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Comment

THE MERCHANT'S EXCEPTION TO THE UNIFORM COMMERCIAL CODE'S STATUTE OF FRAUDS

I. INTRODUCTION

The Uniform Commercial Code's (Code) statute of frauds for sales, § 2-201, contains three provisions.1 Subsection (1) states the general rule that a contract for the sale of goods for $500.00 or more is not enforceable "unless there is some writing sufficient to indicate that a contract for sale has been made and it is signed by the party against whom enforcement is sought."2 Thus, a party who has not signed any writing may assert the statute of frauds as an absolute defense in a contract dispute.3 The practical effect of this provision is to prevent an indi-

1. U.C.C. § 2-201(1)-(2) (1978). Article 2 of the Uniform Commercial Code applies to transactions in goods. U.C.C. § 2-102 (1978). "Goods" means all things which are moveable at the time of their identification to the contract for sale. U.C.C. § 2-105(1) (1978). If the transaction is for services, rather than goods, then the transaction is governed by common law contract principles. J. CALAMARI & J. PERRILLO, THE LAW OF CONTRACTS 16-17 (2d ed. 1977). Where a transaction involves both a sale and a service, courts have held that the "dominant thrust" of the contract should determine whether Article 2 or common law contract principles apply. See, e.g., Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456, 459 (4th Cir. 1983), aff'd, 778 F.2d 196 (4th Cir. 1985), cert. denied, 106 S. Ct. 1640 (1986) (contract between builder and company which installed windows predominantly involved sales, not service); Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572 (7th Cir. 1976) (sale of one million gallon water tank held sale, not service).

2. U.C.C. § 2-201(1) (1978). In full, this subsection states: 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.

Id.

3. The statute of frauds is generally considered an affirmative defense which must be specially pleaded. See, e.g., TCP Indus. v. Uniroyal, Inc., 661 F.2d 542 (6th Cir. 1981) (statute of frauds is affirmative defense and waived if not raised in pleadings); Bevercombe v. Denney & Co., 40 Idaho 34, 39-40, 231 P. 427, 429 (1924) (defendant-seller of potatoes failed to raise statute of frauds in answer and now precluded from raising it); Farmers Coop. Elevator Co. v. Johnson, 90 S.D. 36, 237 N.W.2d 671 (1976) (failure to plead statute of frauds was fatal in breach of oral contract action). But see Lewis v. Hughes, 276 Md. 247, 251, 346 A.2d 291, 238 (1975) (Rule 2-885 of Maryland Rules does not require statute of frauds defense to be specially pleaded).

In addition to raising the defense, the defendant also has the burden of

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vidual from suing for breach of an alleged oral contract.  

Subsection (2) of § 2-201 creates an exception to this strict statute of frauds provision. This subsection provides:

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 requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

Because this provision applies only "between merchants," it commonly is referred to as the "merchant's exception." The merchant's exception drastically alters pre-Code law by eliminating the requirement that a person actually sign some writing before he can be held liable on a contract. This provision contemplates the situation in which one merchant


4. See, e.g., Meylor v. Brown, 281 N.W.2d 632 (Iowa 1979) (oral contract not prohibited or void; merely unprovable if objection is raised, unless exception applies); C.G. Campbell & Sons v. Comdeq Corp., 586 S.W.2d 40 (Ky. Ct. App. 1979) (plaintiff-competitor who accepted defendant's telephone bid to furnish kitchen equipment to construct school building could not enforce oral contract where no writing); Anthony v. Tidwell, 560 S.W.2d 908 (Tenn. 1977) (oral contract for sale of cattle for $50,000 unenforceable); Hughes v. Snigorski, 35 Mass. App. Dec. 122 (1960) (oral agreement to sell yacht for $6,000 unenforceable against seller).

5. In addition to the exception created in subsection (2), subsection (3) creates three more specific exceptions. These exceptions relate to specially manufactured goods (§ 2-201(3)(a)), admissions in pleadings or testimony (§ 2-201(3)(b)) and partial performance of the alleged contract (§ 2-201(3)(c)).

6. U.C.C. § 2-201(2) (1978). The most significant aspect of this provision is that it eliminates the requirement that the party being charged on the contract actually have signed a writing. Edwards v. Wilbur-Ellis Co., 379 F. Supp. 1404, 1406 (N.D. Ga. 1974) (whether buyer's letter to seller of peanut meal served as confirmation was question of fact precluding summary judgment).

The "merchant's exception" provision of U.C.C. § 2-201(2) breaks down into six discrete elements: 1) the sale must be between merchants; 2) the confirmation must have been "received" by the other merchant; 3) the confirmation must be received "within a reasonable time;" 4) the merchant receiving the confirmation must "have reason to know its contents;" 5) the merchant who receives the confirmation must give written notice of objection to the writing's contents within ten days and 6) the writing must qualify as a "writing in confirmation of the contract and sufficient against the sender." This Comment will address each of these provisions.

7. For a discussion of the meaning of "between merchants," see infra notes 38-39 and accompanying text.

sends a writing to confirm an alleged oral agreement.9 If the merchant who receives the confirmation does not object to this writing within ten days, then the confirmatory writing satisfies the requirements of subsection (1) and, therefore, the receiving merchant may be held liable on the contract without ever having signed any writing.10

A written confirmation between merchants to which there has been no timely objection does not prove that there actually is a contract.11 Rather, the only effect is that a merchant who fails to object to a confirmation may not raise the statute of frauds as a defense.12 The party who sent the confirmation still must prove at trial that there was an oral

(whether buyer's letter to seller of peanut meal as confirmation was question of fact precluding summary judgment).


10. See U.C.C. § 2-201(2) official comment 3 (1978). For a discussion of the effect on both the plaintiff and defendant in failing to object to a written confirmation, see infra notes 11-14 and accompanying text.

11. U.C.C. § 2-201 official comment 3 (1978); see also Thomson Printing Mach. Co. v. B.F. Goodrich Co., 714 F.2d 744, 748 (7th Cir. 1983) (alleged seller of used printing machinery precluded from alleging nonreceipt of confirmation when confirmation was delivered to company mailroom); Tipton v. Woodbury, 616 F.2d 170, 176 (5th Cir. 1980) (plaintiff's letter to defendant regarding plaintiff's purchase of all defendant's stock in bank qualified as confirmation); Perdue Farms v. Motts, Inc., 459 F. Supp. 7, 14 (N.D. Miss. 1978) (confirmation of purchase for 1500 boxes of "roasters" qualified as confirmation; merely takes away right of receiving merchant to assert statute of frauds as defense); Campbell v. Yokel, 20 Ill. App. 3d 702, 706, 313 N.E.2d 628, 631 (1974) (failure to object to plaintiff's confirmation alleging oral agreement to sell grain at $5.50 per bushel barred defendant from asserting statute of frauds as defense to plaintiff's breach of contract action).


Trafalgar Square, Ltd. v. Reeves Bros., 35 A.D.2d 194, 315 N.Y.S.2d 239 (1970) is not inopposite. In that case, Trafalgar made several oral orders from Abaco Fabrics. Id. at 195, 315 N.Y.S.2d at 240. Abaco delivered the fabric and followed up each order by sending a copy of the contract to Trafalgar. Id. at 195, 315 N.Y.S.2d at 241. Each contract contained a provision providing for arbitration of disputes arising out of the sale. Id. at 196, 315 N.Y.S.2d at 241. The court concluded that Trafalgar was bound to the provision in the written confirmation which provided for arbitration of disputes arising out of the sale. Id. at 197, 315 N.Y.S.2d at 241. The court did not, however, conclude that Trafalgar was bound to the contract because it did not give written notice of objection. See id.

12. See, e.g., Edwards v. Wilbur-Ellis Co., 379 F. Supp. 1404, 1406 (N.D. Ga. 1974) (whether buyer's letter to seller of peanut meal was confirmation was question of fact precluding summary judgment); American Parts Co. v. American Arbitration Ass'n, 8 Mich. App. 156, 170, 154 N.W.2d 5, 13 (1967) (whether buyer bound to arbitration provision contained in seller's confirmation to be determined by summary hearing); see also R. Anderson, supra note 11, at 89-90; R. Nordstrom, supra note 11, at 60-61; A. Squillante & J. Fonseca, supra note 11, at 287-88; J. White & R. Summers, supra note 11, at 58.
agreement. Nonetheless, in many instances, a written confirmation is strong evidence of both the existence of a contract and its particular terms.

Confirming memoranda are a common part of modern business transactions. Yet, many businessmen are not fully aware of the legal significance of these writings. For the unsuspecting businessman, a confirmatory writing could trap him into costly litigation which easily could have been avoided. The purpose of this Comment is to explain how the merchant’s exception has been interpreted by surveying the relevant case law. More ambitiously, this Comment will point out areas of confusion where the courts either have not spoken or have spoken incorrectly and will suggest possible solutions. Additionally, this commentator hopes to draw attention to an area of the law which has been neglected by legal scholarship, but has been the source of tremendous litigation.

II. Historical Background

The English Parliament enacted the statute of frauds in 1677. At

13. Thomson Printing Mach. Co. v. B.F. Goodrich Co., 714 F.2d 744, 748 (7th Cir. 1983) (alleged seller of used printing machinery precluded from alleging nonreceipt of confirmation when confirmation was delivered to company mailroom); Tipton v. Woodbury, 616 F.2d 170, 175 (5th Cir. 1980) (plaintiff’s letter to defendant regarding plaintiff’s purchase of all defendant’s stock in bank qualified as confirmation); Perdue Farms v. Motts, Inc., 459 F. Supp. 7, 14 (N.D. Miss. 1978) (confirmation of purchase for 1500 boxes of “roasters” qualified as confirmatory writing; merely takes away receiving merchant’s right to assert statute of frauds as defense); Automotive Spares Corp. v. Archer Bearings Corp., 382 F. Supp. 513, 515 (N.D. Ill. 1974) (buyer’s invoice sufficient confirmation of alleged agreement by seller to deliver roller bearings); see also R. Anderson, supra note 11, at 90; R. Nordstrom, supra note 11, at 60-61; A. Squillante & J. Fonseca, supra note 11, at 289; J. White & R. Summers, supra note 11, at 58.

14. See, e.g., General Matter, Inc. v. Penny Prod., 651 F.2d 1017 (5th Cir. 1981) (terms of unilateral confirmation which satisfy “merchant exception” not conclusive evidence of terms of alleged oral agreement); Perdue Farms v. Motts, Inc., 459 F. Supp. 7, 23 (N.D. Miss. 1978) (noting confirmation may be admissible to show terms of alleged agreement, but also noting that defendant could introduce evidence to contradict terms contained therein); Duralon Indus. v. Petal Sales Co., 4 U.C.C. Rep. Serv. 736 (N.Y. 1967) (failure of merchant to object to stated prices in invoice did not preclude defendant from showing that stated prices were incorrect).

15. A Statute for the Prevention of Fraud and Perjuries, 29 Charles 2, ch. 3 (1677), reprinted in H. Reed, Statute of Frauds 265-67 (1884). The actual date of the enactment of the statute of frauds is disputed. Some scholars suggest that the date was 1676. Bouret, Oral Will Contracts and the Statute of Frauds in California, 1896-1980: A Summary and Evaluation, 8 Pepperdine L. Rev. 41, 43 (1980) (citing W. Burbry, Real Property 287 (3d ed. 1965); C. Brown, Statute of Frauds 1-23 (1880); 1 H. Reed, Law of the Statute of Frauds 1-25 (1884)). Other commentators, however, suggest that 1677 is the correct date. Merrill, The Statute of Frauds in Light of the Function and Dysfunction of Form, 43 Fordham L. Rev. 39 (1974) (citing 6 W. Holdsworth, A History of English Law 380-84 (1927); Costigan, The Date and Authorship of the Statute of Frauds, 26 Harv. L. Rev. 329, 334 (1913)). This Comment adopts 1677 as the correct date.
the time of its enactment in the seventeenth century, the jury trial system was in its infancy and, therefore, there were no procedural controls over a jury's discretion in deciding a case. Moreover, evidentiary rules of the time disqualified the plaintiff and defendant from testifying at trial because they were interested parties. This evidentiary rule was significant because the plaintiff and defendant were often the only people with any knowledge of the facts involved in a contract dispute. Because of these procedural and evidentiary rules, a person could easily be accused of having breached an oral contract when there actually was no basis in fact for that claim. The statute of frauds sought to eliminate this type

16. Not only did the evidentiary and procedural rules prohibit the plaintiff and defendant from testifying at trial, but any person who had an interest in the outcome of the litigation was disqualified as incompetent to testify. A. Squillante & J. Fonseca, supra note 11, at 121. Moreover, the jury before whom the case was tried was not bound by any procedural rules which would guide it in arriving at its decision. For example, although the jury generally was led by evidence introduced at the trial, a verdict still could be based on the jury's knowledge of the facts. In this respect, the seventeenth century jury had far greater discretion in its decision-making process than does a jury today. Id.; see also Teven, Seventeenth Century Evidentiary Concerns and the Statute of Frauds, 9 A.DEL. L. REV. 252, 254 (1983) (juries selected even though they had personal knowledge of dispute and allowed to rely on this personal knowledge); Comment, The Nebraska Farmer and U.C.C. Section 2-201(2): The Merchant Exception to the Statute of Frauds, 13 CREIGHTON L. REV. 325, 348 (1979) (unreliable juries made fraud and perjury common).

17. A. Squillante & J. Fonseca, supra note 11, at 121; Teven, supra note 16, at 255; Comment, supra note 16, at 348 (citing Summers, The Doctrine of Estoppel Applied to the Statute of Frauds, 79 U. PA. L. REV. 440, 441 (1931)). The evidentiary rule which excluded interested parties from testifying had a large impact on oral contract cases because frequently, the plaintiff and defendant were the only witnesses to the informal agreement. Teven, supra note 16, at 255. For a detailed discussion of the seventeenth century evidentiary concerns surrounding the statute of frauds, see Teven, supra note 16.

18. A. Squillante & J. Fonseca, supra note 11, at 121; Teven, supra note 16 at 255.

19. Azevedo v. Minister, 86 Nev. 576, 471 P.2d 661 (1970). In this case, the Supreme Court of Nevada stated:

The development of the action of assumpsit in the fourteenth century gave rise to the enforceability of the oral promise. Although parties to an action could not be witnesses, the alleged promise could be enforced on the strength of oral testimony of others not concerned with the litigation. Because of this practice, a party could readily suborn perjured testimony, resulting in marked injustice to innocent parties who were held legally obligated to promises they had never made. Id. at 579, 471 P.2d at 663 (footnote omitted).

Professors White and Summers describe the event precipitating the passage of the statute. J. White & R. Summers, supra note 11, at 50 (cited in Thomson Printing Mach. Co. v. B.F. Goodrich Co., 714 F.2d 744, 746 (7th Cir. 1983)). In 1676, plaintiff John sued Egbert claiming that Egbert had orally agreed to sell him his fighting cock (Fiste) for 100 shillings. Id. John's friend, Harold, claimed that he overheard the deal. Id. Egbert denied the allegations, but John prevailed at trial even though there never actually was a deal. Id. The only evidence of the deal was Harold's testimony that he had overheard the deal. Id. Since the parties to the transaction could not testify at that time, Egbert could
of fraud and perjury\textsuperscript{20} in contract claims by requiring written evidence of an agreement between parties.\textsuperscript{21} Placed in its historical perspective, the statute served a useful function when originally enacted.

Since 1677, procedural controls have emerged which limit a jury’s discretion in deciding a case\textsuperscript{22} and the parties to the alleged oral contract can now testify.\textsuperscript{23} With these changes, commentators have argued offer no proof to rebut John’s claim. \textit{Id.} In the following year, the English Parliament passed the statute of frauds to combat this type of perjury.

