Chapter 7: Uniform Commercial Code

F. Anthony Mooney

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml
Part of the Commercial Law Commons

Recommended Citation
§7.1. Express warranties under the Uniform Commercial Code: Affirmation and sample: General Electric Co. v. United States Dynamics, Inc.\(^1\) General Electric (GE) brought an action against United States Dynamics (Dynamics) for rescission of a contract to purchase a gas purifying machine designed to remove oxygen from nitrogen in a gas pipeline. Dynamics delivered a model of the contemplated purifier for GE’s observation and testing, advising GE that the smaller machine would operate so that “no hydrogen mixes with the main gas stream.”\(^2\) GE retained the model for over one year and reported favorably on its performance; whereupon Dynamics built and sold a larger unit, guaranteeing that it would purify gas to the level required and that no other impurities should be introduced. The larger unit proved incapable of excluding hydrogen, thus failing to purify gas to the desired level. It was later learned that the model likewise failed to exclude hydrogen.

The action was brought in the Federal District Court for the District of Massachusetts. Dynamics counterclaimed for expenses in making changes in the gas purifier after notice of nonconformity, and for the value of the unreturned model. The court found that the failure of the gas purifying machine to exclude hydrogen from gas constituted a breach of contract and entitled the buyer to rescission.

On appeal, the propriety of the trial court’s use of summary judgment in finding for GE was raised. The Court of Appeals for the First Circuit HELD: On the basis of the pleadings, depositions, exhibits, and affidavits, no genuine issues of material fact remained for adjudication and the trial court rightly rendered summary judgment for GE on both its complaint and Dynamics’ counterclaim.

This casenote reflects the belief that it is incumbent upon the practitioner to consider, first, the court’s ultimate determination of liability in General Electric and, second, the court’s analytic orientation, with a view toward refining the decisional rationale and suggesting alternative approaches to problems raised by the case. Exposition of that rationale demands primary focus.

GE argued that the contract consisted of a Dynamics’ letter of price quotations; a GE purchase order and specifications requiring that “no other impurities should be introduced into the affluent nitrogen”;\(^3\) a

\(^{1}\) Mooney: Chapter 7: Uniform Commercial Code Published by Digital Commons @ Boston College Law School, 1969
Dynamics' letter: of agreement to comply with the terms, specifically guaranteeing "that the equipment ... will purify the quantity of gas specified to the level required"; a guaranty of a supply of chemicals; and a patent indemnity agreement. It alleged that such contract was integrated by Dynamics' letter stating that the purchase order included the aforementioned documents. All previous negotiations and/or understandings were thus superseded and rendered extraneous to the contract. Since the introduction of impurities into the nitrogen gas was explicitly proscribed in the contract, given that indisputable introduction, Dynamics' breach of its warranty of purity was self-evident.

Dynamics contended that the terms of the written contract alone should not control in view of Dynamics' reliance on GE's superior testing facilities and favorable reports on the performance of the model. In the alternative, Dynamics interpreted the contract simply to dictate a "sale by sample," the terms of which were satisfied by Dynamics' delivery of a larger version of the model gas-purifying machine.

Presented with this conflict, the court, in an opinion written by Judge Coffin, first acknowledged the limited range of circumstances in which the judicial device of summary judgment can properly be invoked. Citing *Rogen v. Ilikon Corp.*\(^5\), the court stated that the test is met "only when the effluent stream of controversy has been purified by the exclusion of any genuine issues of material fact." Next, it documented GE's account of the integrated contract as a complete and final expression of the mutual undertaking and its neutralizing effect upon whatever antecedent understandings the parties might have entertained, "absent very special circumstances not here present."\(^\text{6}\) While it is apparent, at this stage, that the court has found an express warranty in Dynamics' "explicit guarantee that the equipment would purify the gas,"\(^\text{7}\) Judge Coffin's first reference to the Code\(^\text{10}\) was his use of Section 2-202, the parol or extrinsic evidence rule. Accordingly, evidence of any prior agreement cannot be admitted to contradict the terms "set forth in a writing intended by the parties as a final expression of their agreement," but such terms "may be explained or supplemented (a) by course of dealing or usage of trade ... or by course of performance ...; and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement."\(^\text{11}\) Application of the exclusionary rule here has the binary effect of refut-
ing each alternative contention advanced by Dynamics. Since Dynamics' *anteecedent misunderstanding* cannot satisfy the conditions of subsection (a), all evidence relating to the model and its testing was excluded.

The court's only other resort to a Code provision came in response to Dynamics' abortive use of Section 2-316(3)(b), which provides:

> When a 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 good there is no *implied* warranty with regard to defects which an examination ought in the circumstances to have revealed to him. [Emphasis added.]

Section 2-316(3)(b) was hardly the Code provision most pertinent to Dynamics' case and was readily dismissed with the observation that "inspection could not offset express warranties." It is through this statement that the court first disclosed its finding of the express warranty upon which it based its adjudication of liability. Though not cited by the court, perhaps through inadvertence, perhaps judicious calculation, the Code provision on express warranties is Section 2-313, which reads:

1. **Express warranties by the seller are created as follows:**
   a. 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.
   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 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 such as "warrant" 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.

The language of subsection (1)(a) arguably subsumes Dynamics' agreement to comply with the terms set forth in GE's purchase order. Subsection (1)(c), however, acknowledges yet another mode by which express warranties are created. It is undisputed that the larger gas purifier conformed to the smaller model as expressly warranted under Section 2-818(1)(c) since neither was capable of excluding hydrogen

---

12 For an explanation of the difference between express and implied warranties in general, and the exclusion of the latter by the former, see Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612, 75 A.L.R.2d 103.

from the gas stream. It would thus appear that Dynamics had expressly, though unwittingly, extended two inconsistent warranties, only one of which was breached by the machine's failure to exclude hydrogen. The inevitable question of which express warranty should prevail, though never posed by the court, merits attention.

Resort to Section 2-317(a), providing that "exact or technical specifications displace an inconsistent sample or model or general language of description," might have facilitated resolution of this conflict. The subsection serves only as a guideline aimed at deciphering the intent of the parties when warranties diverge; as such, it is not conclusive. Assuming it were, a sensitive question of fact arises. Could GE's stated requirement that "no other impurities should be introduced ..." and Dynamics' responsive "guarantee that the equipment ... purify the quantity of gas specified to the level required" be properly deemed exact or technical specifications? Or might locution of this sort more closely approximate general language of description? In either case, the question bears more than academic consequence and seems not to be one of law.

Had the trier-of-fact concluded that Dynamics' "model warranty" yielded to the express warranty of purity, it should then have adverted to either of two Code sections explaining the actions of a buyer upon notice of nonconforming chattels: Section 2-602 deals with the manner and effect of a buyer's rightful rejection of goods; Section 2-608 describes the elements of a revocation of acceptance by the purchaser. To decide which Section obtains, it is necessary to determine whether an acceptance has taken place under Section 2-606. That Section reads as follows:

(1) Acceptance of goods occurs when the buyer
   (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
   (b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
   (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

14 UCC §2-317, Comment 3.
15 For an attempt to distinguish between "precise and complete" specifications and general descriptive language, see Neville Chemical Co. v. Union Carbide Corp., 294 F. Supp. 649 (W.D. Pa. 1968).
Despite the fact that GE paid for the gas purifier upon delivery,¹⁷ a fact alleged in Dynamics' brief and uncontested by GE, the case for acceptance is less than convincing. GE promptly reported the inability of the machine to perform in accordance with its requirements, whereupon Dynamics undertook alterations. It rather appears that GE effectively rejected the purifier in keeping with Section 2-602, subsection (l) of which requires that rejection occur within a reasonable time after delivery or tender, and that the seller be seasonably notified. Dynamics did not contend that GE's return of the full-sized unit was tardy since it followed additional testing by GE after Dynamics' attempted repairs. GE's interrupted possession of the machine scarcely characterized an "exercise of ownership by the seller."¹⁸ While this is not to preclude the possibility of finding an acceptance, and revocation thereof, it seems likely that a court mindful of these Code provisions would conclude that return of the gas purifier and demand for refund of the purchase price amounted to an effective rejection under Section 2-602. In either event the Code deals explicitly with contractual issues such as those raised by the conduct of both parties and thus demands usage.

