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Identification of Goods and Casualty to Identified Goods Under Article Two of the UCC

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I. INTRODUCTION

Article two of the Uniform Commercial Code (UCC) introduces a new term into sales law: "identification."[1] Although the concept of identification is hardly new,[2] the use of the word as a term of art originated in the UCC.[3]

The purpose of the UCC is to bring uniformity and clarity to the law of commercial transactions.[4] Before and since its adoption, noted commentators have criticized the Code, claiming that neither uniformity nor clarity has resulted.[5] David Mellinkoff in his now famous critique *The Language of the Uniform Commercial Code*[6] singled out identification for a semantic attack.

> Some years ago, a smiling paranoiac offered to prove to our class in abnormal psychology that he was the true Christ

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[1]U.C.C. § 2-501(1)(a).

[2]*See* text accompanying notes 42-45 *infra*.

[3]The term "identification" is used in article 2 of the Code 43 times.

[4]U.C.C. § 1-102.

[5]*E.g.*, J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 24-33, 197-204 (1972); Goodkin, *The Ambiguous Statutory Machinery Pertaining to Fixtures Under the Uniform Commercial Code: Whether the New 9-313 Provision Effectively Eliminates Prior Criticism of the Old 9-313*, 27 ARK. L. REV. 482 (1973); Hudak & King, *Reforming and Rewriting Article Six of the UCC*, 81 COM. L.J. 284 (1976); Jackson & Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 YALE L.J. 907 (1978); Skilton, *Some Comments on the Comments to the Uniform Commerical Code*, 1966 WIS. L. REV. 597.

[6]Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185 (1967).

> and that Jesus was an imposter. "It's simple," he said. "I am the Christ because the Christ wouldn't lie to you!" The startling swiftness of that circular explanation is rivaled by the UCC on *identification*.[7]

Part of section 2-501, the main section of article two dealing with identification, provides: "In the absence of explicit agreement *identification* occurs (a) when the contract is made if it is for the sale of goods already existing and *identified*."[8] Mellinkoff caustically interprets these words as follows: "[W]hen you make a contract for the sale of existing goods, identification occurs when identification occurs, unless you explicitly agree that identification does not occur when it occurs."[9]

Aside from the circularity of the definition itself, there are at least two other major problems arising from section 2-501. The first problem is how and when fungible goods are identified to the contract. Section 2-501 does not answer this question explicitly, but an attempted explanation is found in comment 5 of section 2-501.[10] However, comment 5 must be read in connection with section 2-105(4)[11] which in turn is explained by comments 3 and 5[12] of that section. Comment 5 of section 2-105(4) refers the reader back to section 2-501. One returns to the point of origin still uncertain of the outcome.[13]

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[7]*Id.* at 191.

[8]U.C.C. § 2-501(1)(a) (emphasis added).

[9]Mellinkoff, *supra* note 6, at 192.

[10]U.C.C. § 2-501, Comment 5, provides:

> Undivided shares in an identified fungible bulk, such as grain in an elevator or oil in a storage tank, can be sold. The mere making of the contract with reference to an undivided share in an identified fungible bulk is enough under subsection (a) to effect an identification if there is no explicit agreement otherwise. The seller's duty, however, to segregate and deliver according to the contract is not affected by such an identification but is controlled by other provisions of this Article.

[11]*Id.* § 2-105(4) provides:

> An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

[12]Comment 3 states: "Subsection (4) does not touch the question of how far an appropriation of a bulk of fungible goods may or may not satisfy the contract for sale."

[13]Mellinkoff commented on this type of definitional problem.

> Some of the things the UCC calls "definitions" have hardly any meaning—some no meaning at all—because they are circular. They define a word with the same word, or with a variation of the word so close that you return to the starting point almost unscathed by information. Sometimes the circuit is short and easy to trace; sometimes the circuit winds over hill and dale before sneaking back on itself.

Mellinkoff, *supra* note 6, at 191.

The second problem lies in the fact that the drafters of the Code sometimes forgot that they had sanctioned a new term. They carelessly inserted old-fashioned synonyms for identification in many of the comments. The words "appropriation," "specific," and "particular" appear in places where "identification" and "identified" should logically be used.[14] The resulting confusion has led to use of the terms "appropriation" and "identification" interchangeably in interpreting Code provisions.[15] Moreover, in section 2-613 of the Code, which is entitled "Casualty to Identified Goods," the use of the term "identified" in the title is inappropriate and misleading. The key to section 2-613 is not whether the goods are identified but whether they are commercially irreplaceable.

Despite a statement by the Indiana Court of Appeals that "[i]dentification is of limited importance under the Code,"[16] identification is, in fact, a very important concept. A number of legal consequences depend upon identification. Title cannot pass until goods are identified.[17] Identification gives the buyer a "special property and an insurable interest" in the goods.[18] Moreover, once goods are identified a buyer may recover them upon the seller's insolvency[19] or upon default or repudiation;[20] he has a limited right of replevin,[21] and he can assert such a right against the seller's unsecured creditors.[22] Identification means certain rights to the seller as well. Under some conditions, the seller may, after identification, pursue an action for the price[23] and resell.[24] Moreover, identification is often a prerequisite for asserting security interest rights under article 9.[25]

Various definitions of identification suggested in the past have been unsatisfactory. One technical definition, that identification is "an intent to identify particular goods and some overt act

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[14]*E.g.*, U.C.C. § 2-105, Comment 3; *id.* § 2-401, Comment 4; *id.* § 2-513, Comment 2; *id.* § 2-606, Comments 1, 2; *id.* § 2-615, Comments 1, 5, 9.

