The Uniform Commercial Code Sales Article Compared with West Virginia Law Part II

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Section 2-301. General Obligations of Parties.

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.

Perhaps the most significant thing about this provision is its avoidance of the use of the term "condition" which was used, in juxtaposition to the term "warranty" in the Sales Act. The nice distinction between a failure of a condition—which relieved the other party from performing—and a breach of warranty—which did not relieve but merely gave a right of action for the breach to the other party—is neatly avoided. The term condition is still employed in the Code, as, for example, in section 2-507 which provides that the seller's tender of delivery is a condition to the buyer's duty to accept the goods, but overly technical, non-commercial concern for "conditions" generally is avoided. Section 2-506, for example, specifically permits a seller to "cure" an improper tender under certain situations; moreover the official comments to the present section 2-301, stress again that obligations to perform in "accordance to the contract" shall be determined with reference to "usage of trade, course of dealing and performance, and the general background of circumstances . . . [considered] in conjunction with the lay meaning of the words used to define the scope of the conditions and duties. . . ."

Section 2-302. Unconscionable Contract or Clause.

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

(2) 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.

There is presently no express principle in West Virginia law which corresponds with the "unconscionable" provision of the Code. A parallel may be found in the equity principle that specific performance will be denied contracts which are not "fair and equitable." The Code provision of course would not bar merely specific enforcement of a contract but would refuse to give any cognizance, legal or equitable, to a clause or contract found unconscionable. In this broad aspect, the Code provision runs contrary to general statements of the West Virginia court to the effect that the wisdom or folly of a contract is not a matter of judicial concern.

The position of the Code is that courts actually do enforce an unstated rule against unconscionability 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." This theory could be arguably supported by West Virginia cases where lack of mutuality, waiver, strict enforcement of forfeiture provisions and the like have been employed to avoid results that might otherwise be characterized as unconscionable. And it should be noted also that statements that courts are unconcerned with the fairness of the bargain

76 See West Virginia cases discussed in Note, 30 W. Va. L. Q. 293 (1930).
77 Griffen v. Fairmont Coal Co., 59 W. Va. 480, 53 S.E. 24 (1906). In Continental Coal Co. v. Connellsville By-Product Coal Co., 104 W. Va. 44, 58, 138 S.E. 1737, 742 (1906) the court, dealing with the granting away of subjacent support, said: "[T]he courts enforce the agreement [a mining lease] on the same principles governing ordinary contract, however harsh and unreasonable they may be."
78 U.C.C. § 2-302, Comment 1.
struck in a contract are normally prefaced with the qualification that such burdensome obligations will be enforced where the language of the contract is clear. In short, before contracts can be enforced, their meaning must be ascertained. At this fork in the road, courts are usually farsighted enough to see an unconscionable result looming along one path and no doubt permit considerations of such uncomfortable destinations to shape their determinations that there may be an ambiguity lurking in the contract language which opens an alternative path.\textsuperscript{82}

Whether the end result flowing from the law of contract in this state would be affected by the adoption of this Code provision could be argued long and hard from either point of view.

It is clear however that the technique for handling contract provisions which could lead to unconscionable results is clearly changed by the Code provision. The court is specifically authorized to hear evidence which bears upon the question of the unconscionability of the clause or contract in question. Thus whether a given provision legitimately protects the interests of one of the contracting parties or merely affords a surprising and unjustifiable means of avoiding fair obligations may be considered in the light of commercial practice or any other relevant evidence. Such determinations are of course open to review by appellate courts and guides for future actions can thus be developed.\textsuperscript{83}

Section 2-303. Allocation or Division of Risks.

Where this Article allocates a risk or a burden as between the parties "unless otherwise agreed", the agreement may not only shift the allocation but may also divide the risk or burden.

This provision basically restates present West Virginia law. Contracting parties are free to make their own law so far as their own transactions are concerned, so long as minimal requirements of a valid contract are met.\textsuperscript{84} An overzealous shifting of burdens

\textsuperscript{82} See Hall Mining Co. v. Consolidated Fuel Co., 69 W. Va. 47, 70 S.E. 857 (1911) and cases cited in note 77, supra. Note also the discussion of the rather arbitrary nature of a determination that contract language is or is not ambiguous in Hartman v. Windsor Hotel Co., 136 W. Va. 681, 68 S.E.2d 746 (1951).

\textsuperscript{83} See Note, 45 VA. L. REV. 583 (1959) and Note, 45 IOWA L. REV. 843 (1960) for well considered discussions of the test of "unconscionability."

and risks of course may result in the absence of a contract due to a lack of mutuality of obligations, but this, of course, requires an extreme case.\textsuperscript{65}

Under the law of sales as it presently stands, the allocations of many risks depends upon the location of title, and the point at which title to the goods involved changes from the seller to the buyer depends upon the intent of the parties.\textsuperscript{66} Thus, these many title-related risks are definitely subject to the terms of the agreement, though litigated cases show that this matter is rarely dealt with explicitly within the contract of sale. Moreover, risks and burdens can be allocated by express agreement without reference to title.\textsuperscript{87} In \textit{J. E. Poling Co. v. Huffman & Frost},\textsuperscript{88} the buyer and seller agreed that lumber sold would be held on the seller's mill site at seller's risk as to fire loss though the timber had been felled, manufactured into lumber and marked with the buyer's brand. The court held that under these circumstances the title to the lumber thus manufactured had passed to the buyer (and thus was not subject to attachment by the seller's creditors) when stacked at the seller's mill, even though the seller continued to bear the risk of fire loss.

The official comments to the section note that the division of risks may be found not only in the express terms of the agreement, but also in the "attending circumstances." As to risks flowing from possession of title, this statement accurately reflects the present state of West Virginia law, since resort to such surrounding circumstances usually is necessary to seek out the "intent" as to when title was to pass.\textsuperscript{69} As to risks and burdens not directly attributable to possession of title, present West Virginia law would not, at least on the surface, emphasize quite so much these surrounding circumstances.

\begin{footnotes}
\item Motor Car Supply Co. v. General Household Utilities Co. 80 F.2d 167 (4th Cir. 1935); Eclipse Oil Co. v. South Penn Oil Co. 47 W. Va. 84, 34 S.E. 923 (1900).
\item Moore v. Patchin, 71 W. Va. 192, 76 S.E. 426 (1912); See numerous other cases holding to the same effect under discussion of section 2-401.
\item E.g. Osborn & Co. v. Francis, 38 W. Va. 312, 18 S.E. 591 (1893) (where evidence sustained a sale on approval, seller bore the risk of subject of sale satisfying buyer, and buyer could arbitrarily refuse to accept goods delivered); Greenbrier Lumber Co. v. Ward, 36 W. Va. 573, 15 S.E. 89 (1892) (seller to deliver on banks of named stream "secure from high water" timber lost in high water held seller's loss.)
\item 84 W. Va. 199, 99 S.E. 445 (1919).
\item E.g. Acme Food Co. v. Older, 64 W. Va. 255, 61 S.E. 235 (1908); Buskirk Bros. v. Peck, 57 W. Va. 360, 50 S.E. 432 (1905). See also cases cited under discussion of section 2-401.
\end{footnotes}
Section 2-304. Price Payable in Money, Goods, Realty, or Otherwise.

(1) The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.

(2) Even though all or part of the price is payable in an interest in realty the transfer of the goods and the seller's obligations with reference to them are subject to this Article, but not the transfer of the interest in realty or the transferor's obligations in connection therewith.

What might otherwise be termed a barter, an exchange of goods for goods rather than goods for money, is brought within the Code by this provision so far as the exchange relates to goods. The Uniform Sales Act took a contrary stand so far as subsection (2) is concerned and excluded from its ambit deals involving an exchange of goods for real estate. Sturgill v. Luvell Lumber Co. characterized an exchange of personalty for personalty as a sale because the transaction was based upon dollar value, i.e., seller took an engine plus 700 dollars worth of lumber for an engine worth 2,700 dollars. The inference is that had the exchange involved a particular pile of lumber, or lumber contained in a designated shed, the transaction might have been characterized a barter and not a sale.

Section 2-305. Open Price Term.

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

(a) nothing is said as to price; or

90 E.g. Kanawha Banking & Trust Co. v. Gilbert, 131 W. Va. 88, 46 S.E.2d 225 (1948). (Court will not look to surrounding circumstances to determine intent of parties and meaning of contract unless contract is subject to more than one interpretation.)

91 See discussion of sections 2-202 and 2-208, supra.

92 UNIFORM SALES ACT § 9 (3).

93 132 W. Va. 172, 51 S.E.2d 126 (1948).
(b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do much [sic] pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.94

West Virginia has recognized in principle the view espoused by this provision, but the section anticipates and resolves many questions to which present West Virginia law provides no answer. In Sterling Organ Co. v. House,95 a buyer was permitted to recover damages for the seller’s failure to supply organs ordered for resale even though no specific price had been set for the particular organs ordered. The court held that the jury could determine a reasonable price.

It should be noted that the provision pays careful attention to the intent of the parties. Subsection (1) starts with the language, “The parties if they so intend” can conclude a contract without the price being settled. And subsection (4) again emphasizes the point that the contracting parties must intend to be bound without the price being fixed before such agreements may be enforced. This question of intent is, of course, usually a question for the trier of fact.

94The word “much” appears in the 1958 official edition of the Code. The word intended is “must.”
9525 W. Va. 64 (1884). See also Tide Water Oil Sales Co. v. Jarvis, 114 W. Va. 493, 172 S.E. 522 (1933). (Dealer-buyer’s purchase price fixed by seller’s local “tank wagon” price.)
Section 2-306. Output, Requirements and Exclusive Dealings.

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

West Virginia presently is in accord with subsection (1) of this provision. In Fayette-Kanawha Coal Co. v. Lake & Export Coal Corp., the West Virginia court specifically upheld the validity of an output contract against arguments that it was void for want of mutuality or for uncertainty. The court held that the producer was bound to continue production in good faith during the term of the contract and that the quantity of coal involved in the contract was governed by good faith operation of the mine in the usual and ordinary way. There is, however, one slight modification of the view of the Fayette-Kanawha case implicit in the present section. In the Fayette-Kanawha case, the court forbade the plaintiff-seller to base his recovery on the expanded output resulting from improvements to his mine which the plaintiff alleged both he and defendant buyer anticipated at the time of entering into the contract. The official comments to the section note that "normal expansion undertaken in good faith would be within the scope of this section." It would thus seem that the quantity involved in a case such as Fayette-Kanawha should be left to the trier of fact.

Subsection (2) expressly states a "best efforts" requirement in exclusive dealing contracts. There is no specific West Virginia law

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96 The validity of an output contract was assumed without any discussion in Fox v. Ritter-Burns Lumber Co., 91 W. Va. 542, 114 S.E. 141 (1922). In the later Fayette-Kanawha Coal Co., case, see note 97, infra, and discussion in text above, the validity of such a contract was expressly dealt with. See generally, Note 42 W. Va. L. Q. 154 (1936).
97 91 W. Va. 132, 112 S.E. 222 (1922).
98 Id., syl. 7.
on this point.\textsuperscript{100} It should be noted that this subsection starts with the terms: "A \textit{lawful} agreement..." It thus does not attempt to make lawful exclusive dealing contracts which under existing contract principles would be unlawful as a restraint upon trade.\textsuperscript{101}

\begin{quotation}
Section 2-307. Delivery in Single Lot or Several Lots.

Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.
\end{quotation}

Where the parties do not specifically agree upon delivery in a single lot or several lots, this section provides the rule to be applied. The assumption is that delivery is to be in a single lot, but circumstances may indicate the contrary, in which case delivery in several lots is permissible and payment for each delivery may be demanded upon such tender if the price due is apportionable. The policy of this section is generally in keeping with the view of the West Virginia Supreme Court expressed in \textit{Tuggle v. Belcher}.\textsuperscript{102} There a seller refused to accept an order for two car loads of a certain kind of lumber because he was uncertain of his ability to deliver more than one car load. The agent of buyer agreed to take one car load immediately and the second car load on an "if available" basis. The buyer refused to pay for the first car load unless the second was shipped, and seller refused to ship the second until paid for the first. The court held for the buyer and ruled he could recover for the first car load and was justified in not shipping the second.

More detailed rules regarding proper delivery and tender are stated in section 2-508. The present section is principally concerned only with establishing a rule for determining whether single

\textsuperscript{100} In \textit{House v. Sterling Organ Co.}, 25 W. Va. 64 (1884) the court seemed to infer that a buyer for resale of organs could not enforce the "exclusive" feature of his contract with the manufacturer since a patented product was not involved, but this point was not relevant to the determination of the case. Exclusive dealing contracts are now generally held valid, see 5 \textit{Williston, Contracts} § 1645 (3d ed. 1937) and the validity of such has been specifically sustained in West Virginia, \textit{Thurmond v. Paragon Colliery Co.}, 82 W. Va. 49, 95 S.E. 816 (1918).

\textsuperscript{101} See, \textit{Pocahontas Coke Co. v. Powhatan Coal & Coke Co.}, 60 W. Va. 508, 56 S.E. 264 (1918).

\textsuperscript{102} 104 W. Va. 178, 139 S.E. 653 (1927).
or multiple deliveries are authorized where there is no express agreement.

Section 2-308. Absence of Specified Place for Delivery.

Unless otherwise agreed

(a) the place for delivery of goods is the seller's place of business or if he has none his residence; but

(b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and

(d) documents of title may be delivered through customary banking channels.

There is no West Virginia authority bearing directly upon the matters dealt with in this provision. Two points from the official comments may bear special note here however. First, this is another "unless otherwise agreed" provision, one which establishes a rule where the parties have not either expressly or impliedly provided for a place of delivery. Second, subsection (c) relating to documents of title provides that ordinary banking channels may be used for delivery of documents of title. This means that due notification by the bank that such documents are on hand completes the delivery and that the buyer is obligated to arrange the physical receipt of the goods. Such documents do not have to be presented personally to the buyer.