That the court might readily serve its end of "rescinding" the contract for breach of an express warranty through appropriate use of the Code is demonstrable. Such use would undeniably render its decision more intelligible and authoritative. It should be stressed, however, that the Code itself does not provide for rescission; under the Code, the basis of this suit is described by either Section 2-602 or Section 2-608. Of far greater import is the contention herein advanced that appropriate use of the Code might indeed serve an entirely different end, that of barring rescission and finding in favor of Dynamics.

First, the pivotal role of Section 2-202, the parol or extrinsic evidence rule, as employed by the court in General Electric, must be appreciated. Intent of the parties to finalize their agreement in writing is prerequisite to operation of the parol evidence rule under Section 2-202. Presumably, the court in General Electric found such intent, apparently without difficulty. By excluding all evidence relating to GE's testing and inspection of the model, the resultant favorable reports of performance, and understandings reached prior to the actual contract, the court ab initio invalidates Dynamics' case. Each of Dynamics' alternative contentions, as well as its counterclaim, is predicated upon the court's appraisal of evidence going to circumstances arising prior to completion of the written contract. Exclusion of such evidence, and strict limitation of other evidence to the integrated written contract, clearly simplifies, indeed settles, the issue. Acceptance of the court's use of Section 2-202 makes its award of

¹⁷ Brief of Defendant at 3; see Comment 3 to §2-606.
¹⁸ UCC §2-602(2)(a).
summary judgment palatable to even the most intense advocates of trial on the merits. This acceptance, however, is neither compelled by a reading of that Section nor a scanning of apposite authorities. Special reference is made to subsection (a) of Section 2-202, permitting the introduction of evidence to explain or supplement the terms of a written contract “by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208).” Section 1-205 (1) defines the first of these exceptional evidentiary areas as “a sequence of previous conduct between the parties to a transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.” Comment 2 to Section 1-205 states that course of dealing is restricted, literally, to “a sequence of conduct between the parties previous to the agreement.” “Agreement,” according to the Code, “means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade, or course of performance as provided in this Act ... .” Circularity aside, the Comment to Section 1-205 assures one that the manner in which the act treats course of performance signifies that “a sequence of conduct after or under the agreement may have equivalent meaning.” Thus the definitional exigencies of “agreement” would seem to be assuaged and the path cleared for admission of evidence relating to the acceptance, testing, and approval of the model by GE. Evidence introduced and heard under this exception to the parol evidence rule casts the agreement of the parties within its proper and complete bargaining context, perhaps explaining the actual intent of both the buyer and seller at the time of the contract.

The significance of this function is affirmed by the Comment to a related provision of the Code, Section 2-208. There it is acknowledged that the concept of this Section was borne of such terms as “course of dealing,” “the circumstances of the case,” “the conduct of the parties,” etc., in the Uniform Sales Act. The purpose of Section 2-202 — to consider only those factors indicative of the meaning of the agreement — is served by the admission of evidence relating to the model gas purifier, however adverse to the interests of a seller determined to exclude such evidence. It is also submitted that a

19 UCC §1-201(3).
20 UCC §1-205, Comment 2.
21 UCC §§2-208, Comment.
22 Perhaps the court would have done well to adopt the rationale of the Board of Contract Appeals, U.S. Atomic Energy Commission, in Carpenter Steel Co., (though not a court operating under the Fed. R. Civ. P.): “In accordance with Board policy to decide cases on their merits, whenever appropriate, evidence relating to the negotiations leading up to the contract was admitted to aid the Board in interpreting the contract. The admission of such evidence is in accord with the provisions of the Uniform Commercial Code which is an appropriate source of Federal law.” AECBCA, No. 5-65, 2 U.C.C. Rptg. Serv. 775.
finding of mutual intent to integrate the agreement in any given set of writings was at least litigable, especially in view of the model, and the cavalier treatment accorded this integral issue was error.

Furthermore, after integrating the contract, the court concluded that "the specification proscribing the introduction of impurities . . . and the explicit guarantee that the equipment would purify the gas, cannot, absent very special circumstances not here present, be nullified by antecedent understandings." Cited as authority for this statement is 3 Corbin on Contracts, Section 573. Perhaps more germane to the issue at hand is Section 590 of the same volume. According to Professor Corbin, the "mere existence of the writing should never be held to exclude testimony of . . . an unstated fundamental assumption." Moreover, evidence of the facts "tending to show that such a fundamental assumption was made, though not expressed in the writing, should never be excluded by any 'parol evidence rule.'" (Emphasis added.) That fundamental assumption in General Electric apparently was shared by both parties prior to discovery of the defect; i.e., no evidence to the contrary, and in light of favorable reports, it was evidently assumed that the model could exclude hydrogen. Only later was the same defect discovered in the model. Also more germane than the court's citation of Section 573 is the observation of Section 541, 3 Corbin on Contracts, that surrounding circumstances must always be known before the meaning of words can become plain and clear.

Whatever the particular door through which evidence of pre-contractual negotiations enters, the parol evidence rule should not be a complete bar to admission of certain extrinsic evidence. Evidence of prior and/or contemporaneous agreements should be admitted, even though inconsistent with the contents of the writing, if offered for a legitimate purpose. Legitimate purposes include attempts of a party to prove that no contract in fact existed, or that the transaction was a nullity due to fraud, illegality, accident or mistake. In circumstances such as these, strict application of the rule would seem to promote, rather than prevent, injustice. Since the Code

23 On intent to integrate the agreement, see 1 Hawkland, A Transactional Guide to the Uniform Commercial Code 167 (1964).
26 Id. at 955.
27 3 Corbin on Contracts §590 (1960).
28 Ibid.
29 Ibid.
30 Ibid. §580.
§7.1 UNIFORM COMMERCIAL CODE

declines to overrule principles of the law and equity, unless specifically displaced by particular provisions of the act, this operational view of the parol evidence rule survives Section 2-202.

Perhaps an aspect of the General Electric opinion beckoning even closer scrutiny than exclusionary use of Section 2-202 is the failure of the court to define the express warranty or warranties purportedly breached by Dynamics in terms of the Code, specifically Section 2-313, subsections (1)(a) and (c). As observed earlier, Dynamics conceivably advanced two inconsistent warranties, only one of which was recognized by the court. It was suggested that, had the court identified both an “affirmation warranty” and a “model warranty,” it might have attached pre-eminent significance to the former through use of Section 2-317(a). Suggestions such as this, however, presuppose the very existence of each express warranty, while the language of subsections (1)(a) and (c) of Section 2-313, specifically the recurring phrase “part of the basis of the bargain,” invites deeper study.

For a seller to expressly warrant his goods under Section 2-313(1)(a), his affirmation of fact or promise to the buyer must, first, relate to those goods and, second, become part of the basis of the bargain. Similarly, to create an express warranty under Section 2-313(1) (c) — to warrant that goods shall conform to a sample or model — seller’s model or sample must be made part of the basis of the bargain. Two questions arise: (1) Are we to assume that both Dynamics’ affirmation of guaranteed purity and the model became, or were made, part of the basis of the bargain? (2) How does one determine what is and what is not part of the basis of the bargain?

David Mellinkoff, discussing definitional imprecision in the Code, regretfully observes that the term “bargain” is “nowhere defined” by the drafters of the Code. The inquiry, therefore, is not one of strict definition but rather focuses upon purposes underlying revision of the statutory predecessors of Section 2-313(1)(a) and (c), Sections 12 and 16 of the Uniform Sales Act. Section 12 defined express warranty as: “Any affirmation of fact or any promise by the seller relating to the goods ... if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon.” (Emphasis added.)

