The U.C.C. Merchant Sections: Reasonable Commercial Standards of Fair Dealing in the Trades

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THE U.C.C. MERCHANT SECTIONS:
REASONABLE COMMERCIAL STANDARDS OF FAIR DEALING IN THE TRADES

I. INTRODUCTION*

Article 2 of the Uniform Commercial Code (U.C.C.) applies to transactions in goods regardless of the status of the parties.¹ Fourteen sections of article 2, however, apply stricter standards of conduct to merchants.² An issue in each of these sections, therefore, is whether one or more of the parties to the transaction are merchants. According to U.C.C. section 2-104(1):

Merchant means a person who deals in goods of the kind or otherwise by his occupation holds himself³ out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.⁴

The interpretation of this definition has sharply divided courts⁵

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* The author thanks Professor Martin A. Frey for suggesting this topic and for his encouragement during the completion of this paper.

¹ "Unless the context otherwise requires, this Article applies to transactions in goods," U.C.C. § 1-102. All citations to the Uniform Commercial Code sections and comments refer to the 1972 Official Text and Comments of the Uniform Commercial Code.


³ "[W]ords of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender." U.C.C. § 1-102(5)(b).

⁴ U.C.C. § 2-104(1) (footnote added).

⁵ Compare, e.g., Cook Grains, Inc. v. Fallis, 239 Ark. 962, 395 S.W.2d 555 (1965) with Continental Grain Co. v. Brown, 19 U.C.C. REP. SERV. 52 (W.D. Wis. 1976). In Cook Grains, Inc. the court concluded that, since the Code merchant definition has its "roots in the 'law merchant' concept of a professional in business," merchant should be given its plain and ordinary meaning as interpreted in pre-Code case law—a professional trader. 239 Ark. at —, 395 S.W.2d at 557
and commentators, as has which criteria listed in the definition apply to each merchant section. This division stems from a misunderstanding of Code policies. As a result of such misunderstanding, some persons who ought to be held to merchant status and standards are not; consequently, Code policies are frustrated. Application of the merchant definition to a specific person depends on whether calling that person a merchant will promote the policies which underlie, not only the entire Code and the specific merchant section involved, but also—and primarily—the merchant definition and, hence, the merchant sections as a group.

The thesis of this comment is that the merchant sections as a group are intended to implement the policy announced in section 2-103(1)(b) of charging persons with reasonable commercial standards of fair dealing in their trades. If this is kept in mind, courts could be correct and consistent in their application—or nonapplication—of the merchant label to specific persons.

That the merchant sections are intended to implement such a policy will be shown in three steps. First, the Code merchant definition in section 2-104 will be analyzed. That analysis will show that merchant status results when a person holds himself out by occupation as having knowledge of a business practice or of goods. Second, the incorporation of the merchant definition by the fourteen merchant sections in article 2 will be discussed. That discussion will show that, while some merchant sections are general in nature, others are specific. The specific merchant sections are those which attribute knowledge of a

(quotting from U.C.C. § 2-104, comment 2). The Wisconsin court in Continental Grain, Inc., however, concluded that the Code merchant definition was intended to apply to all buyers and sellers except the consumer purchaser. 19 U.C.C. REP. SERV. at 59.

6. Compare Newell, The Merchant of Article 2, 7 VAL. L. REV. 307, 332 (1973) [hereinafter cited as Newell] with Dolan, The Merchant Class of Article 2: Farmers, Doctors, and Others, 1 WASH. U.L.Q. 1, 5 (1977) [hereinafter cited as Dolan]. Newell argues that the meaning of merchant may vary with the emphasis given to the nature and purpose of specific merchant rules and to the circumstances of the particular situation. Hence, a person may fit the purpose of a merchant rule, and thus be found to be a merchant, but not fit any of the criteria listed in the Code merchant definition. By contrast, Dolan argues that the meaning of merchant varies with the underlying reason of a particular merchant rule, but that whatever variation results from such reason will be one of the criteria listed in the Code merchant definition.

7. See note 15 infra and accompanying text.
8. See notes 16-27 infra and accompanying text.
9. See note 26 infra and accompanying text.
10. See notes 28-46 infra and accompanying text.
11. E.g., U.C.C. § 2-609(2) which provides, “Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.” (Emphasis added.)
12. E.g., U.C.C. § 2-205 which provides, “An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable.” The
specific business practice or specific knowledge of goods. The general merchant sections apply if a person fits into any of the specific merchant sections. While a premise of this comment is that both types of sections charge merchants with reasonable commercial standards of fair dealing in their trades, it will be pointed out that the general merchant sections do not specify what these standards are. Thus, this comment theorizes and will show that the general merchant sections charge a person with reasonable conduct as measured by the usages of his trade. The more specific merchant sections, by contrast, set out what the reasonable commercial standards are which must be observed. It will be shown that these specific sections charge a person with merchant status if that person represents, by usages of his trade, that he has the knowledge specified in the section. Therefore, in the specific merchant sections, a person can be a merchant for purposes of one section but a nonmerchant for another. Although the sections of a specific nature are, to a certain extent, independent, this comment will show that all merchant sections implement the underlying policy of holding persons to reasonable commercial standards of fair dealing in their trades. 