Another commentator has pointed to \textit{Slade’s Case} as the precipitating event for passing the statute. Teeven, supra note 16, at 252 (citing Slade v. Morley, 4 Eng. Rep. 926 (1602) (commonly referred to as \textit{Slade’s Case}). The importance which this commentator attaches to this case is that it shifted an advantage to the plaintiff. Specifically, after \textit{Slade’s Case}, “the plaintiff’s burden was simply to aver the existence of an informal promise supported by promised consideration.” Teeven, supra note 16, at 252 (citations omitted). The effect of easing the plaintiff’s burden in proving his case alone with the evidentiary rules was not to put the defendant at the mercy of the jury’s discretion. \textit{Id.}

20. Seagram & Sons, Inc. v. Shaffer, 310 F.2d 668, 673 (10th Cir.) (statute intended to prevent fraud and perjury), cert. denied, 373 U.S. 948 (1962); Port City Constr. Co. v. Henderson, 48 Ala. App. 639, 266 So. 2d 896 (1972) (purpose of statute to prevent fraud and perjury); Dehahn v. Innes, 356 A.2d 711 (Me. 1976) (statute of frauds enacted to prevent fraud); see also Bouret, supra note 15, at 44 (citing 3 W. JAEGGER, WILLISTON ON CONTRACTS § 448 (3d ed. 1960); Corbin, \textit{The Uniform Commercial Code—Sales; Should it be Enacted?}, 59 YALE L.J. 821, 829 (1950); Perrillo, supra note 15, at 71. The purpose of the statute also is evidenced by its title—A Statute for the Prevention of Frauds and Perjuries.


Section 17 is the relevant provision of the original statute relating to contracts for the sale of goods. It states:

And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June no contract for the sale of any goods, wares and merchandises, for the price of 10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.


22. Comment, \textit{Changes Wrought in the Statute of Frauds by the Uniform Commercial Code}, 48 Marq. L. Rev. 571, 572 (1965) (citing J. THAYER, \textit{Evidence} 430 (1950)). Presently, juries are bound by rules of evidence and presumptions of law. T. STARKIE, \textit{Evidence} 816 (10th Am. ed. 1876). “They are bound to give the proper legal effect to all instruments established by competent evidence . . . and their verdict must be founded on the evidence adduced in the cause. It is now perfectly settled that a juror cannot give a verdict founded on his own private knowledge.” \textit{Id.}

23. Burdick, \textit{A Statute for Promoting Fraud}, 16 Colum. L. Rev. 275 (1916) (statute is a "relief of times when parties to a lawsuit were excluded as witnesses"); Comment, \textit{Changes Wrought in the Statute of Frauds by the Uniform Commercial Code}, 48 Marq. L. Rev. 571, 572 (1965) (citing J. THAYER, \textit{Evidence} 430 (1950)). Presently, juries are bound by rules of evidence and presumptions of law. T. STARKIE, \textit{Evidence} 816 (10th Am. ed. 1876). “They are bound to give the proper legal effect to all instruments established by competent evidence . . . and their verdict must be founded on the evidence adduced in the cause. It is now perfectly settled that a juror cannot give a verdict founded on his own private knowledge.” \textit{Id.}
that the statute has outlived its usefulness.\textsuperscript{24} In fact, it is argued that the statute actually promotes more fraud than it prevents and, therefore, should be repealed.\textsuperscript{25} Despite these criticisms, the statute has survived. In the United States, every state except Louisiana has enacted legislation modeled on the original English version.\textsuperscript{26} More recently, these same

\textit{cial Code, 48 MARQ. L. REV. 571, 572 (1965) (citing 2 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 196 (1906)); Note, Changes Effected in the Statute of Frauds by the Enactment of the Uniform Commercial Code in Pennsylvania, 36 TEMP. L.Q. 75, 76 (1962) (rationale for statute now gone since litigants can testify).}

\textsuperscript{24} J. WHITE & R. SUMMERS, supra note 11, at 73-74; Corbin, supra note 20, at 822-25. The following quote typifies the attacks on the statute of frauds: “It establishes a highly artificial rule about a very simple matter. It is relic of times when parties to a lawsuit were excluded as witnesses. It is obscure in language, as shown by the multitude of cases decided upon it.” Burdick, supra note 23, at 273.

That the statute arguably promotes more fraud than it prevents is evidenced in two respects. On the one hand, the statute acts as a complete bar to all oral contracts even where the promising party clearly intended to enter an agreement. On the other hand, the statute’s requirement that there be a writing “sufficient to indicate that a contract for sale has been made” is far from conclusive that the parties, in fact, made an agreement. J. WHITE & R. SUMMERS, supra note 11, at 73. Moreover, there still remains the possibility that the writing was forged. \textit{Id.} It is submitted that Professors White and Summers’ observation that the instances of suborned perjury, which the statute was intended to prevent, are no more likely than instances of forgery which the statute does not prevent.

\textsuperscript{25} In fact, England has repealed its statute of frauds. \textit{Note, Changes Effected in the Statute of Frauds by the Enactment of the Uniform Commercial Code in Pennsylvania, 36 TEMP. L.Q. 75, 76 (1962) [hereinafter Changes Effected] (citing LAW REFORM ACT, 1954, 3 ELIZ. 2, CH. 34). England repealed its statute because it believed that the statute promoted more fraud than it prevented. \textit{Note, Changes Effected, supra} at 76.}

Several commentators have suggested that repealing the statute would serve the goals of uniformity and judicial efficiency better than do the present court decisions under Code section 2-201. Burdick, supra note 23 at 274-79; see also Cunningham, \textit{A Proposal to Repeal Section 2-201: The Statute of Frauds Section of Article 2, 85 COM. L.J. 361, 363 (1980).}


Section 17 of the original English statute was revised and incorporated into the Uniform Sales Act, section 4. This section states:

\textbf{1} A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

\textbf{2} The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, produced, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale
forty-nine states have adopted the Code's statute of frauds for sales.27

The Code's statute of frauds is patterned after both the original English statute and the Uniform Sales Act's version.28 However, the Code's version differs from both of the previous statutes in at least one significant respect.29 The Code's statute of frauds for sales contains § 2-

to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

Uniform Sales Act § 4 (superseded by U.C.C. § 2-201 (1952)), reprinted in J. White & R. Summers supra note 11, at 44 n.3.


29. Like section 17 of the original statute and section 4 of the Uniform Sales Act provision, the Code statute of frauds also requires written evidence of the agreement whether it be the actual written contract or some note or memorandum. Compare the original statute (supra note 21) and the Uniform Sales Act's provision (supra note 26) with Code section 2-201(1) (supra note 2).

Despite the similarity between the respective statutes, the Code's statute of frauds was believed to be a compromise between maintaining the old provisions and totally eliminating them. Note, Changes Effected, supra note 25, at 76. The prior statutes were deemed too strict and sometimes prevented parties from enforcing legitimate, informal agreements. In large part, this was the result of courts interpreting sections 4 and 17 as requiring that a writing contain every material term of the contract. See, e.g., Canister Co. v. Wood & Selick Inc., 73
201(2), the "merchant's exception." 30 Section 2-201(2) was introduced with the Code in 1952. 31 This section drastically alters the pre-Code law with respect to merchants who receive a written confirmation of an alleged oral contract.

Under pre-Code law, a merchant who sent a writing confirming an oral contract could be held liable on that agreement because this signed confirmation evidenced that a contract for sale had been made. 32 In contrast, the merchant who received the written confirmation could not be bound to the oral contract since he had not signed any writing which evidenced an agreement. 33 That is, the merchant receiving the confirmation could raise the statute of frauds as a defense if he were sued for breach of contract. 34 Therefore, the merchant who received the written confirmation could "sit back with impunity and watch market conditions before deciding whether or not to act upon an oral contract." 35 On the other hand, the merchant who sent the written confirmation was bound, at all times, to honor this oral contract. 36 The Code drafters recognized this inequity. Accordingly, they established the merchant's exception which requires a merchant to give written notice of objection to a confirmation within ten days. 37

F.2d 312 (3d Cir.) (contract for sale of product at prices to be mutually agreed upon in future not valid since prices not yet established), cert. denied, 296 U.S. 590 (1934); Pitts v. Edwards, 141 S.C. 126, 139 S.E. 219 (1927) (memorandum for sale of cotton held insufficient in not showing its grade, merely referring to telephone conversation); Booser v. Teague, 27 S.C. 348, 3 S.E. 551 (1887) (where deed absolute upon its face, letter conditioning the conveyance insufficient to satisfy statute of frauds); see also Corbin, The Uniform Commercial Code—Sales: Should it be Enacted?, 59 YALE L.J. 821, 830 (1959). The Code liberalized the requirement for a writing to satisfy the statute of frauds in that the writing need only be signed, state a quantity and evidence that a contract for sale has been made. U.C.C. § 2-201, official comment 1 (1978). For a good comparison of the writing requirements under the Uniform Sales Act and the Code, see N.J. STAT. ANN. § 12A:2-201(2), New Jersey Comment Study (West 1962).

30. MASS. GEN. LAWS ANN. ch. 106, § 2-201, Massachusetts Code Comment C (West 1958) ("There was no like provision under the Uniform Sales Act"); N.Y. U.C.C. LAW § 2-201(2), Practice Commentary 8 (McKinney 1964) ("Subsec. (2) of this section makes it necessary for a merchant-buyer or merchant-seller to watch his mail and act promptly if he is not to be bound by a contract for sale with respect to which he has signed no writing."); see Uniform Sales Act, § 4, 1 U.L.A. § 2-201 (1976).

31. See U.C.C. § 2-201(2) (1952).

32. See, e.g., Corbin, supra note 20, at 829-30.

33. Id. at 830-31.

34. Id. at 831-33.


36. See Corbin, supra note 20, at 829-30.

III. ELEMENTS OF THE MERCHANT'S EXCEPTION

A. The Merchant Definition

The merchant's exception applies only "between merchants."38 "Between merchants" means simply that both parties to the transaction involved must be merchants.39 However, while it is clear that this exception applies only when both parties are merchants, there has been some difficulty in developing a precise definition of "merchant."40 The

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38. U.C.C. § 2-201(2) (1978). A non-merchant who signs nothing ordinarily will not be bound to a contract. Currituck Grain Inc. v. Powell, 28 N.C. App. 563, 568, 222 S.E.2d 1, 3 (1976) (reversing summary judgment since question of whether farmer was merchant was genuine issue of material fact).

Article 2 of the Code applies to transactions in goods regardless of the status of the parties. U.C.C. § 2-201 (1978) ("this article applies to transactions of goods"). However, fourteen sections of Article 2 apply a different standard of conduct for merchants. See U.C.C. § 2-103(1)(b) (1978) (good faith for merchant means both honesty in fact and observance of reasonable commercial standards of fair dealing); § 2-201(2) (writing in confirmation of contract may satisfy statute of frauds); § 2-205 (written assurances by merchant to hold offer open to buy/sell goods not revocable for lack of consideration); § 2-207(2) (where written acceptance states terms additional to or different from agreed or offered terms, such terms become part of contract); § 2-209(2) (signed agreement excluding modification or rescission except by signed writing must be separately signed); § 2-312(3) (warranty of title and against infringement); § 2-314 (implied warranty of merchantability for goods sold by merchants); § 2-327(1)(c) (merchant buyer under duty to follow reasonable instructions after electing to return goods); § 2-402(2) (no fraud where seller retains possession for commercially reasonable time after sale or identification of goods); § 2-403(2) (where goods entrusted to merchant who deals in goods of that kind, merchant may transfer all rights of entruster to buyer in ordinary course of business); § 2-509(3) (where seller is merchant, risk of loss passes to buyer only on buyer's receipt of goods where neither shipment contract nor bailee situation);

§ 2-605(1) (merchant buyer who rightfully rejects goods is under duty to follow reasonable instructions when seller has no agent or place of business at place of rejection); § 2-605(1)(b) (between merchants, where seller-merchant requests written statement of all defects prompting buyer-merchant's rejection, failure to state defect ascertainable upon reasonable inspection precludes relying on unstated defect as justification); § 2-609(2) (between merchants, reasonableness of grounds for insecurity and adequacy of assurances offered determined by commercial standards).

39. U.C.C. § 2-104(3) (1978). This provision states that "between merchants' means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants."

40. See, e.g., Bepko, Contracts, Commercial Law, and Consumer Law, 14 Ind. L. Rev. 223 (1981) (discussing whether farmers are merchants under Indiana's commercial code); Newell, The Merchant of Article 2, 7 Val. U.L. Rev. 307 (1972) (suggesting 13 possible definitions of the term "merchant"); Squillante, The Farmer—Is He or Isn't He a Merchant?, 82 Com. L.J. 155 (1977) (discussing whether farmers are merchants); Comment, The U.C.C. Merchant Sections: Reasonable Commercial Standards of Fair Dealing in the Trades, 14 Tulsa L.J. 190 (1978) (concluding that case law has inconsistently interpreted the merchant definition because of misunderstanding of the policies behind the term.
Code defines a merchant as:

[A] person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge 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.41

There are two important aspects to the Code's definition of "merchant." First, it is clear that the drafters intended to distinguish between "professionals in a given field" and "casual or inexperienced" sellers.42 Second, and more importantly, the Code drafters did not intend to create a single class of merchants. Rather, the Code confers merchant status on individuals who either have knowledge or skill with respect to the business practices involved or individuals who have knowledge or skill with respect to the type of goods involved in the transaction.43 The end result of this distinction is that a person may qualify as a merchant under one Code section, yet not qualify as a merchant under a different Code section.44 Specifically, where the Code requires that a person have knowledge of a particular business practice in order to be deemed a merchant, one must be careful not to mistakenly consider whether that person has knowledge of the goods involved in the transaction. Thus, in determining whether a person is a merchant, one must consider the requirements of the specific Code section that is at issue.45

Comment 2 to § 2-104 makes this distinction clear by grouping the

41. U.C.C. § 2-104(1) (1978). The language in this definition has been described as "ambiguous, awkward, odd, difficult to construe and leading to conclusions which do not make much sense." Newell, supra note 40, at 307 (citations omitted).

42. U.C.C. § 2-104 official comment 1 (1978). In relevant part, this comments states: "This article assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer." Id. With respect to the drafters' goal, the late Karl Llewellyn stated:

An early Nineteenth Century period in which the idea of the merchant's obligations threatened to be lost was followed by the recapture and re-establishment of the idea. The whole law, developed now over more than one hundred years, on foreign trade terms and letters of credit—and the whole current effort to establish by bankers' and merchants' negotiation "uniform" interpretations and clauses and "customs" . . . all of these rest on a vital need for distinguishing merchants from housewives and from farmers and from mere lawyers.


44. Comment, supra note 40, at 196; Comment, supra note 36, at 242-43.

45. Comment, supra note 40, at 198-99.
merchant sections into three distinct categories. For example, the official comment to this section states that with respect to §§ 2-201(2), 2-205, 2-207 and 2-209, merchant status turns on a person’s knowledge of the particular business practice involved in the transaction. In contrast, merchant status for §§ 2-314(1), 2-402(2) and 2-403(2) turns on whether the person has specialized knowledge of the goods involved in the transaction. Finally, for §§ 2-103(1)(b), 2-327(1)(c), 2-603, 2-605, 2-509 and 2-609, a person is deemed a merchant if he has special knowledge of either the practices or goods involved in the transaction.

The merchant’s exception, U.C.C. § 2-201(2), falls within the first of the aforementioned categories. Therefore, in determining whether a person is a merchant within the meaning of this section, the inquiry should focus on whether both parties have knowledge of the business practices involved in the transaction. What, specifically, is the busi-

47. Id. In relevant part, this comment states: The special provisions as to merchants appear only in this Article and they are of three kinds. Sections 2-201(2), 2-205, 2-207 and 2-209 dealing with the statute of frauds, firm offers, confirmatory memoranda and modification rest on normal business practices which are or ought to be typical of and familiar to any person in business. For purposes of these sections, almost every person in business would, therefore, be deemed to be a ‘merchant’ under the language ‘who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . .’

Id.
48. Id. In relevant part, this comment states: Obviously this qualification restricts the implied warranty to a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods. The exception for section 2-402(2) for retention of possession by a merchant-seller falls in the same class; as does section 2-403(2) on entrusting of possession to a merchant ‘who deals in goods of that kind.’

Id.
49. Id. In relevant part, this comment states: A third group of sections include 2-103(1)(b), which provides that in the case of a merchant ‘good faith’ includes observance of reasonable commercial standards of fair dealing in the trade; 2-327(1)(c), 2-603 and 2-605, dealing with responsibilities of merchant buyers to follow seller’s instructions, etc.; 2-509 on risk of loss, and 2-609 on adequate assurance of performance. This group of sections applies to persons who are merchants under either the ‘practices’ or the ‘goods’ aspect of the definition of merchant.

