THE NEBRASKA FARMER AND U.C.C. SECTION 2-201(2): THE MERCHANT EXCEPTION TO THE STATUTE OF FRAUDS

"The Farmer who goes forth in the morning and toils all day is as much of a businessman as the man who goes upon the board and bets upon the price of grain."[1]
—William Jennings Bryan

INTRODUCTION

This statement, made by Bryan at political rallies in Nebraska and throughout the midwest, precursed a legal issue which would eventually divide the courts of our day. The resolution of the question of whether a farmer should be deemed a merchant for the purposes of the Uniform Commercial Code has proved difficult for the courts that have faced it. Some courts, including Nebraska, have strained to avoid the issue[2] while others have summarily treated it as a question of fact.[3] Nevertheless, many courts have faced the issue directly. The difficulty of the issue has resulted in a split of decisions[4] and a divergence of rationales.[5]

The majority of the courts have decided the farmer-merchant issue within the context of U.C.C. section 2-201(2)—the merchant

1. A. COOKE, ALISTAIR COOKE'S AMERICA 270 (1973).

2. *See* Cargill, Inc. v. Wilson, 166 Mont. 346, —, 532 P.2d 988, 990 (1975); Kimball County Grain Coop. v. Yung, 200 Neb. 233, 263 N.W.2d 818, 820 (1978); Farmers Coop. Ass'n v. Cole, 239 N.W.2d 808, 814 (N.D. 1976).

3. Sand Seed Serv., Inc. v. Poeckes, 249 N.W.2d 663, 666 (Iowa 1977); Kimball County Grain Coop. v. Yung, 200 Neb. 233, 236, 263 N.W.2d 818, 820 (1978); *see* Decatur Coop. Ass'n v. Urban, 219 Kan. 171, —, 547 P.2d 323, 328-29 (1976); Barron v. Edwards, 45 Mich. App. 210, —, 206 N.W.2d 508, 511 (1973); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 355 (Tex. 1977).

4. Five cases have held that under the circumstances involved, a farmer was not a merchant. *See* Loeb & Co. v. Schreiner, 294 Ala. 722, —, 321 So. 2d 199, 201 (1975); Cook Grains, Inc. v. Fallis, 239 Ark. 962, —, 395 S.W.2d 555, 556-57 (1965); Sand Seed Serv., Inc. v. Poeckes, 249 N.W.2d 663, 666 (Iowa 1977); Decatur Coop Ass'n v. Urban, 219 Kan. 171, —, 547 P.2d 323, 329 (1976); Lish v. Compton, — Utah 2d —, 547 P.2d 323, 326 (1976). However, eight cases have found that a farmer is a merchant. *See* Continental Grain Co. v. Martin, 536 F.2d 592, 594 (5th Cir. 1976) (applying Texas law); Continental Grain Co. v. Brown, 19 U.C.C. Rept. Serv. 52, 57-59 (W.D. Wis. 1976) (applying Wisconsin law); Continental Grain Co. v. Harback, 400 F. Supp. 695, 700 (N.D. Ill. 1975) (applying Illinois law); Sierens v. Clausen, 60 Ill. 2d 585, —, 328 N.E.2d 559, 561 (1975); Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n, Inc., 555 S.W.2d 61, 65 (Mo. App. 1977); Currituck Grain, Inc. v. Powell, 38 N.C. App. 7, 246 S.E.2d 853, 855 (1978); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 358 (Tex. 1977).

5. Note, *The Farmer As Merchant Under the U.C.C.*, 53 N.D.L.R. 587, 598 (1977). [Hereinafter cited as *The Farmer*].

exception to the Statute of Frauds.[6] In large part this has been a direct consequence of the nature of trade on the agricultural commodities market. Since agriculture plays such a large role in the economy of Nebraska, it comes as no surprise that the issue of whether a farmer is a merchant arose in Nebraska in much the same way it has in other states. While the Nebraska Supreme Court has thus far been able to avoid resolving the issue, the importance of agriculture in Nebraska makes it likely that the issue will arise again.

The circumstances in which this issue arises form a re-emerging pattern. This article will discuss this pattern and the reasons for it. It will then examine how other jurisdictions have resolved the issue and discuss the Nebraska Supreme Court's experiences with it. An approach for resolving the issue in a manner which conforms with the purposes and policies of the Uniform Commercial Code will then be suggested.