13. In the third and last step to this analysis, the principles derived from the discussion will be tested on the long standing issue of whether a farmer fits within merchant section 2-201(2) and thus should be labeled a merchant for purposes of that section. 

14. Two of the previously mentioned policies which underlie the entire Code should be identified. Recognition of these policies is important because promoting these policies is one of the considerations in deciding whether to attribute merchant status in a particular situation. 

15. Section 1-102(2) lists the underlying Code policies as “to sim-

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business practice to which this section refers is that of assuring, in a signed writing, that an offer will remain open for a specific or reasonable time.
13. See notes 41-46 infra and accompanying text.
14. See notes 47-78 infra and accompanying text.
15. See, e.g., U.C.C. § 1-102(1) which provides, “This Act shall be liberally construed to promote its underlying purposes and policies.” Comment 1 to this section indicates that two levels of policy accompany each rule: “The text of each section should be read in light of the purpose and policy of the rule in question, as [sic] also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.” Determining the policy of a particular section requires attention to the overall structure of the Code. As Karl Llewellyn, the Chief Reporter of article 2, said, “[The Code is] an integrated whole, whose parts supplement, support, mutually affect and balance one another.” 1 NEW YORK REPORT OF THE LAW REVISION COMMISSION FOR 1954, HEARINGS ON THE UNIFORM COMMERCIAL CODE 179 (1954) [hereinafter cited as 1 N.Y. HEARINGS].

Thus, article 1 is comprised of general definitions, such as the definition of good faith in § 1-201(19), and underlying policies such as those announced in § 1-102 which apply throughout the Code. In addition, part 1 of each article of the Code defines terms which apply to the article where the terms appear. The merchant definition, for example, appears in part 1 of article 2;
plify, clarify and modernize the law governing commercial transactions; to permit the continued expansion of commercial practices through custom, usage and agreement of the parties." To re-emphasize, application of the merchant definition to a specific person should depend on whether calling that person a merchant will promote not only these two policies and the policies behind the merchant section involved but also the policy behind the merchant definition—to charge persons with reasonable commercial standards of fair dealing in their trades.

II. THE MERCHANT DEFINITION

Section 2-104(1) begins, "'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge."16 Despite the seeming alternative language of this section, the following analysis will reveal that merchant status stems from any holding oneself out, by occupation, as having knowledge.17

A source of ambiguity in the definition is the recurring word or. In one context or means "instead of," linking disjunctive expressions, as in "sink or swim."18 Or, however, may also signify "in other words," linking equivalent expressions, as in "violin or fiddle."19 The first or in the merchant definition means "in other words." The use of the word otherwise following or signals this meaning because otherwise implies that a person who deals in goods of the kind is a person who by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.20 If such an implication is accurate, then holding oneself out by occupation as having knowledge or skill is the characteristic of "a person who deals in goods of the kind"21—a dealer—which makes him a merchant. Official comment 2 to section 2-104 also supports this reading by explaining that merchant status is based on specialized knowledge, thus implying that dealers represent that they have specialized knowledge. In addition, merchant status is attributed to persons who hire others who represent

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therefore, it applies throughout article 2 whenever the word merchant is used. See U.C.C. § 2-104(1).

17. Cf. Dolan, supra note 6, at 3 (who distinguishes holding oneself out and dealing).
18. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1585 (3d ed. 1961). If or is used in § 2-104(1) only in its disjunctive sense, the section could be comprised of 17 theoretically variant meanings of merchant. Cf. Newell, supra note 6, at 316 (where nine of the meanings are listed).
20. See Dolan, supra note 6, at 3.
21. U.C.C. § 2-104(1).
by occupation that they have knowledge of practices or of goods.\textsuperscript{22} If dealers are not among those who by their occupations hold themselves out as having knowledge or skill, it would be unjustifiable to attribute merchant status to a person who hires a dealer. Hence, merchant status stems from holding oneself out, by occupation, as having knowledge or skill.