Id.
50. See id.
51. Comment, supra note 35, at 242; Comment, supra note 40, at 202. See also U.C.C. § 2-201, official comment 2 (1978). One commentator has suggested a four step analysis in applying the merchant sections. Comment, supra note 40, at 200. Central to this analysis is determining whether merchant status requires knowledge of business practices or knowledge of the goods involved in the transaction. Id. After this determination, one must identify specifically the business practice or knowledge of goods necessary to be considered a merchant. Id.
ness practice involved of which the person must have such knowledge? On the one hand, the business practice involved in the merchant's exception could be viewed as the specific practice of businessmen confirming oral agreements with follow-up written confirmations. On the other hand, however, the official comment refers to the business practice as one of simply "answering mail." Because answering mail would appear to require no special skill, the comment states that almost every person in business would, therefore, be deemed a merchant.

In most instances, there is little difficulty in determining whether a person is a merchant under § 2-201(2). This is particularly true when the business practice is viewed simply as answering mail. Despite this apparently lenient standard, the courts have encountered peculiar difficulty in determining whether a farmer is a merchant for purposes of § 2-201(2). This issue has been litigated frequently and the courts are hopelessly split on this issue. As will be shown, most of the questions involving merchant status arise in the farmer cases. Moreover, the

52. See, e.g., Comment, supra note 40, at 202 ("Section 2-201(2) describes a business practice—specifically, the business practice between merchants of sending signed, written confirmations of oral contracts.").

53. U.C.C. § 2-104 official comment 2 (1978); see, e.g., Campbell v. Yokel, 20 Ill. App.3d 702, 705, 313 N.E.2d 628, 630 (1974) (holding farmer to merchant status is minimal burden in that business practice involved is simply one of answering mail); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 355-56 (Tex. 1977) (defendant found to be merchant where, through his occupation of farming and selling wheat, he held himself out as having knowledge of "non-specialized business practices such as answering mail").

This distinction may appear trite. However, it is submitted that the distinction is meaningful in that one may know enough to answer his mail when specifically requested to reply. In this sense, everyone involved in business has this knowledge. However, the problem lies in the fact that not every confirmation, or writing which may be held to be a confirmation, will specifically request a response. When no response is requested, then a person may not respond unless he knows that the confirmation procedure is a business practice which may legally bind him to a contract.

54. U.C.C. § 2-104 official comment 2 states:

   For purposes of [2-201(2)] almost every person in business would, therefore, be deemed to be a 'merchant' under the language 'who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . . since the practices involved in the transaction are non-specialized business practices such as answering mail.'

Id.

55. For a discussion of the view that the business practice involved in the merchant's exception is that of "answering mail", see supra notes 52-54 and accompanying text.

56. See Wiseman, supra note 37, at 530-36 (discussion of confusion over whether farmer is considered merchant for purposes of § 2-201(2)).

57. Those courts holding that a farmer is not a merchant include: Pierson v. Arnst, 534 F. Supp. 360 (D. Mont. 1982); Loeb & Co. v. Schreiner, 294 Ala. 722, 321 So.2d 199 (1975); Cook Grains, Inc. v. Fallis, 239 Ark. 962, 395 S.W.2d 555 (1965); Sand Seed Serv., Inc. v. Poeckes, 249 N.W.2d 663 (Iowa 1977); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 547 P.2d 323 (1976); Terminal Grain Corp.
farmer cases represent the type of flawed analysis which courts should avoid in this area.

*Cook Grains, Inc. v. Fallis* was the first decision on the farmer-merchant issue. There, the operator of a grain elevator sued the defendant-farmer who allegedly breached his agreement to sell and deliver 5,000 bushels of soybeans at a cost of $2.54 per bushel. The grain dealer introduced evidence that its agent entered into a verbal agreement that delivery was to be made between September and November, 1968. Following this discussion, the grain company mailed a proposed written contract to the farmer which provided that the farmer had sold 5,000 bushels of soybeans to the grain company.

The grain company signed the contract, however, the farmer neither signed the contract nor sent a written objection to this proposed contract. When the grain company sued to enforce this agreement, the farmer denied that there was a contract and further defended on the grounds that the action was barred by the statute of frauds since he had not signed any writing. In turn, the grain company argued that the sale fell within the merchant's exception, U.C.C. § 2-201(2). Thus, in order to determine whether the merchant's exception applied to this transaction, the Arkansas Supreme Court first had to determine whether this farmer was a "merchant."

v. Freeman, 270 N.W.2d 806 (S.D. 1978); Lish v. Compton, 547 P.2d 223 (Utah 1976); Gerner v. Vasby, 75 Wis.2d 660, 250 N.W.2d 519 (1977).


58. 299 Ark. 962, 395 S.W.2d 555 (1965).
59. Id. at 962, 395 S.W.2d at 555.
60. Id. at 962, 395 S.W.2d at 555. These agreements are called future contracts. Under a future contract, the price and quantity are agreed upon at the time the contract is signed, but delivery is deferred to a later date. See, e.g., Gerner v. Vasby, 75 Wis. 2d 660, 672, 250 N.W.2d 319, 322 (1977) (alleged oral agreement between plaintiff to sell and defendant to buy 10,000 bushels of corn for $1.25 per bushel was enforceable); see also Annotation, *Validity and Enforceability of Contract which Expressly Leaves Open for Future Agreement or Negotiation the Terms of Payment for Property*, 68 A.L.R.2d 1221 (1959).
61. *Cook Grains*, 239 Ark. at 963, 395 S.W.2d at 555-56. The Arkansas Supreme Court did not address the issue of whether sending the actual contract qualified as a writing in confirmation of the agreement. For a discussion of this issue, see *infra* note 262.
62. *Cook Grains*, 239 Ark. at 963, 395 S.W.2d at 556.
63. Id.
64. Id.
65. Id. at 963-64, 395 S.W.2d at 556. The merchant's exception is incorpo-
The Arkansas Supreme Court affirmed the lower court’s holding that this farmer was not a merchant. In so holding, the court acknowledged the merchant definition in § 2-104, but reasoned that in construing a statute, its words must be given their plain and ordinary meaning. The court relied on general dictionary definitions and concluded that, in its plain and ordinary meaning, a farmer is “one devoted to the tillage of the soil,” not a professional trader as contemplated by U.C.C. § 2-104.

*Cook Grains* has been criticized for ignoring the Code’s special merchant definition and, instead, relying on pre-Code definitions of merchant. While this criticism appears warranted, other courts also have incorrectly applied the merchant definition to Code § 2-201(2). For example, in *Campbell v. Yokel*, the Fifth District Court of Appeals of Illinois was confronted with a situation similar to the one in *Cook Grains*. The *Yokel* court stated that the “definition of ‘merchant’ leads us to the conclusion that a farmer may be considered a merchant in

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66. *Cook Grains*, 239 Ark. at 965, 395 S.W.2d at 557.
67. Id. at 965, 395 S.W.2d at 556-57.
68. Id. at 964, 395 S.W.2d at 556. In further support of its holding, the court noted that the Code’s merchant definition had its roots in the “law merchant” concept of a professional in business. *Id.* at 965, 395 S.W.2d at 557. Presumably, the Arkansas Supreme Court did not believe that the Code had departed from this pre-Code concept. *See id.* However, one commentator has stated that the *Cook Grains* court’s reliance on this law merchant concept is misplaced. Comment, *supra* note 40, at 204. According to this commentator, farmers were excluded from law merchant status. *Id.* Code § 1-103 states that the law merchant concept supplements the Code unless displaced by particular provisions of the Act. *Id.* (citing U.C.C. § 1-103 (1978)). From this, courts have concluded that farmers are not merchants. Comment, *supra* note 40, at 204. However, in *Cook Grains*, the Code merchant concept does displace the narrower law merchant concept and, therefore, law merchant concepts are not applicable to the farmer-merchant issue. *Id.*

69. *See Nelson v. Union Equity Cooperatives*, 548 S.W.2d 352, 355 (Tex. 1977) (“merchant” defined in Code and, therefore, one should not look to dictionary definitions as court did in *Cook Grains*); Comment, *supra* note 35, at 247 (*Cook Grains* stands on unsure footing); Comment, *supra* note 40, at 204 (same).
71. *Id.* Similar to the situation in *Cook Grains*, *Campbell* involved the breach of an alleged oral contract. *Id.* Specifically, the plaintiff grain company alleged that the defendant farmer had orally agreed to sell to the plaintiff, 6800-7200 bushels of soybeans at a cost of $5.30 per bushel. *Id.* at 703, 313 N.E.2d at 628. The plaintiff had signed a contract and later mailed it to the defendant for his signature. *Id.* at 703, 313 N.E.2d at 629. The defendant never signed the contract or gave any written notice of objection to this contract. *Id.* at 703, 313 N.E.2d at 629. The defendant refused to deliver the soybeans and informed the plaintiff that since the defendant did not sign the contract, he did not feel bound to any agreement. *Id.* at 703, 313 N.E.2d at 629. When the plaintiff sued for breach of contract, the defendant asserted the statute of frauds as a defense. *Id.* at 703, 313 N.E.2d at 629. In turn, the plaintiff argued that the transaction fell within the merchant’s exception to the statute of frauds and, therefore, the de-
some instances and that one of those instances exists when the farmer is a person 'who deals in goods of the kind . . . involved in the transaction.' 72 The court then noted that the defendant had grown and sold soybeans regularly for several years which made him a person who "deals in goods of the kind . . . involved in the transaction." 73 Therefore, the court concluded, this defendant-farmer was a merchant. 74

Like Cook Grains, Yokel has been criticized for basing the farmer's merchant status on his knowledge of the goods involved in the transaction. 75 As explained, this approach is contrary to the analysis suggested in the Code's official comment and by several commentators. 76 To date, only the court in Continental Grain v. Harbach 77 has applied the approach suggested by the official comment in deciding the farmer-merchant issue.

In Harbach, the complaint alleged that the parties had entered into a contract over the telephone whereby the defendant farmer had agreed to sell and plaintiff grain company had agreed to buy 25,000 bushels of soybeans for $3.81 per bushel. 78 The plaintiff allegedly mailed a written confirmation of this agreement to the defendant who did not give written notice of objection to this confirmation. 79 When the defendant-farmer did not honor the alleged agreement, the plaintiff sued for breach of contract. 80 The plaintiff claimed that the defendant was a merchant and, therefore, the transaction fell within the merchant's exception to the statute of frauds. 81 The defendant denied that he was a merchant, arguing that although he had been a farmer for many years,
he had sold soybeans for only a few months. For this reason, he claimed that he lacked the experience in selling soybeans necessary for him to be considered a dealer in goods of that kind.83

The United States District Court for the Northern District of Illinois held that the defendant-farmer was a merchant.84 The court stated that the defendant's experience in selling soybeans did not alone determine his status as a merchant.85 Rather, the court concluded that the defendant was a merchant under the second part of the Code definition, one who by his occupation holds himself out as having knowledge in the practice involved in the transaction.86 Specifically, the defendant was familiar with the specific confirmation practices commonly used in oral forward contracts.87

It is submitted that the Harbach decision is sound. The court applied the basic analysis that the drafters intended—namely, whether the defendant has knowledge of the business practices involved.88 In this same respect, however, the courts in Cook Grains and Yokel incorrectly approached the problem by not considering the business practice involved.89 However, to the extent that the Harbach court concluded that the business practice involved was the practice of confirming oral forward contracts, it is at variance with the Code's official comment.90 Again, the Code's official comment concludes that the business practice involved is one of simply answering mail.91 Quite clearly, this same analysis would apply in determining whether any individual is a

82. Id. at 699.
83. Id. As part of his defense, the defendant attempted to distinguish this case from Sierens v. Clausen. Id. (citing 60 Ill. 2d 585, 328 N.E.2d 559 (1975)). In that case, the Illinois Supreme Court held that a farmer who sells his crops can be a merchant. Sierens, 60 Ill. 2d 585, 328 N.E.2d 559 (1975). According to the defendant in Harbach, Sierens was distinguishable because there the defendant had sold soybeans for five years whereas Harbach had sold soybeans for only a few months. 400 F. Supp. at 699.
84. Id. at 700.
85. Id. at 699.
86. Id. at 700.
87. Id. A forward or future contract is one in which the "buyer agrees to pay a fixed price in advance, which may be different than the market price when delivery is due. Seller agrees to deliver a stated quantity during a specific future time." Id. at 697.
88. For further analysis of the drafters' intent, see supra notes 38-54 and accompanying text.
89. For a discussion of Cook Grains and Yokel, see supra notes 58-76 and accompanying text.
90. For a discussion of the business practice involved in the merchant's exception, see supra notes 52-54 and accompanying text.
91. U.C.C. § 2-104 official comment 2 (1978); see, e.g., Campbell v. Yokel, 20 Ill. App. 3d 702, 705, 313 N.E.2d 628, 630 (1974) (holding farmer to merchant status is minimal burden in that business practice involved is simply one of answering mail); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 355-56 (Tex. 1977) (defendant, through his occupation of farming and selling wheat, held himself out as having knowledge of "non-specialized business prac-
merchant for purposes of § 2-201(2) and not simply whether a farmer should be deemed a merchant.

With respect to the judicial uncertainty in the farmer-merchant area, the best solution may be one provided by the legislature. For example, Nebraska recently has amended its merchant's exception to include a special provision between farmers and grain dealers. Under this provision, if a written confirmation from a merchant contains notice that the confirmation will be enforceable if there is no written objection within ten days, then this confirmation is enforceable against the recipient without regard to whether the recipient also is a merchant. This would eliminate the difficult factual and legal determinations with which the courts have struggled in this area.

B. The Reasonable Time Element

The second element of the merchant's exception is that the written confirmation be received within a reasonable time. In defining realistic such as answering mail” and, therefore, was merchant); see also supra note 53 and accompanying text.


Between a merchant and a buyer or seller of grain not a merchant, if (i) the contract is an oral contract for the sale of grain, (ii) within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received, (iii) the party receiving it has reason to know its contents, (iv) it contains a statement of the kind of grain, quantity of grain, per unit price, date of contract, and delivery date of the grain, and (v) notice appears on the face of the written confirmation stating that the contract will be enforceable according to the terms contained in the confirmation unless written notice of objection is given within ten days, the writing satisfies the requirements of subsection (1) of this section against the party receiving it unless written notice of objection to its contents is given within ten days after it is received.

Id.

94. U.C.C. § 2-201(2) (1978) (“Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender . . . .”) (emphasis added); see, e.g., Serna Inc. v. Harman, 742 F.2d 186 (5th Cir. 1984) (in cattle seller’s breach of contract action, confirmation sent three and one-half months after alleged agreement, was within reasonable time where: several telephone calls made in intervening period, market price did not fluctuate and no showing of prejudice to defendant); Cargill, Inc. v. Stafford, 553 F.2d 1222, 1224 (10th Cir. 1977) (agreement to buy 26,000 bushels of wheat made over phone on July 31, 1973 and confirmed on August 7, 1973 confirmed within reasonable time); Perdue Farms v. Motts, Inc., 459 F. Supp. 7, 22 (N.D. Miss. 1978) (purchase order received eight days after alleged agreement received within reasonable time).

Although the Code states that the confirmation must be received within a reasonable time, the Code does not answer the question: within a reasonable time of what? Professor Nordstrom states that the most probable construction intended by the drafters is that the writing be received within a reasonable time after the making of the alleged oral contract. R. NORDSTROM, supra note 11, at 61-62. Indeed, courts which have addressed the reasonable time issue seem to
reasonable time, U.C.C. § 1-204 provides that: "[w]henever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by an agreement. What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action." Courts have looked to this definition and concluded that the issue of what is a reasonable time is a question of fact whose answer turns on the particular circumstances involved.

have implicitly adopted this interpretation. See Cargill, Inc. v. Wilson, 16 U.C.C. Rep. Serv. 615, 618 (Mont. 1975) (alleged oral agreement to sell 28,000 bushels of wheat at $1.48 per bushel and 6,000 bushels of higher protein wheat not subject to statute of frauds where plaintiff sent two purchase contracts to defendant who never gave objection); Azevedo v. Minister, 86 Nev. 576, 584, 471 P.2d 661, 666 (1970) (confirmation sent ten weeks after making of alleged agreement not unreasonable as matter of law; question of fact for trier of fact).