THE PROBLEM

Prices change rapidly on the agricultural commodities market.[7] The rapid change in prices necessitates the quick consummation of contracts throughout the marketing chain.[8] The speed in which these transactions take place has spawned the development of a prompt, reliable system for marketing produce based on the use of futures contracts.[9]

Futures contracts permit members of the marketing chain to enter into sales contracts which provide for the future delivery of grain.[10] Consequently, they enable members of the chain to avoid

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6. U.C.C. section 2-201(2), states that:

> 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 ten days after it is received.

Id. All references to the Uniform Commercial Code are to the 1978 Official Text.

7. Continental Grain Co. v. Brown, 19 U.C.C. Rept. Serv. 52, 56 (W.D. Wis. 1976).

8. Dolan, *The Merchant Class of Article 2: Farmers, Doctors, and Others*, 1977 WASH. U.L.Q. 1, 24 n.170. *See* Continental Grain Co. v. Brown, 19 U.C.C. Rept. Serv. 52, 56 (W.D. Wis. 1976); Continental Grain Co. v. Harback, 400 F. Supp. 695, 697-98 (N.D. Ill. 1975).

9. *See* Allenberg Cotton Co. v. Pittman, 419 U.S. 20, 26-27 (1974); 19 U.C.C. Rept. Serv. at 56-57; Dolan, *supra* note 8, at 24 n.170. These contracts are also known as "forward" contracts. 19 U.C.C. Rept. Serv. at 56-57. The use of futures contracts by farmers has become widespread in Nebraska. Brief of Amicus Curiae at 2, Kimball County Grain Coop. v. Yung, 200 Neb. 233, 235, 263 N.W.2d 818, 819 (1978).

10. 419 U.S. 20, 26-28. Under a futures contract, "the seller and purchaser strike a bargain whereby the seller becomes obligated to deliver a stated amount of grain

loss due to price fluctuations by permitting the sale of grain whenever its price reaches a profitable level.[11] In this way a farmer can avoid speculation on future prices even though his crop is not yet ready for market.[12] Futures contracts also enable a grain purchaser to protect himself from declining prices by allowing him to enter into futures contracts for the resale of the crop or by permitting him to sell the contract, itself, on the commodities exchange.[13]

The protection which the futures market affords is possible only if each transaction can be completed quickly—before prices decline. As a result, futures contracts are often oral in form, generally originating over the telephone.[14]

Though trade in futures helps protect participants against loss when prices decline, there is always the possibility that prices will go up instead of down. When prices rise, a farmer will find that it would have been more profitable for him to have delayed the sale of his crop. This presents him with a strong economic incentive to breach his current futures contract and sell his produce to another purchaser at a higher price.[15] Since the farmer often initiates the transactions in the marketing chain, the integrity of each subsequent transaction is put into considerable jeopardy if a farmer breaches his agreement.[16] In spite of the pervasive impact of a breach, a farmer often succumbs to the economic incentive and de-

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during a set future delivery period and the purchaser becomes obliged to pay a fixed price per bushel for such grain". 19 U.C.C. Rept. Serv. at 56. Oral futures contracts allow farmers to lock in current price quotations without having to meet with the buyer to sign a contract. Brief of Amicus Curiae at 2. At the same time, they allow the grain buyer, often a grain elevator operator, to immediately sell the grain, or the futures contract itself, to a larger grain elevator or a member of the Board of Trade, 19 U.C.C. Rept. Serv. at 56.

Under the alternative method of marketing grain, called "spot" or "cash" purchases, the price that the farmer receives for his goods is the current market price at the time of physical delivery. 19 U.C.C. Rept. Serv. at 55. Since the distance between a farmer and a grain buyer can be great, the price the farmer was quoted on the telephone may have changed by the time he delivers his grain. As a result, his risk of loss is increased, since he cannot be sure that the "spot" price will enable him to recoup his expenses. *See* 419 U.S. at 26; 19 U.C.C. Rept. Serv. at 55-56.

11. 419 U.S. at 26; 19 U.C.C. Rept. Serv. at 60.

12. 419 U.S. at 26; 19 U.C.C. Rept. Serv. at 60.

13. 419 U.S. at 26-27; 19 U.C.C. Rept. Serv. at 60. The second alternative is sometimes referred to as "hedging". 419 U.S. at 27; 19 U.C.C. Rept. Serv. at 56.