82 UCC §1-103.
83 UCC §2-313(1)(a) and (c) quoted infra.
84 Exclusionary use of the parol evidence rule would arguably negate such “model warranty” if no mention of model were included in contract. However, counsel for Dynamics claims in his brief (p. 6) that reference to the model is contained in the correspondence which, together with GE’s purchase order and specifications, comprised the contract.
86 Id. at 189.
87 G.L., c. 106, §§14 and 18, repealed by enactment of the UCC.
Actual reliance, notes John M. Stockton in Law of Sales, is the language of both the common law and the Uniform Sales Act, not that of the Code, which rather insists upon a "basis of the bargain" test. The comparative results of such test, when applied to actual cases, are not likely to differ, according to Stockton. One might conclude, inferentially, that, had the drafters of the Code intended to substantially alter or eliminate the common law "reliance" test articulated by the Sales Act, the language of Section 2-315, or the Comment thereto, would make that intention clear. The Comment does outline a significant change in the status of warranties of description and sample, once again "express" rather than "implied." It also states: "In general, the presumption is that any sample or model . . . is intended to become a basis of the bargain. But there is no escape from the question of fact." The second statement bears directly on the use of summary judgment in these matters. On the basis of what the Comment does say, and of what the Code itself neither says nor implies, it is difficult to escape the conclusion that, at the very least, "reliance" and "part of the basis of the bargain" are operational, if not conceptual, equivalents.

Comment 8 to Section 2-313 reiterates this fundamental query: "What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? . . . [A]ll of the statements of the seller do so unless good reason is shown to the contrary." (Emphasis added.) Enlightened use of Section 2-202 in General Electric would permit the seller to show good reason to the contrary, to establish that the object of the buyer's admitted reliance was not an affirmation of fact relating to the large gas purifier but the apparently successful performance of the model during a period of over one year. The contention that GE actually relied upon a model which was made part of the basis of the bargain, as through Section 2-315(1)(c), hardly seems unreasonable; certainly Dynamics' intent to induce purchase with delivery of a model is indicated by the facts. Subsequent commitment to writing of the contractual terms seems to assume the visage of customarily formal business procedure, and it cannot be construed ipso facto to accurately reflect the intent of the parties.

Of far greater use in determining the basis of a seller's reliance,
whether upon affirmation sample or description, is the time-honored inquiry into the relative skill and expertise of the respective contracting parties. The buyer's knowledge, or opportunity for knowledge, relates unequivocally to the reasonableness of contending that GE relied upon representations made by Dynamics or "purchased on his own judgment." In *General Electric*, the superior testing facilities of the buyer are uncontroverted; Dynamics in fact had none. In light of this technological imbalance, the court's tacit premise of an express warranty by affirmation or promise appears somewhat spurious; and Dynamics' "sale by sample" contention gains credence. Left only with a Section 2-315(1)(c) warranty, no inconsistencies need be resolved, with or without the guidance of Section 2-317(a). The performance of the large gas purifier plainly satisfied Dynamics' express warranty by sample or model; hence, no breach of warranty and no basis for rescission of the contract.

In concluding its opinion, the court in *General Electric* first interprets appellants' request, then renders it absurd through analogy, thus:

Dynamics, to take a view of the evidence most favorable to it, would have us read out of a contract a subsequent express commitment in writing because of a prior inchoate impression from GE that the commitment was a safe one to make. No more can we do this than to say that a seller of a horse who relies on the innocent bad judgment of a buyer that the horse is sound and expressly warrants its soundness can escape the burden of his bargain.

The inaccuracy of the court's interpretation of Dynamics' case has been demonstrated; Dynamics points not to a "prior inchoate impression from GE" but to the prior existence of an express warranty by sample, a warranty reflecting the "true" intent of the parties as it goes directly to the basis of the bargain.

Whatever the ultimate decision on key questions of reliance, extrinsic evidence, intent to integrate, and express warranties, it must be conceded that these are questions of fact, not law. Award of sum-

---

44 See Wallace v. McCampbell, 178 Tenn. 224, 156 S.W.2d 442 (1941), in which the court notes that the purchaser was in a position to enlighten seller.
45 See Annot., Sale by Sample—Warranty, 12 A.L.R.2d 524 (1950), for a discussion of what constitutes a sale by sample as regards warranties. Cited therein is a long line of cases upholding the significance of parties' intent and determination of such intent by jury. Also cited: Androvette v. Parks, 207 Mass. 86, 92 N.E. 1006 (1910), which stands for the proposition that written contracts must contain reference to sample for sale by sample to obtain. See note 34 supra.
46 In the unlikely circumstance that the trier-of-fact finds the evidence insufficient to support either an express warranty by affirmation or sample, due to the reliance requirement, UCC §2-315 depicts the elements of an "implied warranty of fitness for a particular purpose." There, however, the reliance requirement is explicit.
47 *General Electric Co. v. United States Dynamics, Inc.*, 403 F.2d at 995.
mary judgment on the pleadings, depositions, and affidavits is appropriate only when there is no substantial factual controversy requiring trial; only when the truth is clear and where no genuine issue remains for trial; and, most significantly, should not be granted when the intent of the parties is an issue. In Skopes Rubber Corp. v. U.S. Rubber Co., the First Circuit Court of Appeals ruled that the question of whether the failure of machine-applied vinyl-coated material for skin-diving suits to conform to sample hand-applied vinyl-coated material breached the contract was for jury determination. In Sylvia Coal Co. v. Mercury Coal and Coke Co., the issues of whether goods were sold by sample under Section 2-313(1)(c) and whether there was a breach of an express or implied warranty for failure to conform to the sample were questions of fact to be decided by a jury. The list of cases and authorities to this effect is long. Indeed, in General Electric, the court limited summary judgment to circumstances in which the "effluent stream of controversy has been purified by exclusion of any genuine issues of material fact." The preceding inquiries demonstrate, if nothing else, that the standards of that test have barely been approached by the facts of General Electric.

Yet another aspect of the case evoking only summary treatment is the counterclaim advanced by Dynamics. First, Dynamics sought compensation for expenses incurred while attempting to rectify the inability of the machine to exclude hydrogen; second, Dynamics claimed the value of the model not returned by GE, alleging that GE "replaced certain portions and removed certain chemicals." The court's denial of the second claim is of particular interest since, unlike rejection of the first, it is not an automatic sequel to the foregoing rationale. As "[t]here is no indication that either action was

48 Rogen v. Ilikon Corp., 361 F.2d 260 (1st Cir. 1966).
49 United States v. Burket, 402 F.2d 426 (1st Cir. 1968).
51 299 F.2d 584 (1st Cir. 1962).
52 151 W. Va. 818, 156 S.E.2d 1 (1967).
53 In Martin v. J. C. Penney Co., 50 Wash. 2d 560, 313 P.2d 689, 80 A.L.R.2d 697 (1957), concededly a case involving alleged breach of an implied warranty of fitness, the questions of buyer's reliance and actual breach by seller were properly left for jury determination.
54 General Electric Co. v. United States Dynamics, Inc., 403 F.2d at 954.
55 Some federal courts go further. In Palmer v. Chamberlin, 191 F.2d 532, 540 (5th Cir. 1951), it was held that "before rendering summary judgment the Court must be satisfied not only that there is no issue as to any material fact, but also that the moving party is entitled to a judgment as a matter of law. Where, as in this case, the decision of a question of law by the Court depends upon an inquiry into the surrounding facts and circumstances, the Court should refuse to grant a motion for summary judgment until the facts and circumstances have been sufficiently developed to enable the Court to be reasonably certain that it is making a correct determination of the question of law."
§7.1 UNIFORM COMMERCIAL CODE

not permitted or contemplated by Dynamics, was damaging to the apparatus, or could possibly be categorized as an exercise of dominion,107 Dynamics' request fails.

