 (the courts generally hold that the seller's right to cure under 2-508 does not limit the buyer's right to revoke acceptance under 2-608); 67A AM. JUR. 2D Sales §§ 1198-99 (1985) (fact that the seller is specifically given a right to cure in 2-508 could be taken to imply that no such right exists under 2-608).

right to cure in the face of the buyer’s contemplation of a section 2-608(1)(a) revocation, because that section by its wording covers only situations where buyer is awaiting seller’s cure. Seller’s limitation is that he must “seasonably” complete the cure.\textsuperscript{439} When buyer is revoking acceptance under section 2-608(1)(b) for a defect newly discovered after acceptance, it seems harsh and inconsistent with seller’s section 2-508(2) cure rights to not give the seller a right to cure. But seller is offered some protection in that the section allows buyer to revoke only where the defect “substantially impairs its value to buyer.” Where the defect is easily repairable, the court is unlikely to find the defect “substantially impairs” the value of the goods to buyer.\textsuperscript{440} Revocation being disallowed, the question for the buyer then becomes, does the buyer wish to leave the goods unrepaired and take his chances in pursuing only monetary damages, or allow the seller to reduce the damages by repairing the goods?\textsuperscript{441}

\textit{City National} should not be characterized as holding that in West Virginia a seller can never exercise a section 2-508 right to cure after revocation of acceptance. First, the court only said that section 2-508 is generally not applicable after acceptance and revocation.\textsuperscript{442} Second, the facts of the case show that the seller was in fact given the opportunity to cure after the post-acceptance discovery of the defect, and failed to take advantage of it.\textsuperscript{443} The ultimate test will come when the court is presented with a case where the buyer accepts the goods, then discovers a latent defect substantially impairing their value to him, then revokes the acceptance, and then the seller attempts to repair or deliver substitute goods in order to avoid breach, but the buyer insists on returning the goods, cancelling the contract, and holding seller liable for money damages.\textsuperscript{444}

\textbf{D. Buyer’s Acceptance Under Section 2-607}

Section 2-607 provides that after accepting the goods, the buyer loses his right to reject the goods for just any nonconformity in the

\textsuperscript{439} W. VA. CODE § 46-2-608(1)(a) (1966).
\textsuperscript{441} Consequential damages caused by a nonconformity in the goods are not recoverable if they could have been prevented by buyer’s mitigation, including allowing seller to repair the goods. W. VA. CODE § 46-2-715(2) (1966).
\textsuperscript{442} City National, 384 S.E.2d at 380.
\textsuperscript{443} Id. at 381.
\textsuperscript{444} W. VA. CODE § 46-2-711(1) (1966).
goods or the manner of tender, and may not revoke the acceptance for any nonconformity known by the buyer at the time of acceptance.\textsuperscript{445} Kesner so states in dicta.\textsuperscript{446}

In two product liability cases, the West Virginia Supreme Court of Appeals cited section 2-607 in addressing questions of implied indemnity. In \textit{Goldring v. Ashland Oil Refining Co.}, the court cited section 2-607(5) as supporting the concept of implied indemnity, stating "The UCC acknowledges that one person in the chain of distribution may be 'answerable over' to another person in the chain who is 'sued for a breach of a warranty or other obligation.'\textsuperscript{447}

In \textit{Hill v. Ryerson \& Son, Inc.},\textsuperscript{448} an employee of the buyer was injured by a splitting hydraulic cylinder and sued the seller of the cylinder. The seller impleaded the manufacturer as a third-party defendant, asserting a cause of action in implied indemnity. The manufacturer raised lack of timely notice as a defense. The manufacturer asserted that section 2-607(3)(a), in providing "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be banned from any remedy," required the seller to so notify the manufacturer, and, thus, seller's failure to do so defeated any action for implied indemnity. The court disagreed, stating that section 2-607(3)(a) was designed for buyers and sellers and "has little relevance to the product liability field."\textsuperscript{449}

In conclusion, the court extended its ruling to cover not only actions for implied indemnity, but to actions brought by injured persons themselves, stating "[w]e, therefore, conclude that . . . 2-607(3)(a) . . . is not available as a defense in a product liability action for personal injuries or in a related suit for implied indemnity."\textsuperscript{450}

\textsuperscript{445} \textit{Id.} § 46-2-607(2).
\textsuperscript{446} Kesner v. Lancaster, 378 S.E.2d 649, 656 (W. Va. 1989).
\textsuperscript{448} 165 W. Va. 22, 268 S.E.2d 296 (1980).
\textsuperscript{449} \textit{Id.} at 30, 268 S.E.2d at 302.
\textsuperscript{450} \textit{Id.} at 35, 268 S.E.2d at 305. While holding the notice requirement of 2-607(3) does not apply to product liability actions, the \textit{Hill} court cited 2-607(5) as giving implicit recognition to the binding effect of notice in an implied indemnity action where the seller is sued for a breach of warranty by her buyer for which the manufacturer is answerable over. \textit{Id.} at 30, 268 S.E.2d at 303 n.3. Subsection (5) provides that where the seller is sued for an obligation for which her seller is answerable over, she may give her seller written notice of the litigation, inviting her seller to come in and defend, and if her seller does not do so, her seller is bound by common determinations of fact. Although
The law appears unsettled as to the duty of a buyer to notify the seller under section 2-607(3)(a). It appears clearer that a non-privity party does not have the section 2-607(3)(a) duty to notify a nonprivity seller or manufacturer in an action for personal injury, but might well have the duty where the action is for economic loss. The court's holding that the Code should have little or no relevance to a manufacturer's duty to indemnify its buyer (the seller) is suspect, because the manufacturer and the buyer entered into a sales contract which was intended to control their rights and liabilities inter se. If the contract between the manufacturer and seller had specifically provided for an allocation of liability for injuries caused by the goods to third persons, that contract would be relevant to the rights of the seller and buyer inter se. As a contract to sell goods, the Code would apply.

E. Buyer's Revocation of Acceptance Under 2-608

The buyer's right to revoke his earlier acceptance of goods after newly discovering defects, or after the failure of the seller to fulfill earlier promises to cure the initially discovered defects, has its roots in common law. The right to rescission has long been recognized in West Virginia. In 1971, the West Virginia Supreme Court of

not clear, the court's point might be that it makes little sense to interpret 2-607(3) as requiring early notice to a manufacturer in order to allow indemnity, when 2-607(5) provides that a seller who is later sued by her buyer and notifies the manufacturer (her seller) of the litigation, binds the manufacturer to factual findings in the litigation. If possibly late notice can bind the manufacturer, why would early notice be required?

451. See W. Prosser, HANDBOOK OF THE LAW OF TORTS § 97 (5th ed. 1984) (2-607(3) is a booby-trap for the unwary). One clear reason for the notice requirement is to allow the seller to act quickly in making repairs, replacements and other curative acts so as to minimize her potential liability. Where the product has already injured a buyer, it is probably too late to prevent further harm. See J. Whitt & R. Summers, supra note 7 at 381.


454. See supra note 372 and accompanying text.
Appeals first addressed a number of the issues accompanying the Code-revocation provision in *Reece v. Yaeger Ford Auto Sales, Inc.* In 1989, the court decided two more cases primarily involving issues of revocation of acceptance. These cases, *Kesner v. Lancaster* and *City National Bank of Charleston v. Wells*, saw the court finally come into its own in using the UCC. The court skillfully interrelated a number of Code sections, made good use of the Official Comments, and frequently referred to well-known UCC treatises as well as law review articles and UCC case law from other jurisdictions.

The facts of *Reece* and *City National Bank* have been detailed above. In *Kesner*, the buyer went to the nonmerchant seller's home to examine a used front-end loader for purchase. During his inspection, the buyer noticed that it was freshly painted and that the undercarriage was in good condition. The seller started and ran the engine but discouraged the buyer from operating the machine. The seller said the machine was in fine shape. On a second visit, the buyer purchased the machine for $9,000, loaded it on a low-boy, and delivered it to the work site. The machine broke down on the site within minutes after it began to remove topsoil. Attempting to

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457. 384 S.E.2d 374 (W. Va. 1989). Revocation of acceptance was a primary issue in a fourth West Virginia case, *Shreve v. Casto Trailer Sales, Inc.*, 150 W. Va. 669, 149 S.E.2d 238 (1966). The transaction involved occurred in 1963, before the applicable date of the Code, and was therefore not covered by the Code. Along with a review of the common law, the court discussed the newly enacted UCC. The court clearly confused revocation with rejection, and the court's discussion should be of little or no precedential value on Code issues.