Nonetheless, Professor Nordstrom does acknowledge that there are several possible interpretations of this phrase. R. NORDSTROM, supra note 11, at 61. For example, one construction is that the writing must be received within a reasonable time after the party learned that the other party does not intend to honor the oral agreement. Id. at 61 n.34. For a more exhaustive discussion regarding the possible interpretations of the reasonable time element, see A. SQUILLANTE & J. FONSECA, supra note 11, at 64.

Professor Nordstrom points out an additional problem with the reasonable time element. NORDSTROM, supra note 11, at 63. Assume that the beginning point for the determination of a reasonable time is the alleged making of the oral agreement. Id. Further, assume that in addition to denying that he received a written confirmation within a reasonable time, the defendant also denies that there ever was an agreement. Id. The problem then becomes how the court goes about determining that the written confirmation was received within a reasonable time. Id. As Professor Nordstrom states:

The trier of fact may have to hear evidence of the oral agreement to determine whether a reasonable time had elapsed between its making and the receipt of the writing. This would make relevant all of the same evidence which the Code makes irrelevant if the statute of frauds is applicable, and the case may be decided in favor of the plaintiff on the credibility of the evidence rather than on the time issue isolated by the Code.

Id. This evidentiary problem has been recognized by other commentators. See, e.g., A. SQUILLANTE & J. FONSECA, supra note 11, at 282; Comment, An Anatomy of Sections 2-201 and 2-202 of the Uniform Commercial Code (the Statute of Frauds and the Parole Evidence Rule), 3 B.C. IND. & COM. L. REV. 381, 384 (1962).

95. U.C.C. §§ 1-204(1)-(2) (1978). In determining a reasonable time, the official comment to Code § 1-204 states that the relevant circumstances would include any course of dealing, usage of trade or course of performance. Id. at official comment 1.

96. See Rockland Indus. v. Frank Kasmir Assoc., 470 F. Supp. 1176, 1179 (N.D. Tex. 1979) (describing § 1-204 as a "less than-helpful" definition); Barron v. Edwards, 45 Mich. App. 210, 216, 206 N.W.2d 508, 511 (1973) (factual question whether defendant's memorandum was sent within reasonable time where agreement allegedly made on November 10 and confirmation sent on March 26 of following year).

In Lish v. Compton, the Utah Supreme Court addressed the issue of whether a written confirmation sent pursuant to the merchant's exception was received within a reasonable time. 547 P.2d 22 (Utah 1976). The court stated that the phrase "reasonable time" is flexible and turns on the particular circumstances,
For example, in *Kimball County Grain Cooperative v. Yung*, the plaintiff grain company agreed to buy and the defendant farmer agreed to sell 15,000 bushels of wheat at a cost of $3.10 per bushel to be delivered in January, 1974. This agreement was made over the telephone on July 26, 1973. In accordance with its past practices, the plaintiff grain company drafted a written contract and held it for the defendant to sign the next time he came to the plaintiff’s grain elevator. In this case, however, the defendant never came to sign the written contract nor did the defendant attempt to deliver the proposed written contract to the defendant. Finally, on January 30, 1974, more than six months after the alleged agreement had been reached, the plaintiff’s general manager delivered the written contract to the defendant. The defendant neither signed the contract nor gave written notice of objection to the writing’s contents within the required ten days.

After the defendant ignored the plaintiff’s requests to deliver the wheat when it was due, the plaintiff sued for breach of contract. The defendant denied the alleged contract and also raised the statute of frauds as a defense to the action. In response, the plaintiff claimed that the transaction fell within the merchant’s exception because the written contract which the plaintiff delivered to the defendant was a confirmation of the alleged oral agreement and the defendant had not given any written notice of objection. Therefore, the plaintiff argued, the contract action was enforceable even though the defendant had not signed a written contract.

and was a question of fact for the jury to decide. *Id.* at 226 (citing *Utah Code Ann.* § 70A-1-204(2) (1953) and *Azevedo v. Minister*, 86 Nev. 576, 471 P.2d 661 (1970)). However, the court added, “if the elapsed time was outside the ambit which fair-minded persons could conclude to be reasonable, then the issue should be ruled upon as a matter of law.” *Lish v. Compton*, 547 P.2d at 226-27. For a further discussion of *Lish*, see *infra* notes 113-28 and accompanying text. See also *Rockland Indus. v. Frank Kasmir Assoc.*, 470 F. Supp. 1176, 1179 (N.D. Tex. 1979) (while reasonable time is generally question of fact, eight months’ lapse was unreasonable delay in sending confirmation as matter of law).

98. *Id.* at 234, 263 N.W.2d at 819.
99. *Id.*
100. *Id.* at 235, 263 N.W.2d at 819.
101. *Id.* However, the plaintiff testified that he had attempted, unsuccessfully, to telephone the defendant several times between September 1973 and January 1974 and remind him of their agreement. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 235-36, 263 N.W.2d at 819. The plaintiff sought to recover, as damages, the difference between the contract price and fair market price for 15,000 bushels of wheat on the date of the alleged breach. *Id.* at 234, 263 N.W.2d at 819.
105. *Id.*
106. *Id.*
107. *Id.*
The Nebraska Supreme Court held that the written confirmation was not received within a reasonable time and, therefore, the contract action was not enforceable. In so holding, the court first noted that U.C.C. § 1-204 was relevant in deciding the issue. The court stated the plaintiff made no pretense of complying with U.C.C. § 2-201(2). Here, the plaintiff had no policy of sending written confirmations. Moreover, there was no adequate excuse for sending the confirmation six months after the oral agreement was reached and only one day before the last possible delivery date under the oral agreement. In sum, the court appears to have followed U.C.C. § 1-204 in determining what was a reasonable time by considering the specific facts and circumstances presented.

In Lish v. Compton, the Utah Supreme Court focused on a practical policy consideration which is extremely important in determining what is a reasonable time as that term is used in the merchant’s excep-

108. Id. at 237, 263 N.W.2d at 820. In so holding, the court affirmed the lower court’s decision. Id. at 234, 263 N.W.2d at 819. The Kimball County District Court, sitting without a jury, found that the parties had entered into an oral contract as alleged by the plaintiff. Id. However, the court held that the contract was not enforceable because of the statute of frauds. Id. That is, there was no writing signed by the defendant to satisfy subsection (1) of the provision. Id. Moreover, the court noted, the transaction did not come within the merchant’s exception to the statute because the defendant was not a merchant as defined in § 2-104, and the written confirmation was not received within a reasonable time. Id.

In addressing the issue on appeal, the court first began its analysis by noting that the action was covered by the Code because crops are included in the Code’s definition of “goods” (U.C.C. § 2-105) and the contract price exceeded $500. Id. at 236, 263 N.W.2d at 819. The parties agreed that unless the case fell within the merchant’s exception, the oral contract in question was unenforceable. Id. at 236, 263 N.W.2d at 820. However, as the court held that the confirmation was not received within a reasonable time, the issue of whether the defendant farmer was a merchant was never addressed. Id. at 237, 263 N.W.2d at 820.

109. Id.
110. Id.
111. Id.
112. Id. A concurring opinion criticized the court for not reaching the important issue of whether a farmer could be a merchant for purposes of § 2-201(2) of the Code. Id. at 238, 263 N.W.2d at 821. (Brodkey, J., concurring). According to Justice Brodkey, the defendant was acting as a merchant when he entered into the oral contract. Id. at 239, 263 N.W.2d at 821 (Brodkey, J., concurring). He reasoned that the inquiry is whether the farmer engaged in the business of raising and selling crops for a profit, as evidenced by his individual experience and prior activities. Id. at 244, 263 N.W.2d at 823 (Brodkey, J., concurring). Here, the defendant had been a wheat farmer for 30 years, he was conscious of wheat prices and had sold wheat to grain elevator companies many times before. Id. Interestingly, Justice Spencer, who also concurred in the court’s opinion, disagreed with Justice Brodkey and argued that the Code drafters as well as the Nebraska legislature did not intend farmers to be considered merchants. Id. at 245, 263 N.W.2d at 824 (Spencer, J., concurring).
113. 547 P.2d 223 (Utah 1976).
More specifically, the Lish court confronted the situation wherein a merchant failed to send a written confirmation in an attempt to "play the market." On August 2, 1973, plaintiff Lish, a grain broker, telephoned the defendant Compton, a wheat farmer, and offered to buy Compton's entire wheat crop for the year. Lish alleged that he orally agreed to buy and Compton orally agreed to sell 15,000 bushels of wheat at a cost of $3.30 per bushel. On August 3, Lish recorded this agreement in his notebook. Lish then sent a confirmation of the sale on August 14 which Compton received the next day, August 15. Within this two week period, the price of wheat increased $1.00 per bushel.

Compton never gave written notice of objection to this confirmation. When Compton did not honor the alleged agreement, Lish initiated an action for breach of contract. Although Lish had not signed a contract with Compton to satisfy subsection (1) of the statute of frauds, he argued that the transaction fell within the merchant's exception to that statute. One of the defenses raised by Compton was that he had not received the written confirmation within a reasonable time.

The court held that the plaintiff did not give notice of confirmation within a reasonable time and, therefore, the contract was not enforceable. In support of its holding, the court acknowledged that the plaintiff, just as the defendant, was in a position to speculate by waiting to see

114. Id. The comment to Code § 2-201(2) is silent on this point. Only the court in Lish appears to have recognized the significance of the "reasonable time" element. For a discussion of Lish, see infra notes 113-28 and accompanying text.

115. 547 P.2d at 244. Under Code § 2-201(2), the merchant who receives a written confirmation must give written notice of objection to the writing's contents within ten days. U.C.C. § 2-201(2) (1978). In contrast, the merchant who sends the written confirmation must do so only "within a reasonable time." Id. Arguably, if both provisions were intended to prevent the respective parties from playing the market, the drafters would have used the same language for both provisions.

116. 547 P.2d at 224.

117. Id. Moreover, on that same day, the plaintiff claimed to have committed this same 15,000 bushels of wheat for resale to the Pillsbury Mills in Ogden, Utah for $3.45 per bushel. Id.

118. Id.

119. Id. at 225.

120. Id.

121. Id. at 224.

122. Id.

123. Id. at 226. The relevant Code section in Utah is Utah Code Ann. § 70A-2-201(2) (1980) (identical to U.C.C. § 2-201(2)).

124. Id. at 227. Before addressing the reasonable time issue, the court first had to determine whether the defendant was a merchant to whom the merchant's exception applied. Id. at 226. The court held that the defendant was not a merchant merely because he sold his crops annually. Id. According to the Lish court, the term "merchant" refers primarily to one whose occupation is that
if the market price for wheat increased or decreased. Specifically, the court noted that if the price of wheat had decreased, then Lish (the grain dealer) could have disregarded this oral agreement and negotiated a new agreement to buy a different farmer’s wheat at the lower, prevailing rate. Thus, the court was suspicious of Lish’s reasons for waiting twelve days before confirming the contract. With respect to the twelve day lapse, the court stated:

[T]here ought to be some better reason than that given by the plaintiff, of mere casual delay, for his failure to give the notice for twelve days. During that time, the defendant did not have the proverbial ‘scratch of the pen’ to bind the plaintiff if the price had fallen. It seems but natural to wonder, if the price had fallen a dollar a bushel, instead of rising that much, would plaintiff have been so anxious to confirm the claimed notation of August 3 and to insist upon paying the defendant the extra dollar per bushel on 15,000 bushels of wheat.

There is no authority explaining why the drafters included the reasonable time element. Nonetheless, it is submitted that this provision was designed to work against the person who sends the written confirmation, in the same way that the ten day rejection period works against the merchant who receives a written confirmation. Under the express terms of the statute, a merchant who receives a confirmation must object of buying and selling. Despite concluding that the defendant was not a merchant, the court still discussed the reasonable time element. See id.

125. Id. Generally, the measure of a buyer’s breach of contract damages is the difference between the contract price and the market price at the time when the buyer learned of the breach. Cargill Inc. v. Stafford, 553 F.2d 1222, 1226-27 (10th Cir. 1977) (buyer of wheat entitled to damages for “anticipatory repudiation” per § 2-725(1); alternative remedy is for aggrieved party to “cover,” whereby buyer can substitute goods after he has urged continued performance for reasonable time).

126. Lish, 547 P.2d at 227.

127. Id.

128. Id. The court’s suspicions were fueled by the fact that the price of wheat in that two week period had increased approximately $1.00 per bushel. Id. Clearly, it was to the plaintiff’s benefit to confirm the contract after the price had increased because he would be buying wheat at $1.00 per bushel less than the prevailing rate. Id. The court was not convinced that the plaintiff still would have confirmed the contract if the price of wheat had decreased $1.00 per bushel rather than increasing $1.00 per bushel. Id.

129. The comment to Code § 2-201(2) is silent on this point.

130. The whole idea of allowing the unsigned confirmatory memorandum to bind the merchant receiving it was in response to the pre-Code inequity which allowed the receiving merchant to play the market. Perdue Farms v. Motts, Inc., 459 F. Supp. 7, 13-14 (N.D. Miss. 1978). For a further discussion of the history behind the merchant’s exception, see supra notes 32-37 and accompanying text. The drafters included the ten-day rejection period specifically to alleviate the inequity of one merchant being bound while the other was free to play the market. See infra notes 203-06 and accompanying text.
to this writing within ten days; otherwise, he cannot assert the statute of frauds as a defense in a contract dispute.\textsuperscript{131} This provision, therefore, prevents the receiving merchant from waiting for market conditions to change before deciding to honor or disregard the oral agreement.\textsuperscript{132}

In contrast to the ten-day rejection period for the receiving merchant, there is no express time period which states when a written confirmation must be received; rather, the statute provides only that it be sent within a reasonable time.\textsuperscript{133} However, like a merchant who receives a written confirmation, the merchant who is supposed to confirm an agreement also may want to see if market conditions will change in his favor before acting upon the oral agreement. In this situation, basic fairness dictates that if merchant $A$ agrees to sell his inventory to merchant $B$ for $100$, but holds off consummating the transaction in hopes of receiving a better bargain, the statute of frauds should bar any breach of contract action by merchant $A$ who may subsequently attempt to confirm the oral agreement.

In this respect, it is submitted that the Utah Supreme Court’s analysis is sound. In deciding whether the dealer sent the written confirmation within a reasonable time, the court properly considered the possibility that the dealer was “playing the market.”\textsuperscript{134} Generally, the longer a merchant takes to send a written confirmation after an oral agreement has been reached, the more likely it is that this merchant has sought to play the market. It is submitted that this inequity can be alleviated by requiring that a written confirmation be sent within a reasonable time and that what is reasonable would turn, in large part, on the court’s consideration of whether the sending merchant was playing the market. If a merchant unreasonably delays in sending a confirmation, then the merchant who receives the confirmation should still have the option of asserting the statute of frauds as a defense to avoid the contract. However, it is further submitted that where there is evidence of a bona fide intent to follow through with an oral agreement, e.g., where there are follow-up telephone conversations,\textsuperscript{135} the time which is

\textsuperscript{131} U.C.C. § 2-201(2) (1978).

\textsuperscript{132} For a discussion of the reasons behind enacting the merchant’s exception, see supra notes 32-37 and accompanying text.

\textsuperscript{133} See U.C.C. § 2-201(2) (1978).

\textsuperscript{134} See supra notes 123-28 and accompanying text.

\textsuperscript{135} See, e.g., Serna v. Harman, 742 F.2d 186 (5th Cir. 1984). In this case, the plaintiff seller sued the defendant buyer for breach of an alleged oral agreement to buy one hundred Charolais cows. \textit{Id.} The alleged agreement occurred on March 18, 1977. \textit{Id.} at 187. The agreement was confirmed by a written invoice dated June 28, 1977 sent by the plaintiff to the defendant. \textit{Id.} at 189.

The Fifth Circuit upheld the trial court finding that the confirmation was received within a reasonable time. \textit{Id.} The court began its analysis by quoting from Code § 1-204. \textit{Id.} The court emphasized that during this three and one-half month interval, the plaintiff made several telephone calls to the defendant confirming their agreement and the market price for these cows did not fluctuate during this period. \textit{Id.} Accordingly, the court concluded that there was no prej-
deemed reasonable should be extended.