[15]*See, e.g.*, Crown Iron Works Co. v. Commissioner of Taxation, 298 Minn. 559, 214 N.W.2d 462 (1974); Miss Celebrity, Inc. v. Dartmouth Finishing Co., 15 U.C.C. REP. SERV. 764 (1974).

[16]First Nat'l Bank v. Smoker, 153 Ind. App. 71, 86, 286 N.E.2d 203, 212 (1972).

[17]U.C.C. § 2-401(1).

[18]*Id.* § 2-501(1).

[19]*Id.* § 2-502.

[20]*Id.* § 2-711(2)(a).

[21]*Id.* § 2-716(3).

[22]*Id.* § 2-402(1).

[23]*Id.* § 2-709(1)(b), (2).

[24]*Id.* § 2-706(2).

[25]National Compressor Corp. v. Carrow, 417 F.2d 97, 101 (8th Cir. 1969); Draper v. Minneapolis-Moline, Inc., 100 Ill. App. 2d 324, 327-28, 241 N.E.2d 342, 344-45 (1968); Dolan, *The Uniform Commerical Code and the Concept of Possession in the Marketing and Financing of Goods*, 56 TEX. L. REV. 1147 (1978).

manifesting that intent,"[26] again gives rise to troublesome circularity by use of the word defined in the definition. Identification has also been defined as the process by which goods are "particularized or designated as the goods to which the contract refers."[27] This definition, though workable, is unnecessarily imprecise. The contract could apply to goods other than those sought to be identified. Identification should be defined to *specify the goods to which the contract refers so that the contract can apply to no others*.[28] This definitional phrase is consistent with the various Code usages and with historical developments in sales law. This Article will develop the meaning of identification historically, examine its current usage in cases decided under the UCC, and delineate how the concept of identification affects various sections of article two.

Identification of goods so that an insurable interest arises is explained in section 2-501:

> (1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs
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> (a) when the contract is made if it is for the sale of goods already existing and identified;
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> (b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;
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> (c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.
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> (2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains

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[26]2 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERICAL CODE § 2-501:4, at 61 (2d ed. 1971).

[27]Stockton, *An Analysis of Insurable Interest under Article Two of the Uniform Commercial Code*, 17 VAND. L. REV. 815, 828 (1964).

[28]A seller may unilaterally identify goods to a contract. U.C.C. § 2-501(1)(b). If the seller tenders nonconforming goods which he has erroneously identified, the buyer may accept or reject the goods in whole or in part. *Id.* § 2-601.

in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.[29]

II. History of Section 2-501

The above version of section 2-501, with minimal and insignificant changes, is enacted in forty-nine states.[30] Prior to its enactment in

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[29]U.C.C. § 2-501, Comments 1-5, provide:

1. The present section deals with the manner of identifying goods to the contract so that an insurable interest in the buyer and the rights set forth in the next section will accrue. Generally speaking, identification may be made in any manner "explicitly agreed to" by the parties. The rules of paragraphs (a), (b) and (c) apply only in the absence of such "explicit agreement".

2. In the ordinary case identification of particular existing goods as goods to which the contract refers is unambiguous and may occur in one of many ways. It is possible, however, for the identification to be tentative or contingent. In view of the limited effect given to identification by this Article, the general policy is to resolve all doubts in favor of identification.

3. The provision of this section as to "explicit agreement" clarifies the present confusion in the law of sales which has arisen from the fact that under prior uniform legislation all rules of presumption with reference to the passing of title or to appropriation (which in turn depended upon identification) were regarded as subject to the contrary intention of the parties or of the party appropriating. Such uncertainty is reduced to a minimum under this section by requiring "explicit agreement" of the parties before the rules of paragraphs (a), (b) and (c) are displaced—as they would be by a term giving the buyer power to select the goods. An "explicit" agreement, however, need not necessarily be found in the terms used in the particular transaction. Thus, where a usage of the trade has previously been made explicit by reduction to a standard set of "rules and regulations" currently incorporated by reference into the contracts of the parties, a relevant provision of those "rules and regulations" is "explicit" within the meaning of this section.

4. In view of the limited function of identification there is no requirement in this section that the goods be in deliverable state or that all of the seller's duties with respect to the processing of the goods be completed in order that identification occur. For example, despite identification the risk of loss remains on the seller under the risk of loss provisions until completion of his duties as to the goods and all of his remedies remain dependent upon his not defaulting under the contract.

5. Undivided shares in an identified fungible bulk, such as grain in an elevator or oil in a storage tank, can be sold. The mere making of the contract with reference to an undivided share in an identified fungible bulk is enough under subsection (a) to effect an identification if there is no explicit agreement otherwise. The seller's duty, however, to segregate and deliver according to the contract is not affected by such an identification but is controlled by other provisions of this Article.