458. *Uniform Commercial Code* (3d ed. 1988), by Professors James J. White of Michigan University and Robert S. Summers of Cornell University, is a frequently-cited, sophisticated, single-volume treatise which explains the varied possible interpretations of the Code sections, and provides a critical analysis and comprehensive review of the case law. *Uniform Commercial Code* (3d ed. 1983) by Ronald Anderson is a comprehensive eleven volume much-cited authority on the UCC. Although it refers to significantly more cases than White & Summers, it often fails to provide a sophisticated critical analysis, settling instead for a text composed largely of positive statements of the law, each citing the case which so stated. The statements often do not represent anything that could be called settled rules of law under the UCC. Two other well-known and more-comprehensive UCC research services, Callaghan's *Uniform Commercial Code Reporting Service* (approximately 100 volumes) and Bender's *Uniform Commercial Code Service* (approximately 30 volumes), have not been cited often by the West Virginia Supreme Court in Article 2 cases. Both are excellent research tools for the UCC.
repair it himself, the buyer noticed pre-existing transmission damage, stripped and rusted bolts, and cracked and welded rails. Estimates to repair the machine were $720 and maybe much higher. Seller refused the buyer’s attempts to revoke acceptance, return the machine, and obtain the return of the purchase price.

Both Kesner and City National point out that the term “rescission” is no longer used in sales of goods cases. The Code has replaced it with “revocation of acceptance.” This makes it clear that reference is being made to the return of the goods, as opposed to a cancellation of the contract, and discards the old rescission concept that buyer must elect between keeping the goods and suing for damages, or returning the goods in exchange for a refund of the price.  

In order for the buyer to revoke his prior acceptance, the defect must “substantially impair” the value of the goods to him. In denying the revocation in Reece, the court emphasized that the cost of repairing the defects in the new automobile was estimated at only $35 to $80. In allowing the revocation in City National, the court mentioned that the automobile had serious engine problems that could not be repaired for a long time, and finally required a rebuilt engine.

In Kesner the seller argued that since the cost of repairs was much less ($720) than the $9,000 purchase price, the value of the loader was not substantially impaired. The court, noting the loader had been inoperable since purchase, needed major repairs, and the $720 estimate did not include other possible costs, upheld the jury’s finding of substantial impairment. The court correctly saw the issue as a question for the jury, and referred to a test for determining substantial impairment. The test is subjective, in that the

459. See Kesner, 378 S.E.2d at 652 n.2; City National, 384 S.E.2d at 379 n.2; see also, W. Va. Code § 2-608 comment 1 (1966).
461. Reece, 155 W. Va. at 456, 184 S.E.2d at 724 (“It can readily be seen that these defects are of a minor nature.” Id. at 459, 184 S.E.2d at 725.
462. City National, 384 S.E.2d at 378. The opinion does not suggest the seller argued that the defect did not substantially impair the value of the goods.
463. Kesner, 378 S.E.2d at 654.
464. Id. at 655.
465. Id.
needs and circumstances of the particular buyer must be examined and the nonconformity must substantially impair the suitability of the goods for these needs. It is also objective in that the "actual defects, . . . must not be trivial or insubstantial," meaning the buyer's personal belief as to the reduced value of the goods is not enough. The trier of fact must make an objective determination that the value of the goods has been impaired as to the buyer's needs.\(^{467}\)

No West Virginia case has raised issues relating to a buyer's attempt to revoke acceptance because of seller's failure to cure a nonconformity in the goods known to the buyer at the time of buyer's acceptance.\(^{468}\) All involve discovery of the defect after acceptance. Kesner paraphrases the language of section 2-608(1)(b) when it states "[t]he buyer must show that his acceptance of goods without discovery of the nonconformity was either due to the difficulty of discovering the defect or induced by the assurances of the seller."\(^{469}\)

In Reece, some of the defects were visible flaws in the appearance of the automobile easily discoverable before acceptance, yet the court did not say these easily discoverable defects prevented revocation (revocation was denied on at least two other grounds). In City National, the defect was a difficult to discover engine problem. In Kesner, the knowledgeable buyer visually inspected the machine and did not discover the latent transmission problems. Importantly, the Kesner court pointed out that the seller assured the buyer that the machine was "in fine shape," and that a seller's assurance, standing alone, will relieve the buyer from the duty to make a discovery of the nonconformity. The clear implication is that this is so even if the defect is not difficult to discover.\(^{470}\) Finally, Kesner makes clear that this determination is also a jury question.\(^{471}\)

In Reece, the court stated the rescission must be within a reasonable time after the purchase.\(^{472}\) This is clearly wrong, and can

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466. Id. at 654 & n.13.
471. Kesner, 378 S.E.2d at 655.
472. Reece, 155 W. Va. at 460, 184 S.E.2d at 726.
be explained by the Reece court's confusing a section 2-608 revocation of acceptance of the goods with a section 2-601 rejection of the goods which, under section 2-602, must be within a reasonable time. Kesner and City National point out that while revocation of acceptance must be within a reasonable time, it is measured from the time the buyer discovered, or should have discovered, the non-conformity, not from the time of the purchase itself. City National points out that "reasonable time" is defined in section 1-204(2) of the Code, and is a question of fact for the jury.

In City National, the buyer revoked acceptance fourteen months after he discovered the defects, and the court still allowed the revocation of acceptance. The court cited cases from other jurisdictions allowing revocation after periods of time ranging from twelve to forty-eight months. The court seemed to hold that a lengthy delay will not prevent revocation where the delay is attributable to efforts or promises to correct a nonconformity that the seller had a continuing obligation to repair. Both positions are consistent with the majority of cases. The court also included the seller's rudeness to buyer in the considerations justifying delay in revocation.

These cases also point out that the buyer can give up his right to revoke acceptance. Kesner, citing Reece, warns that use after

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473. "Rejection must be within a reasonable time after their delivery or tender." W. VA. CODE § 46-2-602(1) (1966).
474. Kesner, 378 S.E.2d at 653.
475. City National, 384 S.E.2d at 381.
476. Id.
477. Id. at 380-82. Eight months after discovery, the buyer delivered the automobile to a dealer not his seller, and notified the lending bank he was stopping payments. The seller itself supposedly did not receive notice of the revocation until it was cross-sued six months later, or fourteen months after discovery of the defects.
478. Id. at 381.
479. In City National, the buyer returned the vehicle three times to the seller for repair, and twice to another dealer. All attempts at repair were unsuccessful. Id. at 378.
480. Id. at 381 (citing 67A AM. JUR. 2D Sales § 1213 (1985); Annotation, Time for Revocation of Acceptance of Goods Under UCC § 2-608(2), 65 A.L.R. 3d 354, 362-63 (1975)). It appeared that the contract in City National contained a warranty requiring the seller to repair defects. Id. at 378.
482. City National, 384 S.E.2d at 381.
revocation may waive the revocation.\textsuperscript{483} \textit{Reece} demonstrated that the parties may take away the right to reject in their contract leaving the buyer only with the right to keep the nonconforming goods and settle for money damages.\textsuperscript{484} Section 2-719(1), and the case law support this position.