The next \textit{or} in the merchant definition links the words knowledge and skill: "‘Merchant’ means . . . a person who by his occupation holds himself out as having knowledge \textit{or} skill."\textsuperscript{23} This raises the possibility that a person may be a merchant by representing that he has a skill as opposed to having knowledge. Any theoretical distinction, however, is immaterial since the merchant sections recognize nonspecialized skills that almost everyone possesses, such as ability to answer a letter.\textsuperscript{24} Thus, if a person has the knowledge specified in the merchant sections, that person should have no trouble applying the knowledge to exercise the skill. Moreover, comment 2 states that merchant status is based on specialized knowledge, not skill.\textsuperscript{25}

This knowledge, according to the definition, may be of business "practices or goods."\textsuperscript{26} Which aspect of the definition, goods or practices, will suffice to establish merchant status in a particular merchant section, the definition does not indicate. If the wrong aspect is chosen and applied, the merchant definition will be wrongly applied and Code policies will be frustrated. The focus of the discussion, therefore, must now shift from the definition in section 2-104(1) to the fourteen merchant sections of article 2.\textsuperscript{27} The issue becomes how the merchant

\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id} (emphasis added).
\textsuperscript{24} U.C.C. \textsection 2-104, comment 2.
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} U.C.C. \textsection 2-104(1) (emphasis added).
\textsuperscript{27} Continuing with the analysis of \textit{or} in the merchant definition of \textsection 2-104(1), it must be noted that \textit{or} also links a person "who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices of goods involved in the transaction" and "to whom such knowledge may be attributed by his hiring of an agent or broker or other intermediary." U.C.C. \textsection 2-104(1). In this context, \textit{or} means instead of, linking disjoint expressions. That is, merchants by occupation hold themselves out as having knowledge of a business practice or of goods, or, if such persons do not represent by occupation that they have such knowledge, they employ those who do. Either way, merchants status stems from a person’s holding himself out by occupation as having knowledge either of a business practice or of goods, depending on the requirements of the disputed merchant section. The last two usages of \textit{or} in the merchant definition link broker, agent, and other intermediaries. \textit{Other} implies that brokers and agents are examples of intermediaries, hence \textit{or} in this context means in other words. Therefore, merchant status stems from holding oneself out by occupation as having knowledge of a business practice or of goods depending on the merchant section in question. Aside from the potential ambiguity of \textit{or} in the merchant definition, an additional problem of deciphering the meaning of merchant from the article 2 definitional sections is that some merchant sections use the phrase "between merchants" as a specially defined
III. HOW THE MERCHANT SECTIONS INCORPORATE THE MERCHANT DEFINITION

A. The Independence of Specific Goods and Practices Sections

Comment 2 to section 2-104(1) groups the merchant sections into three categories. The first category is comprised of sections which base merchant status on specialized knowledge of business practices. Another category comprises sections that base merchant status on specialized knowledge of goods. The third category is made up of sections of a more general nature, such that if a person is a merchant under any of the goods or business practices sections within the first two categories, that person is a merchant for purposes of the more general sections within the third category.

term. According to § 2-104(3), between merchants means that both parties to the transaction are "chargeable with the knowledge or skill of merchants." Most courts have ignored § 1-204(3), assuming that between merchants means that both parties to the transaction must be merchants.

28. According to U.C.C. § 2-104, comment 2:

The professional status under the definition may be based upon specialized knowledge as to goods, specialized knowledge as to business practices, or specialized knowledge as to both and which kind of specialized knowledge may be sufficient to establish the merchant status is indicated by the nature of the provisions.

29. See, e.g., U.C.C. § 2-205 which provides, "An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration." The business practice which § 2-205 describes is that of assuring, in a signed writing, that an offer will remain open for a length of time. The policy of this section is "to limit the power of an offeror to withdraw his firm offer in circumstances in which the offeree reasonably relies on the offeror's firmness." J. WHITE, & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 33 (1972) [hereinafter WHITE & SUMMERS]. Comment 2 to § 2-205 states the policy slightly differently as "to give effect to the deliberate intention of a merchant to make a current firm offer binding." Section 2-205 brings the Code in line with the business practice of relying on firm offers. At common law, an offer was revocable unless supported by consideration. Finding the common law too harsh and contrary to business practices, courts modified the rule by applying the doctrine of promissory estoppel to the option promise or, in the absence of the express option promise, to an implied option promise. See, e.g., Brennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958). See also WHITE & SUMMERS, supra, at 33. Other practice sections include § 2-201(2) (Statute of Frauds), § 2-207(2) (confirmatory memoranda), and § 2-209 (modification of contracts).

30. E.g., U.C.C. § 2-312(3). This goods subsection accords merchant status to a person who by his occupation of selling goods represents that he has knowledge that the goods infringe on no patent or trademark. A person who is classified a merchant under § 2-312(3), however, should not be classified as a merchant under § 2-314, another goods subsection, merely because he held himself out by occupation as having knowledge that no infringement existed. Section 2-314 accords merchant status to a person who, by his occupation of selling goods, represents that the goods sold are of merchantable quality, i.e., that the goods will pass without objection in the seller's trade. Surely a person may represent, by occupation, that he has knowledge of no patent or trademark infringement of the goods he sells without representing that the goods will pass without objection in his trade. Other goods sections include § 2-314 (warranty of merchantability), § 2-410(2) (retention of possession by sellers), and § 2-403(2) (entrusting of possession of goods).