While this analysis seems sound, there is no explicit authority which tells us that the Code's drafters included the reasonable time element for this purpose. Arguably, if the drafters intended this result, they would have included an absolute ten-day rule for sending confirmations just as they did in requiring notice of objection to confirmations. Despite the drafters' silence on this issue, it is submitted that courts ought to read this policy consideration into the reasonable time element. This interpretation would be consistent with the drafters' general goal of putting both buyer and seller in equal positions.

In this regard, the *Lish* court properly interpreted the Code and applied the relevant policy considerations. As long as courts recognize the market-playing opportunity for both merchants, the results will be consistent and fair. Unfortunately, the Utah Supreme Court is the only court that has realized the full significance of the role that this element can play in the merchant's exception.

C. The Receipt Element

The merchant's exception further requires that the written confirmation be received by the party against whom enforcement is sought. The time of receipt is important for two related reasons. On the one hand, receipt of the confirmation stops the time from which we would measure whether a merchant has sent a confirmation within a reasonable time. On the other hand, receipt also begins the ten-day period in which the recipient has to object to the writing's contents.

The receipt element raises two issues. First, when is receipt effective? The Code does not define the word "received" and, therefore, does not definitively answer the question. However, there are two related definitions which indicate how a court might approach this issue. Code § 1-201(26) provides, in relevant part, that "a person 'receives' a notice or notification when (a) it comes to his attention; or (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications." "Receipt of goods" is defined in Code § 2-106.
103(1)(c) as the taking of physical possession of the goods.\textsuperscript{144}

In construing these two Code sections together, one commentator has stated that these related definitions leave little doubt as to the drafters’ intentions as to the term “received.”\textsuperscript{145} Namely, the confirmation either must be delivered to the other party’s place of business or, if the recipient has more than one place of business, to that place from which the oral negotiations took place.\textsuperscript{146} Moreover, where an organization is involved, receipt is measured as if the organization had used due diligence in delivering the document to the appropriate person.\textsuperscript{147}

A second issue related to the receipt element is how a merchant who has sent a written confirmation proves that the other merchant has received the confirmation. Specifically, does the Code require that the merchant who sent the confirmation prove actual receipt,\textsuperscript{148} or can this

\textsuperscript{144} U.C.C. § 2-103(1)(c). Receipt is to be distinguished from delivery since the seller can deliver even though the buyer never receives the goods. \textit{Id.} § 2-103 official comment 2.

\textsuperscript{145} R. Nordstrom, \textit{supra} note 11, at 64 (cited in A. Squillante \& J. Fonseca, 2 \textit{Williston on Sales} 284 (4th ed. 1974)).

\textsuperscript{146} See \textit{id.} at 64.

\textsuperscript{147} See \textit{id.} The issue of effective notice against an organization was addressed in Thomson Printing Mach. Co. v. B.F. Goodrich Co., 714 F.2d 744 (7th Cir. 1983). In this case, Thomson Printing’s president (plaintiff) visited Goodrich’s (defendant) surplus machinery department to shop for used printing machines. \textit{Id.} at 745. While at the company, the plaintiff discussed sales terms with the defendant’s surplus equipment manager, Ingram Meyers. \textit{Id.} Four days later, the plaintiff sent to the defendant a purchase order for the equipment and a check for $1,000 in part payment. \textit{Id.} When the defendant later refused to sell the equipment to the plaintiff, the plaintiff sued for breach of contract. \textit{Id.}

The defendant argued that the agreement was unenforceable because of the statute of frauds. \textit{Id.} at 745. The plaintiff contended, however, that the transaction fell within the merchant’s exception and, therefore, was enforceable. \textit{Id.} at 746. In arguing against the merchant’s exception, the defendant claimed that because the confirmation was not directly addressed to the surplus equipment department, the confirmation was not received by an appropriate person. \textit{Id.} at 747.

The Seventh Circuit found that there was no dispute that Goodrich had received the confirmation. \textit{Id.} The issue of where a merchant should send a confirmation when a corporation is involved was not resolved specifically by the court. \textit{Id.} Nonetheless, the court concluded that “it is probably a reasonable projection that a delivery at either the recipient’s principal place of business, a place of business from which negotiations were conducted, or to which the sender may have transmitted previous communications, will be an adequate receipt.” \textit{Id.} (citations omitted). The court added that receipt was effective against Meyers (Goodrich’s surplus equipment manager) “at whatever point Meyers should have been so notified . . . even though Meyers did not see it.” \textit{Id.} at 748.

\textsuperscript{148} U.C.C. § 2-201(2) and the official comments do not discuss how receipt is to be proven. The provision itself provides only that the written confirmation be received. U.C.C. § 2-201(2) (1978). To date, no court has held that
merchant rely on the presumption that a properly mailed letter is received.

The United States District Court for the Northern District of Mississippi addressed this issue in Perdue Farms, Inc. v. Motts, Inc. In Perdue Farms, the Perdue company informed Motts that it would not sell and load any “roasters” to Motts until payment was complete. According to Motts, this payment term was contrary to their prior oral agreement which Motts had confirmed by writing. One of the defenses raised by Perdue was that they never received Motts’ written confirmation as required by Code § 2-201(2). In support of their claim, Perdue argued

the sending merchant must prove actual receipt. Nonetheless, this interpretation is not impossible particularly when it is remembered that the merchant who allegedly received this confirmation is going to be sued for breaching a contract which he never signed. To make this merchant defend a contract action when he never actually received a confirmation of the alleged oral agreement appears particularly harsh.

149. Most courts have invoked this presumption in some form. See e.g., Sebasty v. Perschke, 404 N.E.2d 1200, 1202 (Ind. Ct. App. 1980) (evidence of properly mailed letter is prima facie proof of receipt, but not conclusive); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 354 (Tex. 1977) (testimony as to business custom of mailing original confirmation sufficient to support finding of defendant’s receipt). To invoke this presumption, a party must show that an envelope was properly addressed, stamped, bore a return address, was deposited in the mail and never returned. Perdue Farms v. Motts, Inc., 459 F. Supp. 7, 19 (N.D. Miss. 1978) (purchaser of 1500 boxes of “roasters” who sent confirmation of purchase not required to show seller actually received confirmation).

150. 459 F. Supp. 7 (N.D. Miss. 1978). Motts alleged that it had an oral contract with Perdue to buy a certain number of roasters. Id. at 11. Motts further alleged that, according to this agreement, they were to send their trucks to the Perdue plant in Maryland to pick up the roasters. Id. However, payment terms for this contract were not discussed. Id. Motts assumed that Perdue would follow the billing practice which they had used before. Id. Under the prior billing practice, the roasters were invoiced the day after delivery and payment was due seven days later. Id.

To confirm the purchases, Motts sent “confirmations of purchase” to Perdue. Id. Perdue never responded to this confirmation. Id. However, when Motts’ trucks arrived to pick up the roasters, Perdue refused to sell the roasters until payment was complete. Id. Thus, Motts sued for breach of contract and the losses resulting from inability to honor their agreement to resell the roasters to Dairyland. Id.

Perdue defended by arguing that the statute of frauds made the oral agreement unenforceable. Id. at 12. However, Motts alleged that its “confirmation of purchase” satisfied the merchant’s exception, under the Mississippi version of the statute of frauds, and, therefore, the oral agreement was enforceable. Id. (citing Miss. Code Ann. § 75-2-201(2) (1972)).


152. Id.

153. Id. at 18. In addition, Perdue claimed that the “confirmation of purchase” did not qualify as a written confirmation per U.C.C. § 2-201(2). Id. at 15. The court noted that the confirmation was signed, stated a quantity and evidenced a contract. Id. at 17. Accordingly, the writing qualified as a written confirmation. Id. For a more detailed discussion of the content of a written confirmation, see infra notes 233-84 and accompanying text.
that Motts had to prove that Perdue actually received the written confirmation.\footnote{158} Motts, on the other hand, argued that receipt could be established by relying on the presumption that a properly mailed letter is received.\footnote{155}

The court rejected both parties’ contentions.\footnote{156} The court noted that although Code §1-201(2) controlled as to when notice is received, neither this Code section nor any other Code section regulated the manner of proving receipt.\footnote{157} Since there was no controlling Code section, the court held that the prior local law and rules of evidence still determined the manner of proving when a written confirmation is received.\footnote{158} In this instance, the local law of Mississippi allowed a party to prove receipt by relying on the presumption of mailing.\footnote{159}

Subsequently, Perdue filed a motion requesting the district court to reconsider\footnote{160} its holding in light of the Mississippi Supreme Court’s ruling in Wholesale Materials Co. v. Magna Corp.\footnote{161} In that case, Wholesale refused to pay the alleged balance due on an account to Mississippi Steel because of an alleged oral agreement to buy steel reinforcing rods at a lower price.\footnote{162} Although Wholesale had no signed contract, its president testified that he wrote a letter to Mississippi Steel confirming this new price agreement.\footnote{163} He then described the procedure his office followed in regularly mailing these letters.\footnote{164} In contrast, Mississippi

\begin{footnotes}
\footnote{154} Id. at 18.
\footnote{155} Id. For a discussion of this presumption, see infra note 174 and accompanying text. Perdue also argued that it was not the drafters’ intent to allow this presumption to prove receipt. Id. Specifically, Perdue pointed out that the merchant’s exception requires that a written confirmation be received. Id. If the drafters intended to use this presumption, they would have simply required that the confirmation be sent within a reasonable time, not received within a reasonable time. Id. at 19.
\footnote{156} Id. at 18.
\footnote{157} Id. at 19 (citation omitted).
\footnote{158} Id.
\footnote{159} Id. Since Motts had raised successfully the merchant’s exception, the court held that Motts would now be entitled to go forward and prove that there was an oral agreement which contained the terms alleged. Id. at 23.
\footnote{160} Id. at 27.
\footnote{161} 357 So. 2d 296 (Miss.), cert. denied, 439 U.S. 864 (1978).
\footnote{162} Id. at 296-97. The alleged oral agreement was between Wholesale’s president, J.W. McLaughlin, and the Magna Corporation doing business as the Mississippi Steel Company. Id. at 297. The alleged agreement was that Mississippi Steel would sell and deliver 2,900,000 pounds of steel reinforcing rods at a cost of $5.90 per one hundred pounds until December 31, 1972. Id. Any steel purchased after this date would be sold at a cost of $6.35 per one hundred pounds. Id.
\footnote{163} Id.
\footnote{164} Id. In fact, Wholesale had also filed a counterclaim alleging that it overpaid Mississippi Steel in the sum of $17,902.05. Id. at 296. The lower court gave judgment to Mississippi Steel for $69,000. Id. at 296-97. From this judgment, Wholesale appealed, asserting both of the aforementioned grounds as being incorrectly decided by the trial court. Id. at 297.
\end{footnotes}
Steel claimed that it never received the written confirmation.\textsuperscript{165}

The Mississippi Supreme Court upheld the trial court's decision that Wholesale failed to prove that Mississippi Steel had received the letter.\textsuperscript{166} In so holding, the court stated:

[S]ince failure to object in writing within 10 days would stop the party to whom the confirmatory writing is addressed, it becomes absolutely necessary that such party receive the confirmatory writing. It would be a simple matter for the sender of the confirmatory writing to mail it by registered mail—return receipt requested. That was not done in this case, and no proof was adduced that appellee received this letter of April 20, 1972.\textsuperscript{167}

In Perdue, the defendant argued that Magna stood for the proposition that the only proper method of proving receipt of a written confirmation was to show that the confirmation was mailed via registered mail, return receipt requested.\textsuperscript{168} However, the Perdue court distinguished Magna, reasoning that the only issue presented in Magna was whether there was enough evidence to conclude that Mississippi Steel received the written confirmation.\textsuperscript{169} Thus, nothing in Magna related to what type of proof was necessary to prove receipt.\textsuperscript{170} Rather, the court sim-

Mississippi Steel further denied ever receiving a purchase order which also was allegedly sent to them. \textit{Id.} But they added that the usual procedure over the course of their ten-year business relationship was for Wholesale to place telephone orders which would be shipped and billed by Mississippi Steel at prevailing market prices. \textit{Id.} at 298.

Consistent with this past practice, Mississippi Steel initially had charged the prevailing rate of $5.90 per one hundred pounds up to July 16, 1973. \textit{Id.} However, after this date, Mississippi Steel increased its billing price along with the prevailing rate up to and finally above $6.35 per one hundred pounds. \textit{Id.}

When Mississippi Steel billed Wholesale for the purchased steel at the prevailing market price, Wholesale refused to pay the balance due in excess of what the parties allegedly had orally agreed upon. \textit{Id.} Therefore, Mississippi Steel initiated a breach of contract action for the amount due. \textit{Id.}

Mississippi Steel contended that there was no agreement between the parties other than as to the past practice of billing at the prevailing rate for all steel delivered. \textit{Id.} Wholesale claimed that it had sent a written confirmation of this alleged oral agreement and, therefore, the transaction fell within the merchant's exception. \textit{Id.} (citing Miss. CODE AN. § 75-2-201 (1972)). Therefore, Wholesale argued, their oral contract action was enforceable. \textit{Id.} at 297.

165. \textit{Id.} at 298. Wholesale’s president explained their office procedures: “We have a regular system like all other companies would have. We have the secretaries type the letters out, then they bring them in for my signature and they place them into envelopes and mail them out.” \textit{Id.} at 297.

166. \textit{Id.} at 299. Because Wholesale did not prove receipt, the merchant’s exception was held not applicable. \textit{Id.} Thus, Magna could assert the statute of frauds which would make the oral contract unenforceable. \textit{Id.}

167. \textit{Id.}


169. \textit{Id.} at 29.

170. \textit{Id.}
ply concluded that the testimony of Wholesale's president was insufficient evidence to prove receipt.\(^{171}\) Moreover, the court reasoned that not allowing receipt to be established by a presumption would limit the utility of Code § 2-201(2) and would be inconsistent with the intent of that section.\(^{172}\) According to the *Perdue* court, the intent of Code § 2-201(2) is to allow a merchant to confirm oral agreements and thereby encourage the business practice of sending confirmatory writings.\(^{173}\)

Other courts have relied on the presumption of mailing in proving receipt.\(^{174}\) However, these courts have not stated whether they are relying on an interpretation of their commercial code or whether they are relying on their local evidentiary rules.\(^{175}\) Nonetheless, it is submitted that other jurisdictions should follow *Perdue* and its interpretation of *Magna*. There is no language in the Code which suggests that proof of actual receipt is required.\(^{176}\) In addition, the merchant's exception was designed, in part, to encourage the business practice of sending confirmatory writings to confirm oral contracts.\(^{177}\) Any decision which would require a merchant to prove actual receipt would seriously limit the utility of § 2-201(2).\(^{178}\) Instead, a court should allow receipt to be proven by the presumption of mailing. This rule would further the drafters' intent of encouraging the practice of confirming oral contracts by not placing too heavy a burden on the sending merchant.\(^{179}\) It is precisely this policy which the *Perdue* court identified in allowing the presumption of mailing to prove receipt.\(^{180}\)

D. *The Reason to Know Element*

The merchant who receives a written confirmation also must have reason to know of its contents.\(^{181}\) One of the few cases interpreting this

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171. *Id.*
172. *Id.*
173. *Id.*
174. *See, e.g.*, Baumgold Bros., Inc. v. Allan M. Fox Co., 375 F. Supp. 807 (1973) (in action against diamond purchaser for damages for breach of contract, presumption of receipt rebutted where irregularities in attempted delivery of diamonds is proven along with testimony showing package was not received); Tabor & Co. v. Gorenz, 43 Ill. App. 3d 124, 356 N.E.2d 1150 (1976) (in action for breach of contract for delivery of soybeans, presumption of receipt is satisfied where evidence shows office custom is to mail properly completed sales notices).
177. *Id.* at 29; N.J. STAT. ANN. § 12A:2-201(2), New Jersey Study Comment 5 (West 1962).
179. *Id.*
180. *Id.*
181. *See U.C.C.* § 2-201(2) (1978); *see also R. Anderson*, *supra* note 11, at
element is the recent decision of the United States Court of Appeals for the Seventh Circuit in Thomson Printing Machinery Co. v. B.F. Goodrich Co. 182 In this case, Thomson Printing alleged that its president had agreed orally with Goodrich's surplus equipment manager to buy used printing machinery from Goodrich and that Goodrich later breached this agreement. 183 Although Thomson Printing had no signed contract, it alleged that it had sent a written confirmation to Goodrich confirming this oral agreement per Code § 2-201(2). 184 Goodrich denied that the written confirmation qualified under Code § 2-201(2) because it was not addressed to the surplus equipment department and, therefore, was not received by anyone with reason to know its contents. 185

83-84; R. Nordstrom, supra note 11, at 64; A. Squillante & J. Fonseca, supra note 11, at 284-85.