Finally, in a separate opinion dealing with the buyer’s suit to rescind against the nonprivity manufacturer, technically a request to force a return of the goods and a return of the purchase price, the \textit{Reece} court held that rescission is not a remedy against a nonprivity manufacturer.\textsuperscript{485} Although this is the general rule,\textsuperscript{486} where the manufacturer has expressly warranted the goods to the ultimate buyer, or led the ultimate buyer to believe that a warranty has been extended, revocation may lie.\textsuperscript{487} This can be especially appropriate where buyer’s seller is unable to respond in damages.\textsuperscript{488}

VII. ASSURANCE OF FUTURE PERFORMANCE AND EXCUSE FOR NONPERFORMANCE

A. Adequate Assurance of Future Performance

The Code recognizes that the essential purpose of a commercial contract is actual performance, not merely a promise and a right to win a lawsuit, and that each party has a contractual right to feel secure while awaiting that performance.\textsuperscript{489} The Code provides that

\begin{itemize}
  \item \textsuperscript{483} Kesner, 378 S.E.2d at 652 n.3.
  \item \textsuperscript{484} Reece, 55 W. Va. at 457-58, 184 S.E.2d at 724-25. The \textit{Reece} court discussed several grounds for denying the buyer's revocation, any one of which, standing alone, should have been sufficient under the Code. The court did not specify any single one as controlling, holding, "It appears from the facts and circumstances in the case at bar, and from the authorities cited herein . . . that the purchaser . . . was not entitled to rescind the contract of sale . . . ." \textit{Id.} at 461, 184 S.E.2d at 726.
  \item \textsuperscript{485} Reece v. Yaeger Ford Sales, Inc. (Reece II), 155 W. Va. 461, 469, 184 S.E.2d 727, 731 (1971).
  \item \textsuperscript{487} Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1977); Volkswagen, Inc. v. Novak, 418 So.2d 801 (Miss. 1982). \textit{See also} Royal Lincoln-Mercury Sales, Inc. v. Wallace, 415 So.2d 1024 (Miss. 1982).
  \item \textsuperscript{488} See Ford Motor Credit Co. v. Harper, 671 F.2d 1117 (8th Cir. 1982).
  \item \textsuperscript{489} W. VA. CODE § 46-2-609 comment 1 (1966).
\end{itemize}
when reasonable grounds for insecurity arise with respect to the other party's performance, the first party may in writing demand that the other party provide adequate assurance of due performance, and, until receiving commercially reasonable assurance, the first party may suspend performance. Failure to provide such adequate assurance within a reasonable time constitutes a repudiation of the contract. A repudiation of a contract performance which substantially impairs the value of the contract entitles the aggrieved party to, among other things, pursue any remedy for breach.

In Mollohan v. Black Rock Contracting, Inc., a service contract not covered by the UCC, a contractor contracted to unload 56,884 tons of rock from railroad cars. Prior to the performance date, the contractor then told the owner's agent that it (contractor) did not have sufficient equipment to perform the contract. The court held that the contractor had not repudiated the contract. In applying the traditional common-law rule, the court held that in order to constitute anticipatory breach, the repudiation must be positive, absolute, and unequivocal. The court refused to adopt as a common-law rule the section 2-609 Code concept of repudiation through a failure of adequate assurance of performance, "except to the extent that a demand for assurances and a failure to give them may be evidence of repudiation... to prove absolute, unequivocal and positive repudiations and anticipatory breach." The facts in Mollohan did not show the kind of clear demand for assurance of performance and a failure to give such adequate assurance as is required by section 2-609. Therefore, even if the case had been a sale of goods case covered by Article 2, the court would not have properly found a failure of assurance and a repudiation. If on the other hand, after being told by the contractor that the contractor did not have sufficient equipment to perform the contract, the owner had demanded

490. W. VA. CODE § 46-2-609(1).
492. W. VA. CODE § 46-2-610(b).
that the contractor tell owner whether or not it still intended to perform the contract, and the contractor refused to so state, the court in Mollohan might have found that an absolute repudiation existed.

B. Excuse by Failure of Presupposed Conditions

The Code continues the excuse for breach found in the common-law concepts of impossibility and frustration of purpose, emphasizing the new idea of commercial impracticability. This section, 2-615, provides that a seller’s delay or nondelivery is not a breach if the agreed-upon performance has been made impracticable by a government regulation, or by the occurrence of a contingency the non-occurrence of which was a basic assumption of the contract.\textsuperscript{496} Although the section excuses the seller from the performance of a contract duty even in cases where performance is not really impossible, in practice it has been very difficult for sellers to qualify for excuse under section 2-615. The severe fluctuations in energy prices in the 1970’s brought a significant number of section 2-615 cases before the courts, as oil, gas, coal, and uranium suppliers sought relief from long-term-supply contracts. The vast majority of parties seeking 2-615 relief lost.\textsuperscript{497}

The West Virginia Supreme Court of Appeals cited section 2-615 in \textit{Elkins Manor Association v. Eleanor Concrete},\textsuperscript{498} but passed

\textsuperscript{496} W. Va. Code § 46-2-615(a) (1966).


\textsuperscript{498} 396 S.E.2d 463 (W. Va. 1990).
up an opportunity to interpret the section when it ruled that Article 2 generally, and section 2-615 specifically, did not apply to the contract covering the sale and installation of pre-stressed concrete slabs. In Elkins, the seller raised section 2-615(a) as a defense to its late delivery of the concrete slabs. The seller’s production had been delayed, apparently because the government agency involved in financing the buyer’s project ruled that seller’s production process did not meet government regulations and because of financial difficulties. Seller had to stop production while it changed its production process. The slabs were delivered late and when the buyer sued for resulting loss the seller argued it was excused because the government-caused delay made timely delivery commercially impractical under section 2-615. The court apparently rejected this defense, holding that the UCC, including section 2-615, did not apply.

In a curious statement, the court opinion implies that if section 2-615 were applicable, 2-615 could not under any circumstances provide the seller with an excuse for late delivery, because a ‘time is of the essence’ clause contained in the contract imposed a higher duty of performance. By “higher,” the court could mean “higher than the Code-supplied duty of performance.” This makes little sense under section 2-615, unless the court means that by this contract provision the parties intended that all risks of late or nondelivery, from whatever cause or source, were to be borne by the seller.

For example, if the contract called for delivery of forty-five-feet-long-concrete slabs, and the State of West Virginia highway department later promulgated a regulation absolutely limiting for six months all trailer loads to no longer than forty feet, would the seller be held liable for its resulting late or nondelivery? If the “time is

499. See supra text following note 83 for a discussion of the court’s questionable determination that the Code did not apply to this contract.

500. 396 S.E.2d at 468.

501. Late delivery was only one of several apparent breaches by the seller. Some timely delivered slabs were defective and rejected. The seller failed to provide delivery to the site as required by the contract. Finally, the seller failed to provide a crane and labor, and failed to install the slabs in the building, both in clear breach of the contract. Id. at 466-67.

502. The court’s words were “this UCC section can not alter express contract language. The contract contained a ‘time is of the essence’ clause, which imposes a higher duty of performance.” Id. at 470.
of the essence,” clause were interpreted as reflecting the parties’ intent to make timely delivery a material part of the contract (so that late delivery was a material breach of the contract) but it was also clear that at the time of making the contract both parties assumed that roads leading to the buyer’s site would continue to allow transport of forty-five-feet-long loads, then section 2-615 would likely excuse the seller from making the timely delivery. But if the clause were interpreted as reflecting the parties intent to allocate all risks of late delivery, no matter from what cause, then section 2-615 would not excuse the seller because the parties’ basic assumption was that the risk of all contingencies, including governmental regulations closing the roads to delivery, were to be borne by seller. The court in Elkins is correct in that the parties can control the allocation of risks and assumptions in their contract. But the question of what the parties actually agreed to in the contract is a jury question, and the rule of law to be applied to the jury-determined facts would be the section 2-615 possibility of excuse for nonperformance.

None of this is to imply that the concrete slab seller in Elkins should have qualified for a section 2-615 excuse under the facts appearing in the opinion, even if the Code had been applied. Certainly there was no basic assumption by the parties in Elkins that the government would not disqualify the seller’s production process if the delivered slabs were found defective. They probably assumed the opposite. Apparently this is what eventually happened, and the elements of section 2-615 were not met. It would be expected that the trial court instructed accordingly upon remand. It is important to note that the concrete slab seller did not automatically lose its legal claim to the defense of commercial impracticability just because the court held that the Code, and section 2-615, did not apply. Commercial impracticability has a foundation in American jurisprudence as evidenced by its adoption in the Restatement (Second) of Contracts. The seller may well make the same argument under common law upon retrial.

A discussion of one aspect of section 2-615 appears in a concurring opinion in *McGinnis v. Cayton*, a non-UCC case examining the validity of a nineteenth century oil and gas lease. The lease provided a market price for oil and a minimum price for the gas which was considered of little or no value at the time of the lease. The court remanded to allow the parties to investigate the possibility that in making the lease, the parties might have been operating on the assumption that the value of gas would remain *de minimis*, making the contract voidable or reformable under the doctrine of mutual mistake. A concurring opinion agreed, but suggested that if the parties drafting the lease had assumed that gas would always have no value, and that neither assumed the risk of its becoming valuable, then the resulting loss to the seller "would be so severe and create such hardship that performance would be commercially impracticable." This would be an unusual use of commercial impracticability in that the "seller's" performance was not made impracticable in that the seller would suffer great loss by having to go out and pay great sums for the goods, but that possessing the goods already, the seller would lose the great profit from the goods.