Rather than disentangle phrases of indefinite theoretical origin and consequence, such as "damaging to the apparatus" and "exercise of dominion," it is appropriate to look to Dynamics' brief for what seems to be the underlying motive of its counterclaim. Though no mention of this appears in the decision, it is a matter of grave concern to Dynamics that "[b]oth the model unit and the machine manufactured for General Electric contained chemicals employed in the process of removing oxygen gas in an unpatentable but nevertheless secret process . . . ."108 While informed that the "process was secret and the exclusive property of the defendant . . . .,"109 GE removed and analyzed these chemicals and studied this process, "so that it now possesses all information necessary to manufacture machines identical to those of the plaintiff . . . ."110 Dynamics further notes that, "almost immediately after declaring the defendant's process unsatisfactory, the plaintiff, after endeavoring for a period of thirty years to develop a new method of removing oxygen from nitrogen, completed the construction of a new unit, which it is now using . . . ."111

These allegations are of more than passing interest since they would seem to embody the gravamen of Dynamics' counterclaim. Claiming the fair value of a model originally worth $1995,112 Dynamics apparently proceeds upon either a "quantum meruit" theory of recovery or one which presupposes the existence of a separate contract covering the model gas purifier. In the unlikely event that such a contractual obligation is found, Dynamics might well invoke Section 2-606 (1)(a) to the effect that GE accepted the smaller unit. One year is probably ample time for inspection;113 it is probably reasonable to regard favorable reports of performance as notification to the seller that the goods are conforming. Acceptance of the model requires either that GE pay for the machine or revoke its acceptance thereof, pursuant to Section 2-608.114

Given the tenuousness of the basic premise, however, it seems unreasonable to apply Code provisions on acceptance of goods to the

107 Ibid.
108 Brief of Defendant at 3.
109 Ibid.
110 Id. at 3-4.
111 Id. at 6-7.
112 Id. at 4.
113 In GE's brief at page 2, it is alleged that the model was retained by GE for a period of one year and ten months.
114 UCC §2-608(5) provides: "A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them." Those duties include holding the goods with reasonable care for the seller's disposition. See UCC §2-602(2)(b) and Comment. If GE either rejected or revoked acceptance of the model, the query becomes whether those duties imposed upon the buyer by the Code were fulfilled.
small gas purifier "qua goods." It is suggested here that the question of whether Dynamics gratuitously delivered a functional piece of sophisticated machinery to GE in hopes of inducing the sale of a larger version is, again, a question of fact involving the intent and understanding of the parties. It is also proposed that Dynamics' counterclaim would bear greater weight if it were based explicitly upon GE's use, or future use, of Dynamics' "secret process." Such a claim might sustain injunctive, rather than contractual, relief in an appropriate court.

In summary, analysis of the General Electric decision reveals its lamentable simplicity and inexplicable indifference to applicable Code provisions. It is tellingly significant that the court, in its terse dismissal of Dynamics' "sale by sample" contention, not so subtly suggests that the small gas purifying machine is a "model," not a "sample." Had the court been operating within the conceptual framework of the Code, such a distinction would not have been made.

Several conclusions are inescapable. First, substantive contractual and warranty issues raised by this case fall well within the purview of the Uniform Commercial Code. Interpretative use of pertinent Code provisions, while enhancing the cogency and authority of the opinion, might serve the same ultimate end of avoiding the contract, if the disposition of the court is resolute. Conversely, Code provisions, properly construed, might materially alter the outcome of the case. Second, the court's limited reading of the parol evidence rule is suspect. Its strict construction is reminiscent of pre-Code case law and fails to recognize the Code's liberalized translation of that hoary and controversial legal axiom. Third, if exclusionary use of the parol evidence rule is deemed unduly harsh and inappropriate under Section 2-202, then sustenance of summary judgment for GE by the court is indefensible. "Genuine issues of material fact" were not accorded recognition, much less adjudication. Fourth, and finally, the court's limited use of the Code is, on one hand, unaccountable and, on the other, misleading. In light of factors such as Massachusetts' early enactment of the Code, the level of the court, and the resources of the parties, legal and otherwise, the conspicuous absence of Code-oriented debate defies explanation. The resultant decision is a potential source of future and unnecessary confusion in an area well covered by the Uniform Commercial Code.

Richard Innis

§7.2. Assignment of commercial lease: Provision relieving assignee of lessor's obligations: Noblett v. General Electric Credit Corp. General Electric Credit Corporation (GECC) took assignment of a lease by which Noblett had rented eight bowling pin set

§7.2. 1 400 F.2d 442 (10th Cir. 1968), petition for rehearing denied, 400 F.2d 448, cert. denied, 393 U.S. 935 (1968), rev'd 268 F. Supp. 984 (W.D. Okla. 1967).
§7.2 UNIFORM COMMERCIAL CODE

The Lessor may assign all its right, title and interest under this lease including the payments due hereunder, but the assignee shall not be held responsible for any of the lessor's obligations. The obligations of the lessee shall, however, continue in full force and effect.

Noblett subsequently defaulted on the lease and assignee GECC sued to recover the accelerated balance due. In his answer, Noblett raised among other defenses that of failure of consideration by reason of alleged breaches of express warranty against defects and implied warranty of fitness, and non-fulfillment of the lessor's obligations to furnish training and advertising assistance. GECC moved for summary judgment contending that in accordance with the terms of the assignment clause, Noblett had agreed not to assert any defenses against an assignee, as authorized by Section 9-206 of the Uniform Commercial Code. The Federal District Court for the Western District of Oklahoma, applying Massachusetts law in accordance with a provision of the lease, agreed that Noblett had thereby waived the pleaded defenses as against the assignee and entered summary judgment for GECC.

The United States Court of Appeals for the Tenth Circuit reversed and HELD: The clause in question did not operate as a waiver of defenses under Section 9-206(1) of the Code since its sole purpose was to relieve an assignee of any affirmative duty to fulfill the lessor's obligations. In support of its interpretation the court referred to Section 2-210(4) of the Code which, absent language or circumstances to the contrary, imposes upon the assignee of a contract the affirmative duties of the assignor. GECC petitioned for a rehearing en banc contending that a provision of Article 2 of the Code had been misinterpreted by the appellate court as governing an Article 9 secured transaction and that the clause in question should have been interpreted as a waiver of defenses against an assignee in accordance with Section 9-206(1) of the Code. Following the court's denial of its petition, GECC petitioned the United States Supreme Court for a writ of certiorari. Certiorari was denied.

The opinion of the court of appeals raises several interesting questions regarding both the relationship between Article 9 and Article 2 of the Uniform Commercial Code and the application of Article 2 sales

---

2 All references to the Code refer to the 1962 Official Text, unless otherwise indicated. The UCC was enacted as Chapter 106 of the Massachusetts General Laws. Section numbers in the two documents are identical.
4 Noblett v. General Electric Credit Corp., 400 F.2d at 446.
5 Id. at 448.
6 393 U.S. 985 (1968).
principles to a transaction involving a lease. Consideration of these questions necessarily begins with an examination of the Code provisions applicable to the case. Section 9-206(1) of the Uniform Commercial Code, under which GECC sought to establish the waiver of defenses, provides in part:

(1) Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by the assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3).

The district court, in holding that the assignment clause excused GECC from any responsibility for the omissions complained of by Noblett, seemed firmly convinced that the portion of the assignment clause which stipulated that "assignee shall not be held responsible for any of the lessor's Bowl-Mor's obligations" precluded Noblett from raising nonfulfillment of any of Bowl-Mor's "obligations" as a defense against GECC. In so interpreting the clause the court accorded it the effect of an express waiver of defenses against an assignee as allowed by Section 9-206(1) of the Code.

