

# 1998 SURVEY OF THE UNIFORM COMMERCIAL CODE IN INDIANA

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## INTRODUCTION

This Article summarizes and comments upon recent developments of particular interest that affect the Uniform Commercial Code (“UCC”) in Indiana.<sup>1</sup> In addition to Indiana state and federal cases, the discussion includes cases that the United States Court of Appeals for the Seventh Circuit has decided that originated in federal district courts in other states within the circuit. Although the latter cases will involve those states’ application of the UCC, the decisions will control the federal district courts in Indiana on UCC issues that Indiana courts have not yet addressed.

## I. ARTICLE 2—SALES

### *A. Seller’s Remedy of Specific Performance; Insecurity, Assurances of Performance, and Anticipatory Repudiation (Sections 2-609; 2-610)*

In *Jay County Rural Electric Membership Corp. v. Wabash Valley Power Ass’n*,<sup>2</sup> which is likely to be a leading case, the Indiana Court of Appeals stated that specific performance may be available to a seller as a remedy for a buyer’s breach, notwithstanding that the UCC is silent on the matter.<sup>3</sup> In 1977, the rural electric company became a member of the power association cooperative and agreed to purchase from the cooperative all the electricity the electric company would require for a term ultimately extended through 2028. The federal predecessor to the Rural Utilities Service (“RUS”) developed this type of “all-requirements” as the principal collateral for billions of dollars in loans to electrical cooperatives nationwide. As the court described: “The all-requirements contract between [the cooperative] and each of its members allows the members to develop, purchase, and secure generation and transmission resources without having to provide individual guarantees for the financing extended [by RUS] to [the cooperative].”<sup>4</sup> The rates the cooperative charged to

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1. IND. CODE §§ 26-1-1 to -10 (1998). Unless the Indiana version of the UCC differs from the Official Draft of the UCC, the citation form used will be the generic form from the Official Draft rather than the full Indiana citation form, e.g., section 2-201 rather than section 26-1-2-201. The UCC, as enacted in other states, will also be cited in this generic form.

2. 692 N.E.2d 905 (Ind. Ct. App. 1998).

3. *Id.* at 913.

4. *Id.* at 908. This historical background of these all-requirements contracts is more fully described in *Tri-State Generation & Transmission Ass’n v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986). On appeal after remand, the court ruled that the sale of all of the assets of a member power company to a non-member would result in a change of the member’s requirements

its members are set by a board consisting of one representative from each of the members.

In late 1996 and early 1997, the electric company sent notices to the cooperative that it would not nominate a representative to the board, was withdrawing from membership, and was terminating its all-requirements contract. The electric company then filed an action for declaratory judgment that its withdrawal and termination were valid and also signed a contract with another wholesale supplier for its requirements of electricity at lower prices than those set by the cooperative.<sup>5</sup> The cooperative responded with a motion for preliminary injunction that would require the electric company to continue purchasing its requirements of electricity from the cooperative at least until final judgment, in effect, granting specific performance temporarily. The trial court granted the preliminary injunction and granted the electric company leave to take an interlocutory appeal.<sup>6</sup>

1. *The Availability of Specific Performance.*—The issue of whether specific performance is available to a seller as a remedy for the buyer's breach is directly intertwined with two of the four requirements for obtaining a preliminary injunction: inadequate remedy at law and reasonable likelihood of success on the merits, the other two being balance of harm and the public interest.<sup>7</sup> Specific performance is traditionally an extraordinary remedy, and equitable in nature.<sup>8</sup> If money damages can suffice, neither an injunction nor specific performance is appropriate.<sup>9</sup> With respect to the likelihood of success on the merits, if the court were to conclude that specific performance is not available to a seller of goods, the request for preliminary injunction would fail.

The UCC expressly mentions the remedy of specific performance in only two instances and then only in the context of a buyer's remedies: first, in section 2-711, the index of the buyer's remedies, which lists specific performance as available "in a proper case,"<sup>10</sup> and, second, in section 2-716, which is captioned, "Buyer's Right to Specific Performance or Replevin," and states simply: "(1) Specific performance may be decreed where the goods are unique or in other

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of power under the all-requirements contract and constitute a violation of the contract. *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 874 F.2d 1349, 1360 (10th Cir. 1989). The court of appeals vacated the district court's denial of a permanent injunction against the sale and remanded for a new trial to determine if money damages would be adequate. *Id.* at 1364. If money damages were not calculable, the court stated that the injunction against the sale should be made permanent. *Id.* The issue of specific performance under UCC section 2-716 was not discussed.

5. See *Jay County Rural Elec. Membership*, 692 N.E.2d at 908.

6. See *id.*

7. See *id.* at 909.

8. See generally Harold Greenberg, *Specific Performance Under Section 2-716 of the Uniform Commercial Code: "A More Liberal Attitude" in the "Grand Style"*, 17 NEW ENG. L. REV. 321 (1981-1982).