[30]1A Uniform Laws Annotated: Uniform Commercial Code iii (West 1976).

many states and contemporaneous with its enactment in others, the UCC went through numerous drafts and revisions.[31] The Proposed Final Draft of the UCC published in the spring of 1950 was much like the current law.[32] At that point, the circular definition was firmly in place. The immediately preceding draft was significantly different, however. Section 2-501 in the May 1949 draft of the UCC was entitled "Manner of Appropriation." Appropriation was defined as follows: "Existing goods are appropriated to a contract for sale by their identification as goods to which the contract refers." The effects of appropriation were set out in a separate and subsequently deleted section.[33]

The 1949 draft, which did not define the term by a repetition of the term itself, was clear. A standard dictionary definition could then give substance to the legal term of art "appropriation." For example, the *Random House Dictionary of the English Language* defines "identify" as "to recognize or establish as being a particular person or thing."[34] Thus, one appropriates goods to a contract by identifying them, that is, by establishing which particular things were involved in the contract in order that the goods referred to in the contract were identical to those appropriated. Or, according to the definition suggested earlier, one appropriates goods by so clearly specifying the goods to which the contract refers that the contract can apply to no others.

The word "appropriation" as used in the 1949 draft came directly from the Uniform Sales Act,[35] the statutory precursor of the UCC. Under the Uniform Sales Act, goods had to be "ascertained"[36] before title could pass. Goods were "ascertained" when they were "appropriated" to the contract. Appropriation to the contract meant some action was taken that made certain, definite, and specific the

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[31]*Id.*

[32]ALI-NCCUSL, UNIFORM COMMERCIAL CODE (proposed final draft 1950). Section 2-501 as currently written was in the same form in the 1957 Official Text. The 1956 recommendations inserted the words "special property" found in the present text. The authors commented that the "reference to the buyer's 'special property' was inserted in subsection (1) to conform to changes in § 1-201(37) and 2-401." *Id.*, Comment. The first supplement to the 1952 Official Draft added the current subsection (3) of 2-501. U.C.C. (Supp. 1, 1952 version).

[33]U.C.C. § 2-502 (1949 draft).

[34]THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 707 (unabr. ed. 1973).

[35]UNIFORM SALES ACT § 19 (1906) (superseded by U.C.C.). The term "identified to the contract" as used in U.C.C. § 2-501 is generally considered the equivalent to the term "appropriated to the contract" as used in the Uniform Sales Act. 67 AM. JUR. 2d *Sales* § 234, at 362 n.83 (1973).

[36]UNIFORM SALES ACT § 17 (1906) (superseded by U.C.C.).

goods to which the contract referred.[37] The courts construing the Uniform Sales Act required an unconditional appropriation.[38]

The word "appropriation" as used in the Uniform Sales Act had a strong common law foundation. It meant, for example, selecting "the article . . . to supply in performance of [the] contract,"[39] or agreement that "a certain article shall be delivered in pursuance of the contract,"[40] or that there is a bargain "with respect to a specific article."[41] There are numerous pre-Uniform Sales Act American cases and many English cases as well that make it abundantly clear that identification, ascertainment, and appropriation all refer to the same action: to specify the goods to which the contract refers so clearly that the contract can apply to no others.[42]

One of the difficulties in comparing UCC cases, Uniform Sales Act cases, and common law cases dealing with appropriation-identification is that the consequences of an identical act have changed over the years. Under the Uniform Sales Act and the common law, the actual, if mystical, passage of title was all important and "ascertainment-appropriation" was the key.[43] The Code changed that legal concept dramatically. Title passage between the vendor and vendee became incidental rather than crucial.[44] Major rights, such as

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[37]I. MARIASH, A TREATISE ON THE LAW OF SALES 343-61 (1930); 2 S. WILLISTON, THE LAW GOVERNING SALES OF GOODS §§ 273a-278 (rev. ed. 1948).

[38]*In re* Lincoln Indus., 166 F. Supp. 240 (W.D. Va. 1958); Wills v. Investors' Bankstocks Corp., 257 N.Y. 451, 178 N.E. 755, 251 N.Y.S. 69 (1931). *See* Henry Glass & Co. v. Misroch, 239 N.Y. 475, 147 N.E. 71 (1925); Lamborn v. Seggerman Bros., 240 N.Y. 118, 147 N.E. 607 (1925); Proctor & Gamble Co. v. Peters, White & Co., 233 N.Y. 97, 134 N.E. 849, 193 N.Y.S. 61 (1922); Beals v. Hirsch, 214 A.D. 86, 211 N.Y.S. 293 (1925); Taylor v. Kurzrok, 214 A.D. 308, 212 N.Y.S. 133 (1925); Boiko & Co. v. Atlantic Woolen Mills Co., 195 A.D. 207, 186 N.Y.S. 624 (1921), *aff'd*, 234 N.Y. 583, 138 N.E. 455, 198 N.Y.S. 61 (1922); UNIFORM SALES ACT § 19, Rule 4(2) (1906) (superseded by U.C.C.); 2 S. WILLISTON, *supra* note 37, § 273a.

[39]Wait v. Baker, 154 Eng. Rep. 380, 383 (Ex. 1848).

[40]*Id.*

[41]*Id.* at 384. *See also* Furby v. Hoey, [1947] 1 All E.R. 236, 238 (K.B.).

[42]*See, e.g.*, The Elgee Cotton Cases, 89 U.S. (22 Wall.) 180 (1874); Kimberly v. Patchin, 19 N.Y. 330 (1859); Seath v. Moore, 55 L.J.P.C. 54 (1886). *See* J. BENJAMIN, A TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY 300, 317, 327 (8th ed. 1950); D. BOWEN, ELEMENTS OF THE LAW RELATING TO VENDORS AND PURCHASERS 176-77 (2d ed. 1929); M. CHALMERS, SALE OF GOODS ACT 1893 §§ 16, 18 (Rule 5(1)), at 62 (14th ed. 1963); 2 S. WILLISTON, *supra* note 37, § 273a.