182. 714 F.2d 744 (7th Cir. 1983). Other cases have stated that the receiving merchant's having reason to know of the contents of the confirmation is an element of proving the merchant's exception, but have not specifically interpreted this element. See, e.g., Perdue Farms, 459 F. Supp. at 12 (N.D. Miss. 1978) (confirmation of purchase for 1500 boxes of "roasters" sufficient written confirmation to remove alleged oral agreement out of statute of frauds); Serna Inc. v. Harman, 742 F.2d 186, 189 (5th Cir. 1984) (cattle seller's confirmation sent three and one-half months after alleged agreement within reasonable time; "reason to know" contents element not addressed).

For a brief discussion of one view behind the enactment of the original English statute of frauds, see Thomson Printing, 714 F.2d at 746 (7th Cir. 1983).

183. Thomson Printing, 714 F.2d at 745. Specifically, Thomson Printing's president alleged that he had agreed with Ingram Meyers, Goodrich's surplus equipment manager, to purchase a piece of used printing machinery for $9,000. Id. Thomson Printing was in the business of buying and selling used printing equipment and Thomson's president traveled to Akron, Ohio to make this deal. Id.

184. Id. at 746. Thomson sent a purchase order in confirmation of the agreement four days after the alleged agreement. Id. at 745. Of course, if Thomson successfully proved that this was a written confirmation, Goodrich would have been prevented from asserting the statute of frauds as a defense to Thomson Printing's contract action. Therefore, Thomson would have been allowed to introduce evidence of this alleged agreement at trial. See U.C.C. § 2-201(2) official comment 3 (1978).

In addition to sending this confirmation, Thomson's president enclosed a check for $1,000 as part payment for the printing machine. 714 F.2d at 745. Thus, Thomson Printing also alleged that this transaction fell within the partial payment exception to the statute of frauds; however, the court did not address this issue. Id. at 746.

185. Thomson Printing, 714 F.2d at 747. According to the court, there was no question that Goodrich had received the confirmation. Id. However, the crux of Goodrich's argument was that Ingram Meyers, Goodrich's surplus equipment manager, was the person who had dealt with Thomson's president. Id. Thus, only Meyers had "reason to know" the writing's contents, not the people in the company mailroom. Id. Specifically, Goodrich claimed that Thomson erred in not designating on the check, envelope or purchase order that the item was intended for the surplus equipment department. Id. The court rejected this argument noting that Meyers was deemed to have received the confirmation from the time that he would have received it had the mailroom exercised due diligence. Id. at 748.
The Seventh Circuit held that Goodrich did have reason to know its contents.\textsuperscript{186} Accordingly, Thomson's letter satisfied the merchant's exception to the statute and the action was not barred.

The court stated that the reason to know element is best understood to mean that the confirmation should have been anticipated and, therefore, should have received the attention of the appropriate parties.\textsuperscript{188} Here, the court emphasized that the confirmation was based on admitted actual negotiations between Thomson Printing and B.F. Goodrich; therefore, the document was not spurious and should have been anticipated.\textsuperscript{189}

As Thomson Printing suggests implicitly, and other commentators have stated explicitly, the reason to know element is a protective device against unscrupulous merchants who never having any agreement, nonetheless send a written confirmation in hopes of establishing a contract.\textsuperscript{190} In this respect, the reason to know element can be regarded as a nontechnical statement of notice.\textsuperscript{191} That is, the receiving merchant must have knowledge of the facts which form the basis of the alleged agreement confirmed in the writing. The close relationship between notice and reason to know is evident from the Code's definition of notice found in Code § 1-201(25).\textsuperscript{192} This section provides that "[a] person has 'notice' of a fact when . . . (c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists."\textsuperscript{193} If the reason to know element is equated with notice, then the

\textsuperscript{186} Id.

\textsuperscript{187} Id. at 749. The jury in the lower court found that Goodrich had breached its contract with Thomson Printing. Id. at 746. The district court concluded, however, that the contract was not enforceable as a matter of law because it was an oral contract in violation of the statute of frauds. Id. at 745. The court of appeals found that the contract was enforceable on the basis of the merchant's exception and, therefore, reversed the district court. Id.

The court engaged in a two step analysis. First, the court concluded that Goodrich's mailroom had received the confirmation and that the surplus equipment department had reason to know its contents. Id. at 748. The court thus concluded that the surplus equipment manager was deemed to have received the confirmation because the mailroom was an appropriate place to receive the confirmation. Id. at 747-48. Accordingly, the court concluded that the written confirmation was received by a person with reason to know its contents. Id. at 748.

\textsuperscript{188} Id. at 747 (citing ÒPerdue Franks, 459 F. Supp. at 20). \textsuperscript{189} Id. at 748.

\textsuperscript{190} A. Squillante & J. Fonseca, The Law of Modern Commercial Practices 318 (1980). It seems only natural that a merchant who receives a written confirmation of an agreement which has no basis in fact would simply disregard the writing as frivolous and not respond to it. In these instances, the merchant should be able to defend a claim that the alleged oral agreement falls within the merchant's exception on the grounds that he did not have reason to know its contents. See R. Duesenberg & L. King, 3 Sales and Bulk Transfers Under the U.C.C. § 2.04(2) at 2-70 (1982) (merchant should not have to defend contract action when no reason to suspect agreement has been reached).


\textsuperscript{192} Id.

\textsuperscript{193} U.C.C. § 1-201(25) (1978) (emphasis added).
merchant who receives a written confirmation need not actually have read the confirmation.\textsuperscript{194} From this, it follows that a merchant who has reason to know the contents of a written confirmation can not negate the force of the confirmation simply by neglecting or refusing to open it.\textsuperscript{195}

E. Written Notice of Objection

To maintain the right to assert the statute of frauds as a defense, a merchant who receives a confirmatory writing must give written\textsuperscript{196} notice of objection to its contents within ten days.\textsuperscript{197} Again, it should be reiterated that the only effect of failing to object within that period is simply to take away the receiving merchant's right to assert the statute of frauds as a defense in a contract action.\textsuperscript{198} Thus, the merchant who

\begin{itemize}
\item \textsuperscript{194} See R. Nordstrom, \textit{supra} note 11, at 64 ("It is not necessary that the recipient actually have read the document or, if he did read it, that he understood it.").
\item \textsuperscript{195} R. Anderson, \textit{supra} note 11, at 84.
\item \textsuperscript{197} U.C.C. § 2-201(2) (1978); see also Perdue Farms 459 F. Supp. at 25 (N.D. Miss. 1978) (poultry seller who failed to object within ten days of receiving buyer's confirmation precluded from asserting statute of frauds as defense); Trafalgar Square, Ltd. v. Reeves Bros. Inc., 35 A.D.2d 194, 315 N.Y.S.2d 239 (1970) (under Code § 2-201(2), merchant who receives written confirmation must object within ten days); Currituck Grain, Inc. v. Powell, 28 N.C. App. 563, 568, 222 S.E.2d 1, 3 (1976) (although farmer failed to object to written confirmation within ten days, question of material fact as to whether farmer was merchant still remained).
\item \textsuperscript{198} See, e.g., Tipton v. Woodbury, 616 F.2d 170 (5th Cir. 1980) (in contract for sale of securities, where defendant failed to object to written confirmation within ten days, defendant lost rights to assert statute of frauds); Sierens v. Clausen, 20 Ill. 2d 585, 528 N.E.2d 559 (1975) (where plaintiff sent written confirmation of alleged oral agreement to buy defendant farmer's soybean crop and defendant never objected, court entitled to find that oral contract made in fact); Campbell v. Yokel, 20 Ill. App. 3d 702, 313 N.E.2d 628 (1974) (failure to object to plaintiff's written confirmation alleging oral contract to sell grain at $5.30 per bushel barred defendant from asserting statute of frauds as defense); Miller v. Kaye, 545 P.2d 199 (Utah 1975) (written confirmation of alleged oral contract for lease of elephant made contract enforceable between parties where defend-
sends the written confirmation still has the burden of proving that an oral contract was made and the precise terms of that contract.\(^{199}\) However, while the written confirmation does not establish the existence of a contract, it may be used as evidence of the alleged agreement and its terms.\(^{200}\)

Some authority suggests that the written objection requirement is premised on the belief that a merchant who receives a written confirmation of an alleged oral contract, and acquiesces by not objecting, implicitly acknowledges that there is an oral contract.\(^{201}\) Conversely, it is argued, a merchant who receives a confirmation of an oral contract to which he never agreed would naturally react by denying that there was any agreement.\(^{202}\)

Regardless of the independent truth or falsity of this premise, it is submitted that the drafters included the written objection element for a more practical reason which goes to the very core of the merchant’s exception. Namely, the ten-day objection period is designed to prevent the merchant who receives a confirmation from playing the market. With the ten-day rejection period, a merchant who receives a written confirmation can no longer sit by and watch market prices without losing his right to assert the statute of frauds as a defense in a subsequent contract dispute.\(^{203}\) This is precisely why the drafters included the

\(^{199}\) See, e.g., Perdue Farms, 459 F. Supp. at 7 (N.D. Miss. 1978) (where plaintiff’s confirmation for purchase of “roasters” qualified as written confirmation, plaintiff still had burden of proving existence of oral agreement and its terms); Automotive Spares Corp. v. Archer Bearings Co., 382 F. Supp. 513, 515 (N.D. Ill. 1974) (“the burden of persuading the trier of fact that a contract was in fact made still rests upon the plaintiff.”).

\(^{200}\) See, e.g., Perdue Farms, 459 F. Supp. at 14 (N.D. Miss. 1978). In Perdue Farms, the court concluded that the confirmation of purchase sent by Motts to Perdue qualified as a written confirmation. Id. at 22. The court was quick to add that the terms in the confirmation were not binding on Perdue. Id. at 23. Nonetheless, the purchase order was admissible as evidence of the terms of the alleged agreement, while Perdue would be allowed to introduce evidence to contradict the terms contained in the confirmation. Id.; see also Duralon Indus. v. Petal Sales Co., 4 U.C.C. Rep. Serv. 736 (N.Y. 1967) (failure of merchant to object to stated prices in invoice did not bar him from showing that stated prices never were agreed upon).

\(^{201}\) Perdue Farms, 459 F. Supp. at 21; Comment, supra note 94, at 385.

\(^{202}\) Perdue Farms, 459 F. Supp. at 21; Comment, supra note 94, at 385.

\(^{203}\) For a discussion of the requirement of written notice of objection and
merchant's exception. It is further submitted that the added requirement of a written objection is evidence of the drafters' intent to prevent the receiving merchant from playing the market. If the true reason for the objection provision was simply that it is natural for a merchant to object when there is no agreement, then there would be no compelling reason to require a written objection.

The most important and most frequently litigated aspect of the objection element is the question of what writings qualify as written objections. The Code imposes no obligation as to the writing's form other than that the objection be written.

Despite the Code's lack of guidance, two basic rules have emerged from the case law. First, the written notice of objection must be made in response to a written confirmation. For example, in Continental-Wirt

its effect on both the sending and receiving merchants, see supra notes 196-202 and accompanying text.

204. For a detailed discussion of the reasons behind enacting the merchant's exception, see supra notes 32-37 and accompanying text.

205. For a discussion of the requirement that the notice of objection be written, see supra note 196 and accompanying text.

206. In fact, the Code requires written notice of objection. See U.C.C. § 2-201(2) (1978). By requiring written objection, the merchant who sent the confirmation is protected from an unscrupulous merchant who might otherwise try to recant a prior oral objection. The writing is evidence of his or her objection.

207. U.C.C. § 2-201(2) (1978). Although the Code requires notice of objection within ten days after it is received, the Code does not specify how to measure this ten-day period. Id.; see also R. Nordstrom, supra note 11, at 65; A. Squillante & J. Fonseca, supra note 11, at 286. The Arizona Court of Appeals addressed this issue in Tiffany Inc. v. W.M.K. Transit Mix, Inc., 16 Ariz. App. 415, 493 P.2d 1220 (1972). In Tiffany, the defendant to the action had received a written confirmation on July 15 and sent his objection to it on July 25. Id. at 418, 493 P.2d at 1223. The court found that "the time in which an act is required to be done shall be computed by excluding the first day and including the last day, unless the last day is a holiday, and then it is also excluded." Id. (citations omitted). Accordingly, the court concluded that the defendant's objection was mailed on the tenth day and, therefore, was timely. Id.

It should be noted that the Tiffany court further noted that the Code did not specify how to calculate the ten-day period. Id. Thus, the court relied on a state statute which provided the rule above. Id. Thus, absent a controlling state statute, it is not altogether clear whether the Tiffany court would have reached the same conclusion.

The Code also does not state specifically whether the objection must be received within ten days or simply sent within ten days. Nonetheless, authorities agree that the confirmation simply must be sent within ten days. See id. (objection sent on tenth day held valid); R. Nordstrom, supra note 11, at 64 (recipient of confirmation not required to assure his objection is received within ten days; properly addressed and stamped letter is sufficient notice).

Finally, the Code fails to state whether the notice of objection must be signed. See U.C.C. § 2-201(2) (1978) and accompanying official comments. There is no case law on this potential problem. The lack of authority is probably because, as a practical matter, the objection party always identifies himself or herself.

Continental's vice-president sent a letter of confirmation to the defendant, Sprague Electric Company. This letter confirmed a telephone conversation between plaintiff's vice-president and defendant's materials manager wherein the defendant had agreed to buy certain industrial equipment from the plaintiff. Before he received the written confirmation, however, defendant's materials manager drafted a letter which stated that the Sprague Company no longer was interested in purchasing the equipment.

Continental later sued for breach of contract claiming that their action was enforceable since they had confirmed this agreement pursuant to Code § 2-201(2). The Sprague Company, in turn, claimed that they properly had rejected that confirmation and, therefore, had maintained their right to assert the statute of frauds as a defense to this action. The United States District Court for the Eastern District of Pennsylvania held that because the defendant had drafted the letter before it received the plaintiff's confirmation, the objection was not in response to that confirmation. Therefore, the defendant's letter did not qualify as a written notice of objection under Code § 2-201(2).

The second basic rule is that a notice of objection must unequivocally object to the very formation or existence of the alleged oral agreement. Only when a merchant unequivocally objects to an agreement

210. Id. at 962.
211. Id. The alleged agreement occurred during an interstate telephone conversation. Id. Therefore, there was an initial question of which state's law applied to the contract action. Id. The federal court, sitting in diversity, concluded that it was bound to apply the law of the state where that district court was seated, including that state's choice of law principles. Id. at 962-63 (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941)). Applying Pennsylvania's conflict of law principles (the modern approach which looks to the law of the state with the most significant relationship to the parties and the transaction), the court concluded that Pennsylvania law controlled, stating that it was reasonable to believe that the parties had contemplated the application of Pennsylvania law. Id. at 963.
212. Id. at 962, 965.
213. Id. at 964.
214. Id. at 964-65. For a detailed discussion of the effect of objecting to a written confirmation, see supra notes 196-200 and accompanying text.
215. Id. at 965. The court further noted that the defendant's letter also was not an objection to the alleged agreement; it was "not a disaffirmance of an oral contract." Id. Rather, it was more of an apology by the defendants for having changed their "initial thoughts." Id. For a further discussion of the content of a written objection, see infra notes 233-84 and accompanying text.
216. Id. at 965.
can he avoid the pitfall of implicitly acknowledging the existence of an alleged oral agreement. For example, suppose that a merchant farmer receives a letter confirming an alleged oral agreement whereby he is supposed to sell his wheat crop to a grain dealer for $5.00 per bushel. If the merchant farmer objects to this confirmation by stating that he never agreed to sell his crop for $5.00 per bushel, a court may find that the farmer has acknowledged implicitly that there was at least some agreement to sell his wheat, albeit, perhaps not for $5.00 per bushel.