VIII. Remedies

A. Seller's Remedies

The remedies for both the seller and the buyer are laid out in part 7 of Article 2. The seller has a variety of remedies, including a limited right to withhold or recover goods on discovery of the buyer's insolvency, the right to stop the manufacture or the delivery of goods, and a right to monetary remedies including dam-


505. 312 S.E.2d 765 (W. Va. 1984).

506. Id. at 769-70.

507. Id. at 775 (citing § 2-615 and cases decided thereunder).


509. Id. § 46-2-704.

510. Id. § 46-2-705.
ages based on resale loss, based upon comparative market price or lost profit, and in limited situations, the whole price. Where appropriate, the seller has a right to incidental damages. These remedies are generally collected in section 2-703. To date, there have been no West Virginia cases discussing seller’s damages under Article 2.

B. Buyer’s Remedies

1. Generally

The buyer’s remedies are collected in section 2-711, a section which parallels section 2-703 for the seller. This section provides that where the seller wrongfully fails to make a delivery, or repudiates, or the buyer rightfully rejects or justifiably revokes acceptance, then the buyer may cover and collect damages, or not cover and collect damages for non-delivery, or in special cases obtain specific performance. If the buyer has accepted a nonconforming tender, and has decided to keep the goods, the buyer has a right to any existing damages.

Where, after seller’s breach, the buyer makes a reasonable cover purchase in good faith and without unreasonable delay, the buyer may recover the difference between the higher cost of cover and the lower contract price together with any incidental or consequential damages. If the buyer decides not to cover he may recover as damages the difference between the higher market price and the lower contract price together with incidental and consequential damages. Where the buyer has accepted a nonconforming tender, and given the proper notification as required by section 2-607(3), he may recover the loss resulting in the ordinary course of events from the

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511. Id. § 46-2-706.
512. Id. § 46-2-708.
513. Id. § 46-2-709.
514. Id. § 46-2-710.
515. Id. § 46-2-714.
516. Id. § 46-2-712.
517. Id. § 46-2-713. The market price is defined in id. § 46-2-723.
breach as determined in any reasonable manner, including incidental or consequential damages. The general measure of damages for breach of warranty as to accepted goods is the difference at the time and place of acceptance between the value of the goods as accepted and the value they would have been had they conformed to the warranty. Incidental damages in these cases include the traditional damages incurred in inspection, receipt, transportation, and care of the goods. Consequential damages include damages resulting from the seller's breach that cannot be prevented by mitigation and which meet the traditional Hadley v. Baxendale requirement that the seller had reason to know at the time of contracting of the general or particular requirements and needs of the buyer, and that such damages might result from breach. In an unusual case, the buyer has a right to specific performance. Liquidated damage clauses are also covered by the Code, and damages may be limited in some cases by the agreement of the parties. Buyer's remedies under the Code have been addressed in approximately six cases in West Virginia.

When the seller has repudiated or failed to perform, or the buyer rightfully rejects or justifiably revokes acceptance, the buyer may cancel the contract under section 2-711(1) and recover appropriate damages under the following several sections. The West Virginia Supreme Court of Appeals has held that such a cancellation under section 2-711 approximates the same result as an action for rescission under prior law. As a practical matter, if a buyer wishes to treat the contract as terminated after the seller's breach in order to stop further performance by either party, the buyer simply "cancels" the contract under section 2-711.

518. Id. § 46-2-714.
519. Id. § 46-2-715(1).
520. 9 Ex. 341; 156 Eng. Rep. 145 (1854).
522. Id. § 46-2-716.
523. Id. § 46-2-718.
524. Id. § 46-2-711.
525. City Nat'l Bank of Charleston v. Wells, 384 S.E.2d 374, 379 n.2 (W. Va. 1989) (citing R. ANDERSON, supra note 458, § 2- 608:6). In the same note, the court acknowledged that it is generally recognized that the UCC has rejected the use of the term "rescission." For further discussion, see supra text accompanying note 433.
No West Virginia case has addressed the buyer's section 2-712 right to "cover" by purchasing replacement goods upon the seller's failure to deliver conforming goods. There have been no West Virginia opinions addressing the buyer's section 2-713 right to decide not to purchase replacement goods and in the appropriate case simply hold the non-delivering seller liable for the difference between the bargain contract price and the higher market price of the goods. Finally, no West Virginia case has considered the buyer's right to specific performance under section 2-716.

2. Where the Buyer Keeps Non-Conforming Goods

A number of West Virginia cases have examined the section 2-714 measure of damages available where the buyer has accepted goods which are non-conforming, and decides to keep them in spite of their non-conformity. Section 2-714 provides:

(1) Where the buyer has accepted goods. . .he may recover as damages for any non-conformity. . .the loss resulting in the ordinary course of events from seller's breach as determined in any manner which is reasonable.
(2) The measure of damages for breach of warranty is the difference. . .between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.526

Damages under section 2-714 are only available where the buyer keeps the non-conforming goods. If the buyer revokes acceptance in order to return the goods to the seller,527 the buyer's remedies are under sections 2-712 (cover), 2-713 (lost bargain), or 2-716 (specific performance).

In Nelson v. Logan Motor Sales, Inc.,528 the buyer purchased a used car from the seller for $3,500. Within two days of the purchase, the transmission began to falter. After several attempts at repair by the seller and by another service shop, the transmission operated

only in first gear. During four months of the year following purchase, the buyer was unable to drive the car because of the transmission problem. A year after purchase, after having driven the car four thousand miles, the buyer stopped using the car because it was too difficult to drive. The buyer sued the seller for breach of implied warranty of merchantability and the seller counterclaimed for the remaining purchase price. As evidence of the breach of warranty damages under section 2-714(2), the buyer testified (1) to the costs of repair, (2) that the car operated in first gear only, and (3) that the car was no longer used after one year because it was too difficult to drive. The jury awarded $3,400 to the buyer and $0 to the seller on the counterclaim. The trial court reversed, finding there was no contract liability and no damages, and granted the seller the $1,990 remaining on the purchase price. The court found the evidence of repair costs was not evidence of general damages under section 2-714, but was only evidence of special damages, and was inadmissible because special damages had not been pleaded. The trial court went on to find that the remaining evidence, buyer’s testimony that the car had only worked in first gear and later could not be driven, was insufficient to support a finding that the car was essentially worthless.

On appeal, the West Virginia Supreme Court of Appeals, recognizing that the plaintiff had the burden of proving the amount of damages, cited prior West Virginia cases in holding that lay witnesses may express their opinions as to the value of property as long as the opinion is not speculative or conjectural. The court went on to hold that the buyer’s testimony that the car was worthless and could not be driven in its current condition was not sufficient to support a finding that the vehicle was essentially worthless.

529. Nelson, 370 S.E.2d Id. at 736.
530. Id.
531. Id. at 737. Because the purchase price of the automobile was $3500 and the jury award was $3400, the court characterized the award as a finding that the automobile as delivered was essentially worthless.

The Nelson court noted that in a prior West Virginia case, Muzelak v. King Chevrolet, Inc., 368 S.E.2d 710 (W. Va. 1988) (see infra text at note 570, the jury awarded the buyer the full purchase price of the automobile for breach of implied warranties on similar evidence. The Nelson court pointed out that in Muzelak, the buyer also produced evidence of value through testimony that the automobile
But importantly, the court held that the evidence of repair costs was admissible to show general damages under section 2-714. The court found that "the cost of repair is strong evidence of the difference between the value they would have had if they had been as warranted . . . . In most cases damages can be determined based on estimates of what it would cost to repair or replace." The court also noted that when repair costs are used to determine the value of the goods as accepted, the buyer's damages are his repair costs. This comment comes early in the court's discussion of the case, and as the context indicates, should not be read to mean that whenever evidence of repair costs is introduced, the only general damages under section 2-714(2) should be those costs of repair.

In Mountaineer Contractors, Inc. v. Mountain State Mack, Inc., the court recognized that although the difference between the value of the goods accepted and the value the goods would have had if they had been as warranted was the usual measure of damages under 2-714, this measure is not intended to be the exclusive measure of damages. Where special circumstances show proximate damages of a different amount, the usual measures of damages for breach of warranty need not be used.