Section 2-309. Absence of Specific Time Provisions; Notice of Termination.

(1) The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time.

(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.
(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

Present West Virginia law is in accord with the provisions of this section. In Greenbrier Lumber Co. v. Ward and Boyd v. Gunnison, the West Virginia court has ruled that the time for delivery in absence of agreement between the parties on this point is a reasonable time. There is no specific ruling in any case in this state which accords with subsection (2) dealing with successive performance where no duration for such performances are fixed. However, Sterling Organ Co. v. House supports this point by inference. There a manufacturer of organs attempted to avoid liability for failure to supply seven of ten organs ordered by House by claiming it had the right to cancel its agreement to sell without giving notice to the buyer. The court held that the arrangement whereby House sold the manufacturer's organs continued at the pleasure of both parties and could not be terminated without reasonable notice by the party seeking to dissolve the arrangement to the other party. In this respect, the rule of the Sterling Organ case is in complete accord with subsection (3). The manufacturer attempted to establish a right to cancel without notice as a matter of usage of the trade. The court held that evidence of such a usage of trade could be denied solely on the basis that it was "unreasonable."

Section 2-310. Open Time for Payment or Running of Credit; Authority to Ship Under Reservation.

Unless otherwise agreed

(a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

(b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods

103 36 W. Va. 573, 15 S.E. 89 (1892).
104 14 W. Va. 1 (1878).
105 25 W. Va. 64 (1884).
after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 2-513); and

(c) if delivery is authorized and may by way of documents of title otherwise than by subsection (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and

(d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

Subsection (b) along with some other provisions of the Code\textsuperscript{106} would bring about a change in West Virginia law but otherwise this provision would essentially fill an existing void in the law of this state. \textit{Back & Greiwe v. Smith},\textsuperscript{66} decided in 1909, held that by shipping under reservation, the seller retained title and risk to goods sent and thus the buyer was justified in rejecting the tender because of damage occurring to the goods during transit. In effect then, \textit{Back & Greiwe} held that authority to ship under reservation is \textit{not} presumed in absence of an agreement on this point. This view is, of course, inconsistent with the Code provision, and it is somewhat inconsistent too with the right of a seller to stop in transit, a right recognized in a subsequent West Virginia case.\textsuperscript{108}

Subsection (a) may appear at first reading to be awkwardly phrased, but there is good reason for the use of the terminology employed. In general, the common law viewed "delivery" and "payment" as concurrent conditions.\textsuperscript{109} The phrasing of the subsection is carefully drawn to avoid possible confusion which may arise here, because delivery may be complete upon placing the goods in the hands of a carrier, but the buyer is not obligated to

\textsuperscript{106} See sections 2-401, 2-505, and 2-509.
\textsuperscript{107} 66 W. Va. 47, 66 S.E. 1 (1909).
\textsuperscript{108} Sharp v. Campbell, 89 W. Va. 526, 109 S.E. 611 (1921). Shipment under reservation is "somewhat" different because it does not depend upon the insolvency of the buyer, where the right to stop in transit does.
\textsuperscript{109} 2 WILLISTON, SALES § 447 (rev. ed. 1948).
pay until the time he "is to receive" the goods—which of course occurs later, at the end of the transit.\textsuperscript{110}

Subsections (c) and (d) cover points on which there is no present West Virginia authority.

Section 2-311. Options and Cooperation Respecting Performance.

(1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of Section 2-204) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

(2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in subsections (1) (c) and (3) of Section 2-319 specifications or arrangements relating to shipment are at the seller's option.

(3) Where such specification would materially affect the other party's performance but is not reasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies

(a) is excused for any resulting delay in his own performance; and

(b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

Of the three major points covered by this provision, present West Virginia law is generally in accord on two and is silent on the third. The principal effect of this provision would be elaboration and clarification.

Several cases have involved the enforcement of contracts under which one of the parties had to specify "particulars of perform-

\textsuperscript{110} The common law "concurrent condition" concept is qualified by the buyer's usual right to inspect before payment. 2 WILLISTON, SALES § 448a (rev. ed. 1948). One West Virginia case generally supports the rule stated in subsection (a), Tuggle v. Belcher, 104 W. Va. 178, 139 S.E. 653 (1927).
ance.' In Boyd v. Gunnison, it was left to the buyer to designate one of three cities as the point of delivery. Several lumber sales cases have involved contracts for a given quantity of lumber, the amount and assortment of lumber to be delivered in any one shipment being left to be designated during the performance of the contract. Thus, present law in this state is in accord with subsection (1) and the effect of the adoption of this part of the provision would be a codification and clarification of existing law.

Subsection (2) spells out buyer's and seller's rights to particularize in absence of contrary agreements arising either expressly or by implication from trade usage, course of dealing or the like. Present West Virginia law is silent on this point. The exceptions referred to in subsection (2) relating to parts of section 2-319 of the Code generally involve instances where the buyer is bound to designate a vessel on which the goods are to be shipped.

Subsection (3) deals with the consequences of a failure by one party to particularize or make known how the performance by the other party is to be accomplished. Where such a failure occurs, the party who awaits the other party's particularization "is excused for any resulting delay" in his own performance. This restates the holding of Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co., where the construction of certain machines was delayed by the buyer's failure to make available promptly certain specifications for the machines. The court stressed that the plaintiff seller was bound to show the extent of delay attributable to the buyer's procrastination. In this respect, the holding in the Wheeling case accords with the "resulting delay" view of the proposed Code section. In addition, the party who is frustrated by the other's failure to particularize may either perform in a reasonable manner or treat the other party's failure as a breach. No West Virginia case specifically recognizes the alternative of "performance in a reasonable manner" (such as by shipping a standard assortment of goods where the buyer has failed to particularize the assortment desired).

112 14 W. Va. 1 (1879).
113 62 W. Va. 288, 57 S.E. 826 (1907).
There is authority which recognizes the second or "breach" option. In Wiggin v. Marsh Lumber Co.,\textsuperscript{114} where the seller repeatedly failed to inform the buyer of what kinds of lumber were available for inspection and thence shipping orders, the court held that the buyer could treat such failure as a breach and recover damages.

Section 2-312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

West Virginia has recognized the implied warranty of title but the various incidents of this rule have never been developed by the case law. The subsection dealing with a warranty against infringement would be new to West Virginia law.

The West Virginia cases which have given rise to the recognition of the implied warranty of title basically involved but one facet

\textsuperscript{114} 77 W. Va. 7, 87 S.E. 194 (1915); accord, Queen v. Kenova Hardwood Flooring Co., 114 W. Va. 623, 173 S.E. 559 (1934) (where seller failed to inspect at point of delivery as court held seller was bound to do, buyer was relieved of obligation to deliver and could recover damages for buyer's failure to accept.).
of this warranty: May a buyer resist payment of the purchase price if the seller did not have title to the property sold.\textsuperscript{115} The answer has been consistently yes. This position is in line with common law authority generally,\textsuperscript{116} and it was the position built upon in the Uniform Sales Act. That Act elaborated upon the implied warranty of title to provide that the seller impliedly warranted: (1) his right to sell; (2) the buyer's right to quiet enjoyment; and (3) that the property was free of incumbrance at the time of sale.\textsuperscript{117} The Sales Act resolved the variety of opinions on the question of when a cause of action arose under the breach of the implied warranty of title, and consequently when the statute of limitations barred an action for the breach. The combination of a warranty of the right to sell—which was breached at the time of sale if at all—and the right to quiet enjoyment—which was breached only when such enjoyment was interfered with, combined to give substantial protection to the buyer.

The Commercial Code provision omits reference to quiet enjoyment.\textsuperscript{118} The practical effect of this is to limit the period of time during which a seller may become liable for a breach of the implied warranty of title. Section 2-725 of the Code places a four year statute of limitations on actions brought under the sales article, and providing generally that the cause of action for a breach occurs when tender of delivery is made.\textsuperscript{119} Thus under the Sales Act, a cause of action could arise years after a sales transaction for breach of warranty of quiet possession, but under the Commercial Code, the


\textsuperscript{116}1 Wm. L. \textsc{Liston}, \textsc{Sales} § 218 (rev. ed. 1948).

\textsuperscript{117}Uniform \textsc{Sales} Act § 13.

\textsuperscript{118}The omission is intentional. The official comments to the section state: "The warranty of quiet possession is abolished. Disturbance of quiet possession, although not mentioned specifically, is one way, among many, in which the breach of the warranty of title may be established."

\textsuperscript{119}Breacht of certain kinds of warranties may arise after tender of delivery, and thus extend the time during which an action for such breach may be maintained. Subsection (2) of Section 2-725 reads, in part, as follows: "A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is to should have been discovered." The official comment to the title warranty section makes it clear that "the [title] warranty is not one which extends to 'future performance of the goods.'"
possibility of an action based upon such a breach expires four years after the tender.\textsuperscript{120}

The implied warranty of title does not arise where there is an adequate disclaimer or the circumstances are such that the buyer should be aware that the seller is not dealing with goods that are his absolutely. To disclaim takes specific language, \textit{viz.}, a sale of goods "as is" would not be adequate to disclaim the warranty of title.\textsuperscript{121} Exclusion of the warranty by circumstances deals with sales by foreclosing lienors, executors, and the like.\textsuperscript{122}

Subsection (3) deals with a warranty against infringement. No West Virginia authority exists on this point. The prevailing view is that a seller impliedly warrants against infringement.\textsuperscript{123}

\textbf{Section 2-313. Express Warranties by Affirmation, Promises, Description, Sample.}

\begin{enumerate}
\item Express warranties by the seller are created as follows:
\begin{enumerate}
\item Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
\end{enumerate}
\end{enumerate}

\textsuperscript{120} \textit{Haweland, Sales and Bulk Sales} 40 (1958): "Under the rule of the Uniform Sales Act, if the quiet possession of goods of a buyer were disturbed fifty years after he bought the goods, the seller could not utilize the statute of limitations to bar buyer's breach of warranty action. Consequently, sellers were forced by the rule in the Uniform Sales Act on the warranty of quiet possession to keep their records long periods of time to forestall or to defend such action. . . ."

\textsuperscript{121} \textit{Haweland, Sales and Bulk Sales} 41 (1958): "Because . . . the unsophisticated usually tend to associate quality and not title with warranty, a full demonstration to the buyer that the title risks are his calls for specific language directed toward that end. . . ."

\textsuperscript{122} The exclusion of an implied warranty of title under such circumstances is based on the reliance theory. It was at one time suggested that no implied warranty of title would arise if the goods sold were not in the possession of the seller, but the possession limitation seems to be withering. See 1 \textit{Williston, Sales} § 218 (rev. ed. 1948). In \textit{Jarrett v. Goodnow}, 39 W. Va. 602, 20 S.E. 575 (1894) the statement that an implied warranty of title arose from the sale of chattels was qualified with the phrase "where the goods are in the vendor's possession . . ." but no elaboration upon this possible limitation has occurred in subsequent cases.

(b) 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.

(c) Any sample or model which is made a part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words as "warranty" or "guarantee" or that he have a specific intention to make a warranty, but 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.

This provision reclassifies the warranties of description and sample as express rather than implied warranties, but otherwise make no substantial change in West Virginia law.

This state adopted the view that an express warranty is created by an affirmation of fact or statement of quality by the seller in Kemble v. Wiltison:124

"Formerly, it was held that to constitute an express warranty, it must be literally expressed, but it is now uniformly held that the form in which the affirmation is made is of little importance. Any affirmation made by the seller of personal property as to its quality at the time of sale, or during the negotiations resulting in the sale, will be treated as a warranty, unless it appears that the purchaser did not rely thereon in making the contract. . . . ."125

Thus, the language in subsection (1) (a) and the language of subsection (2) preceding the "puffing" proviso substantially restate the present West Virginia view.

Subsection (1) (b) and (c) establish the warranties arising from description and sample as express warranties. The only West Virginia case dealing with a warranty arising from the use of a sample did not deal with the question of whether this was an implied

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124 92 W. Va. 32, 114 S.E. 369 (1922).
125 Id. at 38, 114 S.E. at 371.
or express warranty. On the other hand, the warranty arising from a sale by description has been characterized on several occasions as an implied warranty. The classification of warranties as express or implied has significance so far as disclaimers are concerned. A distinction in the method of treating disclaimers of express and implied warranties is developed in section 2-316.

Warranties by description, dealt with in subsection (1) (b), have been recognized on several occasions in West Virginia cases. Such situations arise normally where the buyer orders goods for future delivery from the buyer, and relies upon the seller's selection of the specific articles to fulfill the contract of sale.

Warranties by sample dealt with in subsection (1) (c), pose a problem a bit more difficult than warranties by affirmation or description.

The only West Virginia case, American Canning Co. v. Flat Top Grocery Co., dealing with warranty by sample could be read as expressing a more restrictive view as to the creation of the warranty than that posed by the Code provision. In accurately summing up the views expressed in the body of the opinion, the court adopted a two sentence syllabus which could lead to a conclusion of some conflict. The first sentence states: "The fact that a sample is exhibited does not necessarily make the transaction a sale by sample." This suggests the problem of fact which is discussed in some detail in the official comments to the Code section. There it is noted that "the facts are often ambiguous when something is shown as illustrative, rather than as a straight sample." The second sentence of the syllabus merits a bit more explanation. It states: "The con-

126 American Canning Co. v. Flat Top Grocery Co., 68 W. Va. 698, 70 S.E. 756 (1910).
128 The official comments to the present section note this distinction in regard to implied and express warranties: "'Express' warranties rest on 'dickered' aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms. 'Implied' warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated." See note 127, supra.
129 U.C.C. § 313, Comment 6.
tract must evince intention to contract by sample." On the other hand, the comments to the Code provision say: "In general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain." Here there seems to be a parting of the ways, but the divergence reflects a change in the parole evidence rule, not necessarily any clash over the ease with which a warranty by sample may arise. In the American Canning case a sample was exhibited, but the written contract made no reference to it and in fact stated a quality standard independent of the sample. Properly applying the existing parole evidence rule, the court held that reference to the sample would add to the terms of the written agreement—thus evidence of such a sample was not admissible. Under the parole evidence rule of the Code, evidence of the exhibition of the sample and the nature of the negotiations with reference to it would probably be admissible. When admitted, the issue of whether there was a warranty by sample would then involve the fact question: Did the exhibition of the sample amount to a mere illustration, or an inducing affirmation?