In addressing this dilemma, one commentator has stated:

The objection, if it volunteers too much may itself amount to a satisfactory memorandum. The simplest advice to follow would be to send a brief, concise statement acknowledging receipt of the purported confirmation and denying either its content or that any contract was entered. Avoid details and avoid argumentative comment. Even a lone reference to price may give basis for the confirming merchant to contend that there was in truth a bargain and that oral evidence should be admitted to prove it. The minimization of what is required for an effective memorandum makes it exceedingly unwise to do otherwise than dispatch an unequivocal denial of all the content of the confirmation.

This commentator’s analysis represents how courts have approached the notice of objection requirement. For example, in Perdue Farms, Perdue sent a letter of objection in response to Mott’s written confirmation of their alleged contract. Specifically, the Perdue letter stated: “As our credit representative advised you orally . . . and confirmed by our mailgram . . . credit terms are not available because of your default No-


218. The problem raised in this situation is determining whether the merchant has made a complete or only a partial objection to the alleged agreement.

219. R. DUESENBERG & L. KING, 3 SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 2.04[2] at 2-78 (1980) (quoted in Simmons Oil Corp. v. Bulk Sales Corp., 498 F. Supp. 457, 461-62 (D. N.J. 1981); see also A. SQILLANTE & J. Fonseca, supra note 11, at 285 (“[b]ecause of the duty of higher care imposed upon merchants, it would seem that anything less than unequivocal response to the written confirmation would not meet the requirement of an objection in writing to the confirmation”); Comment, supra note 94, at 386-87 (“anything less than an unqualified objection may testify to the reality of the transaction and the objecting party’s connection to it”).


221. 459 F. Supp. at 21. For a further discussion of the facts of Perdue Farms, see supra notes 150-73 and accompanying text.
November 14, 1975. Since you have not responded to our invitation to make advance cash sales, the previous proposed purchase was automatically cancelled."222

The district court held that Perdue’s reference to unavailability of credit terms suggested that other terms had been agreed to previously.223 Moreover, the reference to cancelling the “previous proposed purchase” also suggested that there was an earlier transaction.224 From this, the court concluded that Perdue’s letter objected only to specific terms of the contract and, therefore, was not a valid objection to Mott’s confirmation.225

The district court in Simmons Oil Corp. v. Bulk Sales Corp.226 faced a situation similar to that in Perdue. In this case, the plaintiff sent a telex message to the defendant which confirmed its agreement to sell the defendant 25,000 barrels of leaded gasoline.227 The following day, the defendant returned the message which stated: “With reference to your telex of 5/29/79, please be advised that the payment clause is not acceptable and we suggest the substitution of a more appropriate and conventional clause.”228

When the defendant later refused to accept delivery of the gasoline, the plaintiff sued for breach of contract alleging that it had confirmed this oral agreement and that the defendant’s telex was not a written objection to the alleged oral agreement.229 The Simmons Oil court rea-

222. Id. at 21 n.31. While Perdue claimed that this letter denied the existence of any agreement, Motts argued that the letter acknowledged an oral agreement. Id. For a further discussion of Perdue Farms, see supra notes 150-73 and accompanying text.
223. Id. at 22.
224. Id. The court reasoned that “a transaction cannot be cancelled unless it was previously made.” Id.
225. Id. The court stated, “The tenor of the letter and mailgram is that of a disagreement over terms or an attempt to cancel a previous agreement because of the occurrence of subsequent events.” Id. In concluding, the Perdue Farms court added that if no oral transaction had occurred, Perdue would have sent a note denying the existence of such a purchase. Id.
227. Id. at 458. The selling price was alleged to be $1.22 per gallon. Id. Four days after this alleged agreement was made, the plaintiff sent a confirming telex to the defendant setting forth the terms of this agreement. Id.
228. Id. at 461.
229. Id. at 457. When the defendant persisted in refusing to have its barges accept delivery of the gasoline, the plaintiff sold the gasoline. Id. at 459. At this time, the prevailing rate for gasoline had decreased to $0.90 per gallon. Id. Thus, the plaintiff sued to recover breach of contract damages based on the difference between the contract price and the cover price. Id. At trial, the defendant moved to dismiss the action on the grounds that even if there were an oral contract, it would be unenforceable because of the statute of frauds. Id.

According to the defendant, there was no signed contract, and the merchant’s exception was not applicable since their telex, dated May 30, had objected to the plaintiff’s written confirmation. Id. at 459.
soned that "the telex volunteers too much." According to the court, "the terms of the May 29 telex, which detailed the alleged contract, were] incorporated by reference." Thus, the court concluded that the defendant's telex was not a written objection and, therefore, the plaintiff's action was not barred by the statute of frauds.

Perdue and Simmons Oil make it clear that the only safe way to object to a confirmation is to deny the existence of any agreement whatsoever. This aspect of the merchant's exception is extremely important to merchants who regularly transact business through oral agreements. Therefore, they should take notice of the legal significance of their responses to any written confirmation.

F. Nature of a Confirming Letter

Throughout this comment, it has been assumed that the written confirmation sent by a merchant qualifies as a bona fide confirmatory writing. However, not every writing suffices as a confirmatory writing. This concluding section describes briefly the standard that courts have applied to written confirmations. More ambitiously, this section addresses the possibility that courts should apply a more stringent standard for written confirmations which are sent pursuant to the merchant's exception, Code § 2-201(2), as compared to a writing analyzed under Code § 2-201(1).

The general rule of the statute of frauds is set forth in subsection (1) of § 2-201. To avoid the statute of frauds defense, this provision requires that there be "some writing sufficient to indicate that a contract for sale has been made." Unlike pre-Code law which required that the writing contain all the material terms of the contract, the Code has only three definite and invariable requirements for a writing under

230. Id. at 461.
231. Id.
232. Id.
233. See, e.g., C.R. Fedrick, Inc. v. Borg-Warner Corp., 552 F.2d 852 (9th Cir. 1977) (letter speaking of future intended executed agreement incorporating price and terms of bid submitted by pump supplier held insufficient written confirmation); R.S. Bennett & Co. v. Economy Mech. Indus., Inc., 606 F.2d 182 (7th Cir. 1979) (seller's letter stating that it was pleased to offer its equipment proposal to defendant held mere offer, not confirmation).
234. For a discussion of what qualifies as a written confirmation, see supra notes 235-84 and accompanying text.
235. For a discussion of a possible higher standard for written confirmations, see supra notes 263-77 and accompanying text.
237. Id. In contrast to the merchant's exception, subsection (1) requires that a writing be signed by the party "against whom enforcement is sought." For the full text of this subsection, see supra note 2.
238. For a discussion of the pre-Code law, see supra notes 32-36 and accompanying text.
subsection (1) of § 2-201:239 the writing must be signed,240 state a quantity,241 and evidence a contract for the sale of goods.242 Where these three elements are present, the writing is “sufficient against the sender.”243 In explaining the requirements of subsection (1), the official comment states that the one term which must appear is quantity. U.C.C. § 2-201 official comment 1 (1978); see also Doral Hosiery Corp. v. Sav-A-Stop, Inc., 377 F. Supp. 387 (E.D. Pa. 1974) (even though writings construed together evidenced contract for sale of hosiery, confirmation insufficient where no quantity); Ace Concrete Prod. Co. v. Charles J. Rogers Constr. Co., 69 Mich. App. 610, 245 N.W.2d 353 (1976) (purchase order stating “concrete for tunnel” insufficient confirmation since no quantity term).

Yet, a number of cases construe the quantity term liberally. See, e.g., Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784, 788 n.7 (5th Cir. 1975) (“all the acceptable cotton produced during 1973 on the following acreage and none other”); Fort Hill Lumber Co. v. Georgia-Pacific Corp., 261 Or. 431, 434, 493 P.2d 1366, 1368 (1972) (“timber is located in approximately T. 10 S., R. 11 W.” and consists of all hemlock that is “within cutting lines marked”); Port City Constr. Co. v. Henderson, 48 Ala. App. 639, 641, 266 So. 2d 896, 900 (1972) (“all the concrete for slab”).

242. U.C.C. § 2-201(1) official comment 1 (1978); Arcuri v. Weiss, 198 Pa. Super. 506, 184 A.2d 24 (1962) (check containing notation “tentative deposit on tentative purchase” did not indicate that contract had been made; insufficient confirmation); see also J. WHITE & R. SUMMERS, supra note 11, at 62. In explaining this language, Professors White and Summers state that the “sufficient to indicate” language of subsection (1) is equivalent to a “more probable than not” standard. Id.

cial comment to subsection (1) states that the writing must simply afford a basis for believing that there was a transaction.\(^{244}\)

An overwhelming majority of courts and commentators have stated that a written confirmation sent pursuant to the merchant’s exception, subsection (2) of § 2-201, simply must meet these same three requirements of subsection (1) of § 2-201.\(^{245}\) Under this permissive standard, courts have stated that the written confirmation must allow for the inference that the writing confirms a prior oral agreement.\(^{246}\) Alternatively, courts have borrowed the language from the official comment to subsection (1) stating that the writing must “simply afford a basis for believing that the offered oral evidence rests on a real transaction.”\(^{247}\)

The seminal decision advocating this permissive standard is *Harry Rubin & Sons, Inc. v. Consolidated Pipe Co.*\(^{248}\) In this case, the Rubin company alleged that it had agreed orally to buy plastic hoops and materials from Consolidated.\(^{249}\) When Consolidated raised the statute of frauds

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201(1)); Evans Implement Co. v. Thomas Indus., Inc., 117 Ga. App. 279, 280, 160 S.E.2d 462, 463 (1968) (writings not sufficient against sender because not signed); Azevedo v. Minister, 86 Nev. 576, 582, 471 P.2d 661, 665 (1970) (quoting Code § 2-201 official comment 1, court implies writing under § 2-201(2) must satisfy three requirements of § 2-201(1)).

244. U.C.C. § 2-201 official comment 1 (1978).


246. See, e.g., M.K. Metals, Inc. v. Container Recovery Corp., 645 F.2d 583, 591 (8th Cir. 1980) (terms of purchase order for scrap metal so specific as to “desires” of seller as to reflect prior dealings).

247. U.C.C. § 2-201 official comment 1 (1978); see, e.g., *Perdue Farms*, 459 F. Supp. at 16 (confirmation of purchase for 1500 boxes of “roasters” allowed for inference that agreement was made); Azevedo v. Minister, 86 Nev. 576, 471 P.2d 661 (1970) (writing must only afford basis for believing that there was a transaction); Harry Rubin & Sons, Inc. v. Consolidated Pipe Co., 396 Pa. 506, 511, 153 A.2d 472, 476 (1959) (periodic accounting statement afforded basis for believing there was oral agreement).


249. 396 Pa. at 508, 153 A.2d at 475. The plaintiff actually alleged that there were three separate oral contracts, each for the sale of goods for more than $500. *Id.* These agreements allegedly were made with an officer for Consolidated. *Id.*
as a defense, the Rubin company claimed that it had sent a written confirmation to Consolidated which satisfied the merchant's exception. The writing which the Rubin company relied on was a purchase order for plastic hoops and a subsequent letter asking Consolidated to enter a similar "order" for additional hoops. Consolidated argued that since the letter used the word "order," rather than the word "contract" or "agreement," the writing was only an offer, not a written confirmation.

The Pennsylvania Supreme Court held that Rubin's letter was a written confirmation under Code § 2-201(2). According to the court, the word "order" showed that there was a binding agreement. In arriving at its decision, the court noted that the writing must "simply afford a basis for believing that the offered oral evidence rests on a real transaction." The Rubin court did not acknowledge any distinction between a writing under Code § 2-201(2) and a writing under Code § 2-201(1). Other courts and commentators have followed the Rubin court's lead. Accordingly, these courts have found that a purchase

250. Id. at 510, 153 A.2d at 475.
251. Id. The purchase order was on a Consolidated form and was signed by Rubin stating the quantity ordered as 30,000 hoops with a description, size and price of the hoops. Id. The Rubin company also relied on a letter which they sent to Consolidated. Id. In relevant part, this letter stated: "As per our phone conversation of today kindly enter our order for the following. . . . It is our understanding that these will be produced upon completion of the present order for 30,000 hoops." Id. at 509, 153 A.2d at 474.
252. Id. at 511, 153 A.2d at 475. The lower court rejected the plaintiff's claim and held that two of the alleged oral agreements were unenforceable because of the statute of frauds. Id. at 508, 153 A.2d at 474.
253. Id. at 511-12, 153 A.2d at 476. The letter was sufficient to remove both oral contracts from the statute of frauds. Id. Specifically, Rubin's statement that "these will be produced upon completion of the present order" indicated that both orders were accomplished facts. Id. at 511, 153 A.2d at 475.
254. Id. at 511, 153 A.2d at 475. "The word 'order' as employed in this letter obviously contemplated a binding agreement." Id. To this, the court added that the sender obviously contemplated a binding agreement and that the recipient should also have interpreted it in this manner. Id. Since this qualified as a written confirmation as to both oral contracts and consolidated gave no notice of objection, Consolidated could not assert the statute of frauds as a defense. Id. at 512, 153 A.2d at 476.
255. Id. at 512, 153 A.2d at 476. As noted previously, this language comes from the official comment to subsection (1). See U.C.C. § 2-201(1) official comment 1 (1978). Other courts have seized upon this language in analyzing written confirmations. See, e.g., Perdue Farms, 459 F. Supp. at 16 (applying this language and concluding that purchase order qualified as confirmation); Azevedo v. Minister, 86 Nev. 576, 583, 471 P.2d 661, 666 (1970) (applying this language and concluding that periodic accounting was confirmation).
256. See Rubin, 396 Pa. at 512, 153 A.2d at 476.
257. See Howard Constr. Co. v. Jeff-Cole Quarries, Inc., 669 S.W.2d 221, 227 (Mo. App. 1983) (citing Rubin for proposition that writings under § 2-201(2) must only satisfy criteria of § 2-201(1)); Azevedo v. Minister, 86 Nev. 576, 583, 471 P.2d 661, 665-66 (1970) (citing Rubin for proposition that writings under § 2-201(2) must satisfy criteria of § 2-201(1)).
order,\textsuperscript{258} invoice,\textsuperscript{259} acknowledgment,\textsuperscript{260} letter\textsuperscript{261} or a written contract\textsuperscript{262} may qualify as a written confirmation of an alleged oral contract.


\textsuperscript{259} See, e.g., Associated Hardware Supply Co. v. Big Wheel Distrib. Co., 355 F.2d 114 (3d Cir. 1965) (retailer received invoice for sales in question which contained letterhead of supplier, quantity and price terms held qualified as confirmation); Automotive Spares Corp. v. Archer Bearings Co., 382 F. Supp. 513 (N.D. Ill. 1974) (invoice for roller bearings which contained letterhead, date, quantity, price and description of items held sufficient confirmation); B & R Textile Corp. v. Domino Textiles, Inc., 77 A.D.2d 539, 430 N.Y.S.2d 89 (1980) (seller's invoice for textile goods was sufficient confirmation where it was on seller's letterhead with name and address of buyer, date, price, payment terms and description of goods); Alarm Device Mfg. Co. v. Arnold Indus., Inc., 65 Ohio App. 2d 256, 417 N.E.2d 1284 (1979) (seller's invoice for sale of screws and washers which contained letterhead, price and quantity held sufficient confirmation).

\textsuperscript{260} See, e.g., Lea Indus., Inc. v. Raelyn Int'l Inc., 363 So. 2d 49 (Fla. Dist. Ct. App. 1978) (acknowledgment of ordered furniture sent to defendant held sufficient confirmation).


\textsuperscript{262} See, e.g., Woodward & Dickerson, Inc. v. Yoo Hoo Beverage Co., 502 F. Supp. 395 (E.D. Pa. 1980) (printed form sales contract used by cocoa powder seller was sufficient for jury to conclude that it was confirmation of alleged oral contract), \textit{aff'd without op.}, 661 F.2d 916 (3d Cir. 1981).