In Mountaineer, the seller delivered defective used mining equipment during a coal boom directly to the buyer's work site. Apparently needing the equipment, the buyer accepted it upon seller's promise that it would pay for repairs. The buyer then proceeded to have the equipment repaired, but the seller failed to pay for the repairs. The buyer kept the equipment and sued for damages under section 2-714.
The court instructed the jury that in assessing damages, that it could consider money expended for repair parts and for the cost of repair labor, and any loss sustained by the loss of the use of the equipment until it was repaired.\textsuperscript{537} The instruction did not instruct the jury to find the damages based upon the respective as-warranted and as-delivered values, but instead directed the jury to consider the cost of repairs and consequential damages. The court justified this departure from the usual section 2-714 measure by stating that the sale took place during a coal boom when it was "virtually impossible" to purchase comparable mining equipment of the kind purchased because of the great demand for machinery of that nature.\textsuperscript{538} The court pointed out that the purchase price paid by the buyer in \textit{Mountaineer} was in some cases over twice the estimated price of comparable new equipment which was impossible to buy. The court concluded that in view of these facts, it would have been very difficult to ascertain the actual value of the equipment either at the time it was sold or at the time it was accepted by the buyer.\textsuperscript{539}

The court’s holding was certainly reasonable in the circumstances. Not only does section 2-714(2) authorize other damages when "special circumstances show approximate damages of a different amount," but, as the court pointed out, the Code provides that "the remedies provided by [this Code] shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed."\textsuperscript{540} Requiring the seller

\textsuperscript{537} The actual instruction was as follows:

The Court instructs the jury that . . . you may consider such items of damage as are the proximate result of the breach of warranty in this case.

In this respect you may consider . . . the following items of damages as you believe . . . to proximately result from the breach.

1. Any money expended for the purchase of parts to repair the equipment;
2. Any money expended to pay for labor used in making the repairs;
3. Any loss sustained by reason of the loss of use of the equipment purchased from the date of purchase until its repair, providing plaintiff acted with reasonable diligence in making repairs.

\textit{Id.} at 302 n.5, 268 S.E.2d at 893 n.4.

\textsuperscript{538} \textit{Id.} at 303, 268 S.E.2d at 893.

\textsuperscript{539} \textit{Id.} at 303-04, 268 S.E.2d at 893.

\textsuperscript{540} \textit{Id.} at 304, 268 S.E.2d at 893 (paraphrasing and citing W. VA. Code § 46-1-106 (1966)). § 46-1-106 states a general rule regarding remedies which applies and supplements the specific remedial rules provided in all Articles of the UCC, including Article 2.
to pay for repair costs did just that. Furthermore, it was especially appropriate in *Mountaineer* to use the cost of repair as the measure of damages. Although the suit was for breach of warranties, the buyer’s chief assertion was that the seller “expressly warranted” that it would repair any defects in the equipment discovered after the buyer used the equipment for one day. The suit was largely to force the seller to perform that promise to pay for repairs.

3. Incidental and Consequential Damages

As just stated above, the basic, broad remedial principle of the UCC, provided in section 1-106 of the general provisions of the Code, is to liberally administer the remedies provided by the Code “to the end that the aggrieved party may be put in as good position as if the other party had fully performed.”\(^5\) This principle includes granting buyer the right to recover for both incidental and consequential damages resulting from the seller’s breach, and this right is so provided in section 2-715. Recovery for incidental and consequential damages is specifically granted to the buyer where the buyer makes a “cover” purchase after the seller’s breach,\(^6\) where the buyer decides not to cover after the seller’s breach but to simply hold seller liable for the difference between the contract price and the higher market price,\(^7\) and where the buyer has decided to accept and keep the goods after a non-conforming tender.\(^8\) Incidental and consequential damages have been addressed as major issues in three West Virginia cases.\(^9\)

Recoverable incidental damages are those expenses reasonably incurred in inspection, receipt, transportation and care of goods rightfully rejected, those expenses incurred in effecting cover, and other expenses incident to the delay or other breach.\(^10\) To recover

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542. *Id.* § 46-2-712(2).
543. *Id.* § 46-2-713(1).
544. *Id.* § 46-2-714(3).
consequential damages, the buyer must establish (1) that the damages were caused by seller’s breach, (2) that at the time of making the contract it was foreseeable that such damages might result from the seller’s breach, (3) the amount of damages with reasonable certainty, and (4) that the losses could not have been avoided by buyer’s mitigation. The burden of proving consequential damages is on the buyer.

Section 2-715 appears to continue the common law as to recoverable consequential damages, and pre-Code common law cases should have precedential value under the Code. The West Virginia Supreme Court of Appeals has stated that recoverable Code consequential damages include lost profits, finance charges, overhead, labor, damages resulting from a bad credit report, attorney’s fees, and annoyance and inconvenience damages. The court has also recognized that prejudgment interest is permitted in Code recoveries where the jury so determines that such interest should be granted.

Interestingly, in City National Bank the court held the breaching seller liable for damages resulting from a bad credit report even though the bank, not the seller, filed the notice of the delinquent account. The seller had originally financed the sale of the vehicle to the buyer, taking a negotiable note from the buyer. The note was then assigned by the seller to the bank. When the buyer discovered

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547. City Nat’l Bank, 384 S.E.2d at 377 syllabus point 4, 383 (citing White and Summers, supra note 7 at 309).
548. Id.
551. City Nat’l Bank, 384 S.E.2d at 383.
552. Id.
553. Id.
554. Id. at 383-84.
555. Id. at 388; Muzelak v. King Chevrolet, Inc., 368 S.E.2d 710, 716-17 (W. Va. 1988).
557. City Nat’l Bank, 384 S.E.2d at 388-89. The City Nat’l Bank court held that the buyer had a right to have the jury consider prejudgment interest under W. Va. Code § 56-6-27 (1966) and Thompson v. Stucky, 300 S.E.2d 295 (W. Va. 1983), but denied the buyer such prejudgment interest because the buyer failed to request a jury instruction on such interest at trial.
extensive defects in the vehicle, he attempted to return the vehicle to the seller and stop making payments to the bank on the vehicle note. The bank then apparently submitted a routine delinquent account notice to a credit reporting agency. As a result, the buyer experienced some delay in receiving a car loan, and was later unable to obtain an equipment loan. The failure to obtain the equipment loan required the buyer to pay other contractors three thousand dollars to perform work that the buyer could have performed had he been able to obtain the loan. The court found that the seller's breach of warranty was the approximate cause of the buyer's default on the note obligation to the bank, and that this produced the bad credit report which led to the buyer's losses.\textsuperscript{558} It should be noted that if the buyer in City National Bank had purchased the truck for his personal use, and not for use in his business, the West Virginia Consumer Credit Protection Act would have given the buyer the right to stop making payments to the bank (assuming the buyer would have had the right because of the seller's breach to stop making payments to the seller if the seller still owned the note) under the Act's provisions making holders of negotiable instruments and assignees of instruments subject to claims and defenses that the buyer has against the seller.\textsuperscript{559} In fact, the buyer in City National Bank did sue the bank under the West Virginia Consumer Credit Protection Act, but the parties settled before trial.\textsuperscript{560}

As noted above, section 2-715(2) incorporates the \textit{Hadley v. Baxendale}\textsuperscript{561} requirement that in order to be recoverable, the con-

\textsuperscript{558} Id. at 384.
\textsuperscript{559} W. Va. Code §§ 46A-2-101, 46A-2-102 (1986 & 1991 Supp.). The buyer in City Nat'l Bank appeared to be buying for business purposes and not for his personal use. The court stated that before purchasing the truck, the buyer advised the seller that he needed the vehicle for use in his business. City Nat'l Bank, 384 S.E.2d at 378, 384. In this case, the West Virginia Consumer Credit Protection Act probably should have been inapplicable. Yet, the court treated the transaction as a consumer transaction later in its opinion in applying the Magnuson-Moss Consumer Warranty Act. See id., at 388-89. Either the court erred, or the buyer had mixed personal-business purposes for the vehicle. See W. Va. Code §§ 46A-1-102(13)(a)(iii) (definition of "consumer credit sale"), 46A-2-101, 46A-2-102(1) (1986 & Supp. 1991).
\textsuperscript{560} City Nat'l Bank, 384 S.E.2d at 379 & n.1. The section cited, § 46A-2-103 of the Act, was probably the wrong section to apply to the facts. Sections 46A-2-101 and/or -102 appear to be the applicable provisions.
\textsuperscript{561} 9 Ex. 341, 156 Eng. Rep. 145 (1854).
sequential damages must have been foreseeable at the time the contract was made. The *City National Bank* court commented on this requirement when it discussed the seller’s liability for losses resulting from the buyer’s inability to obtain a loan because of the bad credit report. The court pointed out that at the time of the purchase the buyer advised the seller that he intended to use the truck for his business. "The [seller] was intimately involved in the financing arrangement and thus, had reason to know that if the vehicle were defective, the plaintiff might legitimately refuse to make any further payments. In such circumstances, it is not unreasonable to assume that the plaintiff might suffer an impaired credit rating and incur additional business expenses."562

The court in *City National Bank* also discussed the Code stipulation that consequential damages are not recoverable if they could have been prevented by the buyer’s mitigation.563 The court held that the buyer’s duty to mitigate does not require him to undertake undue or oppressive burdens.564 The court pointed out that the buyer had attempted to have the truck repaired but was unable to accomplish such repair, and that he was financially unable to pay for a second truck which would have allowed him to avoid the consequential damages.565 The court concluded that there was no unreasonable failure to mitigate damages.