31. According to U.C.C. § 2-104, comment 2, the more general group of sections "applies to
Consideration of the classification scheme set forth in comment 2 leads to the conclusion that the goods sections and the practices sections are independent of each other. This conclusion is reached after an examination of the sections themselves. First, the general merchant sections incorporate both the goods and practices aspect of the merchant definition.\textsuperscript{32} Conversely, the more specific merchant sections, whether concerning goods or practices, incorporate but one aspect of the definition. For example, to be a merchant under a goods section, a person must by occupation hold himself out as having knowledge of goods. Thus, the goods sections incorporate the goods aspect of the definition. Similarly, the business practice sections incorporate the business practice aspect of the definition.

Examination of the classification scheme of comment 2 also reveals that, while a person may represent by his holding of a particular occupation that he has knowledge under one of the specific merchant sections, his holding of the same occupation may not represent possession of knowledge under another of the specific sections. In other words, not only may a person fit the section 2-104(1) merchant definition and still be a nonmerchant as to particular merchant sections, but also a person may be a merchant under one particular section and not under another.\textsuperscript{33} Thus, it follows that a person who qualifies as a merchant in one section which requires knowledge of goods should not automatically be classified as a merchant in the other goods sections. Nor should a person who qualifies as a merchant because of his knowledge of one business practice automatically be classified as a merchant where other business practices are concerned.

The independence of the goods and practice sections is further supported by the fact that merchant sections can be varied by usages of persons who are merchants under either the 'practices' or 'goods' aspect of the definition of merchant." General sections include § 2-103(1)(b) (good faith), § 2-327(1)(c) and § 2-605 (responsibility of merchant buyer to follow seller's instructions), § 2-509 (risk of loss), and § 2-609 (adequate assurance of performance).


33. Karl Llewellyn recognized the truth of this statement and argued that a contrary conclusion was unreasonable:

\begin{quote}
In regard to the warranty of merchantability, it is a question of knowledge of goods, but in regard to those sections of the Act which have to do with . . . a merchant's obligation to answer his correspondence, the matter has to do with practices.

In regard to the matter . . . of instructions on rejection, I would say that it was mixed. Certainly the man ought to understand reshipping practice, but if he doesn't understand how to handle a particular type of goods involved, he isn't under the obligation to follow instructions. They aren't reasonable under those circumstances.
\end{quote}

1 \textit{N.Y. HEARINGS}, \textit{supra} note 15, at 168.
Some merchant sections, therefore, codify certain usages of trade. Such codification was re-

34. An underlying Code policy is freedom of contract. See note 16 supra and accompanying text. According to § 1-102(3), "The effect of provisions of this Act may be varied by agreement." Agreement is defined in § 1-201(3) as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade." Thus, § 2-314(3) provides that warranties other than the implied warranty of merchantability may arise from usage of trade, and § 2-316(3) provides that the implied warranty of merchantability can be excluded by usage of trade. Most merchant sections are variable by usage of trade, though not expressly. E.g., U.C.C. § 2-207(2). See also U.C.C. §§ 1-102(3), 1-102(4).

Section 1-102(3) sets out the exceptions to the Code's general freedom of contract policy. That section states, "[T]he obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement." Since good faith and reasonableness may not be disclaimed by agreement, the drafters of sections such as 2-314 and 2-316 must have had in mind usages of trade different from those specified in the more specific merchant sections. Otherwise, these sections would not be variable by agreement.

It should be noted that § 2-205, unlike other merchant sections, cannot be made less strict by agreement of the parties. Comment 2 to § 2-205 states, "Despite settled courses of dealing or usages of the trade whereby firm offers are made by oral communication and relied upon without more evidence, such offers remain revocable under this Article since authentication by a writing is the essence of this section."
knowledge of goods or of business practices.

_Fear Ranches, Inc. v. Berry_ \(^{37}\) illustrates this premise. In that case a rancher sold cattle infected with brucellosis. In the usual case, section 2-314\(^{38}\) holds the merchant seller to an implied warranty that the goods sold are merchantable. The court, however, held that section 2-314 was inapplicable because of a usage of trade in the cattle industry in New Mexico that a knowledgeable cattle buyer, relying entirely on his own judgment, takes the animals as he finds them.\(^{39}\) In other words, the seller was not a merchant for purposes of section 2-314 because he did not hold himself out by occupation as having knowledge that the cattle were merchantable.\(^{40}\)

To repeat, occupations differ in the kinds of specialized knowledge that those engaged in such occupations hold themselves out as having. Therefore, while merchant status stems from holding oneself out by occupation as having knowledge, whether that knowledge must be of a

\(^{37}\) 470 F.2d 905 (10th Cir. 1972). \(Cf\). Dolan, _ supra_ note 6, at 29.

\(^{38}\) U.C.C. § 2-314(1) provides in part: "Unless excluded or modified . . . , a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

\(^{39}\) 470 F.2d at 908.