The court in \textit{Great Western Sugar Co. v. Lone Star Donut Co.} raised an interesting issue with respect to confirming agreements by sending the contract itself. 567 F. Supp. 340 (N.D. Tex.), \textit{aff'd}, 721 F.2d 510 (5th Cir. 1983) (per curiam). In \textit{Great Western}, Great Western Sugar (GWS) alleged that Lone Star Donut (LSD) breached an agreement to buy a certain amount of sugar from GWS. \textit{Id.} at 341. LSD moved for summary judgment on two alternative grounds: (1) that there was no oral agreement and (2) even if there was an agreement, it was unenforceable because of the statute of frauds. \textit{Id.} GWS then introduced a letter and accompanying form contract which it argued had satisfied the merchant's exception to the statute. \textit{Id.} The letter stated: "This letter is a written confirmation of our agreement. . . . Please sign and return to me the enclosed counterpart of the letter signaling your acceptance of the above agreement." \textit{Id.}
In contrast to the basic statute of frauds provision, the merchant’s exception requires that the writing be “in confirmation of the contract and sufficient against the sender.” The obvious difference in language between the two subsections has led some commentators to believe that the merchant’s exception imposes a stricter writing requirement. This view has enjoyed limited acceptance in the case law.

The United States District Court for the Northern District of Texas held that this was not a confirmation. Id. at 342. The court reasoned that “[b]y requiring the buyer to take further action in order to signal acceptance . . . GWS indicated to the buyer in the 1981 letter agreement that the terms quoted were still subject to acceptance or rejection.” Id. The court concluded by noting that “[a] true confirmation requires no response.” Id.

Despite the lenient standard which courts have applied to written confirmations, courts have also held that confirmations which are mere negotiations are insufficient. See, e.g., Oakley v. Little, 49 N.C. App. 650, 655, 272 S.E.2d 370, 372-73 (1980) (two pages of notes entitled “outline of proposed sale” given to alleged purchaser of securities by purported seller held insufficient confirmation, merely negotiations). Likewise, written agreements which contain language indicating a tentative agreement have been found insufficient. Arcuri v. Weiss, 198 Pa. Super. 506, 511, 184 A.2d 24, 26 (1962) (check inscribed with “tentative deposit on tentative purchase” held insufficient).

263. U.C.C. § 2-201(2) (1978). For the complete text of the merchant’s exception, see supra note 6 and accompanying text.

264. R. DUESENBERG & L. KING, 3 BENDER’S UNIFORM COMMERCIAL CODE Serv. § 2.04[2] at 2-85 (1978) (more stringent standard justified by statutory language and fact that merchant is bound to writing he never signed); R. Nordstrom, supra note 11, at 61; A. Squillante & J. Fonseca, supra note 11, at 268 (“it is fair to assume that subsection (1) sets up the minimum requirement upon which it would be reasonable to impose a more detailed writing on merchants than is required by subsection (1)”).

265. Trilco Terminal v. Prebilt Corp., 167 N.J. Super. 449, 400 A.2d 1237 (1979) (acknowledging that subsection (2) imposes a stricter requirement yet not relying on this distinction since offered writings did not even satisfy minimum requirements), aff’d, 174 N.J. Super. 24, 415 A.2d 356 (1980). But see Perdue Farms, 459 F. Supp. at 15 (acknowledging, but rejecting, the argument that subsection (2) imposes a stricter requirement). Other courts have used language which suggests a stricter standard, yet, these courts have not explicitly acknowledged any distinction between the two subsections. See, e.g., N. Dorman & Co. v. Noon Hour Food Prod., 501 F. Supp. 294, 298 (E.D.N.Y. 1980) (documents must “standing alone . . . completely [represent] an acknowledgment or admission of the party of the existence of an agreement, promise or undertaking which obligates him to pay or perform as alleged.”). Still other courts have used mixed language making it difficult to determine which standard they are following. See, e.g., Rockland Indus., Inc. v. Frank Kasmir Assoc., 470 F. Supp. 1176, 1178 (N.D. Tex. 1979); Doral Hosiery Corp. v. Sav-A-Stop, Inc., 377 F. Supp. 387, 389 (E.D. Pa. 1974). Both the Rockland court and the Doral court referred to the official comment which states that the writing must simply afford a basis for believing that there was an agreement. Rockland, 470 F. Supp. at 1178; Doral, 377 F. Supp. at 389. Yet, these courts also stated that the confirmation must state that there is a completed agreement. Id. It is submitted that they “afford a basis for believing” the language of the official comments is not reconcilable with the language that a confirmation must actually state that there is a completed transaction or binding agreement.
If the merchant’s exception imposes a stricter writing requirement, then what must this confirmation contain? To be “sufficient against the sender,” all courts agree that the confirmation must satisfy the three basic requirements under subsection (1). In addition, the writing must be “in confirmation of the contract.” This phrase has been interpreted to mean that the written confirmation actually must state that there is a binding agreement or completed transaction. Similarly, one court has stated that a writing satisfies the merchant’s exception only when it refers to the prior agreement in language that makes it clear that such an agreement is relied upon. However, the writing does not have to state specifically that it is a confirmation of the alleged oral agreement.

This stricter standard has been justified on two grounds. First, the


Some courts have paraphrased this requirement by stating that the writing must be sufficient to bind the sender. See, e.g., Continental-Wirt Elec. Corp. v. Sprague Elec. Corp., 329 F. Supp. 959, 965 (E.D. Pa. 1971) (letter confirming purchase of industrial equipment sufficient to bind sender); Nelson v. Union Equity Coop. Exch., 536 S.W.2d 635, 637 (Tex. Ct. App. 1976) (instrument which listed name of seller and buyer, quantity of wheat sold, purchase price and shipping terms sufficient to bind buyer to its terms). Presumably these courts mean nothing more than that the writing is “sufficient against the sender.” To the extent that these courts believe that the confirmation actually “binds” the sender, it is submitted that this is inaccurate.

267. U.C.C. § 2-201(2) (1978); see also Perdue Farms, 459 F. Supp. at 16 (writing must be both “sufficient against the sender” and “in confirmation of the contract”). Nonetheless, the Perdue court never gave the “in confirmation of” language any independent, substantive force. Id. Instead, the court simply noted that the phrase required that the agreement be made before the drafting of the writing. Id.


270. Rockland Indus., Inc. v. Frank Kasmir Assoc., 470 F. Supp. 1176, 1178 (N.D. Tex. 1979) (holding confirmation sent eight months after alleged agreement was made was not sent “within a reasonable time”); Perdue Farms, 459 F. Supp. at 16 (“The confirmation does not have to state that it is sent in confirmation of the oral transaction . . . .”); Doral Hosiery Corp. v. Sav-A-Stop, Inc., 377 F. Supp. 387, 389 (E.D. Pa. 1974) (“writing needn’t expressly state that it is sent in confirmation of the prior transaction . . . .”); Trilco Terminal v. Prebilt Corp., 167 N.J. Super. 449, 454, 400 A.2d 1237, 1240 (1979) (“This is not to say that
language of the statute indicates that the Code drafters did not intend the same standard for a writing under both subsections. If the drafters intended the same standard, then arguably, they would have used the same language. Instead, they chose different language and specifically stated that a confirmatory writing must be “in confirmation of the contract and sufficient against the sender.” This is contrasted with subsection (1) which states that a writing must be “sufficient to indicate that a contract for sale has been made.”

Second, applying a stricter standard confines the subsection to its intended area of operation; that is, to deny the statute of frauds defense to merchants who otherwise would withhold their objections in order to play the market. In this respect, the receiving merchant has a meaningful opportunity to object only when he is sure that the merchant who sent the writing is confirming an agreement. Thus, just as it is important to protect the merchant who sent the confirmation from the receiving merchant’s speculation, it also is necessary to protect the receiving merchant from an ambiguous writing. Professor Nordstrom aptly captured this concern when he stated that a writing might be sufficiently clear to satisfy the statute of frauds if its author were being sued, but not clear enough to alert the merchant who receives the writing that such an agreement had been reached and was being confirmed.

271 Trilco Terminal v. Prebilt Corp., 167 N.J. Super. 449, 454-55, 400 A.2d 1237, 1240 (1979) (citing R. Duesenberg & L. King, 3 BENDER’S UNIFORM COMMERCIAL CODE SERV. § 2.04(2) (1978)), aff’d, 415 A.2d 356 (1980); R. Duesenberg & L. King, 3 BENDER’S UNIFORM COMMERCIAL CODE SERV. § 2.04(2) at 2-85 (1978) (more stringent standard justified by statutory language and fact that merchant is bound to writing he never signed); R. Nordstrom, supra, note 11, at 61; A. Squillante & J. Fonseca, supra note 11, at 268 (“[I]t is fair to assume that subsection (1) sets up the minimum requirement upon which it would be reasonable to impose a more detailed writing on merchants than is required by subsection (2).”)

272 U.C.C. § 2-201(2) (1978). For the full text of this subsection, see supra note 6 and accompanying text.

273 U.C.C. § 2-201(1) (1978). For the full text of this subsection, see supra note 2 and accompanying text.


275 167 N.J. Super. at 454, 400 A.2d at 1240.

276 For an explanation of how a merchant who receives a confirmation could play the market under pre-Code law, see supra notes 33-38 and accompanying text.

277 R. Nordstrom, supra note 11, at 61. This policy is well documented in Trilco Terminal v. Prebilt Corp., 167 N.J. Super. 449, 400 A.2d 1237 (1979), aff’d, 174 N.J. Super. 24, 415 A.2d 356 (1980). In this case, Trilco, the plaintiff, sued for breach of four alleged oral contracts, each in excess of $500. 167 N.J. Super. at 450, 400 A.2d at 1238. These oral contracts were followed by purchase orders which stated the kind and quantity of goods as well as the plaintiff’s signature. Id. at 450-51, 400 A.2d at 1238. Moreover, on the face of all the
Despite the strength of these two arguments, it is submitted that the majority's permissive standard is the better view. It is well established that the primary reason for enacting the merchant's exception was to alleviate the pre-Code inequity where the merchant who sent a confirmation could be held to that agreement, but the merchant who received the confirmation could not be bound to the agreement.\(^{(278)}\) However, if courts require that a written confirmation satisfy a more stringent standard, then it is submitted that this will once again create a situation where the sending merchant may be bound to the agreement, while the receiving merchant would not be bound.

For example, assume that a grain dealer sends a confirmation to a farmer which satisfies the minimum requirements of subsection (1) in that it is signed, states a quantity and evidences a contract.\(^{(279)}\) However, the confirmation does not state specifically that the dealer and farmer have a binding agreement and, therefore, it does not satisfy the potentially stricter requirement of subsection (2).\(^{(280)}\) The merchant who signs and sends this confirmation can be bound to the alleged oral agreement because the writing satisfies the minimum requirements of subsection (1).\(^{(281)}\) In contrast, the merchant who receives this confirmation could purchase orders, appeared the word "confirmation" and the printed language, "[t]his order not valid without return acknowledgment." \(\text{Id. at } 451, 400 \text{ A.2d at } 1258.\) The plaintiff claimed that these purchase orders were confirmations under the merchant's exception. \(\text{Id.}\)

The New Jersey Superior Court held that the purchase orders were not confirmations and, therefore, the plaintiff's action was unenforceable because of the statute of frauds. \(\text{Id. at } 455, 400 \text{ A.2d at } 1240-41.\) The court did not have to rely on the theory that confirmations sent under the merchant's exception must satisfy a stricter requirement since the writings were insufficient to satisfy even the minimum requirements under subsection 1. \(\text{Id. at } 454, 400 \text{ A.2d at } 1240.\) The court did, however, acknowledge the possibility that there was a stricter requirement when it stated that "whether more is required of a writing under subsection 2 than under subsection 1 is not yet clear." \(\text{Id.}\)

According to this court, a writing under subsection 2 has to be sufficient against the sender; that is, it must satisfy the requirements of subsection 1. \(\text{Id. at } 451, 400 \text{ A.2d at } 1299.\) In addition, the merchant's exception imposes the independent requirement that the confirmation indicate that a binding agreement has been made. \(\text{Id. at } 454, 400 \text{ A.2d at } 1240.\) The court reasoned that this independent requirement makes it certain that the recipient of the writing is aware that an agreement is being confirmed. \(\text{Id.}\) Only when the recipient is sure that an agreement is being confirmed does he have a meaningful opportunity to exercise his right of objection. \(\text{Id.}\)

The Trilco court specifically distinguished its analysis from the Rubin court's analysis noting that the Rubin court made the written confirmation analysis interchangeable with the basic statute of frauds provision. \(\text{Id.}\)

\(^{(278)}\) For a discussion of the reasons behind enacting the merchant's exception, see supra notes 32-37 and accompanying text.

\(^{(279)}\) For a discussion of the requirements for a writing under subsection (1), see supra notes 236-62 and accompanying text.

\(^{(280)}\) For a discussion of the possible stricter writing requirement for written confirmations, see supra notes 268-77 and accompanying text.

\(^{(281)}\) See U.C.C. \$ 2-201(1) (1978).
not be bound to the alleged oral agreement because the written confirmation does not satisfy the stricter requirements of subsection (2).\footnote{282} From this, it is clear that imposing a stricter standard for written confirmations simply would restore the pre-Code inequity which the drafters intended to eliminate. In contrast, by using the standards of subsection (1) for written confirmations, both the sending merchant and the receiving merchant would be held to the same standard. In this respect, either both merchants would be bound by a written confirmation or both merchants would not be bound.

The obvious trade-off in opting for the majority position is that there will be genuine instances when a merchant will not be able to discern from the writing whether the sending merchant actually is confirming an oral agreement. As a result, the merchant may fail to give proper notice of objection. Nonetheless, it is submitted that the provision should be interpreted to give effect to the drafters' goal of eliminating the pre-Code inequity where one merchant could be bound but the other merchant could not. Moreover, the majority position is tenable in that the only effect of not objecting to a written confirmation is to take away the receiving merchant's right to assert the statute of frauds as a defense.\footnote{283} Thus, even though the receiving merchant did not object to the confirmation because it was ambiguous, he still has the opportunity to prove that there never was an oral agreement.\footnote{284}

IV. Conclusion

To summarize, this Comment has analyzed the elements of the merchant's exception to the Code's statute of frauds for sales. The merchant's exception applies when:

1. a written confirmation is sent between merchants;\footnote{285}
2. the confirmation is sent within a reasonable time;\footnote{286}


\footnote{283. For a detailed discussion of the effect of a party's failure to object, see supra note 198 and accompanying text.}

\footnote{284. For a detailed discussion of the ability to argue lack of oral agreement, see supra notes 199-200 and accompanying text.}

\footnote{285. For a discussion of the merchant definition, see supra notes 38-93 and accompanying text.}

\footnote{286. For a discussion of the reasonable time element, see supra notes 94-139 and accompanying text.}
3. the confirmation is received; 287
4. the receiving merchant has reason to know its contents; 288
5. the receiving merchant gives no written notice of objec-
tion 289; and,
6. the written confirmation qualifies as a bona fide
confirmation. 290

In concluding, it is submitted that a court should follow some
general guidelines in interpreting these elements. First, these elements
should be interpreted by reference to Code methodology, not pre-Code
law. This is particularly important in determining whether a person is a
merchant for purposes of the merchant’s exception. 291

However, where the Code and accompanying comments are silent
on a particular element, a court still should use the Code as a premise
for its judicial reasoning. That is, where the Code is silent, a court al-
ways should consider the policies underlying the specific Code provision
and the Code as a whole. The drafters’ intent in enacting the
merchant’s exception was to eliminate the pre-Code inequity where one
merchant could be bound to the agreement but the other merchant
could not. 292 This Comment has suggested that this policy is of the ut-
most importance in interpreting the reasonable time element and the
standard which a court should adopt regarding written confirmations.
More generally, the Code has a policy of liberally construing its provi-
sions in favor of enforceability. 293 These two underlying policies should
be construed consistently with one another whenever possible.

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287. For a discussion of the receipt element, see supra notes 140-80 and
accompanying text.
288. For a discussion of the reason to know element, see supra notes 181-95
and accompanying text.
289. For a discussion of the written notice of objection element, see supra
notes 196-232 and accompanying text.
290. For a discussion of the nature of a confirming letter, see supra notes
233-84 and accompanying text.
merchant under the merchant’s exception, see supra notes 38-93 and accompa-
nying text.
292. For a discussion of the reasons behind enacting the merchant’s excep-
tion, see supra notes 32-37 and accompanying text.
293. U.C.C. § 1-102(1) (1978). This provision states, “[t]his act shall be
liberally construed and applied to promote its underlying purposes and poli-
cies.” Id. Section 1-102(2) goes on to state that the purposes and policies under-
lying the Code are: (a) to simplify, clarify and modernize the law governing
commercial transactions, (b) to permit the continued expansion of commercial
practices through custom, usage and agreement of the parties...” U.C.C. § 1-
102(2) (1978).