[43]Rosen v. Garston, 319 Mass. 390, 66 N.E.2d 29 (1946); Mitchell v. Le Clair, 165 Mass. 308, 43 N.E. 117 (1896); Pierce Oil Co. v. Carroll, 277 S.W. 220 (Tex. Civ. App. 1925); Rohde v. Thwaites, 108 Eng. Rep. 495 (K.B. 1827); Heilbutt v. Hickson, L.R. 7 C.P. 438, 449-50 (1872); UNIFORM SALES ACT §§ 17-19 (1906) (superseded by U.C.C.); K. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES 561, 571-73, 577-81 (1930); I. MARIASH, *supra* note 37, §§ 343-61 (1930).

[44]The Comment to U.C.C. § 2-101 stipulates: "The legal consequences are stated as following directly from the contract and action taken under it without resorting to the

risk of loss, hinged on clear-cut objective actions by the parties rather than on title passage. Identification as used in the Code became the key action.[45]

III. Identification and the Fungible Bulk Problem

Section 2-501 specifically provides that identification "can be made at any time and in any manner explicitly agreed to by the parties." This approach is in keeping with general Code policy to encourage parties to make their own agreements. The Code is available to supply the terms and procedures only if the parties have ignored, overlooked, or avoided them. In the case of identification, when the parties fail to state how and when identification occurs, one turns to section 2-501.

Assume a contract for goods that are already in existence, that is, they do not have to be manufactured or grown. The provision in section 2-501(1) that identification occurs "when the contract is made if it is for the sale of goods already existing and identified," offers little enlightenment. There are two possible situations. Consider the case in which the goods involved are clearly unique.[46] In that case, if the contract description is sufficient to describe the goods, no more is needed and identification occurs at the time the contract is made. In the second case, assume the goods are not unique, but standardized.

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idea of when property or title passed or was to pass as being the determining factor." Nordstrom states: "The Code's approach can be summarized thus: specific problems are identified and solutions to those problems are established without concern as to who has title or the time a title might have passed from seller to buyer." R. Nordstrom, Handbook of the Law of Sales § 125, at 375 (1970). Hawkland says,

> [I]n the U.C.C. there are usually specific provisions with respect to the various rights and duties of the buyer and seller, such as risk of loss (2-509 and 2-510), insurable interest (2-501), . . . and often these provisions are not predicated upon ownership considerations. Consequently, the "title" concept is relatively unimportant under the U.C.C.

W. Hawkland, Sales and Bulk Sales 91 (1955).

[45] *See* U.C.C. § 2-401, Comments 2, 4; *id.* §§ 2-501(2), 2-509, 2-510.

[46] At common law, unique meant irreplaceable and specific performance was an appropriate remedy. U.C.C. § 2-716, Comment 2. *See* Uniform Sales Act §§ 68, 76 (1906) (superseded by U.C.C.); 5A A. Corbin, Contracts § 1142, at 117-18 (1964) (Specific performance is granted when "the subject matter of the contract is unique in character and cannot be duplicated or because the obtaining of a substantial equivalent involves difficulty, delay, and inconvenience."); Restatement (First) of Contracts § 361, Comment g (1932) ("A chattel may be unique in kind, quality, or personal association, or so nearly so that the purchase of its equivalent elsewhere is impracticable."); 3 S. Williston, *supra* note 32, § 602 ("Where, however, a chattel is unique or not purchasable in the market, specific performance has been granted. . . . In some cases, . . . the importance of the goods in the particular case, and the difficulty of acquiring them, except through the defendant, will induce the court to decree specific performance."). *See also* Morris v. Sparrow, 225 Ark. 1019, 287 S.W.2d 583 (1956); McCallister v. Patton, 214 Ark. 293, 215 S.W.2d 701 (1948); Fortner v. Wilson, 202 Okla. 563, 216 P.2d 299 (1950).

If the contract provided for the sale of 1,000 widgets, the goods might be "existing" under section 2-501(1)(a), but they are not sufficiently "identified" for identification to have occurred. Two actions must take place if identification is to occur at the time the contract is made. First, the description must be made more specific, for example, "1,000 widgets in boxes number 1 through number 100 in our warehouse in Podunk, Ohio," and second, sometime prior to the making of the contract, boxes containing 1,000 widgets must have been designated number 1 through 100. Thus, when the contract is made the goods would then be *already* existing and identified. To substitute the clearer definition suggested by this Article, the goods are already existing and are so clearly specified as the goods to which the contract refers that the contract can apply to no others. A clear case of goods already existing and identified can be found in *Draper v. Minneapolis-Moline, Inc.*,[47] in which the court ruled that there was sufficient identification when the seller pointed to a tractor on his premises and told the buyer it was his in reference to a contract into which the two parties had entered.[48] In *Richards & Associates, Inc. v. Tennessee Forging Steel Corp.*,[49] 268 tons of steel product which "had been prepared, set aside, and tagged" were also sufficiently identified to the contract.[50]

Suppose next that the contract had provided for the sale of 1,000 widgets located in our warehouse in Podunk, Ohio and that at the time of the making of the contract there were only 1,000 widgets in the warehouse. Under section 2-501(1)(a), which deals with identification contemporaneous with the making of the contract, the existing goods must either be unique or have been designated, segregated, or marked prior to the making of the contract. Because the contract can apply only to those particular or specific goods, identification is complete upon the making of the contract.