\(^{40}\) The courts have consistently refused to find liability under § 2-314 where the seller is engaged in an isolated sale. The implied warranty of merchantability does not arise in such case, these courts hold, because one sale is insufficient to establish a usage of trade. In _Sieman v. Alden_, 34 Ill. App. 3d 961, 341 N.E.2d 713 (1975), for example, the plaintiff-buyer of an automated multi-tear saw sued the defendant-seller for breach of an implied warranty of merchantability. Plaintiff was injured when a cant of wood exploded while being fed through the saw. Plaintiff contended that defendant was a merchant for purposes of § 2-314 because he held himself out by occupation as having knowledge of how to use the saw. The court, however, was unimpressed with the plaintiff's argument that being an employer of a saw mill did not mean that one was in the business of selling saws. The court cited comment 3 to § 2-314 in support of its holding: "A person making an isolated sale of goods is not a 'merchant' within the meaning of the scope of [Section 2-314] and, thus, no warranty of merchantability would apply." 34 Ill. App. 3d at —, 341 N.E.2d at 715. The conclusion which may be drawn from this case is that an isolated sale is not enough to produce merchant status in that a person engaged in an isolated sale does not represent by his occupation that the goods sold are merchantable.

A case based on similar reasoning is _Samson v. Reising_, 62 Wis. 2d 698, 215 N.W.2d 662 (1974). That case involved the sale of food by band mothers at a fund-raising luncheon. The food was contaminated. The court refused to accord merchant status to the band mothers for the purpose of bringing them within § 2-314. The court reasoned:

A commercial restauranteur as in [the cities of] either Betheia or Kresge would fall within the definition of a merchant. Also, it should be noted that [Section 2-314] imposes an implied warranty, not for a sale alone, but because of the special responsibility that are placed upon a merchant who is defined as one holding himself out as having knowledge and skill peculiar to the trade involved. The Wauwatosa Band Mothers, although selling the food, were not merchants as contemplated by the statutes.

62 Wis. 2d at —, 215 N.W.2d at 669.
business practice or of goods depends upon the requirements of the particular merchant section in question.

B. The Underlying Policy of Merchant Sections

Concluding that the goods and practices sections are independent, *i.e.*, that a person may be a merchant under one merchant section and not under another, does not imply that merchant sections have no singular underlying policy or common thread. Quite the contrary. The preceding analysis of the merchant definition has demonstrated the overall requirement of attributable knowledge. Merchant status, regardless of the merchant section involved, derives from holding oneself out by occupation as having knowledge, either of goods or of business practices. In addition, all the merchant sections are unified by the underlying Code policy of good faith.

Section 1-201(19) imposes on all persons an obligation to perform Code duties in good faith. This requires “honesty in fact in the conduct or transaction concerned.”\(^ {42} \) The good faith required of a merchant, however, is defined not only as “honesty in fact in the conduct or transaction concerned,” but also as “the observance of reasonable commercial standards of fair dealing in the trade.”\(^ {43} \) Thus, the thesis of this comment is that the merchant sections are unified by and are intended to implement the policy of charging merchants with “merchant good faith,” that is, with observance of reasonable commercial standards of fair dealing in their trades. This is supported by the comment following section 1-203 which states that the merchant good faith duty is implemented by courses of dealing and usages of trade. More importantly, the comment also provides, “Particular applications of this general principle [of merchant good faith] appear in specific provisions of the Act such as . . . the duty of a merchant buyer who has rejected goods to effect salvage operations (Section 2-603).”\(^ {44} \) Thus, some merchant sections specify reasonable commercial standards of fair dealing in the trades;\(^ {45} \) they are particular applications of the general duty of “merchant good faith.” Other merchant sections, by contrast, do not specify what is required for “merchant good faith” but impose upon a merchant the general duty of reasonableness as measured by commer-

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41. See notes 16-27 *supra* and accompanying text.
42. U.C.C. § 1-201(19).
43. U.C.C. § 2-103(1)(b). This is one of the article 2 general merchant sections.
44. U.C.C. § 1-203, comment.
45. See note 12 *supra* and accompanying text.
cial standards. Merchant status in these general merchant sections results if a person is a merchant under any other merchant section. In this respect, the general merchant sections are not independent of the more specific ones.

Thus, merchant sections implement the Code policy of holding persons to reasonable commercial standards of fair dealing in their trades by holding them to the representations they make by occupation, that is, by holding them to observance of the usages of their trades.