The court of appeals, however, injected an entirely new element into the case. In construing the clause as intended to relieve the assignee of the duty of fulfilling any of Bowl-Mor's obligations to Noblett, the court referred to Section 2-210(4) of the Code, which provides that:

An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

The court interpreted this provision of the Code to mean that:

"Whether the allegations in the answer and amendment thereto, to-wit: breach of warranty of fitness of the machines; disregard of the agreement to provide 'on-the-job training'; and failure to make allowance for advertising and sign, be technically designated as 'defense,' 'counterclaim' or 'set-off' and regardless of whether defendant seeks rescission of the contract or affirmance with damages to him because of the alleged breach, it is clear that all of the omissions complained of by him were obligations of Bowl-Mor, not plaintiff. It seems further to be clear from the contract that plaintiff is exonerated from responsibility for all of these complaints unless the contract provision allowing same be invalid." 268 F. Supp. at 986.
An assignment in general terms under the Uniform Commercial Code, and, hence, under present Massachusetts law, is an assignment of rights, and unless the language or the circumstances indicate the contrary, it is also a delegation of performance of the duties of the assignor and its acceptance by the assignee, constituting a promise by him to perform those duties.  

With regard to the lease provision in question, the court observed:

The provisions [sic] of the lease agreement which speaks in terms of obligations is peculiarly suited to an indication for the purposes of Section 2-210(4) that there was no "delegation of the performance of the duties of the assignor" or a "promise by him to perform those duties." Indeed, more apt language for this purpose could hardly be devised than was used in the lease agreement.

In its petition for rehearing, GECC contended that the court had interpreted Section 2-210(4) of the Code as applying to this lease transaction and that inasmuch as Article 2 of the Code governs only sales transactions, such an interpretation was erroneous. The primary basis for the court's decision, however, does not appear to be grounded in its suggestion that the purport of the clause in question was to avoid affirmative obligations theoretically imposed upon the assignee by Section 2-210(4). The case appears to turn on the court's reluctance to read the wording of the lease clause as a definite "waiver of defenses." Since this was so, the court declared "the rule continued operative that failure of consideration could be raised as a defense either against the assignee or the assignor . . . ." This reluctance was apparently occasioned by the fact that prior Massachusetts law, as enunciated in the case of Quality Finance Co. v. Hurley, established a "policy" in Massachusetts adverse to the enforcement of contract clauses purporting to be blanket waivers of defenses against assignees. Hence, the appellate court in Noblett felt that since Section 9-206 of the Code alters this established policy by explicitly permitting agreements not to assert any "claim or defense" against an assignee, any clause intending to do so should manifest a clear intention to waive defenses.

In responding to the petition for rehearing, the court could have emphasized this interpretation of the clause itself as the basis for its decision, thereby minimizing the effect of GECC's allegation that the reference to Section 2-210(4) blatantly contravened fundamental Code definitions and principles. Instead, the court again chose to refer to Section 2-210(4). The context of this reference is revealing:

... In other words, it is argued that "the application of Section 2-210(4) was erroneous" and would open all secured transactions to

8 Noblett v. General Electric Credit Corp., 400 F.2d at 446-447.
9 Id. at 446.
10 Id. at 447.
question by indicating that in the absence of specific negation the obligation of performance would be placed upon the security holder as a matter of course. It should have been enough to preclude such misunderstanding to quote, as we did, Section 2-210(4) which states among other things that there is a delegation of performance "unless the language or the circumstances (as in an assignment for security) indicated the contrary." [Emphasis added.] We did not refer to Section 2-210(4) to indicate that the "Sales" provisions of the Code necessarily governed Secured Transactions in the absence of language so providing but rather to demonstrate that waiver of affirmative performance is not the same as waiver of defenses for non-performance by a party to the original contract.12

A close reading of this excerpt discloses some intriguing ambiguities. In response to GECC's objection that the court had erred in applying Section 2-210(4) of the "Sales" Article of the Code to a "Secured Transaction" involving a lease, the court maintained that the quotation from Section 9-210(4) "should have been enough to preclude such misunderstanding . . . ." By this statement, the court could have meant any one of the following: (1) Section 2-210(4) does apply to the lease situation under consideration but does not impose obligations of performance upon this assignee because the court views the lease as having been assigned for security, thus clarifying any "misunderstanding" concerning the affirmative obligations of an assignee; or (2) Section 2-210(4) does not apply and was only referred to analogously since the court believed that a security interest governed by Article 9 was involved, thus clarifying any "misunderstanding" surrounding the court's purpose in referring to Section 2-210(4); or (3) Section 2-210(4) does apply to the lease before the court, but does not impose obligations of performance upon the assignee because the "waiver clause" in the lease served as adequate "language indicat[ing] the contrary . . . ." 13 that is, the assignor's affirmative obligations would not run with the assignment. This, again, clears up any "misunderstanding" concerning the affirmative obligations of an assignee.

It is interesting to note that the court emphasized the phrase "as in an assignment for security" which tends to support possibility (1). On the other hand, the next sentence of the opinion seems to declare that Section 2-210(4) was only invoked to demonstrate the difference between a waiver of affirmative performance and a waiver of defenses, thus supporting either possibility (2) or (3). The subtly ambiguous wording which gives rise to these possible interpretations of language in the opinion suggests that the court may have been choosing its words very carefully. Indeed, the court seems to have deliberately avoided issuing a clear statement regarding the applicability or nonapplicability of the

12 Noblett v. General Electric Credit Corp., 400 F.2d at 448.
13 See UCC §2-210(4).
sales provisions of the Code to the commercial lease under consideration. This ambiguity, if intentional, may have been influenced by the tendency on the part of a number of courts to treat the burgeoning practice of leasing goods, equipment, and vehicles as essentially analogous to sales and to apply sales principles in cases involving such leases.14 These courts have doubtless been influenced by a number of authorities who have long been urging this result15 and, perhaps, by certain language of the Code itself which points in that direction.16 Initially, the decisions taking this approach were founded upon a bailment principle of implied warranty of fitness for intended purposes which can be traced to the common law. One of the first American decisions adopting this principle was Hoisting Engine Sales Co. v. Hart,17 a case involving a lease of construction equipment. The court, after tracing the principle of implied warranty of fitness in bailments through numerous English and American precedents, adopted what it stated was the English view as codified at that time in 1 Halsbury’s Laws of England §1117:18

... The owner of a chattel which he lets out for hire is under an obligation to ascertain that the chattel so let out by him is reasonably fit and suitable for the purpose for which it is expressly

14 See Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, 951, 428 S.W.2d 46, 51 (1968) (concerning the proliferation of leasing establishments and treating the long-term lease of an ice machine as “analogous to a sale” in applying breach of implied warranty provisions of the Code); Cintrone v. Hertz Truck Leasing and Rental Serv., 45 N.J. 454, 450, 212 A.2d 769, 777 (1965) (taking judicial notice of the growth of the business of leasing vehicles and applying common law sales principles of breach of warranty to a truck rental); Farnsworth, Implied Warranties of Quality in Non-Sales Cases, 57 Colum. L. Rev. 653 (1957) (noting the boom in enterprises which thrive on the rental of everything from automobiles and floor waxers to linens and diapers, and urging the extension of implied warranties of fitness to leasing situations).

15 See, e.g., Duesenberg and King, 3 Sales & Bulk Transfers Under the U.C.C. §7.01[2][b] (1966) (urging extension of implied warranty of merchantability to bailments and leases); Willier and Hart, Forms and Procedures Under the U.C.C. §12.02[1] (1969) (urging the analogous application of express and implied warranty provisions of the Code to leases of goods); Farnsworth, note 14 supra, at 673-674; See also, Note, The Uniform Commercial Code As a Premise for Judicial Reasoning, 65 Colum. L. Rev. 880, 891-892 (1965) (predicting application of UCC §2-302 beyond sales since the problem of unconscionability is not confined to sales); Note, Unconscionable Sales Contracts and the Uniform Commercial Code, Section 2-302, 45 Va. L. Rev. 583, 590-591 (1959) (commenting on potential for application of §2-302 beyond sales).