4. Punitive Damages

The Code makes no specific provision for punitive damages, and in fact provides that "neither consequential nor special nor penal damages may be had except as specifically provided in this act or by other rule of law."566 The Code does provide that "remedies for material misrepresentation or fraud include all remedies available

563. "Consequential damages . . . include (a) any loss . . . which could not reasonably be prevented by cover or otherwise." W. VA. CODE § 46-2-715(2) (1966).
565. *Id.* Even though the buyer had stopped making payments on the purchased truck, it apparently would have taken more than the amount of the suspended payments to purchase a replacement truck.
under this article for non-fraudulent breach." The Code also provides in its Article 1 general provisions that: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law...relative to...fraud,...shall supplement its provisions."

The West Virginia Supreme Court of Appeals addressed fraud and punitive damages in the context of a Code sales transaction in *Muzelak v. King Chevrolet, Inc.* The buyer in *Muzelak*, having previously purchased a car from the seller's sales manager, called the sales manager with a request for a car. The sales manager returned the call, stating that he had "the right car for her." He did not mention that there had been a series of serious repair problems with the car. In fact, the car had been used as a demonstrator for eight months by another salesperson, and it had been repaired ten times during those eight months. An engine vibration problem had never been solved. After the buyer purchased the car, the sales manager told a fellow worker that it took someone of his sales ability "to get rid of" the car. After the purchase, the buyer returned the car for repair thirteen times (most of which were covered by warranty) but the car was never satisfactorily repaired. A constant engine vibration and transmission fuel leak were never corrected. The car was so unreliable that the buyer did not drive the car after the first eight months of use. The buyer sued the seller for breach of express and implied warranties, for breach of the Magnuson-Moss Warranty Act, for negligence, for breach of common law misrepresentation under section 2-721 of the Code, and for misrepresentation and deception under the West Virginia Consumer Credit Protection Act. The jury awarded the plaintiffs $15,000 in compensatory damages and $25,000 in punitive damages. The circuit court reduced the compensatory damages by a third, and allowed

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567. *Id.* § 46-2-721.
568. *Id.* § 46-1-103.
569. 368 S.E.2d 710 (W. Va. 1988).
570. *Id.* at 711.
571. *Id.* at 712.
the buyer one-half of her attorney's fees under the Magnuson-Moss Warranty Act.

In Muzelak, the buyer pleaded a cause of action for common law material misrepresentation under section 2-721 of the Code. The court instructed the jury on misrepresentation, using as part of its instruction language found in the West Virginia Consumer Credit Protection Act's definition of unfair and deceptive acts or practices, which provides:

(f) Unfair . . . or deceptive acts or practices means . . . The act, use or employment by any person of material misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission in connection with the sale or advertisement of any goods or services . . . .

On appeal, the seller asserted that the trial court erred in allowing the jury to find punitive damages in the amount of $25,000 on the instruction given, because the buyer's claim and the court's instruction were based upon the West Virginia Consumer Credit Protection Act.

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574. Muzelak, 368 S.E.2d at 712 & n.3.
575. W. Va. Code § 46A-6-102(f)(13). This Code language became the central part of the court's instruction, which in full reads as follows:

MISREPRESENTATION OR CONCEALMENT OF MATERIAL FACTS. Betty Muzelak has sued King Chevrolet for making material misrepresentations regarding the 1982 Chevrolet Cavalier sold.

The court instructs the jury that the act, use or employment by any person of material misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission in connection with the sale or advertisement of any goods or services, is unlawful. W. Va. Code, § 46A-6-102(f)(13); 46A-6-104; 46A-6-107; 46A-6-108.

If you, the jury, find that King Chevrolet, Inc. has employed any material misrepresentation, or the concealment, oppression or omission of any material fact with intent that Betty Muzelak rely on such concealment, suppression or omission in connection with the sale of the 1982 Chevrolet Cavalier and that thereby Betty Muzelak suffered any ascertainable loss of money or personal property, Betty Muzelak is entitled to recover her actual damages. W. Va. Code, § 46A-6-102(f)(13); 46A-6-106(1).

Muzelak, 368 S.E.2d at 713 n.5.

The seller, King Chevrolet, had offered the following instruction:

The Court instructs the jury that the plaintiff, Betty Muzelak, must prove with clear and convincing evidence to the jury that she was (1) influenced to purchase the 1982 Cavalier by some misrepresentation of material fact, or the concealing, suppressing or omitting of a material fact, and (2) that defendant King Chevrolet intended that she rely on such concealment, suppression or omission when she purchased the vehicle. W. Va. Code, § 46A-6-102 [1974].

Muzelak, 368 S.E.2d at 713 n.6.
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Act, a statute which provides its own remedies, limiting the remedy to the recovery of "actual damages or $200, whichever is greater." The West Virginia Supreme Court of Appeals denied the seller's appeal on this point, finding that the seller had not objected to the court's instruction at trial, and also finding that the jury award was justified under West Virginia common law fraud and misrepresentation, which was pleaded and proven by the buyer.

The court held that:

The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that the was damaged because he relied upon it.

The court found that the elements of common law misrepresentation were proved with sufficient evidence to sustain the jury's verdict. The seller's intent to sell a demonstrator with a poor service history, the salesperson's bragging about the sale to fellow salespersons, the reliance of the buyer on the seller as a result of satisfaction with a prior purchase, all connected to the seller's omission of the information on the car's unreliability and poor service history, were clearly sufficient to satisfy the elements of common-law material misrepresentation. The court went on to hold that "in actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative

576. W. Va. Code § 46A-6-106(1986). The pertinent part of this section provides:

Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article, may bring an action in the circuit court of the county in which the seller or lessor resides or has his principal place of business or is doing business, or as provided for in sections one and two [§§ 56-1-1 and 56-1-2], article one, chapter fifty-six of this Code, to recover actual damages or two hundred dollars, whichever is greater. The court may, in its discretion, provide such equitable relief as it deems necessary or proper.

Id. at 46A-6-106(1) (emphasis added).

577. Muzelak, 368 S.E.2d at 713-14.

578. Id. at 714 (citing Lengyel v. Lint, 167 W. Va. 272 syllabus point 1, 280 S.E.2d 66 syllabus point 1 (1981); Horton v. Tyree, 104 W. Va. 238, 139 S.E. 737 (1927)).

579. Id. at 715.
enactment authorizes it, the jury may assess . . . punitive . . . damages. 580 Finally the court held that the $25,000 award was not grossly excessive or monstrous. 581 The court pointed out that the punitive damage award was less than 2.5 percent of the seller's net worth of over one million dollars.