The next, and most troublesome, example is a contract which speaks of 1,000 widgets in our warehouse in Podunk, Ohio, when there are, in fact, 10,000 widgets in that warehouse. The likely assumption is that there is not a sufficient identification. Since we do not know exactly which 1,000 widgets are the subject of the contract, there can be no specific identification. It would be well to point out at this juncture that the Code policy favors early identification in moments of doubt.[51] What is bothersome here is that it is not entirely clear which of the 10,000 widgets are covered by the

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[47]100 Ill. App. 2d 324, 241 N.E.2d 342 (1968).

[48]*Id.* at 327-28, 241 N.E.2d at 344.

[49]24 U.C.C. REP. SERV. 326 (E.D. Tenn. 1978).

[50]*Id.* at 330.

[51]U.C.C. § 2-501, Comment 2.

contract. If we conclude that the widgets are not identified, then the contract is one for the sale of future goods and falls under section 2-501(1)(b).[52] In a sale of future goods, identification does not occur until the seller ships, marks, or otherwise designates them as the goods to which the contract refers.[53]

It is arguable, however, that what is being sold in this example is an undivided share of all the widgets in the Podunk warehouse. In other words, if widgets are fungible,[54] then the sale of 1,000 is an undivided share in an identified fungible bulk of 10,000 widgets located in our warehouse in Podunk, Ohio. Subsection (3) of section 2-105 permits a sale of a "part interest in existing identified goods" and subsection (4) of section 2-105 provides that an "undivided share in an identified bulk of fungible goods is sufficiently identified to be sold." Comment 5 of section 2-501 explains further that "[u]ndivided shares in an identified fungible bulk . . . can be sold. The mere making of the contract with reference to an undivided share in an identified fungible bulk is enough . . . to effect an identification if there is no explicit agreement otherwise."

Regarding the primary issue, whether widgets are fungible, the UCC definition of fungible is broad enough to encompass any standardized good. Section 1-201(17) defines fungible goods as "goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit." One court has held, for example, that wooden dowels are fungible.[55]

The next issue that arises is the definition of an "identified fungible bulk." Even if we read the word "identified" to mean so clearly specified that the contract can apply to no other, specifying 1,000 widgets in a certain warehouse seems to establish the existence of an identified fungible bulk. By specifying the warehouse

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[52]Section 2-105(2) specifies that "[g]oods must be both existing and identified before any interest in them can pass." If goods are not both existing and identified, they are "future" goods and a present sale cannot be accomplished.

[53]Martin Marietta Corp. v. New Jersey Nat'l Bank, 25 U.C.C. REP. SERV. 1458 (D.N.J. 1979); *see* U.C.C. § 2-105(2).

[54]U.C.C. § 1-201(17) provides:

> "Fungible" with respect to goods or securities means goods or securities of which any unit is by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this Act to the extent that under a particular agreement or document unlike units are treated as equivalents.

[55]Valley Forge Flag Co. v. New York Dowel & Moulding Import Co., 395 N.Y.S.2d 138, 139 (1977). This ruling rested upon the finding by the court that a dowel was a round wooden rod or stick requiring no particular type of wood, and that the defendant admitted that he could have replaced the dowels by purchasing them on the open market. The dowels were apparently interchangeable and replaceable. *See* text accompanying notes 74-77 *infra*.

one identifies the bulk. If there are thousands of other widgets in the warehouse, it is true that we cannot know exactly which widgets were sold without a more precise description. But section 2-105(4) provides that one can sell "[a]n undivided share in an identified bulk of fungible goods . . . although the quantity of the bulk is not determined," and that "[a]ny agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common." Therefore, when one sells a certain quantity of a fungible good from a clearly specified bulk of goods, for example, 1,000 widgets from our warehouse in Podunk, Ohio, one is selling an undivided share in an identified fungible bulk.

The term "undivided share" is applied to interests in property either real or personal. Frequently, the term is used in connection with forms of concurrent ownership—joint tenancy, tenancy in common, and tenancy by the entirety. All of these forms of ownership require that each tenant have an equal right to possess the whole. Cribbett in *Principles of the Law of Property* speaks of "co-owners [who] have simultaneous interests in every portion of the thing, but no separate interest in any particular portion of it."[56] Both sections 2-105 and 2-501 apply this terminology to the sale of goods. The parties to the sale who have an "undivided share in an identified bulk of fungible goods" have, therefore, simultaneous interests in the whole bulk and no separate interest in any particular portion of it. They have a claim, determined by the extent of their share, to every part of the whole and not to a particular portion that has been specified or particularized. When one sells an undivided share in an identified fungible bulk, one is selling a portion of a bulk of fungible goods—the bulk in question so clearly designated that the contract can apply to no other. The new owner has a simultaneous interest in the whole bulk but no separate interest in any specific portion of it.

Given the policy in favor of early identification coupled with the Code sections which provide for ownership in common,[57] the sale of 1,000 widgets from a warehouse in Podunk, Ohio, when there are 10,000 widgets in the warehouse, should sufficiently identify the goods to allow a present sale.