9. See *id.*

10. U.C.C. § 2-711(2)(b).

proper circumstances.”<sup>11</sup> The only remedy expressly available to a seller that approaches specific performance is the seller’s right to recover the price of the goods, section 2-709. This remedy has sometimes been called “a specific performance remedy,” apparently because, in most cases, the seller’s only interest is in compelling the buyer to perform by paying for the goods.<sup>12</sup> As White and Summers state: “The action for the price is, of course, the analogue to the buyer’s action for specific performance.”<sup>13</sup>

In *Jay County*, the court of appeals agreed with the trial court that in an appropriate case, a seller may be entitled to specific performance.<sup>14</sup> In reaching its decision, the court relied on the reasoning of *Central Illinois Public Service Co. v. Consolidated Coal Co.*,<sup>15</sup> which was quite similar in its facts. In *Consolidated Coal*, the electric company had agreed in 1962 to buy from the coal company all of its requirements of fuel for one of its generating stations; the contract was ultimately extended through 1995. One aspect of the complex litigation between the parties was the coal company seller’s request for an order of specific performance against the electric company buyer. In reaching its decision in favor of the seller, the court referred to several pre-UCC cases in which the facts supported a decree of specific performance in favor of a seller.<sup>16</sup> The court noted that section 2-703 is not an exclusive list of seller’s remedies,<sup>17</sup> and that, although the seller’s action for the price pursuant to section 2-709 may equate an action for specific performance, a court may award an order of specific performance to a seller in unusual circumstances.<sup>18</sup> The circumstances in *Consolidated Coal* consisted of the contract between the parties, which contained many features of a joint venture, particularly because the power company station was located at the mouth of the mine, and the closure of the mine as a consequence of the contract termination would put hundreds of workers out of work.<sup>19</sup>

The Indiana Court of Appeals agreed with the *Consolidated Coal* court that while specific performance is not enumerated in the index of a seller’s remedies in section 2-703, neither is it prohibited as a remedy.<sup>20</sup> Further, the court noted

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11. *Id.* § 2-716(1).

12. *See* *Central Ill. Pub. Serv. Co. v. Consolidated Coal Co.*, 527 F. Supp. 58, 64-65 (C.D. Ill. 1981), *aff’d & remanded*, 673 F.2d 1333 (7th Cir. 1981); John E. Murray, Jr., *The Emerging Article 2: The Latest Iteration*, 35 DUQ. L. REV. 533, 611 (1997).

13. 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 7-2 n.2 (4th ed. 1995).

14. *Jay County Rural Elec. Membership*, 692 N.E.2d at 913.

15. 527 F. Supp. 58 (C.D. Ill. 1981), *aff’d & remanded*, 673 F.2d 1333 (7th Cir. 1981).

16. *Id.* at 65 (citing *United Fuel Gas Co. v. Columbian Fuel Corp.*, 165 F.2d 746 (4th Cir. 1948); *Allen W. Hinkel Dry Goods Co. v. Wichison Indus. Gas Co.*, 64 F.2d 881 (10th Cir. 1933); *Oklahoma Natural Gas Corp. v. Municipal Gas Co.*, 38 F.2d 444 (10th Cir. 1930)).

17. *Id.* at 64-65.

18. *Id.* at 65.

19. *Id.* at 64.

20. *Jay County Rural Elec. Membership*, 692 N.E.2d at 913.

that section 1-103 preserves principles of law and equity as supplemental to the UCC in the absence of a contrary provision.<sup>21</sup> In proper circumstances, where an award of money damages would not sufficiently protect the aggrieved seller, a decree of specific performance is appropriate.<sup>22</sup>

The *Jay County* court continued that the uniqueness of the interrelationship of the power association cooperative with its members, the relation of the cooperative with RUS, the length of the contract, as well as the probable inability of the electric company to pay huge but presently unquantifiable damages, justified the grant of the preliminary injunction (and might support a final judgment granting specific performance).<sup>23</sup>

The court's position is sound. Section 1-102 states that the UCC "shall be liberally construed and applied to promote its underlying purposes and policies," two of which are "to simplify, clarify and modernize the law governing commercial transactions; [and] to permit the continued expansion of commercial practices through custom, usage and agreement of the parties."<sup>24</sup> Further, the UCC's remedies "shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . ."<sup>25</sup> Taking these provisions together with section 1-103, and considering the preliminary findings of the insufficiency of money damages coupled with the irreparable harm to the cooperative, specific performance appears to be the only remedy that would achieve the goals that underlie the UCC.

The drafters of the revised Article 2 appear to agree. In the December 1993 draft, specific performance remained a buyer's remedy. In commenting on the draft's section 2-709, "Action for the Price," the reporter stated: "The current version of Article 2 says nothing about a seller's right to specific performance. This remedy is not displaced by Section 2-709 and, presumably, is still available under Section 1-103."<sup>26</sup> In the note to section 2-716, "Buyer's Right to Specific Performance or Replevin," the reporter stated:

The Drafting Committee agreed with the Study Group that specific performance should be available to the buyer if the parties have expressly agreed. . . . The Drafting Committee, however, rejected a proposal that similar language should be included for the seller. As it now stands, a seller's right to specific performance depends upon

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21. *Id.* UCC section 1-103 states: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." U.C.C. § 1-103.

22. *Jay County Rural Elec. Membership*, 692 N.E.2d at 913.

23. *Id.*

24. U.C.C. §§ 1-102(1), (2).

25. *Id.* § 1-106(1).

26. *Id.* § 2-709, Reporter's Notes, Note 3 (Dec. 21, 1993 Draft) (copy on file with the *Indiana Law Review*).

equitable principles not displaced by Article 2. See Section 1-103.<sup>27</sup>

The drafters have since changed their position. At least since 1996, the revised versions of Article 2 under consideration have authorized an award of specific performance to either the buyer or the seller.<sup>28</sup> By using the phrase “the agreed performance of the party in breach[,]”<sup>29</sup> new section 2-807 “recognizes that performance other than the goods may be unique.”<sup>30</sup> As the drafters observed in 1996: “A seller may obtain specific performance of the buyer’s agreement to accept and to pay for the goods in appropriate cases. This simply affirms what some courts have always done, especially in long term supply contracts.”<sup>31</sup> As one scholar states: “There are a number of cases, dating from almost a century ago to the present, in which a long-term supply contract has been specifically enforced because determination of damages was deemed too speculative.”<sup>32</sup>

Thus, it appears that, at least preliminarily, the order that the electric company continue to take its requirements from the cooperative is in accord with the philosophy underlying the UCC and the thinking of the experts involved in its revision. The cooperative still has the burden of proving that its remedy at law for money damages is inadequate, but that is a matter for the trial on the merits. If the cooperative can prove that this is one of the unusual cases in which money damages will not be an adequate remedy for the buyer’s breach, no good reason exists for the denial of the specific performance remedy.