IV. THE FARMER AS A MERCHANT UNDER THE CODE STATUTE OF FRAUDS EXCEPTION—MERCHANT METHODOLOGY APPLIED

The foregoing analysis of the merchant definition and discussion of merchant sections suggests certain steps to follow in applying a merchant section. First, determine the facts which will cause the section to become operative and the policy considerations which are behind the section. Then, determine the type of knowledge the merchant section in question requires for merchant status—knowledge of a business practice or knowledge of goods. Next, if one of the more specific merchant sections is involved, determine the specific business practice or knowledge of goods the merchant section requires. Finally, examine the occupation of the person whose status is in question to decide whether the requisite knowledge is a usage of his trade. If such knowledge is a usage of the person’s trade, then he holds himself out by occupation as having the requisite knowledge. He is, therefore, a merchant for purposes of the merchant section in question. Following these four steps assures that a person who fits the merchant definition is accorded merchant status in accordance with the purposes of a particular section and of overall Code policies. Again, the underlying policy of the merchant sections is to hold persons to the reasonable commercial standards of fair dealing in their trades. Merchant sections implement this policy by holding a person to the representations he makes by occupation.

46. See note 11 supra and accompanying text.
47. “[E]ach section or sub-section contains a statement of the factual conditions which are the operative conditions on which the result stated in the rule rests.” S. MENTSCHIKOFF, COMMERCIAL TRANSACTIONS: CASES AND MATERIALS 7-8 (1968) [hereinafter cited as MENTSCHIKOFF]. Therefore, the proper approach to construing Code sections is first to discern the operative facts which will make the rule apply and to determine whether the operative facts match the facts at bar. Because each rule is limited to its reason and to underlying Code policies, the operative facts do not exist where application of the rule would violate its reason.
48. See note 15 supra and accompanying text.
49. Note that the standard is not one of actual knowledge. Although actual knowledge may
To illustrate how the policy of holding persons to reasonable commercial standards of fair dealing in their trades is implemented in a particular merchant section, this comment will now analyze the question of whether a farmer is a merchant within merchant section 2-201(2).

In July, 1974, Farmer Brown allegedly contracted by telephone to sell Johnston Feed Service 25,000 bushels of grade 2 corn for $3.21 per bushel with delivery to be in October, November, and December, 1974. Farmer Brown later refused to deliver the corn, causing Johnston Feed Service a loss of $50,375.

Johnston Feed Service filed suit50 against Brown in Wisconsin, a state which had enacted the Uniform Commercial Code. Since article 2 of the Code defines goods to include "growing crops,"51 article 2 was the governing law, and section 2-201, the Code's Statute of Frauds, was controlling because the alleged sale exceeded $500.52

Relying on the Statute of Frauds, Farmer Brown argued that, even if a contract was shown to exist, it would be unenforceable because it was not evidenced by a writing as required by section 2-201(1).53 Section 2-201(2), however, provides an exception to the writing requirement where the transaction is between merchants:

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the [writing] requirements . . . against such party unless written notice of objection to its contents is given within 10 days after it is received.54

be present, comment 2 to § 2-104(1) indicates that a person who buys or sells as a hobby will not necessarily be deemed a merchant due to his actual knowledge. If a person does have actual knowledge of a business practice or of goods, however, he violates § 1-201(19), the subjective good faith section, by representing otherwise. But see Continental Grain Co. v. Harbach, 400 F. Supp. 695 (N.D. Ill. 1975) in which the court stated, "in view of his actual knowledge and business experience, no additional positive representation is necessary." Id. at 699 (emphasis added).
51. U.C.C. § 2-105(1).
52. U.C.C. § 2-201(1) provides:
Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
53. Note that Brown did not admit that a contract existed because to do so would make the contract enforceable under § 2-201(3)(b).
54. U.C.C. § 2-201(2) (emphasis added). Llewellyn explained the policy behind the "between merchants" exception to the Statute of Frauds:
Johnston Feed Service argued in answer that the oral contract with Brown was between merchants and that its signed confirmatory writing sent to Brown satisfied section 2-201.

The first step in resolving the issue of whether Farmer Brown was a merchant within section 2-201(2) is to determine the type of knowledge that section 2-201(2) merchants hold themselves out as having: knowledge of a business practice or knowledge of goods or knowledge of both. Section 2-201(2) describes a business practice—specifically, the business practice between merchants of sending signed, written confirmations of oral contracts. By this business practice, if the recipient of the confirmation does not object to it, the sender may presume that the terms of the confirmation embody the contract. Section 2-201(2), by depriving the merchant recipient of the Statute of Frauds defense, protects the sender's conclusion that a contract consistent with the terms of the confirmation exists.

Did Farmer Brown, in selling his crops under a futures contract, hold himself out by his occupation as having knowledge of this business practice specified in section 2-201(2)? The answer to this question depends on whether this practice is found to be a usage of his trade.