Section 2-501(1)(a) provides for identification simultaneous with the making of the contract so that a present sale is accomplished. Thus, identification occurs when the words of the contract so clearly specify the goods to which the contract refers that the contract can

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[56]J. CRIBBETT, PRINCIPLES OF THE LAW OF PROPERTY 94 (2d ed. 1975).

[57]*See* U.C.C. § 2-105(3), (4); *id.* § 2-501, Comment 5.

apply to no others. This result can be accomplished by describing three types of goods: (1) Unique, or commercially irreplaceable, goods; (2) goods already separated, marked or designated; and (3) goods within a clearly specified fungible bulk.

IV. Relation of Identification to Section 2-613

One of the most important consequences of identification is that it shapes the rights of the buyer and seller when non-negligent casualty occurs to the goods.

Consider section 2-613, labeled *"Casualty to Identified Goods"*:

> Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (Section 2-324) then
>
> (a) if the loss is total the contract is avoided; and
>
> (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

This section allows avoidance of the contract entirely if the loss of the goods is total, and either avoidance or acceptance with price allowance at the buyer's option, if the loss is only partial. The kind of goods to which section 2-613 applies is far from clear. If one reads the section carefully and avoids the misleading title, the section does not apply to all goods identified to the contract but only to goods "[w]here the contract requires for its performance goods identified when the contract is made."[58] What does that mean? Comment 1 to section 2-613 states that the section applies to goods "whose continued existence is presupposed by the agreement." What this section was designed to cover becomes marginally clearer when one discovers that in the 1949 draft of the Code, section 2-613 applied "[w]here the contract relates to identified goods which are irreplaceable or are treated by the parties as unique for purposes of

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[58]It has been suggested that "identified" is an imprecise term here: "Perhaps the closest synonym for 'identified' in this section [2-613] is 'specified.' If the purchased goods are specified by the contract (as that one refrigerator and no other, or that machine to be built and no other), the first condition of section 2-613 has been met." R. Nordstrom, *supra* note 44, § 108, at 327 (1970). *See* National Compressor Corp. v. Carrow, 417 F.2d 97 (8th Cir. 1969).

the contract."[59] In the 1956 recommendations, the current phraseology is substituted.[60] Comment 1 to section 2-613, however, has remained the same under both texts, leading to the conclusion that the drafters thought that the new text meant the same thing as the old.

The conclusion to be drawn from a reading of the text and history of both sections is that the section requires two criteria. First, the goods must be identified. Second, the goods must be unique or irreplaceable. Section 2-613 is designed to cover destruction of goods under contract before the risk of loss has passed to the buyer. The central issue is whether the casualty loss will excuse the seller from performance; and in this respect is comparable to the common law doctrine of "impossibility"—if the subject matter of the contract is destroyed, the contract is void because it is "impossible" to perform.[61] If unique or irreplaceable goods are destroyed, the seller is excused for impossiblity.[62] That is not the same as saying that if identified goods are destroyed the seller is excused. All unique goods are identified but not all identified goods are unique.[63] Thus, the title to

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[59]U.C.C. § 2-613 (May 1949 draft).

[60]ALI, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE (1957).

[61]Taylor v. Caldwell, 122 Eng. Rep. 309 (Q.B. 1863). Numerous American courts adopted the common law doctrine and excused performance when it became impossible to perform. *E.g.*, Columbus Ry. Power & Light Co. v. City of Columbus, 249 U.S. 399 (1919); Krause v. Board of Trustees, 162 Ind. 278, 70 N.E. 264 (1904); Juett v. Cincinnati N.O. & T.P.R. Co., 245 Ky. 379, 53 S.W.2d 551 (1932); Elsemore v. Inhabitants, 137 Me. 243, 18 A.2d 692 (1941); Ellis Gray Milling Co. v. Sheppard, 359 Mo. 505, 222 S.W.2d 742 (1949); Matousek v. Galligan, 104 Neb. 731, 178 N.W. 510 (1920); Gouled v. Holwitz, 95 N.J. 277, 113 A.2d 323 (1921); International Paper Co. v. Rockefeller, 161 A.D. 180, 146 N.Y.S. 371 (1914). *See generally* Schlegel, *Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things: The Doctrine of Impossibility of Performance*, 23 RUTGERS L. REV. 419 (1969); Annot., 12 A.L.R. 1273, 1278 (1921).

[62]*E.g.*, Stewart v. Stone, 127 N.Y. 500, 28 N.E. 595 (1891), wherein the court stated:

> By the contract now under consideration, the cheese and butter were to be manufactured at this factory, and to be made from the milk furnished by the patrons. . . . The existence of that particular factory was terminated by its destruction, and the loss with it of the manufactured product . . . rendered it impossible for the defendant to further proceed with the performance of his contract . . . . And, as the nature of the agreement was such that it must be deemed to have been contemplated by the parties to it that the articles to be manufactured should be made *only* from the materials furnished by the patrons and at the factory referred to, there was necessarily an implied condition so qualifying the defendant's undertaking as to relieve him from performance rendered impossible without his fault.

Id. at 507-08, 28 N.E. 596-97 (emphasis added).

[63]Pittenger Equip. Co. v. Timber Structures, 189 Or. 1, 217 P.2d 770 (1950). The Oregon Supreme Court construed Uniform Sales Act § 68 as follows: "Goods that are 'specified or ascertained' may in an occasional instance be unique, but they may also be readily available in the market." *Id.* at 22, 217 P.2d at 779.

section 2-613, "Casualty to Identified Goods," is inappropriate and misleading. The section would be better titled "Casualty to Goods."