2. *Insecurity, Assurances, and Anticipatory Repudiation.*—Another argument the electric company made in *Jay County* was that the power cooperative had repudiated the contract when the latter announced its desire to merge with another cooperative.<sup>33</sup> Although both cooperatives had adopted resolutions supporting the merger, at the time the electric company filed its

27. *Id.* § 2-716, Reporter’s Notes (Dec. 21, 1993 Draft) (copy on file with the *Indiana Law Review*).

28. *See id.* §§ 2-807 (May 1, 1998 Draft), 2-707 (Mar. 1, 1996 Draft), and the respective notes to each. *Id.* §§ 2-807 (May 1, 1998 Draft), 2-707 (Mar. 1, 1996 Draft), available in National Conference of Commissioners on Uniform State Laws, *Drafts of Uniform & Model Acts* (visited Mar. 25, 1998) <<http://www.law.upenn.edu/bll/ulc/ulc.htm>> [hereinafter *Draft Acts*]. The more recent of these sections states, in part:

A court may enter a decree for specific performance if the parties have expressly agreed to that remedy of the goods or the agreed performance of the party in breach of contract are unique or in other proper circumstances. Even if the parties expressly agree to specific performance, a court shall not enter a decree for specific performance where the breaching party’s sole remaining contractual obligation is the payment of money.

*Id.* § 2-807(a) (May 1, 1998 Draft), available in *Draft Acts*, *supra*.

29. *Id.* § 2-807 (May 1, 1998 Draft), available in *Draft Acts*, *supra* note 28.

30. *Id.* § 2-807, Note 1 (May 1, 1998 Draft), available in *Draft Acts*, *supra* note 28.

31. *Id.* § 2-707, Note 1 (Mar. 1, 1996 Draft), available in *Draft Acts*, *supra* note 28.

32. Gregory M. Travaglio, *Measuring Seller’s Damages for Breach of Long-Term Gas Purchase Contracts*, 14 E. MIN. L. FOUND. § 23.03[5] (1993).

33. *Jay County Rural Elec. Membership*, 692 N.E.2d at 910.

complaint for declaratory judgment, RUS had not yet approved the merger. In fact, RUS suspended the merger indefinitely due to concerns about the assignability of the all-requirements contracts of the cooperative's members, one of which was the subject of this lawsuit.<sup>34</sup> As the court noted, under section 2-610, when a party repudiates a contract anticipatorily, the other party may treat the repudiation as a breach and may seek damages, however, the repudiation "must be positive, absolute, and unconditional."<sup>35</sup> The court of appeals agreed with the trial court that factual questions remained as to whether the electric company had acted prematurely, whether the proposed merger was itself a repudiation, and whether the electric company simply wanted to get out of the contract for its own benefit and was using the proposed merger as a pretext.<sup>36</sup>

The electric company also argued, pursuant to section 2-609, that it had demanded adequate assurances of performance, either assuring that the merger discussions had ceased or that the cooperative would be able to perform.<sup>37</sup> The electric company claimed that the failure of the cooperative to give those assurances resulted in a breach that entitled the electric company to terminate the contract. However, according to the court, the electric company demanded for assurances filing the suit and, therefore, this case did not fall within the UCC's requirements.<sup>38</sup> Indeed, the court could also have stated that, contrary to the electric company's position that it had reasonable grounds for insecurity, its own lawsuit gave the cooperative reasonable grounds for insecurity as to whether the electric company would perform, thereby entitling the cooperative to demand reasonable assurances of performance under section 2-609. Further, even assuming that the electric company had a right to demand assurances of performance, both the trial court and the court of appeals agreed that the cooperative's response to the electric company's demands was likely to be found to constitute satisfactory assurance of performance.<sup>39</sup>

*B. The Predominant Thrust Test; Course of Dealing (Section 2-105);  
Confirmations (Sections 2-201, 2-207); Acceptance by  
Performance (Section 2-206)*

In *Echo, Inc. v. Whitson Co.*,<sup>40</sup> which involved Illinois law, the Seventh Circuit addressed numerous issues arising from the cancellation of a distributorship agreement by the seller and its refusal to deliver goods to its buyer.<sup>41</sup> At the outset, the court stated that because the predominant thrust of the

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34. *See id.* at 910-11.

35. *Id.* at 910.

36. *Id.* at 911.

37. *See id.*

38. *Id.*

39. *Id.*

40. 121 F.3d 1099 (7th Cir. 1997).

41. In a prior opinion, the court of appeals affirmed the district court's grant of summary judgment in favor of the seller against the buyer who had claimed that seller had breached the

hybrid distributorship agreement was the sale of goods, the UCC governed the matter in its entirety.<sup>42</sup> This is consistent with the Indiana Supreme Court's declaration that where the predominant thrust or aspect of a contract is the sale of goods, notwithstanding the presence of other matters, the UCC governs the contract and all matters arising under it.<sup>43</sup>

The primary issue in the present discussion is the buyer's contention that the seller had breached a contract to fill an order placed by the buyer pursuant to the distributorship agreement. That agreement provided, "[a]ll orders for Products shall be subject to acceptance by [seller] at Lake Zurich, Illinois' [which was] where its headquarters were located."<sup>44</sup> The opinion does not mention if the individual order forms contained similar language. The buyer contended that the seller had waived the requirement of home-office approval by regularly sending its sales managers to negotiate with distributor-buyers. The court declared that the practice of sending sales managers who signed orders placed by buyers was not inconsistent with this term in that the seller's sales managers were merely soliciting offers by way of specific orders that could then be accepted at the home office.<sup>45</sup>