Section 2-314. Implied Warranty: Merchantability; Usage of Trade.

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as
(a) pass without objection in the trade under the contract description; and

132 The statement in the text is qualified because the parole evidence rule is not abolished by the Code provision (2-202), but merely narrowed by it. An additional consistent term not reduced to writing may be shown but it is possible that the sample warranty not reduced to writing may have been inconsistent with the warranty of quality included in the writing, in which case the Code provision too would not admit evidence of the sample warranty.

In the American Canning Co. case the written warranty apparently related only to the fill of the can and the ratio of solid to fluid content of the can. The defendant's complaint under the asserted warranty by sample was not clear, but the sample warranty could have been consistent with the written warranty; e.g., the color and appearance of the berries contained in the cans could be warranted by the sample while the nature of the pack warranted by written description. If such were the case, the Code parole evidence provision would admit evidence relating to the asserted warranty by sample, while the present parole evidence rule would not.
(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.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

This provision and the one following deal with implied warranties. Their adoption would both enlarge and clarify the existing law of implied warranty in this state. The present section deals with the implied warranty of merchantability. The following section deals with a warranty of fitness for a particular purpose. The present section, warranty of merchantability, is based on a policy which has gained wide, though not universal acceptance, viz., when purchasing goods from a merchant who deals in goods of the kind sold, the buyer may assume that the goods are of merchantable quality or generally fit for the ordinary purposes for which such goods are used. The section dealing with fitness for a particular purpose requires something more than a mere sale by a merchant to be shown to establish an implied warranty. Under this latter section, the emphasis shifts to an actual reliance upon the skill and knowledge of the merchant. Under the former section of merchantability, reliance is not relevant save when positive acts by the buyer demonstrate that he is in fact not relying on the merchant's skill or knowledge but rather upon his own examination of the goods in question. The distinction is here emphasized as present West Virginia law blends "fitness" warranties generally and much confusion results.

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133 Code section 2-316 (3) (b) deals with the exclusion of warranties resulting from buyer's examination prior to sale. Such examination may preclude the existence of an implied warranty of merchantability.

134 Millenson v. Lamp, 99 W. Va. 539, 130 S.E. 137 (1925). This is a prime example of the confusion of a warranty of merchantability and a warranty of fitness for a special purpose.
In general terms, this would be the impact of Section 2-314 on existing West Virginia law: (1) the warranty of merchantability would be expanded. The most significant expansion would occur by the elimination of the "sealed container" exception to that warranty which is currently recognized in this state.\(^{135}\) (2) The sale of restaurant food and the like would clearly be a sale with implied warranties attaching. Whether such transactions amount to sales is presently an open question in this state.\(^{136}\) (3) The quality demanded by the warranty of merchantability would be greatly elaborated by subsection (2).

West Virginia has recognized an implied warranty of merchantability in numerous cases.\(^ {137}\) It was first dealt with in *Hood v. Bloch Bros.*,\(^ {138}\) where a merchant buyer resisted payment of full price for a lot of cheese on the grounds that much of that delivered was not merchantable. The buyer won his point on appeal, the court saying: "[I]n the sale of goods by description, where the buyer has not inspected them, there is, in addition to the condition precedent that the goods shall answer the description, an *implied warranty* that

\(^{135}\) Pennington v. Cranberry Fuel Co., 117 W. Va. 680, 186 S.E. 610 (1936). Prosser indicates that this is a minority view. "The battle is now very largely won for the buyer; ..." Prosser, *Torts § 83* (2d ed. 1955).


An implied warranty of merchantability was denied in the following cases: Pennington v. Cranberry Fuel Co., 117 W. Va. 680, 186 S.E. 610 (1936); (foot sold in sealed container); Continental Supply Co. v. Stephensone, 94 W. Va. 313, 118 S.E. 537 (1923) (seller had no drilling line in stock as requested by buyer and at buyer's urging obtained a line from another seller and billed it to buyer at seller's cost. "[I]n this transaction there was absolutely no consideration paid or agreed to be paid to the plaintiff for this warranty and there can be no warranty without consideration. ..."); Showalter v. Chambers, 77 W. Va. 720, 88 S.E. 1072 (1916) (buyers examination prior to offer of purchase held to preclude reliance upon a warranty of merchantability); Griffen v. Runion, 74 W. Va. 641, 82 S.E. 868 (1914) (sale of stallion by "The Imported Percheron Horse Co."—apparently a merchant dealing in the kind of horse sold—the court held no implied warranty of procreative ability in sale of a stallion.); Watkins v. Angotti, 65 W. Va. 193, 63 S.E. 969 (1909) (sale of machinery, apparently not by a dealer in machines, but apparently by a former user of the machines, no implied warranty allowed); Lambert v. Armentrout, 65 W. Va. 365, 64 S.E. 260 (1909) (sale of horse).

\(^{138}\) 29 W. Va. 244, 11 S.E. 910 (1886).
they shall be salable or merchantable."  

The reason given by the court in justification of this conclusion however casts some doubt on the scope of the warranty of merchantability in this state. Noting that the sale involved a producer merchant as seller (i.e., someone who should know the quality of the goods he is selling) and the subject matter of the sale was stored at a distance from the place of sale (thus making inspection at time of sale impractical) the court made the following statement: “This necessary trust in and reliance upon the judgment and information of the seller seems to be at the root of the doctrine of implied warranty.” Thus the court seems to ground the implied warranty of merchantability upon justifiable reliance.

In subsequent cases, this crucial element of justifiable reliance has been alternately ignored and stressed. Its present role is at best conjectural. In *Gorby v. Bridgemen* an implied warranty of merchantability was attached to the sale of an automobile with no mention made of the justifiable reliance element. Again, in *Appalachian Power Co. v. Tate* the warranty was attached to the sale of a refrigerator with no mention of the justifiable reliance element. But in *Millenson v. Lamp*, decided just three years after *Appalachian Power*, the court imposed a warranty of fitness on the sale of a player piano and relief solely on the theory of the seller's superior knowledge and skill. To this point, the warranty of merchantability seemed to be blossoming in West Virginia law without too much concern for the possible limitations that lay dormant in the justifiable reliance element. Then came *Pennington v. Cranberry Fuel Co.*, and *Burgess v. Sanitary Meat Market* and a bizarre element of confusion.

The Pennington case carved out the sealed container exception and it did so strictly on the justifiable reliance theory.

"[The warranty of fitness] is based upon the fact that the seller not only knows the purpose for which the goods are used, but

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139 *Id.* at 252, 11 S.E. at 912.
140 *Id.* at 255, 11 S.E. at 913-14.
142 90 W. Va. 428, 111 S.E. 150 (1922).
143 99 W. Va. 539, 130 S.E. 137 (1925).
144 117 W. Va. 680, 186 S.E. 610 (1936).
145 121 W. Va. 605, 5 S.E.2d 785 (1939).
that the circumstances are such as to make it appear that the buyer has relied upon the skill and judgment of the seller to supply his needs.

Can we say that in purchasing goods contained in a package known to have been sealed by the manufacturer or packer, so that no opportunity is afforded the retail seller to inspect the contents the buyer is relying upon the skill and judgment of the seller as to the condition of what the sealed package contains? The buyer knows that the seller has had no opportunity to exercise his experience, skill or judgment beyond the selection of the person who manufactures or puts up the goods in question..."\[^{146}\]

Note that the court stresses the fact that where the buyer has no reasonable grounds to expect the seller to have discovered the flaw, he has no right to rely on an implication of fitness. In the Burgess case, following the Pennington decision by some three years, an implied warranty was imposed upon the sale of minced ham. "Of course," said the court, "the purchaser must rely upon the seller's judgment and integrity..."\[^{147}\] There was no showing in the Burgess case that the merchant seller was aware or should have been aware of the condition of the meat which caused the illness to the purchaser. So far as the records show, the defects in both the Pennington case and the Burgess case were equally latent and unknown to the sellers.

The implied warranty of merchantability would arise under the Code provision only where the seller is a "merchant with respect to goods of that kind." Thus, if a buyer purchases a used car from a dealer in such cars, an implied warranty attaches,\[^{148}\] but if he purchases from a private individual through a newspaper advertisement,

\[^{146}\] 117 W. Va. 680, 684, 186 S.E. 610, 611.
\[^{147}\] 121 W. Va. 605, 609, 5 S.E.2d 785, 787.
\[^{148}\] The mere fact that the goods are not new does not mean that an implied warranty of merchantability does not attach. Guyandotte Coal Co. v. Virginia Electric & Mach. Works, 94 W. Va. 300, 118 S.E. 512 (1923) recognized the implied warranty of merchantability in connection with the sale of a second hand mining machine. The official comments to the present Code provision note (Comment 3): "A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description." For example, if new window drapes were delivered with blemishes and noticeable spots of fading, this would no doubt amount to a breach of the warranty of merchantability, but if used drapes were purchased described by color and size, blemishes and fades would not prevent them from being merchantable unless so extreme as to make them reasonably unfit for use as drapes.
no such warranty arises. While no particular stress is laid on this view in this context in the West Virginia case, the pattern of results would not be disturbed by such a limitation on the implied warranty of merchantability. The warranty of merchantability first arose in sales by manufacturers and growers to others who purchased for resale and not for use. The warranty then grew to cover purchases for use and the Uniform Sales Act, codifying this expansion, noted that the warranty of merchantability applied whether the seller was a "grower or manufacturer or not". The Code continues the same general policy.

Subsection (2) is unique in spelling out standards of quality imposed by the warranty of merchantability. It is the first attempt in this country to lend meaning to the warranty by statute. The most significant of the various attributes of merchantability is stated in subsection (2) (c), that goods shall be "fit for the ordinary purposes for which such goods are used; . . ." Thus automobiles should transport refrigerators should refrigerate and player pianos play. Subsection (2) (f) deals specifically with affirmations of fact or promises made on labels or containers. This avoids the problem of whether a retailer adopts such statements as a part of his transaction with the consumer. The obligation runs also of course from the supplier to the retailer.

Section 2-315. Implied Warranty: Fitness for Particular Purpose.

Where the seller at the time of contracting has reason to know

149 The official comments point out however that the general obligation of good faith expressed in the general article of the Code, section 1-203, would demand that a non-merchant seller disclose known material hidden defects which reasonable examination by the purchaser would not reveal.

150 See generally the cases in note 137, supra. In all cases in which a warranty of merchantability has been imposed, the seller has been a merchant, but in no case where the warranty has been denied has the court relied upon the non-merchant status of the seller as a reason for denying an implied warranty.

151 Llewellyn, On Warranty of Quality and Society, 36 Colum. L. Rev. 699 (1936).

152 Uniform Sales Act § 15 (1).

153 Vold, Sales § 89 (2d ed. 1959).


155 Appalachian Power Co. v. Tate, 90 W. Va. 428, 111 S.E. 150 (1922).


157 Cochran v. McDonald, 23 Wash. 2d 348, 161 P.2d 305 (1945). (Dealer held not to have adopted warranties expressed on a label by mere sale of goods.) Silverstein v. R. H. Macy & Co., 266 App. Div. 5, 40 N.Y.S.2d 916 (1943). (Facts of sales transaction held to show dealer adopted similar manufacturer warranties as his own.)
any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

This provision would ease somewhat the burden on the buyer desiring to establish a "particular purpose" warranty from that which would be imposed by present West Virginia law. The particular purpose warranty is recognized in this state, but as with the implied warranty of merchantability, the precise nature of the particular purpose warranty cannot be stated with accuracy.

The leading case in this state on the particular purpose warranty is Schaffner v. National Supply Co.\(^5\) where the court recognized the warranty but maneuvered plaintiff's case around it and concluded by affirming his right to recover on another warranty theory. This is what the court said about the particular purpose warranty:

"We conclude from these authorities that an implied warranty of fitness of goods will arise when the buyer discloses to the seller his needs or the purpose to which he intends to apply the goods purchased, and orders from the seller such goods as will meet those requirements, leaving it entirely to the judgment of the seller as to what particular goods he will supply; ..." (Emphasis added)\(^5\)

The emphasized language in the above quotation illustrates the distinction between the particular purpose warranty as it presently exists in this state and the warranty as proposed in the Code provision. The Code provision relies upon the less stringent terminology of "has reason to know" in describing the point of making the seller cognizant that his skill and judgment are being relied upon. There is a difference of emphasis here and other particular purpose warranty cases in West Virginia generally reflect the more stringent standard of the Schaffner case.\(^6\)

\(^{150}\) 80 W. Va. 111, 92 S.E. 580 (1917).
\(^{159}\) Id. at 121, 92 S.E. at 584.
\(^{160}\) Buffalo Collieries Co. v. Indian Run Coal Co., 73 W. Va. 665, 81 S.E. 1055 (1914). (Seller changed method of handling coal to provide washed instead of unwashed coal. Buyer, under a year long contract, objected because washed coal froze in cars and mechanical unloading equipment would not handle properly. The court ruled: "There is no implied warranty
The actual disposition of the particular purpose warranty in the *Schaffner* case, as well as the quoted language above, tends to emphasize even more the distinction noted. After making the general statement of the rule above quoted, the court continued in that case:

"[B]ut where the buyer discloses to the seller the purpose for which he desires the goods and suggests than an article of a particular kind is desired by him, and the seller cannot supply the particular article, and the buyer thereupon orders such other article, there will not arise any implied warranty that the goods furnished will be fit for the purpose to which the buyer intends to apply them. The buyer will be taken to have exercised his judgment in the selection of the goods described, . . ." 161

A fair application of the proposed Code section would not carve out any such exception as a rule of law, but rather would categorize this as an element of fact to be considered by the jury. The official comments to the section start with the statement: "Whether or not this warranty arises in any individual case is basically a question of fact. . . ."