In considering this question, the court pointed out that farmers who grow and sell crops engage extensively in futures contracting with grain companies. The court stated, "The oral forward contract-confirmation practices . . . are well-known and widely-followed by farmers." The court also explained the commercial necessity in the futures market of the business practice of section 2-201(2) and noted, "The operation of the commodity futures market . . . depends for its stability upon the integrity and enforceability of contracts for purchase and resale." Therefore, the court found that farmers who sell large quanti-

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These days we are making contracts over the long-distance telephone as an increasingly standard practice. Decent businessmen having made a contract over the long-distance telephone confirm before five o'clock or close of business that day. As the statute now stands, any crook who wishes to play it both ways against the middle has only to fail to communicate and the other guy is stuck. He can hold him or get out according to the market. This happy opportunity for fraud is unfortunately being indulged in to a considerable extent. We think that the machinery provided in the section, [not by any means wholly satisfactory, at least] is a safeguard against this particular type of abuse and fits the practice of constantly closing deals at a distance, and orally.

1 N.Y. HEARINGS, supra note 15, at 179.
56. Id. at 60. Dolan and others have argued that farmer is too vague a designation from which to determine whether a person fits § 2-104(1). See Dolan, supra note 6, at 18. "The term 'farmer' itself best illustrates the failure of attempting to determine merchant status by the application of occupational terms. A farmer can be a laborer, a tenant, a rancher, a vintner, a grower, a shepherd, a corporation, or a 'gentleman.'" Id. at 22 n.161.
ties of crops under futures contracts hold out to the grain companies that they have knowledge of the business practice described in section 2-201(2), because the practice of oral forward contract-confirmation is a usage of their trade.\textsuperscript{57}

Proper Code construction, as previously stated,\textsuperscript{58} requires consideration not only of the reason behind the specific section scrutinized but also of the underlying Code policies announced in section 1-102.\textsuperscript{59} Holding that farmers who sell large quantities of crops are merchants promotes the policies both behind the merchant exception to the Statute of Frauds and behind the Code's merchant sections as a whole.

The policy behind section 2-201(2) is to guard against fraud and to foster an even distribution of risk in the market place.\textsuperscript{60} Farmers enter into futures contracts to guard against the chance of a market decline, but they risk a market rise. Conversely, the grain company to whom the farmer sells his crop guards against a market rise by entering into futures contracts, but it risks a market decline. Holding these farmers to merchant status fosters an even distribution of risk in the commodities market; a contrary holding places an unreasonable burden on the grain company. Holding farmers who have entered futures contracts to merchant status, moreover, prevents the kind of fraud that section 2-201(2) is designed to guard against. The farmer, if held not to be a merchant, would be protected by the written memorandum of the deal if the market falls, but he would be free to avoid the deal by claiming the Statute of Frauds defense if the market rises. This holding, by preventing such conduct on the part of farmers, also promotes the policy underlying the merchant sections of article 2—holding persons to observance of reasonable commercial standards of fair dealing in their trades.

By holding a farmer who sells large quantities of crops under a futures contract to merchant status, courts also advance the underlying Code policy announced in section 1-102(2)(b) of permitting the continued expansion of commercial practices through custom, usage, and agreement of the parties. Section 2-201(2) changes former law which recognized no "between merchants" exception to the Statute of Frauds.\textsuperscript{61} In doing so, it conforms with modern business practice

\textsuperscript{57} Continental Grain Co. v. Brown, 19 U.C.C. REP. SERV. 52, 59 (W.D. Wis. 1976).
\textsuperscript{58} See note 15 \textit{supra} and accompanying text.
\textsuperscript{59} See note 15 \textit{supra} and accompanying text.
\textsuperscript{60} See Kimball County Grain Coop. v. Yung, 200 Neb. 233, —, 263 N.W.2d 818, 823 (1978); and see note 54 \textit{supra}. See also WHITE & SUMMERS, \textit{supra} note 29, at 47-48.
\textsuperscript{61} See, e.g., Ozier v. Haines, 411 Ill. 169, 103 N.E.2d 485 (1952). See also note 36 \textit{supra}. 

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which, in the facts discussed here, is essential to the commodities market.

As compelling as this argument appears, however, courts are sharply divided on whether a farmer who sells his crops annually under a futures contract is a merchant for purposes of the "between merchants" exception to the Statute of Frauds. The reasons given by courts for not holding farmers to merchant status vary. Some courts have held that farmers are not merchants because Code merchant status has its roots in the law merchant. According to section 1-103, "[u]nless displaced by the particular provisions of this Act, . . . the law merchant . . . shall supplement its provisions." Farmers were excluded from law merchant status; therefore, some courts reason, they are not part of the Code merchant class. One pre-Code definition of merchant formulated by a court which held farmers to be non-merchants stated: "A merchant is defined to be, in one sense, a trader, by Webster, and by Burrill and Bouvier in their Law Dictionaries, and a person who is engaged in farming and stock raising is not a merchant."63

This reasoning can be refuted by looking to the language of the Code itself. While it is true that the Code merchant definition has its roots in the law merchant, the Code merchant concept displaces the narrower law merchant concept.64 Section 1-103 allows the law merchant to supplement the Code only if not "displaced by the particular provisions of this Act." Therefore, to the extent that the Code merchant definition displaces the law merchant concept, that concept is inapplicable.65 Even if the law merchant and Code merchant concepts


64. Those who by occupation hold themselves out as having knowledge of business practices or of goods include more persons than dealers, with whom the law merchant was primarily concerned. See notes 16-21 supra and accompanying text.