The court's position is sound. Professor Allen Farnsworth states:

[T]he insertion into a proposal of a clause that reserves to its maker the power to close the deal is a compelling indication that the proposal is not an offer. A common example provides that the agreement is not binding until it has been approved at the home office of the maker of the proposal.<sup>46</sup>

Professor Farnsworth suggests that possible reasons for such a clause may be to assure that the salesman has not changed standard terms or that the credit of the buyer is good.<sup>47</sup>

The court continued that even if the practice of sending out sales managers were inconsistent with the distributorship agreement, it was a course of dealing pursuant to UCC section 2-105 that was "trumped" by the express distributorship agreement.<sup>48</sup> The characterization of the practice as a course of dealing raises

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overall distributorship agreement. *Echo, Inc. v. Whitson Co.*, 52 F.3d 702 (7th Cir. 1995). The present decision involved the buyer's counterclaims in the seller's action for unpaid invoices.

42. *Echo*, 121 F.3d at 1102.

43. *See Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*, 612 N.E.2d 550, 554 (Ind. 1993). In adopting the predominant thrust test, the court resolved a conflict between districts of the court of appeals. *Compare Baker v. Compton*, 455 N.E.2d 382 (Ind. Ct. App. 1983) (predominant thrust test), *with Data Processing Servs. Inc. v. L.H. Smith Oil Corp.*, 492 N.E.2d 314 (Ind. Ct. App.) (bifurcated approach so that the UCC applied only to goods issues), *reh'g denied*, 493 N.E.2d 1272 (Ind. Ct. App. 1986).

44. *Echo*, 121 F.2d at 1102.

45. *Id.*

46. 1 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.10 (1990).

47. *Id.*

48. *Echo*, 121 F.3d at 1102. UCC section 1-205(1) states: "A course of dealing is a

some question, because a course of dealing is "restricted, literally, to a sequence of conduct between the parties previous to the agreement."<sup>49</sup> Rather, the practice seems to be more like a "course of performance" of the distributorship contract itself.<sup>50</sup> Although express terms of a contract will control a course of dealing or a course of performance,<sup>51</sup> a course of performance that varies from a requirement in the contract may constitute a waiver of that requirement.<sup>52</sup> However, the court specifically found that there was "no indication of waiver by [the seller,]"<sup>53</sup> thus negating the possibility that even if the practice in question were construed to be a course of performance, the express requirement of home office approval was not waived.

The buyer also argued that the seller actually had accepted the order when the seller sent out a letter addressed "'To All Distributors,' . . . 'recapping'" the Spring 1993 orders, and requesting distributors to verify that the data with respect to new orders was correct.<sup>54</sup> The court refused to find that the letter was "an objective manifestation of acceptance that could create a contract."<sup>55</sup> Rather than act as a commitment to supply the goods ordered, the letter served verification and clarification purposes only.<sup>56</sup> The letter at most acknowledged receipt of the orders, and did not constitute acceptance of any buyer's order.<sup>57</sup>

As a further argument, the buyer contended that if the letter was not an acceptance of its offer in traditional offer-acceptance terms, it "operate[d] as an acceptance" because it was a "confirmation" within the meaning of section 2-207(1).<sup>58</sup> The court quickly rejected this argument by observing that the confirmation to which that section refers is a written confirmation of a prior oral agreement. The purpose of the written confirmation is to satisfy the statute of frauds found in section 2-201.<sup>59</sup> As the court noted: "To quote one UCC

sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." U.C.C. § 1-205(1).

49. U.C.C. § 1-205, cmt. 2.

50. UCC section 2-208(1) states: "Where the contract for sale involves repeated occasions for performance . . . and opportunity for objection to it by the other, any course of performance accepted or acquiesced in . . . shall be relevant to determine the meaning of the agreement." *Id.* § 2-208(1).

51. *See id.* §§ 1-205(4), 2-208(2).

52. *See id.* § 2-208(3).

53. *Echo*, 121 F.3d at 1102.

54. *Id.* at 1101 (quoting Letter from Echo, Inc., to Power Tool Co. (Oct. 15, 1992)).

55. *Id.* at 1103.

56. *See id.*

57. *See id.*

58. *See id.* UCC section 2-207(1) states: "A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon . . ." U.C.C. § 2-207(1).

59. *See Echo*, 121 F.3d at 1103-04.

commentator, 'A confirmation differs from an acceptance in that if it is a true confirmation, a contract between the parties already exists.'"<sup>60</sup> Here, there was no prior agreement for the "recap" letter to confirm.<sup>61</sup> The seller never accepted the buyer's offer to buy, and judgment for the seller on the buyer's counterclaim was appropriate.

*C. Non-recoverability of Fees as Incidental or Consequential Damages (Section 2-715)*

In *Indiana Glass Co. v. Indiana Michigan Power Co.*,<sup>62</sup> the Indiana Court of Appeals joined "the overwhelming weight of authority from other jurisdictions indicating that attorney's fees are not recoverable under [section] 2-715."<sup>63</sup> A glass manufacturer sued a power company for negligence and breach of the UCC implied warranties of merchantability<sup>64</sup> and fitness for a particular purpose<sup>65</sup> following damage to the manufacturer's production caused by the power company's failure to supply electricity of consistent voltage. After the trial court ruled that a sale of electricity is a sale of goods within the scope of the UCC and that the power company had failed to disclaim the UCC warranties, the parties settled all issues between them except the issue of attorney's fees.<sup>66</sup> The successful buyer claimed that it could recover its attorney's fees as incidental or consequential damages under section 2-715. Although this was a novel issue in Indiana law, the court had previously decided the issue under Kentucky's version of section 2-715, which is identical to that of Indiana.<sup>67</sup>