Under the 1949 draft of section 2-613, the goods had to be irreplaceable or treated by the parties as unique for the purpose of the contract.[64] It could be argued that the second phrase would allow identification by itself to create unique goods. For example, the marking of the 1,000 widgets with numbers 1 through 1,000 would, by itself, make them unique widgets. The 1956 change removes this possibility by specifying that the contract must require identified goods, but this change still leaves the text open to interpretation. If the Code drafters meant unique goods, it would have been helpful if they had said unique goods. A section so worded need not have been circumscribed by the narrow common law definition of uniqueness. It could have been broadened to include the concept of "commercial feasibility of replacement."[65] If one interprets section 2-613 to apply to all identified goods, identification becomes synonymous with uniqueness. By that interpretation, no other goods, even those exactly the same as the identified goods, will ever satisfy the contract.

Suppose that the contract calls for the sale of 1,000 widgets in our warehouse in Podunk, Ohio, that there are only 1,000 widgets in the warehouse, and that the warehouse and the 1,000 widgets are destroyed. Under the criterion found in the 1949 draft, one would have to find either that the goods were irreplaceable, or that the parties treated them as unique for the purposes of the contract. Since widgets are fungible, it is likely that they are replaceable in the market, but the parties to the contract could have intended to treat them as unique by specifying the only widgets located in a specific warehouse. In other words, the "continued existence" of those particular widgets in that specific warehouse was "presupposed by the agreement."[66] To fall within the ambit of the current version

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[64]U.C.C. § 2-613 (1949 draft).

[65]U.C.C. § 2-716, Comment 2. *See* Kaiser Trading Co. v. Associated Metals & Minerals Corp., 321 F. Supp. 923 (N.D. Cal. 1970), *aff'd*, 443 F.2d 1364 (9th Cir. 1971); *cf.* Poltorak v. Jackson Chevrolet Co., 322 Mass. 699, 79 N.E.2d 285 (1948):

> It is settled in this Commonwealth that specific performance of contracts [will be granted] for the sale of chattels where the buyer shows that he is unable by reason of the nature of the subject, the conditions of the market, or other circumstances, to procure an article substantially similar to the one which he contracted to buy, or that the delay, expense and difficulties incidental to procuring such an article will entail serious inconvenience, loss of [*sic*] hardship, or that he stands in such a relation to the article that manifest justice will not be done unless performance is decreed.

Id. at 700, 79 N.E.2d at 285-86.

[66]U.C.C. § 2-613, Comment 1. In Israel v. Luckenbach S.S. Co., 6 F.2d 996 (2d Cir. 1925), the court stated:

> Where parties enter into a contract on the assumption that some par-

of section 2-613, it would have to be shown that the contract required for its performance goods identified to the contract when the contract was made. A contract that requires certain goods for its performance also presupposes the continued existence of the goods.[67]

If it can be shown that the parties to the contract identified those 1,000 widgets in that specific warehouse because the contract required such a specificity, the seller is excused. It is traditional to treat goods so specifically described in terms of location as unique.[68] If goods are treated as unique, their destruction is an excuse for non-performance.[69] In the famous case of *Howell v. Coupland*,[70] the court excused a farmer from a contract specifying that the crop was

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> ticular thing essential to its performance will continue to exist and be available for that purpose, . . . if before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it.

Id. at 997. *See also* Gibbs v. Hersman, 73 Cal. App. 732, 239 P. 350 (1935); Howell v. Coupland, 46 L.J.Q.B. 147 (1876); Taylor v. Caldwell, 122 Eng. Rep. 309 (Q.B. 1863); RESTATEMENT (FIRST) OF CONTRACTS § 460, Comment d.

[67]As noted by Corbin:

> There are many contracts in which the performance of one of the promises will be absolutely impossible in case of the destruction or non-existence of some specific thing. The parties . . . assume the thing's continued existence and express no intention as to what shall be done in case the things is destroyed or non-existent.

6 A. CORBIN, *supra* note 46, § 1337, at 388.

[68]In Holroyd v. Marshall, 33 L.J.Ch. 193 (1862), the court stated in dictum that "a contract to sell the 500 chests of a particular kind of tea which are now in my warehouse in Gloucester, was a contract relating to specific property, and which would be specifically performed." *Id.* at 196. *See also* Henry Heide, Inc. v. Atlantic Mut. Ins. Co., 80 Misc. 2d 485, 363 N.Y.S.2d 515 (1975) (sugar identified by its location in a particular warehouse in an action concerning the risk of loss after the mysterious disappearance of over 200,000 pounds of sugar).

Specific performance is generally not available for contracts in which the goods are neither intrinsically unique nor described by the contract in terms of a particular location. Bunge Corp. v. Recker, 519 F.2d 449 (8th Cir. 1975) (seller not excused in absence of a contractual requirement to grow the crop on particular land); Dunavant Enterprises, Inc. v. Ford, 294 So. 2d 788 (Miss. 1974). One commentator gave the following illustration:

> A farmer who has contracted to sell a ton of beans would not be excused by this section [2-613] if he had no beans because of a crop failure. Beans, as thus used in the contract, are not unique, and the farmer would have to procure them from someone else in order to perform and avoid a breach of the contract. But if the farmer contracted to sell beans grown on designated land, the failure of that specific crop would excuse him.

Hawkland, *supra* note 44, at 121.