The fact situation present in the *Schaffner* case is akin to the problem encountered in the "patent or other trade name" exception recognized to the particular fitness warranty under the Uniform Sales Act.162 Because of the unfortunate wording of that provision,163 some cases created an unintended and unnecessary exception to the

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161 80 W. Va. 111 at 121, 42 S.E. 580 at 584.
162 *Uniform Sales Act* § 15 (4).
163 "(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."
warranty of fitness for particular purposes.\(^{164}\) This Sales Act limitation was created to cover the situation where a buyer ordered an item by a trade name, since obviously such a buyer would not be relying on the skill or judgment of the seller, but upon his own selection. But if the buyer asks the seller, for example, for a paint remover that will prepare an antique chest for refinishing and the seller offers and buyer agrees to buy Brand X paint remover, the buyer is relying on the seller’s selection even though the deal is couched in terms of a trade name. The Code makes no special reference to the trade name situation in its provision. The comments however point out that where deals are consummated in terms of trade or patent names that this is merely one of the fact elements considered in determining if the buyer is relying on the seller’s skill in selection.\(^{165}\)

It should be noted that this implied warranty, unlike the one dealt with in the preceding section, is not limited to merchants. The comments make this note: “Although normally the warranty will arise only where the seller is a merchant with the appropriate ‘skill or judgment,’ it can arise as to non-merchants where this is justified by the particular circumstances.”\(^{166}\)

Section 2-316. Exclusion or Modification of Warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must

\(^{164}\) Vold, Sales § 90 (2d ed. 1959): “A problem of application [of the patent or trade name exception] . . . has often given rise to sharp controversy. The buyer may make known to the seller the purpose which goods are wanted. The seller thereupon may recommend goods identified by patent or trade-name. The buyer then orders such goods on that recommendation. Many cases have held that under such circumstances there is no warranty of suitability; the transaction has been classified as one to which the special rule [patent or trade-name exception] applies. More carefully analyzed, however, such situations are readily seen not to involve this special rule at all. The patent or trade-name may be used as the convenient way in which to identify the goods.”

\(^{165}\) U.C.C. § 2-315, Comment 5.

\(^{166}\) Id. Comment 4.
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."

(3) Notwithstanding subsection (2)

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

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

Disclaimers have posed some of the most vexing problems in sales law. Present West Virginia law is barren of authority in this much litigated area. The adoption of the Code provision at this point will do little to illuminate the darkness left by the void in the law of this state. The noble intent of the drafters of the Code was blunted by the criticisms of the New York Law Revision Commission study of the 1952 draft of the Code, and the revision of the

provision in response to that criticism has been obscurity.\textsuperscript{166} Sub-
section (1) is probably the most befuddling in the entire sales article. It attempts to deal with the exclusion of express warranties. Sub-
section (2) and (3) are more meaningful and set up more understand-
able guides for the requirements of valid disclaimers of implied warrants. Subsection (4) makes it clear that the Code draws a distinc-
tion between the rules regulating the avoidance of the creation of warranty and those applicable to limiting the remedies for war-
ranties given.

Subsection (1) says that express warranties and disclaimer language should be construed as consistent when reasonable—and when not reasonable, the disclaimer must give way to the express warranty subject to the Code provision on parol evidence. A typical form of difficulty arises in the clash of a parol warranty which is disclaimed in a written contract. If the disclaimer is not sufficiently broad to negate clearly the oral warranty the Code provision demands that they be construed as consistent. But if the disclaimer is sufficiently broad to prevent them to be reasonably construed to-
gether, the written disclaimer will predominate over the parol war-
ranty. The parol evidence rule of the Code bars introduction of evidence which is not consistent with the writing or which contra-

\textsuperscript{166} The provision on disclaimer of express warranties in the 1952 draft of the Code reads as follows: "If the agreement creates an express warranty, words disclaiming it are inoperative." The variety of comments on the revision of this provision as it appears in the current 1958 text of the Code is interesting.

(1) From Ezer, \textit{The Impact of the Uniform Commercial Code on the California Law of Sales Warranties}, 8 U.C.L.A. L. Rev. 281, 310 (1961); "Its language says nothing; it means nothing. In effect, section 2-316(1) re-enacts the Sales Act coverage of exclusion and modification—which was nonexistent. The matter is still in the lap of the courts, who are free to take this language and do what they will: . . ."

(2) From Hawkland, \textit{Sales and Bulk Sales} 46 (1958): "One other aspect of the effect of 2-316(1) is worth noting. Affirmations of fact made by the seller during a bargain usually become part of the contract sub-
sequently formed, and, in the past, the seller's legal department, by using appropriate disclaimer provisions in preparing the final contract, has been able to protect the seller from the over-enthusiastic affirmations of fact or promise . . . made by his sales force in negotiating the deal. This protection is withdrawn by subsection 2-316(1), and the seller's legal department should advise the seller to educate his salesman not to make factual affirmations or promises which cannot be kept . . . ."

(3) From Note, 49 Ky. L.J. 240, 252-53 (1960): "[A]lthough the 'disclaimer' is ineffective as against express warranties contained in the agreement, an 'entirety' clause stating that the contract contains all the terms agreed upon will effectively prevent claims of other express warranties made orally prior to the writing. The parol evidence rule contained in the Code is consistent with Kentucky decisions [viz., that patrol warranties cannot be shown when a written contract contains a general disclaimer clause]. . . ."
dicts the writing. It would seem clear that subjecting the latter portion of subsection (1) of the present disclaimer provision to the parol evidence rule permits express oral warranties to be effectively excluded. While this permits the buyer to be surprised by unread and unbargained for disclaimers, the buyer is given substantial protection by the implied warranties of the Code and the more stringent requirements set up for their disclaimer in subsection (2) and (3). The seller who wishes to protect himself from unwarranted commitments by overzealous sales agents is still afforded an opportunity to protect himself.

Subsection (2) sets up general standards for the disclaimer of implied warranties to cover situations not expressly covered by subsection (3). The two major classifications of implied warranty are treated differently. Disclaimer of the implied warranty of merchantability must (a) mention merchantability and (b) be conspicuous if the contract is in writing. The Code is not clear (nor do the comments help) as to what is meant by "a writing." Two interpretations are plausible: (1) If any part of the deal is reduced to writing, then the disclaimer of merchantability must be in writing, and conspicuous; (2) If the disclaimer is written, then it must be conspicuous. If the latter course is followed, a seller could maintain an oral disclaimer of merchantability though some of the terms were reduced to writing, e.g. price and quantity. If the first interpretation is adopted, the seller could not maintain his oral disclaimer of merchantability.

The requirements for effective disclaimer of the implied warranty of fitness\(^\text{169}\) are more specific. It, in every case, must be written and conspicuous.

The Code gives a fairly precise guide as to what is "conspicuous." Section 1-201 (1) in the general article of the Code provides, in part that "Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color."

Subsection (3) deals with three specific situations in which implied warranties are excluded or modified, without following the standards of subsection (2). Subsection (3) (a) provides an exception to the mechanical standards adopted in the preceding sub-

\(^{169}\text{It is clear that the Code here refers to the implied warranty of fitness for a particular purpose created by section 2-315, not to the warranty of fitness for general purpose created by section 2-314 as one facet of the general warranty of merchantability.}
section with recognition of the "as is" sale as a sale where the buyer justly stands the risk of quality defects. Thus if a used car dealer sets off certain of his stock to be sold on an "as is" basis, he can sell without bearing the risk of merchantability and without making his disclaimer "conspicuous" in a written memorandum of sale.

Subsection (3) (b) incorporates what is left of the doctrine of caveat emptore. Recall at this point however that the principle implied warranties recognized under the Code are the warranties of merchantability, and such arise only on sales by merchants dealing in goods of the kind involved in the transaction. Thus today, as a century ago, if A, who is not a merchant dealing in horses, sells his horse to B, B still takes the risk of the horse being blind or being unsound. But when the average housewife buys a vacuum cleaner at a department store, she need not retreat to one of those rare carpeted areas to test its suction in order to avoid the risk of being saddled with a machine not fit for its ordinary purposes. But where an examination is made, the buyer is held bound to observe any defects which "an examination ought in the circumstances to have revealed to him. . . ." One West Virginia case is relevant here. In Showalter v. Chambers a merchant buyer made an offer to purchase a carload of hay which he had previously rejected as not being of the quality originally ordered. Upon unloading the hay, the buyer claimed that even poorer quality hay filled the bulk of the car and that a small portion of medium quality hay had been loaded at the opening of the car. The court held in that case that as a matter of law the buyer couldn't complain since he had inspected all he wanted and was under no obligation to make an offer. The Code would encourage, but not demand, a different result. What the examination "ought in the circumstances to have revealed" would be a question of fact. Under the circumstances of the Showalter case, it is at least arguable that the buyer was not bound to know of large quantities of rotten hay discoverable only upon removal of a substantial portion of hay from the car. A buyer is not bound, of course, to discover latent defects.171

A second point on exclusion or modification of implied warranty by the buyer's examination should be stressed. The Code uses terminology of "has refused to examine" to indicate that a

170 77 W. Va. 720, 88 S.E. 1072 (1916).
171 See, U.C.C. § 2-316, Comment 8.
buyer who is requested and refuses to examine loses the benefit of implied warranties as to defects which his examination would have revealed. The commentaries to the section make it clear that the mere fact that the goods are available for inspection and the buyer fails (as opposed to refuses) to inspect does not exclude implied warranties as to defects which an examination would have revealed. The seller must request the inspection in order to put the buyer on notice that the buyer must take the risk of observable defects.

Subsection (c) permits implied warranties to be excluded or modified by usage of trade and the like. An example of this might be found in used car auctions attended principally by dealers in used cars where the understanding is common that cars are sold “as is” and the buyer takes the risks of latent mechanical defects.

Subsection (4) segregates for separate consideration of limiting remedies for breach of warranty which is dealt with elsewhere in the Code. The distinction is thus made between creating warranties and placing limits on the remedies available for those warranties which do arise in a given sales transaction.

Section 2-317. Cumulation and Conflict of Warranties Express or Implied.

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

This provision continues and elaborates upon the concept of the Uniform Sales Act to the effect that the giving of an express

172 Ibid.
warranty does not negative consistent implied warranties. This view was acknowledged and accepted by the West Virginia Supreme Court in *Hill & Gain v. Montgomery Ward & Co.*\(^{173}\) The court held in the *Hill & Gain* case that a guarantee of general satisfaction amounted to a sale or return transaction and negated any implied warranties. At first blush, this seems inconsistent with the Code provision here under consideration. It is entirely possible that a flaw could develop in the item sold which would be covered by an implied warranty of merchantability but which would not arise until after the period during which the return option survived. For example, suppose a person buys a room air conditioner on a sale or return agreement with no time limit on return being specified, and that after two months of normal and satisfactory operation, the machine breaks down requiring substantial and expensive repairs. It would seem that a period of two months would be more than adequate for a fair trial of the air conditioner and the return option should have expired. But it would seem true also that such a machine, to be reasonably fit for its ordinary use, should operate without such substantial mechanical failure for more than a mere two months. What result in West Virginia? *Hill & Gain* says the buyer has a reasonable time *after discovery of the defect* to return the item and recover the purchase price. Since this option of return runs for an indefinite period of time, it is properly held inconsistent with implied warranties. The return option would be more limited under the Code provision, section 2-327 (1) (b), and thus the mere fact that the transaction involved a sale or return would not negate implied warranties under the Code.

It should be noted that the rules established under subsections (a), (b) and (c) are not absolute but are guides to the determination of the predominating warranty unless circumstances show another result to be more plausible. The rules are aimed at emphasizing that "which probably claimed the attention of the parties in the first instance."\(^{174}\)

\(^{173}\) 121 W. Va. 544, 4 S.E.2d 793 (1939).

\(^{174}\) U.C.C. § 2-317, Comment 3. The only other West Virginia case which posed a fact situation in which the cumulation or conflict of warranties may have been involved was American Canning Co. v. Flat Top Grocery Co., 68 W. Va. 698, 70 S.E. 756 (1910) where buyer attempted to show a breach of a warranty of sample and the seller relied upon an express warranty written in the sales contract. The court held that the sample warranty could not be shown since it would amount to a violation of the parol evidence rule.
Section 2-318. Third Party Beneficiaries of Warranties Express or
Implied.

A seller’s warranty whether express or implied extends to any
natural person who is in the family or household of his buyer or
who is a guest in his home if it is reasonable to expect that such
person may use, consume or be affected by the goods and who is
injured in person by breach of the warranty. A seller may not
exclude or limit the operation of this section.

West Virginia has never specifically decided a case contrary to
the present section, but the supreme court in Burgess v. Sanitary
Meat Market indicated that such a contrary rule would be rec-
ognized if the case arose. The court said there:

"Of course, a food seller’s implied warranty does not inure
to the benefit of parties other than the purchaser. . . . However,
the circumstances of the instant sale do not bring this
plaintiff within the rule barring recovery. Here, plaintiff and
his sons went together to the defendant’s meat market and
there the ham was purchased in plaintiff’s presence with plaint-
iff’s money and taken home by plaintiff himself. To preclude
this plaintiff from his right of recovery, simply because plaint-
iff’s son asked for the ham and took the package from de-
fendant’s clerk, hardly seems consonant with sound reasoning.