The buyer urged the court to ignore the majority rule and hold that attorney's fees are recoverable either as incidental or consequential damages under section 2-715 or under general principles of law and equity, which, according to section 1-103, have not been displaced by the UCC. The court properly rejected these arguments. The incidental damages provided for in section 2-715(1) are expenses incurred by a rejecting or revoking buyer in handling the goods or in effecting cover.<sup>68</sup> The consequential damages in section 2-715(2)(a), described as "any loss," were not meant to change the general rule of law that each party must bear its own legal expenses.<sup>69</sup>

The buyer also contended that section 1-106(1), which states that UCC

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60. *Id.* at 1103 (quoting HAROLD GREENBERG, RIGHTS AND REMEDIES UNDER U.C.C. ARTICLE 2 § 7.11 (1987)).

61. *See id.* at 1104.

62. 692 N.E.2d 886 (Ind. Ct. App. 1998).

63. *Id.* at 888.

64. U.C.C. § 2-314.

65. *Id.* § 2-315.

66. *See Indiana Glass*, 692 N.E.2d at 887.

67. *See Landmark Motors v. Chrysler Credit Corp.*, 662 N.E.2d 971, 976-77 (Ind. Ct. App. 1996).

68. *See Indiana Glass*, 692 N.E.2d at 888.

69. *See id.* at 888-89.

remedies “shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed,” justified an award of its attorney’s fees.<sup>70</sup> The court responded that section 1-103 preserves applicability of the principles of law and equity, including the law merchant, unless “explicitly displaced by the provisions” of the UCC.<sup>71</sup> The court also held that section 2-715 does not displace the common law rule in Indiana that precludes recovery of attorney’s fees in the absence of a specific statute.<sup>72</sup>

The court could have pointed to the single instance in Indiana’s version of the UCC that expressly provides for recovery of attorney’s fees. The Official Draft’s version of section 2-721 provides that all UCC remedies shall be available in actions based on fraud or material misrepresentation.<sup>73</sup> Indiana Code section 26-1-2-721 adds a unique provision, not found in the UCC of any other state, that a successful plaintiff in such a suit “shall also be entitled to recover reasonable attorney’s fees.”<sup>74</sup> The Indiana General Assembly knew how to change the general rule that each party must bear its own legal costs, and did so in this one section. The failure to so provide in other sections of the Indiana Code indicates that it intended no other changes in the prevailing rule.

*D. Modification and Waiver (Section 2-209); The Parol Evidence Rule (Section 2-202); The Statute of Frauds (Section 2-201); and Requirements Contracts (Section 2-306)*

The dispute in *Pepsi-Cola Co. v. Steak ‘N Shake, Inc.*,<sup>75</sup> arose from claims and counterclaims of breach of a contract pursuant to which the buyer agreed to replace its then current soft drink products with the seller’s products. Following months of negotiation, the seller sent to the buyer a proposed draft agreement together with an unsigned letter (the “Letter”) from one of seller’s vice-presidents who described the seller’s marketing programs in somewhat more detail than contained in the draft agreement.<sup>76</sup> Further drafts were exchanged, with the “Contract” finally consisting of two signed agreement forms. The Contract contained a merger or integration clause, a no-oral-modification clause, as well as a marketing provision that described the parties’ participation in the Contract.<sup>77</sup>

Shortly thereafter, the buyer sent a letter requesting that the seller send a signed copy of the Letter and that the Letter be made part of the Contract.<sup>78</sup> The

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70. *Id.* at 889 (quoting U.C.C. § 1-106(1)).

71. *Id.*

72. *Id.*

73. U.C.C. § 2-721.

74. IND. CODE § 26-1-2-721 (1998).

75. 981 F. Supp. 1149 (S.D. Ind. 1997).

76. *See id.* at 1152.

77. *See id.*

78. *See id.*

seller sent the signed copy but did nothing else. The buyer then sent a second letter that purportedly summarized a telephone agreement to incorporate the Letter into the Contract and requested a signed confirmation of that oral agreement to incorporate the Letter.<sup>79</sup> The seller did not reply. The buyer again sent a letter demanding incorporation of the Letter into the Contract and stated that if the seller did not comply with this demand, the buyer would assume that the seller will stand behind the terms of the Letter and that it will be part of the Contract. Again, the seller did not respond.<sup>80</sup>

Three years later, the buyer gave notice of termination, the seller sued for breach, and the buyer counterclaimed that it was terminating for cause in that the seller itself had breached. Both parties moved for summary judgment on various issues, and the court denied all of these motions.<sup>81</sup>

The first issue before the appellate court was whether the Letter was part of the Contract. Citing section 2-209(2), the *Pepsi-Cola* court observed that although any contract may be modified by subsequent agreement of the parties, the UCC permits the parties to agree not to modify the agreement between them except by a signed writing, which the parties did in this case.<sup>82</sup> The record was clear that the seller never agreed to the modification.

The buyer also contended that the seller's failure to respond to the buyer's last letter—the one saying that in the absence of a reply the buyer would assume the Letter to be part of the Contract—was a waiver of the no-oral-modification clause and that the Contract should be deemed modified to include the Letter.<sup>83</sup> The court stated that although section 2-209(4) allows an unsuccessful modification under section 2-209(2) to operate as a waiver of the no-oral-modification requirement, a party must rely on the attempted modification and the reliance must be reasonable.<sup>84</sup> In this instance, the buyer may have relied, but its reliance was unreasonable in view of the seller's repeated refusals by “loud silence” to incorporate the Letter into the Contract.<sup>85</sup> Furthermore, a waiver can arise from a party's silence only where that party has a duty to speak, a duty that the buyer could not establish in this case, and a duty the court was unwilling to impose on the seller.