XI. STATUTE OF LIMITATIONS

A. Generally

The UCC statute of limitations provides that any action for breach of contract must be brought within four years after the cause of action accrues. This period may be shortened by the parties to not less than one year, but may not be lengthened. 582 The cause of action accrues upon seller's breach. 583 A breach of warranty occurs when tender of delivery is made, unless a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, in which case the cause of action accrues when the breach is or should have been discovered. 584 The pre-Code case law on tolling of the statute of limitations is continued. 585

The West Virginia UCC statute of limitations has been applied to actions brought to recover for rotting masonite apartment siding, 586 for deteriorating house brick, 587 and for the purchase price of stone. 588 Its application has been refused in a personal injury action. 589 These court opinions have addressed issues relating to when the Code stat-

580. Id. (citing Cook v. Hecks, Inc., 342 S.E.2d 453 (W. Va. 1986); Wells v. Smith, 297 S.E.2d 872 (W. Va. 1982)).
583. Id. § 46-2-725(2).
584. Id. As to an action brought after an earlier action for the same breach had been discontinued, see id. § 46-2-725(3).
585. Id. § 46-2-725(4).
ute of limitations applies (instead of other statutes of limitations), when the statute begins to run, allegations of explicit warranties of future performance made so as to delay the commencement of the statute, and tolling the running of the statute. The court has made it clear that, as to the sale of goods, the section 2-725 Code statute of limitations supercedes any general statute of limitations.590

B. Scope and Applicability of Section 2-725

In Roxalana Hills Ltd. v. Masonite Corporation,591 the contractor purchased building siding and applied it to the exterior of an apartment complex. Six years after the purchase the buyer discovered that the siding absorbed moisture, became soft, rotted and decayed, became unsightly, and caused inconvenience to the tenants.592 The buyer sued the seller and the manufacturer for tort and for breach of a UCC warranty. The tort action was covered by a two-year statute of limitation running from the time of discovery;593 the breach of warranty action was covered by the Code section 2-725 four-year statute, running from the time of tender of delivery, unless a warranty explicitly extended to future performance. Delivery being six years before the lawsuit, the buyer had to establish a tort cause of action or a warranty extending to future performance. Buyer could do neither.

In rejecting buyer's tort claims in strict liability, the federal court cited the West Virginia Supreme Court of Appeal's holding in Star Furniture Co. v. Pulaski Furniture Co.594 requiring that if the damage is to the property itself, it must result from a "sudden calamitous event" or it is not covered by strict liability. "Damages which result merely because of a 'bad bargain' are outside the scope of strict liability."595 Importantly, the Roxalana court continued by stating

592. Id. at 1197-8.
593. See W. VA. CODE § 55-2-12 (1981). In product liability cases, the statute begins to run when the plaintiff knows, or by the exercise of reasonable diligence should know, that he has been injured by the product. Hickman v. Grover, 358 S.E.2d 810 (W. Va. 1987).
595. Id. at 859, quoted in Roxalana, 627 F. Supp. at 1196.
“[E]ven if a sudden calamitous event were not required . . . the Supreme Court of Appeals of West Virginia expressly excluded tort liability for ‘bad bargains’.”596 The court then reviewed federal cases from around the country,597 indicating that mere damage to other property does not preclude a finding of purely economic loss.598 The court emphasized that the buyer did not even mention “safety of the product” in the pleading, and concluded that no cause of action existed in strict liability.599

In determining that a simple negligence cause of action did not exist, the Roxalana court predicted that West Virginia, in applying the same concepts it applied to strict liability, would deny a tort cause of action for mere economic loss flowing from a bad contractual bargain.600

Two years after the federal court's decision in Roxalana, the West Virginia Supreme Court of Appeals confirmed that the UCC statute of limitations applied to a cause of action arising out of the gradual deterioration of building materials not accompanied by personal injury or a sudden calamitous event. In Basham, et al. v.


597. Id. at 1196-98. The court opinion follows a curious development around the country, that is citing primarily federal case law on matters governed purely by state law under Erie v. Tompkins, often without even identifying the state whose laws are presumably being applied by the courts. The theoretical basis for citing primarily federal case law is not clear. If a West Virginia state court ruling is primary authority on West Virginia law, and the ruling of a state court in another state on a similar situation in its state is (as a primary authority on its state law) at most secondary authority on what West Virginia law should be, then a federal court deciding a state law issue in that state is (as a secondary authority on the law of that state) at most a tertiary authority on what West Virginia law should be. Adding to this the practice of citing a federal circuit court of appeals ruling without identifying the state whose law the circuit court of appeals is applying, what is being cited as an authority on our law is a tertiary authority, ruling on some unidentified law.

It is one thing to predict that West Virginia is likely to follow a certain rule because Virginia or Pennsylvania, or even California does so, but quite another to say West Virginia is likely to follow a certain rule because a non-West Virginia federal court predicts some unidentified state will apply that certain rule. See Erie v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938).

598. Roxalana, 627 F. Supp. at 1197 (citing Daitom Inc. v. Pennwalt Corp. 741 F.2d 1569 (10th Cir. 1984) (Kansas) (defective dryer resulted in unsalable product); Jones and Laughlin v. Johns-Manville Sales Corp., 626 F.2d 280, 282 (3d Cir. 1980) (defective roof caused damage inside building); National Can Corp. v. Whittaker Corp., 505 F. Supp. 147, 149 (N.D. Ill. 1981) (defective can caused buyer's soft drink to deteriorate)).

599. Id. at 1198.

600. Id. at 1198-99.
General Shale et al., the exterior of the plaintiffs' homes became unsightly when the brick facade began to disintegrate. The homeowners sued the manufacturer of the bricks, the suit occurring at least six years after the deliveries of the bricks. Citing the Roxalana opinion with approval, the court held that "a party who suffers mere economic loss as a result of a defective product must turn to the Uniform Commercial Code to seek relief."

The court also rejected the homeowners' position that a separate independent tort cause of action was created by their allegations of the manufacturer's willful, wanton, and reckless conduct and their own request for punitive damages. The court did imply that a separate tort cause of action might be found in fraud, but did not specifically rule on this, finding that the complaint failed to allege the circumstances of fraud with particularity as required by the rules of civil procedure.

In Basham, the homeowners also argued that their action was covered by the West Virginia ten-year statute of limitations for "deficiency in the planning, design, surveying, ... or the actual construction of any improvement to real or personal property." The court had no trouble finding that the clear and unambiguous wording of this "'architects and builders' statute" demonstrated it was not intended to cover actions against the manufacturer of defective construction materials.

In 1985, the West Virginia Supreme Court of Appeals applied the Code statute of limitations to the seller's attempt to collect the

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602. In addition to also alleging that bricks on their homes, patios, steps, barbecue grills, fireplaces, and chimneys had disintegrated, the plaintiffs also alleged other damage, including water leakage into the interior. Id. at 830-31 & n.1. The opinion does not indicate whether property other than the brick itself, was damaged. Obviously the houses as a whole were. The court did not address the issue of how damage caused by the purchased goods to other, non-purchased property might affect the determination of whether the tort or the Code statute of limitations should apply.
603. Id. at 834.
604. Id. at 835.
605. Id. at 835-36 (citing W. Va. R. Civ. P. 9(b)).
606. Id. at 833, (quoting W. Va. CODE § 55-2-6a (1988)).
purchase price of stone from a buyer in *Greer Limestone Co. v. Nestor.* 607

On two occasions, West Virginia federal courts have refused to apply the UCC statute of limitations. In *Maynard v. General Electric Co.*, 608 an employee of a trucking company, engaged by the seller to ship the goods to the buyer, was injured when the carton containing the goods fractured and fell off a forklift. The lower court ruled that the tort claims were barred by the tort statute of limitations, and the breach of the UCC warranty claims barred by the lack of privity (still a West Virginia requirement in 1972). On appeal, the employee added the argument that he (or his employer and he through his employer) was the beneficiary of a warranty that the goods would be properly boxed. There is some chance that the employee was arguing that the warranty was implied in the seller-buyer sales contract, to which the Code statute of limitations would apply. The opinion indicates the employee was alleging that the warranty was implied in the contract between the seller and the carrier, which, as a contract for trucking, would not have been covered by the Code. In any case, the appellate court, tracing the history of personal injury actions in West Virginia, ruled that the two-year tort statute of limitations applied to all actions for personal injury damages. 610

The other case, *Bradford v. Indiana and Michigan Electric Co.*, applying admiralty law, rejected the application of section 2-275 to an action for indemnity for a defective product. 611

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607. 332 S.E.2d 589 (1985). The court never identified the actual materials purchased by the buyer, but the seller was in the business of selling stone and stone products.
610. 486 F.2d 583 (4th Cir. 1973) (*Maynard II*).
611. 588 F. Supp. 708 (S.D. W. Va. 1984). In *Bradford*, a seaman was injured by a defective product and sued his employer under admiralty law and the Jones Act. The employer in turn sued the product seller and manufacturer for indemnity, and these defendants raised the statute of limitations as a defense. The court, searching for a statute of limitations to guide the court, first determined that admiralty law had no statute of limitations, that the defense should be treated as a laches defense. The court then searched for a statute of limitations to serve as a guide to laches. It rejected the four-year UCC statute, citing an earlier fourth circuit case holding that 2-725 does not govern suits for indemnity for defective products. See *Walker Mfg. v. Dickinson, Inc.*, 619 F.2d 305, 310 (4th Cir. 1980).
C. Commencement of the Statutory Period

Under section 2-725(2), the statute begins to run upon the tender of the goods to the buyer, even if the goods are to last a long time. In Basham, the bricks were expected to last for the respective lives of the houses; the lives of the houses could be decades, and it could be expected that some defects would not be discovered until long after the sale. The court, based upon the express language of section 2-725(2), rejected the time of discovery rule of Hickman v. Grover and held the running of the statute is not delayed by the difficulty of discovering the defect. This decision reflects the Code language and the general rule.