16 See UCC §2-102 (generally defining the scope of Article 2 as applying to “transactions in goods”); Comment 2 to UCC §2-315 (indicating that warranties could be applied to non-sales transactions “such as in the case of bailments for hire”); See also, Hawkland, A Transactional Guide to the Uniform Commercial Code 90 (1964) (reference to Comment 2 to §2-315 as suggesting application beyond strictly sales); The Uniform Commercial Code As a Premise for Judicial Reasoning, note 15 supra, at 887.

17 237 N.Y. 50, 142 N.E. 342 (1923).

18 See the modern equivalent of this provision in 2 Halsbury’s Laws of England §237 (3d ed. 1953) (citing English cases from as early as 1843).
let out, or for which, from its character, he must be aware it is intended to be used; his delivery of it to the hirer amounts to an implied warranty that the chattel is in fact as fit and suitable for that purpose as reasonable care and skill can make it.\(^{19}\)

A later case, *Motion Pictures for T.V. v. North Dakota Broadcasting Co.*,\(^ {20}\) involving the leasing of films for television, reviewed a number of the earlier cases and formulated the following principle: "By analogy the law applicable to sales contracts should logically apply to a contract of bailment and license such as the one under consideration in this case."\(^ {21}\)

The trend initiated in these earlier cases has continued to the present day. A significant modern case applying the common law principle of implied warranty in fitness to a rental contract is *Cintrone v. Hertz Truck Leasing and Rental Service*.\(^ {22}\) In essence, the *Cintrone* case held that public policy considerations require that the lessee as well as the buyer of automobiles be protected against injuries from defective component parts. The lengthy opinion examines numerous authorities and previous cases which had urged the propriety and desirability of affording warranty protections to lessees of goods. Since the *Cintrone* decision is based mainly upon the common law concept of implied warranty of fitness,\(^ {23}\) it is not basically a Code decision. However, in support of extending warranty coverage to leases, the opinion cites Comment 2 to Section 2-313 of the Uniform Commercial Code which states:

> [W]arranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire. . . .

In another case decided in the same year as *Cintrone*, the United States Court of Appeals for the District of Columbia invoked the common law principle of unconscionability to set aside the tells of a contract purporting to be a lease of household items. *Williams v. Walker-Thomas Furniture Co.*\(^ {24}\) involved a furniture company which utilized a lease form rather than a conditional sales contract in its sales to consumers. This "lease" purported to rent to the customer each item he had purchased for a stipulated monthly rental and further provided that when the total of these monthly "rental payments" equalled the cost of the items "leased," title would pass to the customer. The con-

\(^{19}\) 237 N.Y. at 37, 142 N.E. at 344.
\(^{20}\) 87 N.W.2d 781 (N.D. 1958).
\(^{21}\) Id. at 784. See Annot.: Warranties in connection with leasing or hiring of chattels, 68 A.L.R.2d 850, 854; 9 Williston on Contracts §1041 (3d ed., Jaeger, 1967).
\(^{22}\) 45 N.J. 434, 212 A.2d 769 (1965).
\(^{23}\) See text at note 18 *supra*.
\(^{24}\) 550 F.2d 445 (D.C. Cir. 1965).
tract contained another intricately worded provision, the primary effect of which, in the words of the Court, was:

... to keep a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated. As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings.\(^{26}\)

The plaintiffs in *Williams* had defaulted on their payments under such contracts and the defendant furniture company sought to repossess every item purchased by the plaintiffs during the five years previous to the default. In striking down the "leases" as unconscionable, the court invoked the common law concept of unconscionability. The Uniform Commercial Code, which had recently been enacted by Congress, was not in force in the District of Columbia when the leases in question were executed. The court, however, referred to the unconscionability provision of the Code to support its decision, commenting:

\[\text{We consider the Congressional adoption of Section 2-302 persuasive authority for following the rationale of the cases from which the section is explicitly derived. Accordingly, we hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.}\(^{26}\)

Other cases have progressed beyond applying common law principles to lease contracts and have specifically applied various sale provisions of the Code to such transactions. Such a case was *Electronics Corporation of America v. Lear Jet Corp.*\(^{27}\) involving the lease of an aircraft. The lease contained the following provision:

\[\text{Lessor itself makes no express or implied warranties or representations as to any matter whatsoever including, without limitation, the condition of the aircraft, its merchantability or its fitness for any particular purpose.}\(^{28}\)

The lease had been assigned to an insurance company which has provided financing for the purchase of the aircraft. This lease, like the lease in the *Noblett* case, also provided that it be interpreted in accordance with Massachusetts law. The plaintiff moved for summary judgment on the ground that the disclaimer clause in the lease barred the defenses raised by the defendant. In denying the motion, the New York Court of Appeals cited G.L., c. 106, §2-302, observing:

\[^{25}\text{Id. at 447.}\]
\[^{26}\text{Id. at 449.}\]
\[^{27}\text{55 Misc. 2d 1066, 286 N.Y.S.2d 711 (1967).}\]
\[^{28}\text{Id. at 1067, 286 N.Y.S.2d at 713.}\]
... It is clear that under Massachusetts law a claim that a contract is unconscionable due to extraordinary limitation of warranties on the part of one contracting party will preclude the granting of summary judgment.29

A comment accompanying the abstract of the case in the Uniform Commercial Code Report-Digest notes with approval that the court expressed no reservations about applying Section 2-302 of the Code to a lease transaction. While it is unclear from the report of the case whether the lease was specifically assigned to the financing insurance company as security for the financing or for some other purpose,80 it is possible that the court in Lear was applying Section 2-302 of the Code to a provision in a lease which was assigned as security.

_Sawyer v. Pioneer Leasing Corp._81 involved the lease of an ice machine. The lessee, an independent grocer, had been given to understand that he was purchasing the ice machine. When he asked why he was being requested to sign a lease the salesman explained that “it was just like buying a car; after you make so many payments, it is your box.”82 When the machine malfunctioned and the lessee’s repeated attempts to have the lessor remedy the problem proved fruitless, the lessee stopped making payments and a lawsuit by the lessor followed. The lower court granted a directed verdict for the lessor based on a clause in the lease which disclaimed all warranties and declared that the machine was delivered “at the sole risk” of the lessee. The appellate court reversed, holding that the disclaimer clause was invalid for failure to comply with Section 2-316(2) of the Code which requires that language intended to disclaim implied warranties be “conspicuous”: “We are holding that Section [2-316](2) is applicable to leases where the provisions of the lease are analogous to a sale.”83 In a recent New York Case, _Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House_,84 a five-year equipment lease was held to constitute a transaction governed by Article 2 of the Uniform Commercial Code insofar as its warranties were concerned. The court commented in this case:

29 Id. at 1068, 286 N.Y.S.2d at 713.
80 See 55 Misc. 2d at 1067, 286 N.Y.S.2d at 712 where the court states: “Chandler [Leasing Corporation] obtained financing of this agreement from an insurance company to which the lease was assigned and the aircraft mortgaged as security.” It appears unclear from this statement whether the phrase “as security” applies only to the aircraft mortgage or also relates back to the lease. The construction of the sentence tends more to support the interpretation that the lease was intended as security.
81 244 Ark. 943, 428 S.W.2d 46 (1968).
82 Id. at 946, 428 S.W.2d at 48.
83 Id. at 957, 428 S.W.2d at 54. But see, dissent of Justice Fogleman, Id. at 958, 428 S.W.2d at 54, and discussion in text accompanying note 51 infra (expressing reservations concerning the majority’s failure to enunciate specific criteria for the determination of when a lease is “analogous to a sale”).
In view of the great volume of commercial transactions which are entered into by the device of a lease rather than a sale, it would be anomalous if this large body of commercial transactions were subject to different rules of law than other commercial transactions which tend to the identical economic result.\footnote{Ibid.}

In denying the plaintiff’s motion for summary judgment, predicated upon a purported disclaimer of warranties in the lease, the court ruled that the alleged disclaimer did not exclude implied warranties of fitness and merchantability since it failed to employ specific language to this effect as required by Section 2-316. In holding that Section 2-316 applied to the lease, the court stated:

... A consideration of the applicable law, and of economic reason, leads this court to conclude that Article 2 of the Uniform Commercial Code, to the extent that its provisions can be considered applicable, governs the equipment lease before the Court.\footnote{Ibid.}

Decisions such as these, particularly decisions which extend the provisions of Article 2 of the Code to lease transactions, invariably evoke strenuous objections from the unsuccessful party. In the Noblett case, for example, GECC vigorously protested the appellate court’s reference to Article 2 of the Code in construing the purported “waiver of defenses” clause in the lease. No doubt equally vigorous objections to any application of Article 2 can be expected on remand.