The second issue the court addressed was whether the Letter was admissible as evidence of the Contract's meaning with respect to the marketing provision, an issue that implicated section 2-202, the UCC's parol evidence rule.<sup>86</sup> The rule

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79. *See id.*

80. *See id.*

81. *See id.* at 1151.

82. *Id.* at 1154.

83. *See id.* at 1155.

84. *Id.*

85. *Id.*

86. UCC section 2-202 states:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted

itself determines what prior or contemporaneous agreements or terms are part of the written agreement at issue. The interpretation of an ambiguous term in that agreement may be considered an exception to the rule.<sup>87</sup> Indeed, if the issue is one of interpretation, some scholars state that the parol evidence rule does not apply at all.<sup>88</sup>

The court clearly and correctly stated: "While parol evidence may not be introduced to add to or contradict a fully integrated written agreement, evidence outside the document may be introduced to clarify or interpret an ambiguous term or phrase."<sup>89</sup> The court next reiterated the traditional definition of "ambiguity," that "[a] contract term is ambiguous if a reasonable person could find that it is susceptible to more than one interpretation,"<sup>90</sup> and concluded that because the "marketing program," as used in the Contract was susceptible to several interpretations, the Letter was admissible to explain the term.<sup>91</sup>

The final UCC argument the buyer raised in *Pepsi-Cola* was that the Contract failed to comply with the Statute of Frauds and therefore, was unenforceable because it lacked a quantity term. The court rejected this argument as well and stated: "A writing, which contemplates a requirements contract, satisfies the Statute of Frauds even though the writing does not detail any specific quantities."<sup>92</sup> The court's position is sound and is in accord with current thinking.<sup>93</sup> The court concluded that a reasonable jury could find that the contract was a requirements contract, particularly because it provided for payments to the buyer's former soft drink supplier thereby making the seller its only supplier, and that the buyer was required to have four of the seller's products available at each of its restaurants.<sup>94</sup> The court did not, however, rule explicitly that this was a requirements contract, only ruling that the language satisfied the Statute of Frauds, because the issue of whether the Contract was a requirements contract was a question of fact for the fact finder.<sup>95</sup>

by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented . . . .

(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.

U.C.C. § 2-202.

87. See DOUGLAS J. WHALEY, *CASES, MATERIALS AND PROBLEMS ON CONTRACTS* 561, 598 (2d ed. 1993).

88. See, e.g., JOHN E. MURRAY, JR., *MURRAY ON CONTRACTS* § 85A (3d ed. 1990).

89. *Pepsi-Cola*, 981 F. Supp. at 1156.

90. *Id.* (citing *Canada Dry Corp. v. Nehi Bev. Co. of Indianapolis*, 723 F.2d 512, 519 (7th Cir. 1983); *Piskorowski v. Shell Oil Co.*, 403 N.E.2d 838, 844 (Ind. Ct. App. 1980)).

91. *Id.* at 1157.

92. *Id.* at 1158 (citing *Zayre Corp. v. S.M. & R. Co.*, 882 F.2d 1145, 1154 (7th Cir. 1989)).

The UCC specifically authorizes requirements contracts. U.C.C. § 2-306.

93. See GREENBERG, *supra* note 60, § 8.5 and the cases cited therein; 1 WHITE & SUMMERS, *supra* note 13, § 2-4 n.12.

94. *Pepsi-Cola*, 981 F. Supp. at 1158-59.

95. *Id.* at 1159.

*E. Change of Requirements Under a Requirements Contract (Section 2-306)*

*Indiana-American Water Co. v. Town of Seelyville*<sup>96</sup> also involved a long-term requirements contract, this time for a supply of water. In 1983, the water company agreed to sell and the town agreed to buy through 2008, “such quantities of water as the Town may hereafter from time to time need.”<sup>97</sup> Long before the parties entered into the contract, the town had purchased land that could be used as a well field for the supply of water.<sup>98</sup> In 1997, when the town announced it would sell bonds to finance the construction of its own water supply on that well field, the water company sought a declaratory judgment that the town’s plan would result in a breach of the supply contract.<sup>99</sup>

The court of appeals considered two issues: First, whether the contract was a requirements contract, authorized by UCC section 2-306, or merely an indefinite quantities contract that was illusory because it imposed no obligation on the parties; and, second, whether the planned reduction in the town’s requirements under the contract was in good faith, as authorized by section 2-306, or in bad faith, thereby constituting a breach of contract.<sup>100</sup>

The court had relatively little difficulty in agreeing with the trial court that the contract in this case constituted an enforceable requirements contract “in which the purchaser agrees to buy all of its needs of a specified material exclusively from a particular supplier, and the supplier agrees, in turn, to fill all of the purchaser’s needs during the period of the contract.”<sup>101</sup> The more difficult issue for the court was whether the town/buyer was acting in good faith in determining its requirements, as mandated by section 2-306(1).<sup>102</sup>

The court correctly observed that the seller assumes the risk that the buyer’s requirements may change, but “the buyer is not free, on any whim, to quit buying from seller.”<sup>103</sup> The essential test of the buyer’s good faith in changing its requirements is whether the buyer has legitimate business reasons for doing so or is merely attempting to get out of a disadvantageous contract.<sup>104</sup> The court concluded that the “Town’s decision to develop its preexisting well field

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96. 698 N.E.2d 1255 (Ind. Ct. App. 1998).

97. *Id.* at 1257.

98. *See id.*

99. *See id.* at 1257-58.

100. *Id.* at 1257.

101. *Id.* at 1259.