Roxalana addressed the Code provision that provides "where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the [statute of limitations begins running] when the breach is or should have been discovered." In this case, the buyer alleged a number of express warranties which the buyer argued extended the time for the running of the statute. First, the buyer alleged that product literature in the form of an advertisement or pamphlet stated that the factory-applied finish nails were warranted for five years and that the siding was warranted against hail damage for twenty-five years. The court did not discuss the effect of these warranties on the statute of limitations. It could be presumed that the court concluded that these warranties were not relevant to an extension of the statute in the case at hand because the defects in the siding related to its absorption of water and decay, and not to any defect or failure in the nails or the ability of the siding to resist hail damage.

614. Basham, 377 S.E.2d at 835.
Next, the buyer apparently alleged that warranties were created by statements made by seller’s agents after the siding was purchased and applied to the building. One statement, made in a letter to buyer, stated that the siding should perform “quite satisfactorily.” Other statements, apparently made by agents of the seller at a deposition in the case, stated “[i]f properly installed, [the siding] would last the lifetime of the building to which it is attached.” The court analyzed these statements by referring to the Code’s section 2-313 provision on the creation of express warranties. Noting that a statement only becomes an express warranty if it is made “part of the basis of the bargain,” the court reasoned that such statements made after the completion of the apartment complex could not constitute a basis of the bargain for the previously sold goods.\(^6\)

The court further held that these statements, “relied upon by Roxalana (buyer) as warranties, are easily dismissed as merely opinions, in addition to the problem of their not being a basis of the bargain.”\(^6\)

The court’s conclusion that these statements could not be part of the basis of the bargain because the statements were made after the sale and delivery is in accord with the majority of court opinions on this matter, but the court failed to consider its earlier decision in *Mountaineer Contractors, Inc. v. Mountain State Mack.*\(^6\) This case held that statements made after the contract were made can become express warranties as modifications to the contract, which need no additional consideration to be binding. Clearly, the statement made in a deposition as to a product characteristic already proven not to be true, and which is already the subject of litigation, could not be viewed as the offer of an express promise of that quality so as to constitute a modification of the contract.\(^6\)

The court was correct in concluding that the post-sale statement that the siding should perform “quite satisfactorily,” was both merely

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618. Id. at 1201.
620. Where a similar statement (“the siding will last the lifetime of the building”) was held to create an express warranty at least one court has held that it constituted a warranty explicitly extending to future performance of the goods. See Moore v. Puget Sound Plywood, Inc., 214 Neb. 14, 332 N.W.2d 212 (1983).
a seller's commendation and could not be part of the basis of the bargain. But the court probably erred in concluding that the statement, "the siding is specially formulated for weatherability and durability," made in a written advertisement-pamphlet, was not an express warranty in that it merely expressed the "value of the product and falls short of the factual affirmation or description that forms a basis of the bargain." This advertisement-pamphlet probably did create an express warranty under section 2-313, at least as to some characteristics. Certainly siding manufactured by the same process that was used to manufacture interior paneling would likely not be "specially formulated for weatherability and durability," and should be held to breach the warranty statement. However, just because the statement creates an express warranty does not mean that the warranty "explicitly extends to future performance of the goods." It is a question of fact as to whether this statement explicitly extends to the future performance of the goods. Obviously, a buyer could not determine whether siding was specifically formulated to provide durability and weatherability unless the buyer performed laboratory tests or the siding remained on the outside of a building for some time in the future to see whether in fact it was durable and did weather. On the other hand, the statement did not "explicitly" provide a specific future time period covered by this promise, and most warranties of the quality of most goods would have to await future performance to test the truth of the statements. The language of section 2-725(2), "requiring that the warranty "explicitly extends to future performance" was not meant to cover all such statements. The cases are mixed, but tend to require language referring to a future event such as "lifetime guarantee" or "warranted for three years" or "will last for 24,000 miles."

The court correctly determined that the issue of whether these warranties extended to the future, so as to begin the running of the statute

of limitations, was moot, because the buyer actually discovered the defects within one year after the installation of the siding. Even delaying the beginning of the running of the statute of limitations until that discovery, the four years had expired before the lawsuit was brought. Therefore, even if the alleged warranties explicitly extended to future performance and delayed the commencement of the statute, the statute was only delayed until the discovery. The court’s discussion of the creation of these warranties is flawed, and its determination as a matter of law that no warranty was created by the statement in the advertisement-pamphlet concerning weatherability and durability was probably wrong. Nevertheless, the action it took was probably justified on two grounds. First, the warranty found did not “explicitly extend to future performance,” at least as the cases and commentary seem to require, and, second, even if they did, and the statutory period had been delayed, the statutory period would still have run before the suit was filed.

D. Tolling of the Statute

West Virginia courts have twice addressed the tolling of the statute of limitations. “Tolling” refers to the interruption or suspension of the running of the statute for a reasonable time until facts justifying the tolling can reasonably be accommodated. “Tolling” is also sometimes used to refer to the beginning anew of the running of the entire period of the statute.624 In Roxalana, the buyer alleged that the defendants’ responses to inquiries regarding the problems set up an equitable estoppel which tolled the statute of limitations. Without a discussion of the underlying facts, the court concluded that the seller made no representations which induced the buyer not to take action and referred to an earlier decision on the tolling principle. In Humble Oil & Refining Company v. Lane,625 the West Virginia Supreme Court of Appeals held that, in order to establish estoppel sufficient to stop the defendant from pleading the statute of limitations, a party must show she was induced to delay bringing her lawsuit by some words or conduct that she relied upon to her detriment. In the absence of

a promise not to plead the statute of limitations, a mere request for
delay or forbearance will not estop the other party from pleading the
statute of frauds. Although *Humble* involved a tort action, estoppel
will apply to transactions covered by the UCC through section 1-103.626
The cases are mixed as to what actions, including attempted repair,
will constitute estoppel.627

In *Greer Limestone*, the court directly addressed whether a pay-
ment on an account tolled the statute. The court, citing a long line
of West Virginia cases, held that the Uniform Commercial Code did
not change the traditional law that a payment made on a charge ac-
count constituted a new promise to pay the contract amount, and that
the statute of limitations began anew upon the date of such payment.628
This is in accord with the express language of the section 2-725(4)
allowing continuation of the non-Code law on tolling, and with the
general rule.629

**XII. CONCLUSION**

A careful reading of the West Virginia Code cases reveals a sur-
prising failure on the part of the courts to carefully work with the
precise Code language, to use all of the applicable Code sections, to
interrelate the applicable sections, and to explain how they reach their
conclusions under the Code language. At the same time, when the
courts have carefully analyzed the Code, they have generally dem-
onstrated a progressive approach in interpreting and applying the UCC.
Overall, their decisions are clearly in the mainstream of developing

626. *See supra* notes 175-80 and accompanying text.
627. *See, e.g.*, Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456 (4th Cir.
1983); Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813 (6th Cir. 1978), *cert. denied*,
441 U.S. 923 (1979); City of Bedford v. James Leffel & Co., 558 F.2d 216 (4th Cir. 1977); O'Keefe
F. Supp. 1183 (E.D. Mo. 1971), *aff'd*, 460 F.2d 276 (8th Cir. 1972); A. J. Aberman, Inc. v. Funk
Homes, 658 S.W.2d 106 (Tenn. 1983).
UCC jurisprudence. Finally, and maybe most importantly, the results reached in most of the cases appear just and fair.