The arguments in support of such objections generally focus upon the fact that leases per se are not expressly governed by the Code. The scope of Article 2 is broadly stated in Section 2-102 as encompassing “transactions in goods,” but this general assertion is substantially restricted by Section 2-106(1) which provides: “In this Article unless the context otherwise requires ‘contract’ and ‘agreement’ are limited to those relating to the present or future sale of goods.” Section 2-106(1) then proceeds to define a “sale” as consisting of “the passing of title from the seller to the buyer for a price.” (Emphasis added.) Since no passing of title is contemplated in a lease transaction, Article 2 appears, at least on its face, to be inapplicable. The scope of Article 9, on the other hand, is defined in Section 9-102(1)(a) as applying to:

... any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, accounts or contract rights. [Emphasis added.]

“Chattel paper” is defined in Section 9-105(1)(b) of the Uniform Commercial Code: “‘Chattel paper’ means a writing or writings which evidence both a monetary obligation and a security interest in or a
lease of specific goods." Inasmuch as this definition includes leases which evidence a monetary obligation, it is clear that it is possible to assign a lease as security. The Code makes it clear, however, that this must be the specific purpose of the assignment. Code Section 1-201(37) provides in pertinent part:

... Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest"... Whether a lease is intended as security is to be determined by the facts of each case. . . .

Thus, unless a given lease is intended to create a security interest, it would seem that Article 9 does not apply to the transaction. In the Noblett case there is no express recognition, by either the trial court or the appellate court, that the lease for the eight pin setting machines was assigned to GECC for security. The lease could have been assigned outright to GECC on the basis of a sale of chattel paper, a practice not uncommon in commercial circles. In this case, Section 9-102(1)(b) would seem to apply. This section provides:

... [T]his Article applies so far as concerns any personal property and fixtures within the jurisdiction of this state... (b) to any sale of accounts, contract rights or chattel paper.

[Emphasis added.]

Since, as indicated above, a lease is "chattel paper," this provision would appear to place the outright sale of a lease within the ambit of Article 9. Yet, unless the lease was intended to create a "security interest" such a result would seem to contravene the criterion of "intent of the parties," enunciated in the definition of a "security interest" which appears in Section 1-201(37). While on the one hand it might be argued that treating the sale of a straight lease as a transaction governed by Article 9 flies in the face of this basic definition, on the other hand the proponent of such a view must reconcile his position with the 1966 amendment of Comment 2 to Section 9-102 which states:

Commercial financing on the basis of accounts, contract rights and chattel paper is often so conducted that the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered by subsection (1)(b) whether intended for security or not, unless excluded by Section 9-103 or Section 9-104. The buyer then is treated as a secured party and his interest as a security interest.\(^\text{97}\)

In this situation it would appear very difficult to avoid the conclusion that the sale of a lease is subject to Article 9. On the other hand, it

\(^{97}\)See 1 Coogan, Hogan and Vagts, Secured Transactions Under the U.C.C. §5.08[2][d] (1967).
is possible that the arrangement between Noblett and Bowl-Mor was similar to the arrangement regarding the ice machine in the Sawyer case. Retention of title to the pin setters by Bowl-Mor could have been intended by the parties to be in the nature of a "security interest," with a tacit agreement that upon expiration of the lease Noblett would either automatically or upon payment of a nominal "purchase price" obtain title to the pin setters. In this circumstance it is arguable that in accordance with the "lease-sale" analogy applied in Sawyer and the earlier cases discussed above, the "security interest" retained by Bowl-Mor would be in the nature of a "purchase money security interest." Code Section 9-206, under which GECC sought to validate the alleged waiver of defenses clause provides in subsection (2):

When a seller retains a purchase money security interest in goods, the Article on Sales (Article 2) governs the sale and any disclaimer, limitation or modification of the seller's warranties. [Emphasis added.]

It would seem that extending the "lease-sale" analogy to its logical conclusion would justify applying the provisions of Article 2 to waiver or disclaimer clauses in leases "analogous to sales."

In view of this consideration it is possible that in looking to Section 2-210(4) for assistance in interpreting the alleged "waiver of defenses" in the lease, the appellate court was not so much applying the "sales" provisions of the Code to a secured transaction, as contended by GECC, as it was applying the "sales" provisions of the Code to the lease itself, thereby treating the transaction, for all practical purposes, as a "sale." Assuming this to have been the Court's approach, the reference to Section 2-210(4) in determining the intent and effect of the clause in question was entirely logical. While, of course, Section 2-210(4) indicates that in assignments for security the assignee does not assume the affirmative obligation of the assignor, the court, as indicated above, at no point conceded that the assignment to GECC was "for security." Viewed in this light, the Noblett decision may implicitly be setting the stage for continuation of the current judicial tendency to apply sales provisions and protections to leases "analogous" to sales.

The developing trend toward extending the coverage of both common law and Code concepts of unconscionability to lease transactions may also have particular significance when Noblett is analyzed in terms of present Massachusetts law regarding the validity of waiver of defense clauses. In Quality Finance Co. v. Hurley, the Supreme Judicial Court considered a conditional sales contract including a clause which purported to waive defenses against assignees of the contract. Noting a policy in Massachusetts, expressed in the provi-

88 See UCC §9-107.
sions of General Laws, Chapter 231, Section 5, against the enforcement of such "blanket" waivers of defenses, the Court held that such a clause in a sales contract was invalid. The district court in Noblett, while pointing out that it did not have access to the Massachusetts statutes to verify its opinion, concluded that with the adoption of the Uniform Commerical Code and Section 9-206 thereof, General Laws, Chapter 231, Section 5 was effectively repealed and that waivers of defenses were now expressly approved by statute in Massachusetts. 89 On this particular point a New York court in General Electric Credit Corp. v. Beyerlein 40 took issue with this conclusion by the district court in Noblett. The court in Beyerlein observed:

... I am unable to agree with this conclusion of the District Court. Contrary to the information apparently before that court, although the Massachusetts U.C.C. did not become effective until after the decision of Quality Finance Company, it was enacted in 1957 prior to the decision and is referred to in a footnote appearing at page 154. Although at the time of the enactment of the Code many existing Massachusetts statutes were repealed, an examination of the Annotated Laws of Massachusetts, including the 1966 Cumulative Supplement, does not reveal that Section 5 of Chapter 231 of the General Law has been repealed or amended. My limited facilities for research of Massachusetts law have failed to disclose any subsequent holding contrary to that of Quality Finance Company and I have no reason to assume that the Supreme Judicial Court of Massachusetts would hold differently today. 41

A comment accompanying the abstract of the district court proceedings in the Noblett case in the Uniform Commercial Code Reporter-Digest has also criticized the district court's conclusion that waivers of defenses are now expressly approved by statute in Massachusetts, as being too broad in scope, since the Hurley case involved a consumer purchasing an automobile and Section 9-206 does not purport to alter existing non-Code law relating to consumers.