102. As applicable to this case, UCC section 2-306(1) states:

A term which measures the quantity by . . . the requirements of the buyer means such actual . . . 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 . . . requirements may be . . . demanded.

U.C.C. § 2-306(1).

103. *Indiana-American Water*, 698 N.E.2d at 1260.

104. *See id.* at 1261.

constitutes a legitimate, long-term business decision, and not merely a desire to avoid the terms of its contract with [the] Water Company."<sup>105</sup>

## II. ARTICLES 3 & 4—NEGOTIABLE INSTRUMENTS AND BANK COLLECTIONS: STATUTE OF LIMITATIONS FOR CONVERSION OF CHECKS

Contrary to the vast majority of jurisdictions, the Indiana Court of Appeals, in *UNR-Rohn, Inc. v. Summit Bank*,<sup>106</sup> ruled that a cause of action for conversion of a check under former section 3-419<sup>107</sup> accrues when the aggrieved party "could have, in the exercise of ordinary diligence, discovered the conversion of the checks."<sup>108</sup> The plaintiff alleged that the bank, in which it had several accounts, had converted checks payable to plaintiff by cashing them or depositing them into the personal account of one of plaintiff's employees until 1991, when the plaintiff discovered the embezzlement.<sup>109</sup> The bank contended that the two-year statute of limitations relating to personal property barred claims for conversion of any checks cashed or negotiated prior to 1991, because the prior version of Article 3 did not contain an applicable statute of limitations.<sup>110</sup>

Although it specifically "recognize[d] that the vast majority of authority from other jurisdictions runs against applying the discovery rule to an action for conversion of negotiable instruments under UCC section 3-419 in the absence of fraudulent concealment on the part of the defendant asserting the defense of the statute of limitations,"<sup>111</sup> the court rejected the discovery rule as being contrary to the policy of Indiana.

The court analyzed the history of the so-called discovery rule as it applies to tort actions in general and expressly refused "to carve out an exception to the discovery rule in injuries to personal property involving conversion of negotiable instruments [as being] wholly incongruous and inconsistent with Indiana's system of jurisprudence."<sup>112</sup> Accordingly, the court reversed the grant of summary judgment in favor of the bank on this issue and remanded for a factual finding with respect to the date when the bank's customer could have discovered the conversions.<sup>113</sup>

This result will continue to apply under the revised version of Article 3, which states that an action for conversion of a negotiable instrument "must be commenced within three years after the cause of action accrues."<sup>114</sup> The official

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105. *Id.*

106. 687 N.E.2d 235 (Ind. Ct. App. 1997).

107. IND. CODE § 26-1-3-419 (1993) (recodified as amended at IND. CODE § 26-1-3.1-420 (1998)).

108. *UNR-Rohn*, 687 N.E.2d at 241.

109. *See id.* at 236.

110. *See id.* at 239-40.

111. *Id.* at 241 n.5.

112. *Id.* at 241.

113. *Id.*

114. IND. CODE § 26-1-3.1-118(g) (1998).

comment thereto states that the section “does not define when a cause of action accrues.”<sup>115</sup> Thus, Indiana will continue to have a rule under the UCC that is not “uniform.”

In most cases of employee embezzlement, a diligent employer, acting with due care, should be able to discover the employee’s defalcations before the statute of limitations runs. Moreover, the UCC’s policy is that employers should bear the risk of hiring dishonest employees, and banks will be liable only on a comparative negligence basis.<sup>116</sup> If the employer in *UNR-Rohn* entrusted the dishonest employee with responsibility for checks, the forged endorsements would have been effective, and the employer would have no recovery against the bank for conversion unless the bank’s failure to exercise ordinary care contributed to the loss.<sup>117</sup>

### III. ARTICLE 8—INVESTMENT SECURITIES

The question in *Giuffre Organisation, Ltd. v. Euromotorsport Racing, Inc.*,<sup>118</sup> was whether a share of stock in Championship Auto Racing Teams, Inc. (“CART”) was an investment security within Article 8 of Indiana’s UCC, so that a security interest under Article 9 could be perfected by possession alone.<sup>119</sup> Applying Indiana law, the Seventh Circuit Court of Appeals affirmed the U.S. District Court for the Southern District of Indiana decision that it was not an investment security within Article 8.

Euromotorsport owned two shares of stock in CART, which gave it both a financial interest and membership in CART, as well as the right and obligation to participate in CART races.<sup>120</sup> When various problems led to financial difficulties, Euromotorsport entered into a complex financial relationship with Giuffre and gave one CART share to Giuffre as security for its financial support. Unfortunately, creditors filed an involuntary petition in bankruptcy against Euromotorsport, and CART redeemed the two shares for failure to participate in its races in violation of Euromotorsport’s membership obligation.<sup>121</sup> Giuffre requested that it be treated as a secured creditor of the stock certificate that it had possessed thereby giving it entitlement to the cash paid to redeem it.<sup>122</sup> Giuffre claimed that the CART share was a “certificated security” within section 8-102 of the 1977 version of Article 8,<sup>123</sup> and that its security interest was perfected by

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115. *Id.* cmt. 1.

116. *See* IND. CODE § 26-1-3.1-405(b) (1998).

117. *See id.*

118. 141 F.3d 1216 (7th Cir. 1998).

119. *Id.* at 1217. *See also* U.C.C. § 9-115 & cmt. 2.

120. *See Giuffre Organisation*, 141 F.3d at 1216.

121. *See id.* at 1217.

122. *See id.*

123. IND. CODE § 26-1-8-102 (1993) (recodified as amended at IND. CODE § 26-1-8.1-102 (1998)).

possession.<sup>124</sup> The bankruptcy judge agreed, but the district court did not.