. . ." 177

The present section negates the privity concept in a significant way.
And the official comments note, “Beyond this, the section is neutral

175 If it were not for the Burgess case discussed in the text above, an
argument that West Virginia has recognized some loosening of the privity
requirement could be made on the basis of Pennington v. Cranberry Fuel
Co., 117 W. Va. 680, 186 S.E. 610 (1936). That case established the sealed
container exception to the implied warranty doctrine in this state and com-
pletely ignored the possibility of disposing of the case on the privity
basis. The purchase in that case was made by a “servant of the household”
and the person injured was a child-member of the household. The Burgess
case, however, clearly states that only the purchaser is protected, though
the facts there indicate that other members of the plaintiff’s family suffered
from eating the contaminated product. If it were to be assumed that the
court in Pennington consciously ignored the privity issue then privity would
take on an anomalous shape in this state. There seems to be no sense in
a distinction which would say that a servant who purchases for a family
is the “agent” of the entire household, but a member of the family who
shops for the family buys for himself alone and is not an agent for the
other members who rely upon his purchases. But there seems to be no other
distinction, save the fact that the court could reach a decision in favor of
the defendant in Pennington without having to rely upon a ludicrous ap-
lication of the privity doctrine.

176 121 W. Va. 605, 5 S.E.2d 785 (1939).
177 Id. at 611, 5 S.E.2d at 787.
and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." This comment says that the Code takes no position on such situations as those which arose in Rogers v. Toni Home Permanent Co., an Ohio decision of 1958 which ruled a consumer could recover on an express warranty theory against the manufacturer on the basis of express affirmations in advertisements of the manufacturer concerning the product which caused the damage, and Henningsen v. Broomfield Motors Inc., which recognized an implied warranty by an automobile manufacturer to a member of the household of the purchaser.

The final sentence of the present provision bars exclusion of limitation of the effect of the present section, not of warranties in general. This does not mean that though a merchant may exclude or limit his warranties as to the purchaser he may not similarly exclude them as to members of his household, etc., as are explicitly brought within warranty protection by this section. If a merchant effectively excludes all warranties in the sale of a given item, there are no warranties running to members of the household, etc., of the purchaser. But if any warranty does not arise in connection with the sale, it must run at least to those covered by this section.


(1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner

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178 U.C.C. § 2-318, Comment 3. Judge Kenna's concurring opinion in the Burgess case, supra, Note 176, at 611, 6 S.E.2d at 254, noted that while he approved the ruling there recognizing an implied warranty on the part of the merchant, that this created an anomalous situation as the manufacturer's liability under West Virginia law was determined upon negligence. Thus strict liability attaches to the retainer, who is less likely to actually be responsible for the wrong, while only negligence liability attaches to the manufacturer, who is more likely to have been in a position to prevent the harm.

179 167 Ohio St. 244, 147 N.E.2d 612 (1958).

180 161 A.2d 69 (N.J. 1960). The court also held void as against public policy a limitation upon warranty liability to replacement of parts defectively manufactured.

181 U.C.C. § 2-318, Comment 1.
provided in this Article (Section 2-504) and bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2-503);

(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this Article on the form of bill of lading (Section 2-323).

(2) Unless otherwise agreed the term F.A.S. vessel (which means "free alongside") at a named port, even though used only in connection with the state price, is a delivery term under which the seller must

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within subsection (1) (a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this Article (Section 2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

This provision makes it clear that the terms F.O.B. and F.A.S. are delivery terms and not mere price terms. In addition, the section
spells out in detail the division of responsibilities of the buyer and seller when such terms are used in a sales agreement. It should be noted that this is another "unless otherwise agreed" provision of the Code and its rules apply only where the agreement, made either explicitly or implicitly as by course of dealing, do not attach a different meaning to the terms. By and large, West Virginia case law has recognized F.O.B. as a delivery term though there is one case which casts some doubt on this view. In *Back & Greiwe v. Smith* the court noted that usually F.O.B. place of shipment means that the goods are "delivered" when given to the shipper, but it refused to recognize the rule in that case because the seller had the goods consigned to himself, thus shipping under reservation. West Virginia has recognized the right of a seller to stop goods in transit, thus there exists the potential power to prevent tender after delivery without use of the consignment-to-seller technique. It seems clear that the court refused to recognize as the F.O.B. term as a delivery term in that particular instance.

The more detailed obligations which are incurred by buyer and seller under the use of the terms F.O.B. and F.A.S. would fill an area that is presently a void in West Virginia Law.


(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination.

(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to

(a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills

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103 66 W. Va. 47, 66 S.E. 1 (1909). The buyer in this case refused to accept the goods tendered because of substantial damage which apparently resulted during shipment. Had the F.O.B. term been held a term of delivery, the risk of loss during transit would have fallen upon the buyer. Note that under section 2-310 of the Code a seller may ship under reservation unless otherwise agreed, and section 2-509 the risk of loss falls on the buyer when the goods are shipped, even though shipped under reservation.

of lading covering the entire transportation to the named destination; and

(b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and

(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.

(3) Unless otherwise agreed the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

(4) Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

No West Virginia cases were found dealing with C.I.F. or C. & F. terms in sales contracts. This provision codifies and clarifies for the most part the case law which has developed around the use of the C.I.F. contract, but some minor changes have been made. The basic idea of the C.I.F. term is that the seller delivers the goods, and thus passes the risk of loss, to the buyer upon delivery to the carrier—normally a vessel for overseas shipment in C.I.F. contracts—and deals in terms of a price which includes the cost of the goods, plus the cost of the insurance covering the goods.
during shipment and the cost of the freight. One change brought about the Code provision is the added requirement that the shipper-seller obtain war risk insurance "then current at the port of shipment ..." a form of insurance that is not usually contemplated by the C.I.F. contract presently.\footnote{Smith Co. Ltd., v. Marano, 267 Pa. 107, 110 Atl. 94 (1920) is a leading case on C.I.F. contracts. The goods were shipped C.I.F. but lost at sea as a result of submarine warfare and the buyer was held to stand the risk of loss.}


Under a contract containing a term C.I.F. or C. & F.

(1) Where the price is based on or is to be adjusted according to "net landed weights", "delivered weights", "out turn" quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.

(2) An agreement described in subsection (1) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.

(3) Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods should have arrived."

This section elaborates upon variations under the typical C.I.F. and C. & F. contract where the risk of deterioration or shrinkage during transportation is borne by the seller. However, where net landed weight or delivered weight or similar terms are used in connection with C.I.F., the risk of marine loss still falls upon the buyer and only the loss of ordinary deterioration during shipment falls on the buyer. Again, there is no West Virginia authority bearing upon such questions.
Section 2-322. Delivery "Ex-Ship".

(1) Unless otherwise agreed a term for delivery of goods "ex-ship" (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

(2) Under such a term unless otherwise agreed

(a) the seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and

(b) the risk of loss does not pass to the buyer until the goods leave the ship's tackle or are otherwise properly unloaded.

This provision elaborates upon the term "ex-ship" which is the commercial opposite of C.I.F. in that the risk of loss, including marine risks during transit, is upon the seller. It is somewhat the overseas shipment parallel to the F.O.B. destination contract on an overland shipment save that in an "ex-ship" contract the risk shifts at the unloading, while in the F.O.B. destination contract the risk passes upon tender of the goods at the destination even though they may still be in possession of the carrier.186

Section 2-323. Form of Bill of Lading Required in Overseas Shipment; "Overseas".

(1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term C.T.F. or C. & F., received for shipment.

(2) Where in a case within subsection (1) a bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set

186 See section 2-509.
(a) due tender of a single part is acceptable within the provisions of this Article on cure of improper delivery (subsection (1) of Section 2-508); and

(b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

(3) A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of internat deep water commerce.

Again, no West Virginia authority is involved. This section generally distinguishes the C.I.F. contract where a named vessel is involved, where the bill of lading must show the goods to be loaded, as against a C.I.F. contract which does not designate a vessel in which the bill of lading need only show the goods to have been received for shipment. Subsection (2) recognizes the general commercial practice of requiring an acceptance of a part set of bills issued in a set where the person tendering the part set provides for indemnification for losses which might result from a failure to present the full set. This practice is discussed in Dixon, Irmaos & Cia v. Chase Nat'l Bank.147

Section 2-324. "No Arrival, No Sale" Term.

Under a term "no arrival, no sale" or terms of like meaning, unless otherwise agreed,

(a) the seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the non-arrival; and

(b) where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (Section 2-613).

147 144 F.2d 759 (2d Cir. 1944).
No West Virginia authority is involved. This basically recognizes another variation in allocation of risks in regard to overseas shipments where the seller bears risk of loss during shipment, but negates his liability to a buyer where the shipment does not arrive and the seller is not responsible for its failure to arrive.

Section 2-325. "Letter of Credit" Term; "Confirmed Credit".

(1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

(2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him.

(3) Unless otherwise agreed the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term "confirmed credit" means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market.

No West Virginia authority is involved. This section rounds out a series of provisions starting with section 2-319 which are aimed at fixing the meanings of numerous common commercial terms and abbreviations.

Section 2-326. Sale on Approval and Sale or Return; Consignment Sales and Rights of Creditors.

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

(a) a "sale on approval" if the goods are delivered primarily for use, and

(b) a "sale or return" if the goods are delivered primarily for resale.

(2) Except as provided in subsection (3), goods held on approval are not subject to the claims of the buyer's creditors until
acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum". However, this subsection is not applicable if the person making delivery

(a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or

(b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or

(c) complies with the filing provisions of the Article on Secured Transactions (Article 9).

(4) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this Article (Section 2-201) and as contradicting the sale aspect of the contract within the provisions of this Article on parol or extrinsic evidence (Section 2-202).

Some West Virginia cases have dealt with sale on approval and sale or return transactions, but none have clearly distinguished the two. In addition to clarifying this distinction, the Code would make some changes in the rights of creditors under its provisions relating to the sale or return transaction.

West Virginia cases tend to lump sale or return and sale on approval into a single category in which the return privilege is viewed basically as a means of affording the buyer an added opportunity to determine quality or suitability of the goods involved. Osborne & Co. v. Francis 188 is the only case which seriously attempted a distinction between the two kinds of transactions, and

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188 38 W. Va. 312, 18 S.E. 591 (1893). (Transaction involving a sale for use of a farm machine.)
the distinction there offered was that a sale on approval permitted
the buyer to return conforming goods for any reason, no matter
how arbitrary, while the sale or return was held to demand the
exercise of reasonable judgment by the buyer. Subsequent cases
have pretty well ignored this proferred distinction. No West Vir-
ginia case has clearly recognized the "or return" provision as a
means of shifting financing burdens or business risks. The Code
makes a sensible distinction here, and avoids the common law's
awkward concern for intent and title.

Recognizing the sale or return as a credit mechanism, the Code
establishes in subsection (2) the general principle that goods held
by the buyer under a sale or return arrangement are subject to
the claims of the buyer's creditors. This accords generally with
the West Virginia Trader's Act, which has long provided a measure
of protection to creditors who deal with a merchant who deals in

189 There is a good bit of case law on the question of whether a "sale
on approval" where satisfaction of the buyer is involved amounts to a
contract or a sale at all since a promise to accept if satisfactory may be
illusory. Some courts have strained to read into these contracts standards
of reasonableness. See generally, 1 WILLISTON, SALES §§ 191, 191a (rev.
ed. 1948). The Code comments to the present section (comment 1) rec-
ognize the buyer's agreement to receive and test as consideration for the
seller's delivery and agreement to sell, but takes no position the diversity
of opinion as regards automatic application of a test of reasonable satisfaction
where an industrial machine is involved.

190 Hill & Gain v. Montgomery Ward & Co., 121 W. Va. 554, 4 S.E.2d
793 (1939). (Court held a "guarantee bond" to constitute the transaction
a "sale or return" with an "unqualified right to return" in the buyer. This
was a sale for use and there was no mention, apparently, in the consumma-
tion of the sale of the words "sale on approval" or "sale or return." The
ruling conforms to the general principle that no special form of words are
necessary to constitute a sale or return or sale on approval contract.);
(Entrusting of goods for resale, buyer claiming return privilege. Court treats
this as a sale where approval of the fitness of the product involved is the
issue, and denied the buyer's right to return on a combination of the
buyer's failure to promptly return after it had an opportunity to determine
suitability of product for sale and an agents presumed inability to give
return privilege for more than a reasonable time. This disposition of the
case ignores the possibility that the sale or return transaction may not in-
volve a question of "satisfaction" at all but may be used as a device to
shift business risks away from the retailer and back towards the producer.);
Ohio River Contract Co. v. Smith, 76 W. Va. 503, 85 S.E. 671 (1915). (A
sale for use, court intimating that a reasonable determination of suitability
or fitness was involved, though the case did not turn on this point. See
further discussion of this case under the annotations to the following section
of the Code.)

191 2 WILLISTON, SALES § 270 (rev. ed. 1948).

192 W. VA. CODE, ch. 47, art. 8, §§ 1-5 (Michie 1955); See 18 MICHIE'S
JUR. TRADER'S ACT.
stock owned by someone other than himself.  

Subsection (3) of the Code provisions sets up certain exceptions to the general principle of subsection (2) and here there are some conflicts between the policies of the Code provision and those of the Trader's Act.

Subsection (3) (a) contemplates the sign requirement established by section 1 of the Trader's Act, but subsection (3) (b) conflicts with that act. Subsection (3) (b) says goods held by a merchant on a sale or return basis are not subject to the claims of his creditors if he is generally known to be engaged in selling the goods of others. It has been held in West Virginia that the creditor's knowledge that the merchant was dealing in goods owned by another was immaterial where the notice provisions of the Trader's Act were not complied with.  

Subsection (3) (c) excepts from the general rule of section (2) the interests of a seller who has complied with the filing provisions of Article 9 of the Code. This parallels to a degree the exception under the Trader's Act added in 1933 which recognizes that the Uniform Conditional Sales Act filing requirements provided adequate notice to creditors where the conditional sale technique was employed as a means of inventory or equipment financing.

As a part of the integration of the Code as a whole into West Virginia law, the wisdom of retaining the Trader's Act in its present form will be considered. Article 9 of the Code comprehensively deals with the problems of chattel security and no doubt a significant change in the Trader's Act would be advisable to correlate it with the Code provisions.

Subsection (4) of the Code codifies the rule of Braude & McDonnel, Inc. v. Isadore Cohen Co., to the effect that an oral "or return" agreement conflicts with a writing which evidences a sale absolute upon its face.