[69]Pearce-Young-Angel Co. v. Charles R. Allen, Inc., 213 S.C. 578, 50 S.E.2d 698 (1948). *See* note 62 *supra*.

[70]46 L.J.Q.B. 147 (1876).

to be grown on his land because that specific crop was destroyed.[71] If the farmer had merely promised to deliver a certain crop without reference to growth in a specific location, he would not have been excused.[72] In the latter case, the seller could go into the market, buy the goods, and perform. If, in the hypothetical case, the designation of a specific warehouse renders the widgets unique, and the warehouse is destroyed, the seller would be excused under *Howell v. Coupland.*

If it could be shown that the designation of that particular warehouse was not through any special choice of the parties but was a mere administrative convenience, that new widgets were constantly available in the market, and that since the making of the contract the price of widgets had risen considerably, it would seem unjust to allow the seller to avoid the contract. The standard of the current section 2-613 is that the contract requires for its performance goods identified to the contract. Certainly, goods so identified are not required for the performance of the contract, yet under section 2-613, it is possible that the seller may avoid performance even if the warehouse and its contents are destroyed.

To ascertain whether the goods are required to be identified to the contract one can use a simple test. Assume, after the warehouse was destroyed, that the seller had delivered 1,000 widgets to the buyer from another warehouse. To allow the buyer to reject the widgets as non-conforming under section 2-601 because they did not come from the original warehouse specified would be commercially silly. One should read section 2-613 to mean that for goods to be required for the performance of the contracts, they must be unique, that is, irreplaceable by commerically reasonable standards. This would exclude from section 2-613 identified goods which could be replaced in a commercially reasonable manner. Section 2-613 is clearly misnamed. It does not apply to casualty to all identified goods.[73]

The decision in *Valley Forge Flag Co. v. New York Dowel & Moulding Import Co.*[74] illustrates that section 2-613 does not and should not apply to every case in which goods are identified. In *Valley Forge* the plaintiff-buyer agreed to purchase 30,000 5/16 × 24″ Ramin Dowels and 100,000 3/8 × 30″ Ramin Dowels. At the time

[71] *Id.* at 148-50. American jurisdictions have also held that performance is excused under a contract for the sale of agricultural products or lumber to be grown on specific lands when conditions rendered performance impossible. *See* Ontario Deciduous Fruit-Growers Ass'n v. Cutting Fruit-Packing Co., 134 Cal. 21, 66 P. 28 (1901); Matousek v. Galligan, 104 Neb. 731, 178 N.W. 510 (1920); International Paper Co. v. Rockefeller, 161 A.D. 180, 146 N.Y.S. 371 (1914); note 68 *supra.*

[72] Colley v. Bi-State, Inc., 21 Wash. App. 769, 586 P.2d 908 (1978). A farmer who contracted to sell 25,000 bushels of wheat failed to deliver due to dry weather. The court did not excuse performance, ruling that wheat was not identified within the meaning of U.C.C. § 2-613. *Id.* at 774, 586 P.2d at 911-12.

[73] *See* [1980] 3A BENDER'S U.C.C. SERV., SALES & BULK TRANSFERS § 14.13(3).

[74] 395 N.Y.S.2d 138 (Civ. Ct. N.Y. 1977).

of the contract, the goods were not identified to the contract. No specific dowels were designated and they were not a part of an identified fungible bulk. The defendant-seller shipped the dowels to the plaintiff. At this point the dowels became identified to the contract according to section 2-501(b) because the seller had selected certain dowels. Subsequently, the ship carrying the dowels was destroyed and the dowels were lost. The defendant claimed he should be excused from his contract under section 2-613. The court disagreed:

> Section 2-613 "has application in the limited situations where the continued existence of identified goods is a presupposition of the agreement. The sale of a unique chattel comes within its scope, but not the sale of chattels, any one of which fitting the description of the contract may be delivered." . . . Thus, with respect to fungible goods more than just an identification in a sales contract by kind and amount is necessary to come within the meaning of the section.[75]

Here the court is using the word "identification" in a generic sense, and not as a term of art. Mere description of the type of goods to be delivered was not sufficient. These goods were "identified" to the exclusion of all other dowels not at the making of the contract but rather at the time of shipment. Since the dowels were fungible and the contract did not require for its performance a specific bunch of dowels, section 2-613 was inapplicable.[76]

The court in *Valley Forge* further recognized that the seller's claim was basically a claim of impossibility based on the uniqueness of the item. Having decided the dowels were fungible and not required to be identified at the time of the contract, the court said that "the goods were not 'identified' within [the] meaning of § 2-613."[77] Application of section 2-613 thus requires more than mere identification. The identified goods must also be commercially irreplaceable.

V. Conclusion

Identification as a legal term of art in the UCC is so broad and ill-defined that it is of dubious value in those cases where identification is crucial. The term should be either replaced by more precise nomenclature or limited to the definition suggested in this Article: specification of the goods to the contract so that the contract can apply to no others.

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[75]395 N.Y.S.2d at 139 (quoting 3A Bender's, *supra* note 73).

[76]395 N.Y.S.2d at 139. *See also* Henry Heide, Inc. v. Atlantic Mut. Ins. Co., 80 Misc. 2d 485, 363 N.Y.S.2d 515 (1975) (buyer's right to recover not defeated by failure to segregate shares in a fungible bulk).

[77]395 N.Y.S.2d at 139.