On appeal, the district court ruled that the restrictions on CART stock precluded the stock from being certificated securities within Article 8, and only a security agreement under section 9-203 plus a filed financing statement under section 9-302 could accomplish perfection.<sup>125</sup> Accordingly, Giuffre was merely an unsecured creditor. The court of appeals affirmed.

One key issue the Seventh Circuit had to resolve, without guidance from any Indiana decision on point, was whether a share in a closely held corporation was a certificated security within Article 8, possession of which perfects a security interest under Article 9. Former section 8-102(1)(ii) defines such a security as being ““of a type commonly dealt with on securities exchanges or commonly recognized in any area in which it is issued or dealt in as a medium for investment.””<sup>126</sup> In 1985, the Supreme Court of the United States held that sale of stock in a closely held business was a sale of a security under federal law.<sup>127</sup> Revised Article 8 incorporates the Supreme Court’s decision into UCC sections 8.1-102(a)(15)(iii)(B) and 8.1-103(a). The *Giuffre Organisation* court concluded that, in view of the *Landreth* decision plus the swift enactment of revised Article 8 in Indiana, the Indiana Supreme Court would hold as many other courts have: Stock in closely held corporations can be certificated securities within the earlier version of Article 8.<sup>128</sup>

However, the CART stock was not simply a share in a closely held corporation.<sup>129</sup> As described by the court:

A share of stock in CART represents not only an investment (and an opportunity to share in whatever profits CART makes) but also a membership, and thus a right to participate in the races. No owner can enter a car without the membership that is linked to ownership of CART stock. Ability to pay for a share is not enough to buy one . . . . Transfer of any CART share requires the approval of CART’s board, which may be had only if CART determines that the buyer is fit to race.<sup>130</sup>

Moreover, ownership of the shares carried with it not only an interest in the corporation but also a contractual obligation to race.<sup>131</sup> Euromotorsport’s failure to race breached that obligation and resulted in the redemption of the two shares pursuant to the terms of that obligation. Thus, CART shares were more like an interest in a franchise operation or ownership of a cooperative apartment, neither

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124. See *Giuffre Organisation*, 141 F.3d at 1217.

125. See *id.*

126. *Id.* at 1217 (quoting U.C.C. § 8-102(1)(ii), *found in* IND. CODE § 26-1-8-102(1)(a)(ii) (1993) (recodified as amended at IND. CODE §§ 26-1-8.1-102(4), (15) (1998))).

127. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 697 (1985).

128. *Giuffre Organisation*, 141 F.3d at 1218.

129. *Id.*

130. *Id.* at 1216.

131. See *id.*

of which is a certificated security, notwithstanding the label affixed to it.<sup>132</sup>

In affirming the determination of the district court, the court of appeals concluded:

In diversity litigation under *Erie*<sup>133]</sup> all we can do is predict how the state courts will handle the subject when it arrives. Perhaps the Supreme Court of Indiana will never have an opportunity to interpret the definition of a security in the 1977 version of Article 8, but we are reasonably confident that if it did so it would treat a document used to control participation in a professional sport as a “franchise” or something similar rather than as a “security.”<sup>134</sup>

#### IV. ARTICLE 9—SECURED TRANSACTIONS: REPOSSESSION AND BREACH OF THE PEACE (SECTION 9-503)

*Birrell v. Indiana Auto Sales & Repair*<sup>135</sup> presented a novel question for Indiana courts. In that case an independent contractor, paid by an automobile dealer/creditor to repossess an automobile, directed a fifteen-year-old boy who had no driver’s license to make the repossession.<sup>136</sup> The boy did so, drove above the speed limit, and crashed into plaintiff’s car. Plaintiff filed suit against the creditor and the repossession contractor to recover for her personal injuries.<sup>137</sup> The trial court granted summary judgment for the dealer and the plaintiff appealed.<sup>138</sup>

The UCC issue in this appeal was whether the repossession violated the statutory duty imposed by section 9-503 that permits repossession without judicial process “if this can be done without breach of the peace.”<sup>139</sup> If it did, the automobile dealer could be liable for the reposessor’s negligence, an exception to the general rule that an employer is not responsible for the negligence of an independent contractor.<sup>140</sup>

The court noted that the UCC does not define the term “breach of the peace.” According to White and Summers, the term is a “well-worn phrase,” not redefined by the UCC drafters, and “has been the subject of countless judicial opinions.”<sup>141</sup> In ruling that the boy’s conduct did not constitute a breach of the peace within section 9-503, the *Birrell* court relied on two non-Indiana cases, both of which support the rule that traffic violations following the actual taking

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132. *See id.* at 1218-19.

133. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

134. *Giuffre Organisation*, at 1219.

135. 698 N.E.2d 6 (Ind. Ct. App. 1998).

136. *Id.* at 7.

137. *See id.*

138. *See id.*

139. *Id.* at 8.

140. *See id.* at 7-8.

141. 4 WHITE & SUMMERS, *supra* note 13, § 34-7.

of the car do not violate section 9-503.<sup>142</sup> Whether the boy's conduct after the repossession might constitute a separate breach of the peace is irrelevant. The UCC deals only with conduct during the actual repossession, not thereafter. As the act of repossession moves away from the residence of the debtor, the likelihood of a breach of the peace within the UCC diminishes substantially.<sup>143</sup> It would seem rather plain that once the repossession itself is achieved peacefully, the subsequent action of the reposessor is irrelevant to this section of the UCC, even if that action is itself a breach of the peace.

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142. *Birrell*, 698 N.E.2d at 8-9 (discussing *Wallace v. Chrysler Credit Corp.*, 743 F. Supp. 1228 (W.D. Va. 1990); *Jordan v. Citizens & South Nat'l Bank*, 298 S.E.2d 213 (S.C. 1982)).

143. See WHITE & SUMMERS, *supra* note 13, § 34-7.