It would appear that Code Section 9-206 is confined by the scope of Article 9 to "secured transactions," and that the policy in Massachusetts against the enforcement of such clauses continues except where specifically altered by statute. It is noted in this connection that, as indicated by the court in Beyerlein, Chapter 231, Section 5 was not expressly repealed when the Code was adopted by the Massachusetts legislature. 42 Hence, waivers of defenses against assignees may not be enforceable in Massachusetts when contained in a non-

41 Id. at 726-727, 286 N.Y.S.2d at 353.
42 Extensive research of the Massachusetts statutes has failed to reveal any indication that G.L., c. 231, §5, has been repealed.
§7.2 UNIFORM COMMERCIAL CODE

negotiable chose in action except when: (1) the transaction involves nonconsumer goods; and (2) the assignment with respect to which enforcement is sought is intended as an assignment for security.43

Assuming these to be the prerequisites for enforcement of a waiver clause, a purported waiver of defenses under any other circumstances could be unconscionable as a matter of law. Suppose in the Noblett case, for example, the waiver of defenses clause had been clearly worded and the lease was neither sold nor otherwise intended to create a security interest. If the court were to treat the original lease arrangement as analogous to a sale, the waiver clause in the lease could be vulnerable to attack on the grounds that it is prima facie unconscionable under present Massachusetts law.44

In contrast to its negative prohibitions, such as that against unconscionable clauses or contracts, an affirmative requirement of “good faith” obtains throughout the Uniform Commercial Code. Section 1-203 of the Code provides that: “Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”

Section 9-206(1), under which GECC sought to establish a waiver of defenses on the part of Noblett, provides that such waivers shall be enforceable by an assignee: “who takes his assignment for value in good faith and without notice of a claim or defense . . . .” (Emphasis added.)

It seems appropriate at this point to examine the current increase in the popularity of chattel leases in the light of the good faith principle of the Uniform Commercial Code. The theoretical inapplicability of the express warranty, implied warranty, unconscionability and other protective provisions of the Code could induce a merchant interested in evading these strictures to adopt the use of a lease form as opposed to a sales contract.45 The simple addition of a parol assurance that upon the expiration of the lease the lessee would be allowed to purchase the chattel for a nominal sum could satisfy the lessee’s reluctance to enter into such a lease transaction.46 For the unscrupulous merchant, a commercial lease, under which the rental payments might ultimately exceed by several times the actual value of the chattel being leased, could also provide a convenient device

43 Including, of course, sales of leases, which are considered as creating a security interest, whether or not one was intended. See UCC §9-102(1)(b) and text at note supra.

44 Unless the court treats the lease as analogous to a sale, there would seem to be no basis upon which the unconscionability provisions of the sales article of the Code could be invoked.

45 There is also a potential tax benefit for the commercial lessee. Under Int. Rev. Code of 1954, §162(a)(2), sums expended for rentals of equipment in connection with a trade or business are deductible as expenses. On the other hand, if the equipment is purchased, it must be capitalized and only annual depreciation is deductible. See Int. Rev. Code of 1954, §167(a).

for circumventing the usury laws. Indeed, this potential avenue of abuse was perceived in the *Pioneer Leasing* case. The court commented:

... It is possible that similar agreements could be used to cloak usurious charges, i.e., a transaction which was actually a sale could be set up as a lease in order to enable charges to be made that would, under a credit sale, constitute usury.47

It might also be noted that GECC as assignee has litigated at least two other lawsuits based upon similar leases of bowling pin setting machines in the past few years.48 In both cases Bowl-Mor was the assignor and the defenses raised included defects in the pin setting machines and nonperformance by Bowl-Mor. In both cases GECC sought to preclude these defenses on the basis of the standard waiver of defenses clause in the lease. The leases were both assigned shortly after their execution and in one case the defendant alleged that GECC was the alter ego of Bowl-Mor.49 It might further be noted that Bowl-Mor went bankrupt after Noblett's lease was assigned to GECC. In the event that Noblett was given assurances regarding training, advertising assistance or future repair service on the pin setting machines, these circumstances might call into question Bowl-Mor's good faith in offering such assurances.

If *Noblett* is the implicit harbinger of further expansions in the area of applying "sales" concepts to commercial leases manifesting the essential attributes of a sale, questions regarding the ultimate limits of this sort of "analogizing" appear certain to arise. If the full warranty protections of Article 2 of the Code are to be extended to leases, it would appear that any clause in a lease purporting to waive these protections would have to defer to the provisions of Section 2-316 of the Code. This section requires that the language intended to exclude such protections be "conspicuous" and, in the case of an implied warranty of fitness, couched in "language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty... . . . ."] Section 2-316 further provides that language intended to exclude or modify the implied warranty of merchantability or any part of it must specifically mention merchantability. Even if not fully extended to cover leases, Section 2-316 should at least suggest minimum standards of fairness for language intended to modify or exclude common law implied warranties in leasing transactions.

At least one jurist has recently expressed the fear that further application of sales principles to commercial leases will give rise to

---

47 Sawyer v. Pioneer Leasing Corp., 244 Ark. at 958, 428 S.W.2d at 54.
serious difficulties. Dissenting in the *Sawyer* case, Justice Fogleman of the Supreme Court of Arkansas opined that in applying the sales provisions of the Code to a lease the court was “acting legislatively”:

... I fear the problems that will arise in the future when the application of other sections of the Commercial Code to leases is sought. The draftsmen of the Code did not have in mind that the provisions thereof would be extended to leases, and it may well be that the application of other sections will be somewhat clumsy. See, e.g., sections 85-2-701 to 85-2-725, both inclusive.50

The apprehension expressed by Justice Fogleman is, perhaps, symptomatic of the uncertainty which presently pervades this area of the law. The *Noblett* case is no exception. While the court of appeals has ruled that Noblett did not waive his defenses, the ultimate implications of that ruling are far from clear. It remains to be seen whether the lower court will follow the recent trend of treating certain leases as sales and will allow sales defenses such as unconscionability or breach of express or implied warranty to be raised against the lease. Even if this approach is adopted by the court, the extent to which it might be adopted and its specific ramifications are presently imponderable. In addition, there remains the question, which *Noblett* cannot at this point resolve, of precisely what effect the adoption of Section 9-206 has had upon the status of clauses purporting to waive defenses against assignees in Massachusetts. Is there, as has been suggested, a continuing policy in Massachusetts adverse to the enforcement of such waivers even in *non-consumer* situations if the transaction is not “secured”? The handling of the *Noblett* case on remand should provide an interesting study of the judiciary’s struggle to embody in its decisions the objectives of flexibility, adaptability and expansion set forth in Section 1-102 as the underlying purposes of the Code:

1. This Act shall be liberally construed and applied to promote its underlying purposes and policies.
2. Underlying purposes and policies of this Act are:
   a. to simplify, clarify and modernize the law governing commercial transactions.
   b. to permit the continued expansion of commercial practices through custom, usage and agreement of the parties.

It would seem that these objectives, and indeed the spirit of the Uniform Commercial Code itself, more than justify the recent trend to accord warranty and other sales protections to lease transactions. Noblett should at least be permitted to raise any legitimate defenses he might have arising out of his transactions with the now bankrupt Bowl-Mor company. Indeed, there seems to be no substantial reason

50 *Sawyer v. Pioneer Leasing Corp.*, 244 Ark. at 959, 428 S.W.2d at 55.

http://lawdigitalcommons.bc.edu/asml/vol1969/iss1/10
156 1969 ANNUAL SURVEY OF MASSACHUSETTS LAW §7.2

for refusing to accord to a lessee those protections to which he would have been entitled had he simply signed a different form of contract. Such a refusal would elevate form over substance and would thwart a fundamental principle, avowedly included in the Code by its drafters:

This Act is drawn to provide flexibility so that since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the court in the light of unforeseen and new circumstances and practices.51

The practicability of this principle of expansion may be tested to endurance, however, as interpreters of the Code struggle, in cases such as Noblett, to adapt its provisions to a burgeoning leasing industry which deals almost exclusively in transactions which the Code was not specifically designed to regulate.

F. ANTHONY MOONEY

51 UCC §1-102, Comment 1.