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193 The Trader's Act is aimed generally at any person engaged in the business of buying and selling where the ownership of the stock or some of it involved in such sales is owned by someone other than the person engaged in the business. It is thus broader in its scope than the present Code section which deals with only the sale or return situation.

194 Morris v. Clifton Forge Grocery Co., 46 W. Va. 197, 32 S.E. 997 (1899). (Fact that trader had informed agent of creditor that he was dealing as an agent for a principal who was not disclosed by a sign or by publication as required by the Trader's Act held immaterial.) Accord, Hoge v. Turner, 96 Va. 624, 32 S.E. 291 (1899).


196 87 W. Va. 763, 106 S.E. 52 (1921).

197 See discussion of § 2-202.
Section 2-327. Special Incidents of Sale on Approval and Sale or Return.

(1) Under a sale on approval unless otherwise agreed

(a) although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and

(b) use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and

(c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.

(2) Under a sale or return unless otherwise agreed

(a) the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and

(b) the return is at the buyer's risk and expense.

West Virginia case law has touched upon some of the issues resolved by this provision, but in the main the section would resolve unanswered questions in this state.

The Code pattern for treating these two similar kinds of transactions is further manifested and clarified here. The sale on approval passes to the seller a risk of satisfying his potential buyer and affords the buyer an opportunity to check the quality or suitability of the goods while they are in his possession. The sale or return, contrawise, is treated as a technique for shifting back along the distributive chain financial burdens or business risks or both. This distinction is not presently drawn by West Virginia law, and thus the working out of details manifests the contrast between the sporadic pattern of West Virginia decisions which furnish little in the way of a general pattern or theory and the Code which provides a well defined approach to such sales transactions.
Three West Virginia cases should be noted in connection with this provision: *Ohio River Contract Co. v. Smith*,\(^{198}\) *Osborne & Co. v. Francis*\(^{199}\) and *George DeWitt Shoe Co. v. Adkins.*\(^{200}\)

In the *Ohio Contract Co.* case, the buyer, being sued for the purchase price, maintained that it had agreed to buy on an approval basis certain material to be used in a construction job and claimed to be exempt from paying the purchase price because it had disapproved the goods tendered. The court ruled that the facts would not support this position as the buyer had used one-fourth of the materials tendered, that such extensive use was not consistent with a mere testing of the goods. The buyer was held to have accepted the entire lot by such extensive use of goods tendered. This disposition of the case is consistent with subsection (1) (b) of the present Code provision.

In the *Osborne & Co.* case, again involving a sale for use, thus a sale on approval under the Code theory, the court intimated that under a sale on approval the return is at the seller's risk and expense. The court did not specifically rule on the point, but the buyer refused to accept the machine delivered and tested, and his defense was held sound. After his test, the buyer notified the seller of his disapproval and left the machine standing on his farm for the seller to pick up indicating the risk of return was on the seller. Thus, the case appears to be in accord with subsection (1) (c).

The *George DeWitt Shoe* case, however, would probably be decided differently under the Code. There a merchant buyer took a stock of shoes for resale with a right of return. The court held the buyer could not return the shoes remaining in stock seven

\(^{198}\) 76 W. Va. 503, 85 S.E. 671 (1915). This case has been cited as authority for the point that an acceptance of part is acceptance of the whole in cases where a sale on approval was not involved, e.g. Dixie Appliance Co. v. Bourne, 138 W. Va. 810, 77 S.E.2d 879 (1953). The Code makes a distinction between acceptance and approval. Under the Code provision, unless otherwise agreed, an approval under a sale on approval must relate to the entire lot of goods involved, but an acceptance, under a normal sale involving a tender of goods where no "on approval" privilege is accorded, may apply to "commercial units" within the entire lot of goods tendered. See sections 2-601 and 2-606 and discussions.

The comments to the present section note that there may be two sale on approval contracts involved in a single transaction: e.g., a woman takes home two dresses on an “on approval” basis; she is not bound to approve both or disapprove both, but if she has a suite of furniture delivered on an “on approval” basis, she may not select out individual pieces to keep and disapprove the remainder.

\(^{199}\) 38 W. Va. 312, 18 S.E. 519 (1893).

\(^{200}\) 83 W. Va. 267, 98 S.E. 209 (1919).
months after delivery as this ran well beyond the time necessary for a reasonable test of quality and suitability. This views the deal as a sale on approval, but the Code assumes a delivery of goods for resale involves a sale or return, not a sale on approval. There was a substantial dispute in the DeWitt Shoe case as to whether the right of return was given. The court was very hesitant to find a sale or return in the Code sense, principally because it doubted an agent's authority to make such a contract for his principal. The Code view is that a sale with a return privilege made to another for resale is presumed to be a sale or return, and less than the entire amount delivered may be returned. The return under the Code provision must be seasonable, and what would be a seasonable return would depend, not upon the time for testing suitability or fitness, but upon the reasonable time necessary to dispose of the shoes by resale. Seven months could be a reasonable time here, depending upon the stocking practices and velocity of stock turnover in the retail shoe business involved.

Section 2-328. Sale by Auction.

(1) In a sale by auction if the goods are put up in lots each lot is the subject of a separate sale.

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

201 "Seasonable" is defined in section 1-204 of the Code in subsection (3) in the following terms: "An action is taken 'seasonably' when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time."
(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

This provision restates and amplifies generally accepted rules relating to auction sales with only a few innovations. The generally accepted view is that an auction sale is "with reserve" unless otherwise indicated and thus goods put up for sale may be withdrawn anytime before a bid is accepted.\textsuperscript{202}

Subsection (4) gives the bidder who has been prejudiced by "by-bidding" an option which probably is not available under present law. The usual effect of such by-bidding is to give the purchaser whose bid is accepted a privilege to avoid the sale.\textsuperscript{203} The Code in addition gives him the option of taking the goods at the last good faith bid.

A seller is permitted to make or procure bids on his property without risking a right of avoidance in other bidders where the sale is a forced sale. Where an owner is not voluntarily selling his property, he is of course denied the usual methods of protecting himself from sales at unduly low prices, such as withdrawing the goods because bids are not high enough to be acceptable.\textsuperscript{204}

Section 2-401. Passing of Title; Reservation for Security; Limited Application of This Section.

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered

\begin{itemize}
  \item \textsuperscript{202} \textsc{Restatement, Contracts} § 27.
  \item \textsuperscript{203} Peck v. List, 23 W. Va. 338 (1884). See, 5 \textsc{Am. Jur. Auctions} § 23 (1936).
  \item \textsuperscript{204} There was a time when the chancery courts of England permitted good faith by-bidding to prevent the sacrifice of property at auction sales. See, 5 \textsc{Am. Jur. Auctions} § 25 (1936), where Peck v. List, supra note 203, is misleadingly cited for the proposition that a small minority of American courts have followed the old English Chancery rule. The exhaustive opinion by Judge Green in the Peck case notes some American decisions which apparently followed the old English Chancery rule, but that rule is roundly condemned in Judge Green's opinion.
\end{itemize}
by the other provisions of this Article and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale".

The introductory language of this provision emphasizes one of the key features of the sales article of the Code; the title concept
of sales is abandoned. This is a major conceptual change in sales law which would be brought about by the adoption of the Code. Risk of loss, rights of creditors and such problems are dealt with directly under the Code, not through the medium of locating an elusive title. The Uniform Sales Act and the common law, contrariwise, regarded the location of title as the key to the unraveling of many such problems. The Code, however, recognizes a lingering concern for title, and thus the necessity of the substantive portion of this section. The Code concern for title arises in two instances: (a) where the Code section specifically refers to title, and (b) in situations not covered by the Code. Subsections (1) and (3) establish rules for determining the location of title which follow, in general, familiar guides.

Subsection (1) states, with some qualifications, the general rule that title may pass whenever the parties explicitly agree. The Uniform Sales Act and the common law phrase this principle a bit differently, not emphasizing the necessity of an explicit agreement. In other words, present law says that title passes when the parties intend it to pass and then looks to express agreements or to implications from express agreements or surrounding circumstances to find the intent of the parties. The “guides” used by the present law to find a mythical intent fairly well parallel the “rules” stated in the subsections (2) and (3) of the Code provision. While some cases stress the matter of intent as a fact question for a jury, others seem to treat the “guides” or “gap filling” rules as rules of

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206 E.g. § 2-310.

207 Morgan v. King, 28 W. VA. 1 (1886) is the tap root of the doctrine in West Virginia. The court there said, id., at 14: “The question, whether a sale of personal property is complete or only executory is to be determined from the intent of the parties as gathered from their contract, the situation of the thing sold and the circumstances surrounding the sale.” Accord: Revelle v. McQuay, 85 W. VA. 129, 101 S.E. 76 (1919); Moore v. Patchin, 71 W. VA. 192, 76 S.E. 426 (1912); Shock v. Gowing, 71 W. VA. 250, 76 S.E. 441 (1912); Bank of Huntington v. Napier, 41 W. VA. 481, 23 S.E. 800 (1895); Hood v. Bloch Bros., 29 W. VA. 244, 11 S.E. 910 (1886).

208 Hood v. Bloch Bros., 29 W. VA. 244, 11 S.E. 910 (1886); Morgan v. King, 28 W. VA. 1 (1886).
law which bind the jury, or control the issue.\textsuperscript{209} The Code approach makes more sense and provides that where this intent is not expressed, then an established set of rules automatically apply.

Recall at this point that the role of title is substantially reduced under the Code and that most problems resolved on a title basis under present law are treated directly by specific provisions of the Code.

The Code's recognition that express agreement may control title is subject to some qualifications, as it is under present law. First among these is one dealing with the sale of future goods or expectancies. Identification is the key under the Code and the Code provision on identification of goods to a contract of sale, section 2-510, recognizes and clarifies the concept of "potential possession," which was the common law answer to this problem.\textsuperscript{210} The subsection also notes the distinction between the "special property" interest which arises in the buyer after identification and the "reservation of a security interest" in the seller after "title" passes to the buyer. The "special property" device is employed to give a buyer some legal protection for his expectancies, such as his right to goods upon a seller's insolvency under section 2-502. This interest arises automatically upon identification of goods absent an explicit agreement to the contrary. The security interest of the seller on the contrary does not arise automatically but requires some affirmative action by him.

Subsection (2) states the familiar principle that the property interest in the goods, where the goods are to be shipped to the buyer, pass upon the seller's delivery to the carrier,\textsuperscript{211} unless the seller has undertaken to deliver the goods to a particular destination. In the latter case, the property interest passes to the buyer upon tender at that destination.\textsuperscript{212} This generally restates principles employed under common law to locate title. One change would result under West Virginia law here. Subsection (2) makes it clear that the reservation of a security interest in the goods does not affect the


\textsuperscript{211} E.g. Mullins v. Farris, 100 W. Va. 540, 131 S.E. 6 (1925); Wholesale Coal Co. v. Price Hill Colliery Co., 98 W. Va. 438, 128 S.E. 313 (1925).

\textsuperscript{212} E.g. Bloyd v. M. & J. Pollock, 27 W. Va. 75 (1885).
point at which the title to the goods passes. West Virginia has ruled to the contrary.\textsuperscript{213}

Subsection (3) provides rules for the determination of the passing of title where no shipment is involved, and subsection (4) provides that a revesting of title upon rejection is not a "sale" but a revesting by operation of law.

Section 2-402. Rights of Seller's Creditors Against Sold Goods.

(1) Except as provided in subsections (2) and (3), right of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this Article (Section 2-502 and 2-716).

(2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

(3) Nothing in this Article shall be deemed to impair the rights of creditors of the seller

(a) under the provisions of the Article on Secured Transactions (Article 9); or

(b) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security or the like and is made under circumstances which under any rules of law of the state where the goods are situated would apart from this Article constitute the transaction a fraudulent transfer or voidable preference.

This section ties up some loose ends. The Code does not attempt to rewrite the law of fraudulent conveyances as it bears upon the sale of goods, but it does make it clear that retention of possession

\textsuperscript{213} Back & Greiwe v. Smith, 66 W. Va. 47, 66 S.E. 1 (1909).
in the current course of business is legitimate and not fraudulent. This no doubt accords with present West Virginia policy.\textsuperscript{214}

The rights of a buyer before he has possession of the goods, created by Section 2-502 (dealing with an advance payment and subsequent insolvency of seller) and 2-716 (dealing with buyer's right to specific performance) are subjected to the existing law of fraudulent conveyances. Subsection (3) makes it clear that rights of creditors created under article 9 prevail over rights arising under the sales article and emphasizes the limits on the subsection (2) exception of retention in "current course of business."

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Section 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting".

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even through

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale", or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

\textsuperscript{214} In Poling v. Flanagan, 41 W. Va. 191, 194, 23 S.E. 685, 686 (1895) the court said: "The rule that the retention of possession of a chattel by the seller after absolute sale is \textit{per se} fraud . . . rendering the sale void as to subsequent purchasers and creditors of the seller, does not prevail here, but it is \textit{prima facie} evidence of fraud, and will overthrow the sale as purchasers and creditors unless circumstances of good faith are shown by the purchaser. . . ." Commercially reasonable retention in the ordinary course of trade would no doubt evidence the necessary good faith referred to here.
(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles of Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7).

This provision would enlarge the protection given to good faith purchasers and to those who buy in the ordinary course of business. Those situations not covered more specifically by Code provisions mentioned in subsection (4), relating to bulk sales, secured transactions and document of title cases, are lumped together in this general provision. The general policy underlying this provision has been stated with conciseness by Vold:

"[T]he original defrauded seller and the good faith purchaser from the fraudulent buyer are usually equally meritorious. Favoring here the innocent purchaser tends to promote negotiability of goods. This in turn tends to promote security of transaction: in other words, stability of deals and certainty in contract relations. These tend, at least prima facie, to promote the general welfare by securing the maximum fulfillment of human wants."\(^{215}\)

Needless to say, the more security that is placed in transactions, the less security there remains in pre-existing property rights.