65. Llewellyn cautioned:

\[T]he definitions laid down in this Code are not "dictionary" definitions. They don't tell people how to think. They don't tell people how to write. They don't even tell people how to write contracts. What they do is to say what, in this Code, these words mean when they are found in this Code . . . .

1 N.Y. HEARINGS supra note 15, at 168 (emphasis added). Further, as Mentschikoff noted:

The Code was drafted on the basis of recurrent typical factual situations in commercial life and on an appraisal of the desirable rules for the regulation of those situations; so that . . . proper construction of the Code does not lie in movement from the prior law to the section or sections dealing with the same problem. Such a movement does not represent the manner of its drafting and can lead to very queer and inadequate results because it leaves things out or brings in problems of construction which are nonexistent when the
were congruous, the advent of futures trading as the chief means of selling farm crops has arguably expanded the farmer class enough to bring it within the Code merchant definition.66

A related reason courts have given for holding that farmers are not merchants is that the merchant class includes dealers who, by definition, both buy and sell. Because a farmer only sells his crops, he is not a dealer and, consequently, according to some courts, not a merchant.67 The problem with this argument is that persons other than dealers, such as manufacturers, hold themselves out as having knowledge of the business practice described in section 2-201(2). Thus it seems clear that the Code merchant definition is not synonymous with dealer.68

Another reason that farmers have been held not to be merchants within section 2-201(2) is that farmers are casual sellers in that they sell crops only once a year.69 Comment 1 to the merchant definition contrasts a merchant with a casual or inexperienced seller or buyer.70 The implication of the comment is that a casual seller does not hold himself out as having some specific knowledge. One court, however, refuted this reasoning by noting: "A sale of 75,000 bushels of corn for a total price in excess of $212,000 is not a 'casual sale.'"71 Nor, as has been demonstrated, are farmers inexperienced in this type of transaction. Another court concluded: "The marketing of a crop is as important to the farmers as the raising of it."72

Still a different approach to the problem has been taken. One court barred a farmer from asserting the Statute of Frauds while, at the same time, holding that the farmer was not a merchant.73 The court held that the oral contract was enforceable against the farmer under the doctrine of promissory estoppel. This conclusion, however, ignores the fact that merchant status is predicated on a doctrine not unlike estoppel. The following analysis reveals the truth of this statement. "An estoppel arises where man has done some act which the policy of the law will not permit him to . . . deny."74 Where a person makes a representa-

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66. See supra note 4 and accompanying text.
68. See notes 16-22 supra and accompanying text.
70. U.C.C. § 2-104, comment 1.
tion that misleads another to such other person's detriment, the doctrine of estoppel applies. Thus, by entering certain kinds of transactions, such as the selling of crops on the futures market, a farmer will ordinarily be understood to hold himself out as having standard knowledge of the business practices involved in the transaction. The Code merchant sections hold persons to the representations they make by occupation. The underlying rationale is commercial necessity: "Between commercial men . . . a continuing sense of reliance and security . . . is an important feature of the bargain."

Finally, some courts have decided that a farmer is a merchant for purposes of section 2-201(2), but for the wrong reasons—because of his knowledge of his crops. This construction ignores the context in which the farmer-merchant issue arises. Section 2-201(2) describes and governs a business practice, the sending of a written confirmation. Thus, the type of merchant subject to the section is a person whose merchant status is derived from knowledge of that business practice, not from knowledge of goods.

V. Conclusion

The merchant sections of article 2 are intended to implement a policy of holding persons to reasonable commercial standards of fair dealing in their trades. The merchant sections implement this policy on two levels. General merchant sections hold persons to reasonable—but unspecified—conduct as measured by commercial standards. More specific merchant sections hold persons to observance of definite commercial practices, which are set out in those sections, when those persons hold themselves out by their occupations as having knowledge of those practices.

If courts will heed the underlying policy of the Code merchant sections, the merchant cases will become consistent. By observing this policy, courts will know what kind of representation, whether of goods or of a business practice, the merchant section in dispute calls for. They will, therefore, know which part of the merchant definition to apply. Courts, in other words, will then know to accord merchant sta-

75. The duty imposed on merchants is also similar to the tort negligence standard of care required of professionals. "[B]y undertaking to render [professional] services . . . he will ordinarily be understood to hold himself out as having standard professional skill and knowledge." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 162 (4th ed. 1971).
76. See notes 17-22 supra and accompanying text.
77. U.C.C. § 2-609, comment 1.
tus when a person holds himself out by his occupation as having the requisite knowledge called for by the merchant section, that is, when the requisite knowledge is a usage of his trade.

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