Present West Virginia law is ambivalent in this area, though it tends to emphasize less than the Code provision the desirability of the security of transactions. The West Virginia court has on several occasions repeated the statement that one cannot pass any better title than he has himself. But such statements are qualified by the phrase "in general" no doubt out of recognition of the voidable title situation.

Subsections (1) (a) to (1) (d) deal generally with situations in which it has occasionally been held that the good faith purchaser could not claim a superior right in the property as against the original

\(^{215}\) Vold, Sales § 79 (2d ed. 1959).
None of these precise questions are posed directly in West Virginia cases, though it is interesting to note in relation to subsections (1) (b) and (1) (d) the recent case of *Holt Motor Co. v. Casto.* There the absconding middleman had obtained an automobile by use of a no fund check in Virginia and then sold the car to a West Virginia buyer. The court characterized the original obtaining of the car as criminal, but ultimately resolved the case on what it held to be the absence of good faith on the part of the West Virginia buyer. Thus, inferentially, West Virginia is in accord with subsection (1) (b) and arguably with subsection (1) (d).

Subsections (2) and (3) run contrary to a 1903 decision of the West Virginia court, but they are in accord with some uniform acts adopted in this state subsequent to that decision. In *Ullman, Einsetein & Co. v. Biddle Bros.*, the original owner entrusted merchandise in the hands of a merchant and recovered it from the merchant's purchaser. The court hinted broadly at circumstances showing an absence of good faith on the part of the purchaser but resolved the case by the original recognition of this state of the maxim of *Nemo dat quod no habitis—you can't sell what you don't own.* "Mere possession without more . . . will not be ground for an inference of authority to sell . . ." the court said. The court rather winks at the fact that this was more than mere possession, it was possession with other goods, not distinguished, which were held out for sale by a merchant. The edge has been honed off this decision by the adoption in this state of the Uniform Conditional Sales Act which protects the person who buys from the conditional vendee in the normal course of business—even though the condi-

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216 By stressing the concept of title in considering the rights of the original owner versus a subsequent good faith purchaser, the question of whether the original owner intended to pass title to the middleman becomes crucial. Thus, if the owner intended to pass title, but not to the person who took the property, no title actually passed to the person who took the goods and thus there was no voidable title to pass to the good faith purchaser. See, e.g., *Dresher v. Roy Wilmeth Co.,* 118 Ind. App. 542, 82 N.E.2d 260 (1948).

Subsection (1) (d) avoids the possibility of the argument that because certain kinds of fraud are denominated larceny, and punished as such, that the fraudulent taker has no power to pass a superior property right to a good faith purchaser. Note, for example, that W. Va. Code, ch. 61, art. 3, § 20 (Michie 1955) states that any person guilty of the kinds of embezzlement described therein is "guilty of larceny" of the property involved.


218 53 W. Va. 415, 44 S.E. 280 (1903).

219 Id., syllabus 2.
tional vendor has filed notice of his retained title interest. And adoption at the recent session of the legislature of the Uniform Trust Receipts Act adopts the same view that the buyer in the normal course of business can defeat the security interest of a financing agency which has filed proper notice of its security interest in the merchant's stock.

The protection of buyers "in the stream of commerce" grows to maturity in the Code provision. The concept already has a strong beach head in this state. One reservation, not readily apparent from a reading of this Code provision alone, should be noted here, though. In the definition section of the general article of the Code, one who buys from a pawn broker is excluded from the definition of "buyer in the ordinary course of business."


(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) when the contract is made if it is for the sale of goods already existing and identified;

(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

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221 W. Va. Laws, 1961 ch. 76 § 9 (2) (a). (This becomes ch. 28, art. 15, § 9 (2) (a) of the Code.) Uniform Trust Receipts Act § 9 (2) (a).
222 See Vold’s interesting comments on the “stream of commerce” concept at Vold, Sales § 30, at 179 (2d ed. 1959).
223 U.C.C. 1-201 (9).
(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

Part 4 of the Sales Article threw away the title key which is presently the answer to most sales law riddles. Part 5 in turn goes back to resolve these problems, avoiding the all or nothing at all title approach of the existing law.

The present provision deals with when identification occurs and fixes certain rights in relation to identification. The buyer gets an insurable interest in the goods and a special property interest (dealt with in the next section) upon identification. The rules as to when identification occurs stated in subsections (1) (a) through (1) (c) apply unless there is an explicit agreement to the contrary. The present law looks to appropriation as the genesis of the buyer's rights in the goods and qualifies the presumed time of appropriation by a general intent of the parties. This of course invites a broader inquiry and provides for more ambiguity than the narrower allowance for variations in the "explicit agreement" phase.

Subsection (1) (c) is worthy of special mention here since its effect ranges well beyond the present section. Section 2-107 (2) provides that a present sale may be made of things which may be identified and that such sales are sales of goods. Subsection (1) (c) says that crops and unborn young of animals may be identified at conception, or at planting, or when they become growing crops. There is no resort to the concepts of fructus industriales or fructus naturales in the crop situations—thus nursery stock or Christmas trees may be identified and the subject of a present sale.

In addition, the seller's right to substitute goods under most circumstances after he has alone identified them is reserved in sub-

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224 Appropriation passes the title and all the risks and rights of ownership. See Ailes & Goodwin, Some Comments on the Appropriation Tangle in the Law of Sales, 45 W. Va. L. Q. 319 (1939). The Uniform Sales Act states the rules of when title passed (i.e. when appropriation occurred) in section 19, which leads off with this phrase: "Unless a different intention appears. . . ."

225 See 1 WILLISTON, SALES §§ 61, 62 (rev. ed. 1948).
section (2) and his insurable interest in the goods is given liberal scope. As to the latter point, existing West Virginia law is, no doubt, in accord.\footnote{226}


(1) Subject to subsection (2) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of an unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

The buyer's special property interest arising from identification considered in the preceding section has no parallel in present West Virginia law. The buyer's interest in the goods now depends upon his title to the goods.\footnote{227} It should be noted that the interest here is limited by (1) the fact that the buyer's right to the goods arises under this provision only when the seller becomes insolvent within ten days after payment of the first installment,\footnote{228} and (2) by subsection (2) which prohibits a buyer from identifying goods of greater value than were called for by the contract and thus obtain a windfall at the expense of other creditors of the insolvent seller.

Section 2-503. Manner of Seller's Tender of Delivery.

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular

\footnote{226}The vendor's insurable interest in realty has been recognized, Bowman v. Hartford Fire Ins. Co., 113 W. Va. 784, 169 S.E. 443 (1933) as has the buyer's interest under a conditional sale. Cook v. Citizens Ins. Co., 105 W. Va. 375, 143 S.E. 113 (1928).


\footnote{228}Where insolvency occurs outside the ten-day period, the rights of the buyer advancing money on the purchase price is covered generally by article 9.
(a) tender must be at a reasonable hour, and if it is of 
goods they must be kept available for the period rea-
sonably necessary to enable the buyer to take posses-
sion; but

(b) unless otherwise agreed the buyer must furnish facili-
ties reasonably suited to the receipt of the goods.

(2) Where the case is within the next section respecting ship-
ment tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular desti-
nation tender requires that he comply with subsection (1) and also 
in any appropriate case tender documents as described in subsections 
(4) and (5) of this section.

(4) Where goods are in the possession of a bailee and are to be 
delivered without being moved

(a) tender requires that the seller either tender a negotiable 
document of title covering such goods or procure ac-
knowledgement by the bailee of the buyer’s right to 
possess of the goods; but

(b) tender to the buyer of a non-negotiable document of 
title or of a written direction to the bailee to deliver 
is sufficient tender unless the buyer seasonably objects, 
and receipt by the bailee of notification of the buyer’s 
rights fixes those rights as against the bailee and all 
third persons; but risk of loss of the goods and of any 
failure by the bailee to honor the non-negotiable docu-
ment of title or to obey the direction remains on the 
seller until the buyer has had a reasonable time to 
present the document or direction, and a refusal by the 
bailee to honor the document or to obey the direction 
defeats the tender.

(5) Where the contract requires the seller to deliver documents

(a) he must tender all such documents in correct form, 
except as provided in this Article with respect to bills 
of lading in a set (subsection (2) of Section 2-323); and

(b) tender through customary banking channels is suf-
cient and dishonor of a draft accompanying the docu-
ments constitutes non-acceptance or rejection.
Present West Virginia law says very little about tender. The Code provision here says a great deal. Risk of loss hinges in some situations under tender, thus what amounts to tender takes on greater significance under the Code than it has under present law.

Buried in one of Judge Green's lengthy opinions, however, is some reflection on tender. In this case, Bloyd v. M. & J. Pollock, the seller undertook to deliver a carload of wheat to the buyer at Wheeling. The wheat was damaged by flood while still on the car on a rail siding in Wheeling about twenty-four hours after its arrival. The question was: Had the risk of loss passed to the buyer at the time of damage. The answer was: Yes. Judge Green ruled that the title and risk passed to the buyer at the moment the wheat arrived at the depot in Wheeling. This rushes tender a little bit and gives the buyer small chance to exercise dominion over the goods. The Code requires tender at a reasonable hour and requires notification of the buyer. In the Bloyd case, the wheat arrived between five and six o'clock in the afternoon—probably not a reasonable hour to start unloading a carload of wheat. But the buyer received notice of the shipment around eight o'clock the following morning and failed to take the goods before it was damaged late in the afternoon of that day. The Code would direct a result consistent with that of the Bloyd case, but it would do so because the goods were at the buyer's disposal during normal business hours on the day following their arrival and the notice given the buyer was no doubt adequate to meet the Code requirement.

One other West Virginia case, Franklin v. Pence, could be stretched to support a position contrary to that pronounced in subsection (5) (b), but the issue was not very clearly presented in that case. The seller was defending his refusal to continue delivery under a series of orders placed by the plaintiff buyer in that case because a sight draft for a previous order had been dishonored.

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229 U.C.C. § 2-509.
230 27 W. Va. 75 (1885). Some of Judge Green's opinions run well over one hundred pages. This particular one was a relatively concise seventy-five pages long, most of it devoted to the possible liability of the common carrier involved in shipping the goods—though the common carrier was not a party to the case.
231 128 W. Va. 353, 36 S.E.2d 505 (1945).
232 In Tuggle v. Belcher, 104 W. Va. 178, 139 S.E. 653 (1927) it was held that a seller could refuse to ship a second carload of lumber products until a prior carload had been paid for, no credit being agreed upon and delivery in installments being appropriate under the terms of the contract of sale.
The question of whether the dishonor of the draft amounted to a rejection was not raised, and the question of just what effect the dishonor of the sight draft had upon the seller's duty to continue performance was generally ignored. The Code view on this point is commendable, and at best the West Virginia position is confused.

Section 2-504. Shipment by Seller.

Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must

(a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) promptly notify the buyer of the shipment.

Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.

It has been held in this state that it is the buyer's obligation to furnish cars under an F.O.B. point of shipment contract. In Wiggin v. Marsh,233 this appears to have been held as a general rule of law, and in Virginia Iron, Coal & Coke Co. v. Lake & Export Coal Co.,234 it appears that such an obligation could be inferred from course of dealing or usage of the trade. This general assumption would be reversed by the Code provision which places upon the seller the obligation of making the contract for transportation—subject of course to a contrary agreement between the parties. The contrary agreement may arise either from express terms or from course of dealing or custom of the trade. It is believed that the assumption of the Code that the seller bears the obligations imposed

233 77 W. Va. 7, 87 S.E. 194 (1915).
by this provision absent such agreement reflects fairly common busi-
ness practice where buyer and seller deal at a distance.

Section 2-505. Seller's Shipment Under Reservation.

(1) Where the seller has identified goods to the contract by
or before shipment:

(a) his procurement of a negotiable bill of lading to his
own order or otherwise reserves in him a security
interest in the goods. His procurement of the bill to
the order of a financing agency or of the buyer indicates
in addition only the seller's expectation of transferring
that interest to the person named.

(b) a non-negotiable bill of lading to himself or his nom-
inee reserves possession of the goods as security but
except in a case of conditional delivery (subsection (2)
of Section 2-507) a non-negotiable bill of lading nam-
ing the buyer as consignee reserves no security interest
even though the seller retains possession of the bill
of lading.

(2) When shipment by the seller with reservation of a security
interest is in violation of the contract for sale it constitutes an im-
proper contract for transportation within the preceding section but
impairs neither the rights given to the buyer by shipment and identi-
fication of the goods to the contract nor the seller's powers as a holder
of a negotiable document.

This provision would reverse existing West Virginia law as in
this state the reservation of a security interest has been held to
affect the passing of title and thus in turn to change the point at
which risk of loss shifts and other incidents of title occur.²³⁵ Contra-
wise, this provision recognizes the seller's right to retain a security
interest in the goods to insure payment without affecting other in-
cidents of the sales transactions. The Uniform Sales Act had a gen-
ernally similar provision,²³⁶ but these were aimed at emphasizing the
"rightfulness" of the seller's reservation of the security interest. The

²³⁵ Allen & Wheeler Co. v. Farr, 81 W. Va. 150, 93 S.E. 1030 (1917);
²³⁶ Uniform Sales Act § 20.
assumption is that the seller has a right to retain this security interest, but the present section deals more with the rights and duties of the parties to the transaction where such an interest is reserved.

Section 2-506. Rights of Financing Agency.

(1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

No relevant West Virginia authority is found upon the points covered by this provision. The section is aimed primarily at insuring the financing agency's authority to exercise the shipper's rights, subsection (1), and fixing a financing agency's right to reimbursement by the terms of the papers it accepts at the time it purchases or honors a draft. "Financing agency" is broadly defined in section 2-104 to include generally banks or any other institution or agency which intervenes in the financing or collecting process under a sale of goods.

Section 2-507. Effect of Seller's Tender; Delivery on Condition.

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

237 U.C.C. § 2-505, Comment 1.
Tender and payment are considered concurrent conditions, unless otherwise agreed, according to this section and according to existing West Virginia law. It should be noted that the language of subsection (2) is drawn cautiously so as to avoid conflict with section 2-403. Only the buyer's rights as against the seller are here dealt with, the rights of a third party who may purchase the goods received by the buyer under a conditional delivery would be controlled by section 2-403.

Section 2-508. Cure by Seller of Improper Tender or Delivery; Replacement.

(1) Where any tender of delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

No present West Virginia authority specifically authorizes the "cure" of tender as in this section. A somewhat similar concept may be drawn from Emerson Shoe Co. v. Neely. There the seller tendered a conforming delivery far in advance of the date set for performance and the buyer rejected, but was held liable on the contract when the seller made a second tender when the time for performance subsequently did arise, which also was rejected. It is inferrable from the decision in this case that the seller is not limited unreasonably to one tender under all situations.

Subsection (2) may extend the seller's time for tender. It would cover the situation where the precise quantity or quality of the tender may be subject to some variation, and the seller reasonably believes his tender would be acceptable. A situation somewhat con-

239 99 W. Va. 657, 129 S.E. 718 (1925); Cf. Linger v. Wilson, 73 W. Va. 669, 80 S.E. 1108 (1914). (Buyer held to waive objection to a curable defect, an overage in a shipment of wheat, by relying first on another reason for rejecting seller's tender.)
verse to this arose in *Fox v. Ritter-Burns Lumber Co.*,²⁴⁰ where the buyer rightfully rejected a totally inadequate tender. The seller, of course, must have reasonable grounds to believe that his tender would be acceptable.

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**Section 2-509. Risk of Loss in the Absence of Breach.**

(1) Where the contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but

(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

(a) on his receipt of a negotiable document of title covering the goods; or

(b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or

(c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4) (b) of Section 2-503.

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on sale on approval (Section 2-327) and on effect of breach on risk of loss (Section 2-510).

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Under present law, risk of loss is normally an incident of title. With the title concept abandoned by the Code, this provision allocates

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²⁴⁰ *91 W. Va. 542, 114 S.E. 141 (1922).*
the risk in substantially the same manner as it is placed via the title vehicle under present law. A few more specific changes occur under West Virginia law than under common law generally and Uniform Sales Act law because of some peculiarities in the law of this state.

Subsection (1) deals with those situations where shipment of the goods is involved. Normally a seller's risk of loss ends with his delivery of the goods to the carrier. Subsection (1) (a) specifically states this, and emphasizes the fact that a reservation of a security interest by the seller does not alter the rule. This latter point changes the law in West Virginia where it has been held that the reservation of a security interest was a retention of "title" by the seller casting upon him the risk of loss during transit.

Subsection (1) (b) deals with the transfer of the risk where the seller undertakes delivery of the goods at a destination, e.g. an F.O.B. destination rather than F.O.B. point of shipment contract. In this case, risk of loss passes upon tender. An early West Virginia case held that risk of loss passed immediately upon the arrival of the goods at the destination. The Code would extend the seller's risk here by the "duly so tendered" phrase so that the buyer would not assume the risk until he had an opportunity to take possession of the goods.

Greater precision is achieved under the Code provisions than under common law, while the same degree of flexibility is retained. Common law considered intent as the guiding factor in determining when title passes, and thus the general rules of when title is assumed to pass under various circumstances must always be hedged by the possibility that a different intention might possibly be inferred from the peculiar facts of the case. The rules of the Code section apply unless there is a different agreement by the parties changing the point at which the risk of loss shifts. This requires a more precise showing and cannot be so easily inferred from quivocal circumstances than the showing of a "contrary intent" concerning a more general concept of title.

E.g. Under the Uniform Sales Act § 20, a reservation of a security interest in the goods shipped did not affect the passing of title and risk of loss, while under West Virginia law, a contrary rule obtains. See note 245, infra.


Subsection (2) makes no significant change.

Subsection (3) does change the allocation of risks somewhat. Under the normal title approach, an unconditional contract to sell an identified article normally passes title and thus risk of loss immediately upon the contracting. Subsection (3) ignores the title concepts here and views possession as more significant where a merchant seller is involved. Thus where the seller is a merchant, risk of loss passes upon the receipt by the buyer. Where the seller is not a merchant, risk of loss passes upon tender and the allocation of risk remains much the same as under present law.

Subsection (4) qualifies the general application of the rules of this provision by recognizing the authority of parties to allocate risks by agreement and by reference to situations where risk of loss is covered under other special circumstances.

Section 2-510. Effect of Breach on Risk of Loss.

(1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.


248 U.C.C. § 2-509, Comment 4: "The underlying theory of this rule is that a merchant who is to make physical delivery at his own place of business continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession."

249 Tender requires that the seller put conforming goods at the buyer's disposal at a reasonable hour and with adequate notice to enable the buyer to take possession. Section 2-503. These rules in regard to tender contemplate the usual merchant seller situation. The Code is not so clear as to the point at which the risk of loss shifts where the seller is not a merchant, because its rules regarding tender simply don't anticipate this situation precisely. For example, suppose an individual sells a piano no longer used in the home through a newspaper want-ad. The Code is not clear as to whether tender would occur when the seller agreed "Take it anytime you want it," or not until later when the buyer has had a reasonable opportunity to make arrangements for its removal. The provision on tender would seem to contemplate that tender is complete when the seller "puts and holds the goods" at the buyer's disposition. But it would seem more compatible with the provisions of the instant section on risk of loss that the risk not pass until the buyer has a reasonable opportunity to actually exercise dominion over the goods.

250 See, I. E. Poling Co. v. Huffman & Frost, 84 W. Va. 199, 99 S.E. 445 (1919) where it was specifically agreed that the seller would retain the risk of fire loss as to lumber remaining at his mill site. The court used this agreement to argue that the parties intended title to the lumber to pass to the buyer as the lumber was manufactured since such express agreement as to the allocation of risks would have been unnecessary if the title to the lumber had remained with the seller at this point in the transaction.
(2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

(3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

Breach does not presently have a direct bearing upon the shifting of or the reallocation of the risks of loss under a sales transaction. But indirectly, breach may have that effect. In general terms, the adoption of this provision would broaden slightly the protection afforded to a non-breaching party who still retained control, and thus bore the risk of loss, of goods identified to a contract of sale. For example, a repudiation of an executory contract for sale by the buyer amounting to a breach prevents the seller from passing the title to the goods to the buyer—and thus the buyer never sustains any risk of loss under present law in this situation. Under the Code, the buyer could be forced to bear a part of that risk, if goods had been identified to the contract. Aside from the fact that the quantum of the risk under these narrow situations is qualified by the non-breaching party's insurance coverage, no substantial change would result in existing law.

Section 2-511. Tender of Payment by Buyer; Payment by Check.

(1) Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

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251 Acme Food Co. v. Older, 64 W. Va. 255, 61 S.E. 235 (1908). See also Norman Lumber Co. v. Keystone Mfg. Co., 100 W. Va. 515, 131 S.E. 12 (1925). (Seller's shipment of non-conforming goods; buyer rightfully rejected and sold for seller's account. Had goods been lost or damaged in transit, the loss no doubt would have been seller's risk even though title normally passes upon delivery of such goods to the carrier.)

252 Notice that "identification" can occur earlier in the sales transaction than "appropriation" under present sales law. See U.C.C. § 2-501.

253 See Queen v. Kenova Hardwood Flooring Co., 114 W. Va. 623, 173 S.E. 559 (1934). (Seller had moved goods to point of loading at buyer's request but buyer failed to inspect there and goods were never loaded. Loss resulting from deterioration was held the buyer's loss.) Compare, Black & Sons v. Johnson & Sons, 65 W. Va. 518, 64 S.E. 626 (1909). (Buyer's failure to inspect goods moved to loading point held to prevent title passing from seller to buyer, thus permitting seller to make another sale of the same goods.)
(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

(3) Subject to the provisions of this Act on the effect of an instrument on an obligation (Section 3-802), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

This section continues the recognition of tender of performance and tender of payment being concurrent conditions unless a credit term is agreed upon. Subsections (2) and (3) would provide some additional precision to the law. Subsection (2) would prevent a seller from tricking a buyer out of the advantage of his bargain by a surprise demand for legal tender. Subsection (3) declares a payment by check to be a conditional payment as between the immediate parties, whereas present law says it is a question of fact as to whether payment by check is an absolute or a conditional payment. Notice, however, that the phrase “as between the parties” does not permit the rule of conditional payment to impose upon the rights of third parties who may, after delivery, obtain rights in the goods. Thus, under section 2-401 of the Code a subpurchaser could have greater rights in property delivered than the original seller even though a check taken as payment is dishonored.

Section 2-512. Payment by Buyer Before Inspection.

(1) Where the contract requires payment before inspection non-conformity of the goods does not excuse the buyer from so making payment unless

(a) the non-conformity appears without inspection; or
(b) despite tender of the required documents the circumstances would justify injunction against honor under the provisions of this Act (Section 5-114).

(2) Payment pursuant to subsection (1) does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies.

Neither of the points covered by this provision are resolved under present West Virginia law. No authority is found on the point of when a buyer is excused from making payments before inspection where the contract anticipates such. On the second point, the reservation of the buyer's right of inspection (and rejection) after payment is made, it could be inferred from Norman Lumber Co. v. Keystone Mfg. Co.\(^{255}\) that payment before inspection, and before there is opportunity for inspection, does not affect the buyer's right to reject the goods shipped. It appears there that payment was made against invoices before the non-conforming goods arrived at the buyer's place of business.


(1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

(2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

(3) Unless otherwise agreed and subject to the provision of this Article on C.I.F. contracts (subsection (3) of Section 2-321), the buyer is not entitled to inspect the goods before payment of the price when the contract provides

(a) for delivery "C.O.D." or on other like terms; or

(b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

(4) A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance become impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids the contract.

\(^{255}\) 100 W. Va. 515, 131 S.E. 12 (1925).
There are two different kinds of inspections involved in sales transactions—one a dickering inspection, the other a performance inspection. The dickering inspection is one which is a part of the negotiations; the ostensible buyer is requested to inspect the goods offered for sale to ascertain their quality and fitness for himself. This pre-sale inspection has the effect of limiting the seller's implied warranties under present law and under the Code section dealing with limitations and disclaimers of warranties.\footnote{U.C.C. § 2-316 (3) (b).} The second kind of inspection, the performance inspection, occurs after the contract of sale has been consummated and affords the buyer an opportunity to check the quality of the goods tendered under a pre-existing contract to assure himself that the tendered goods conform to the contract. It perhaps belabors the point to be so pedantic, but to make some sense out of the West Virginia cases touching upon inspections and relate this to the Code position requires a well-understood foundation.

The Code section here concerned deals with a cluster of narrow questions related to the performance inspection. When has the buyer the right of inspection? Subsection (1) says before payment and after the goods are identified under reasonable circumstances, with certain exceptions. The exceptions noted deal with C.O.D. contracts and the like and where the parties otherwise agree. Subsection (2) determines who bears the cost of inspection and subsection (4) establishes rules for those situations where the agreed upon inspection becomes impossible.

Several West Virginia cases have implicitly recognized the usual rule that a buyer may inspect at the destination where some shipment is involved.\footnote{Schaffner v. National Supply Co., 80 W. Va. 111, 92 S.E. 580 (1917).} But the one case in West Virginia which most directly calls the issue of inspection to task involved a buyer's claim that he had a right to inspect and reject at the destination and this issue became completely garbled. The case is \textit{Guyandotte Coal Co. v. Virginia Elec. & Mach. Works}.\footnote{94 W. Va. 300, 118 S.E. 512 (1923).} There the Coal Company contracted to buy a used mining machine. The machine was at Birmingham, Alabama. The buyer was located at Kitchen, West Virginia. There was a conflict in the evidence concerning the seller's warranties; the seller's position being that it refused to warrant the
machine at all and demanded the buyer inspect it; the buyer's position being that the machine had been warranted as being in "first class condition." The court held that since the written contract did not mention warranties, the seller was obligated to deliver a merchantable second-hand mining machine. Taking this view of the case, the court made the following statement concerning the trial court's rejection of an instruction offered by the plaintiff buyer:

"This instruction, if given, would have told the jury, in effect, that the place of delivery under the contract was at Kitchen and that the plaintiff had the right to inspect and reject the machine at that point notwithstanding, that under the contract and under the manifest intention of the parties as disclosed by the evidence, this machine was to be delivered at Birmingham, Alabama, at that point the plaintiff had the right to examine and reject the machine. . . ."\(^{259}\)

Because the court here confused the dickering inspection—that is, the seller's demand that the buyer predetermine the quality of the goods offered prior to the sale—with the buyer's performance inspection, this case could be construed to mean that a seller can cut off the buyer's right of inspection by demanding it be done at the point of shipment.

Needless to say, the most significant impact of the adoption of this provision in West Virginia would be one of clarification.

Section 2-514. When Documents Deliverable on Acceptance; When on Payment.

Unless otherwise agreed documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment.

No West Virginia authority is found upon this point.

Section 2-515. Preserving Evidence of Goods in Dispute.

In furtherance of the adjustment of any claim or dispute

(a) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving

\(^{259}\) Id. at 312, 118 S.E. at 516.
evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other; and

(b) the parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

This provision has no parallel in present West Virginia law as procedures peculiar to sales transactions. Rule 34 of the West Virginia Rules of Civil Procedure authorizes inspection of "things" in the control of an adversary and article 10 of chapter 55 of the West Virginia Code establishes general rules for arbitration. Basically, the only change which would result from the adoption of this section would be the giving to the party not in control of the goods concerned a legal right to "inspect, test and sample" goods in the control of another party involved in sales transaction even though no litigation is pending and thus no discovery process available. The aim of the provisions is to promote amicable settlements on the merits.

(Discussion of the Sales Article will be concluded in the next issue.)