14. Dolan, *supra* note 8, at 24 n.170; Brief of Amicus Curiae at 2. *See, e.g.*, Continental Grain Co. v. Martin, 536 F.2d 592, 593 (5th Cir. 1976); Continental Grain Co. v. Harback, 400 F. Supp. 695, 696 (N.D. Ill. 1975); Continental Grain Co. v. Brown, 19 U.C.C. Rept. Serv. 52 (W.D. Wis. 1976); Loeb & Co. v. Schreiner, 294 Ala. 722, —, 321 So. 2d 199, 200 (1975); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, —, 547 P.2d 323, 325 (1976); Kimball County Grain Coop. v. Yung, 200 Neb. 233, 234, 263 N.W.2d 818, 819 (1978); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 354 (Tex. 1977); Lish v. Compton, — Utah 2d, —, —, 547 P.2d 223, 224 (1976).

15. 419 U.S. at 26 n.8.

16. *Id.* at 27; 19 U.C.C. Rept. Serv. at 60.

nies the existence of an oral futures contract when market prices have risen above the contract price. Thus, it is no surprise that the majority of cases dealing with the merchant status of farmers have involved the application of the Uniform Commercial Code to a situation in which a grain buyer has brought an action against a farmer for breach of an oral contract.[17]

The factual setting which results in the issue of whether a farmer is a merchant has become highly predictable.[18] When the grain purchaser brings his action for breach of the oral contract, the farmer will contend that he did not enter into such an agreement and that even if he did, the Statute of Frauds provision of the Uniform Commercial Code, section 2-201, makes the contract unenforceable.[19] The grain purchaser will respond by producing a memorandum of their agreement and will state that he mailed a copy of it to the farmer, who failed to object to it within ten days.[20] He will contend further that the farmer's failure to object removed the Statute of Frauds as a defense under section 2-201(2), the merchant exception to the Statute of Frauds.[21] The farmer will respond that he is not a merchant and, therefore, is not subject to section 2-201(2).[22] The question before the court then becomes "is a farmer a merchant under the Uniform Commercial Code?"[23]

17. *See* Continental Grain Co. v. Martin, 536 F.2d 592, 593 (5th Cir. 1976); Continental Grain Co. v. Harback, 400 F. Supp. 695, 696 (N.D. Ill. 1975); Continental Grain Co. v. Brown, 19 U.C.C. Rept. Serv. 52 (W.D. Wis. 1976); Loeb & Co. v. Schreiner, 294 Ala. 722, —, 321 So. 2d 199, 200 (1975); Cook Grains, Inc. v. Fallis, 239 Ark. 962, —, 395 S.W.2d 555, 556 (1965); Sierens v. Clausen, 60 Ill. 2d 585, —, 328 N.E.2d 559, 560 (1975); Campbell v. Yokel, 20 Ill. App. 3d 702, —, 313 N.E.2d 628, 629 (1974); Sand Seed Serv., Inc. v. Poeckes, 249 N.W.2d 663, 664 (Iowa 1977); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, —, 547 P.2d 323, 326-27 (1976); Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n, Inc., 555 S.W.2d 61, 63 (Mo. App. 1977); Currituck Grain, Inc. v. Powell, 28 N.C. App. 563, —, 222 S.E.2d 1, 2-3 (1976); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 354 (Tex. 1977); Lish v. Compton, — Utah 2d —, —, 547 P.2d 223, 225 (1976). The Uniform Commercial Code is applicable since article two of the U.C.C. applies to transactions in goods. U.C.C. § 2-102. Section 2-105 expressly defines goods as including crops. U.C.C. § 2-105.

18. *The Farmer, supra* note 6, at 594.

19. *Id.* U.C.C. section 2-201 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. . . .

Id. (emphasis added).

20. *The Farmer, supra* note 6, at 594.

21. *Id.*; *see* note 6 *supra*.

22. *The Farmer, supra* note 6, at 594.

23. *Id.*; *see* Continental Grain Co. v. Martin, 536 F.2d 592, 593 (5th Cir. 1976); Continental Grain Co. v. Brown, 19 U.C.C. Rept. Serv. 52, 57 (W.D. Wis. 1976); Continental Grain Co. v. Harback, 400 F. Supp. 695, 696-97 (N.D. Ill. 1975); Loeb & Co. v. Schreiner, 294 Ala. 722, —, 321 So. 2d 199, 200-01 (1975); Cook Grains, Inc. v. Fallis,

CASE LAW

The courts that have faced the issue of whether a farmer is a merchant utilized different sources in reaching their conclusions. This may explain why they arrived at different results. The courts uniformly quoted section 2-104 of the Uniform Commercial Code,[24] which 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 or skill may be attributed by his employment of an agent or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Although it may seem fairly straightforward at first, the problems with this definition are manifold. The language in section 2-104(1) has variously been described as "ambiguous, awkward, odd, difficult to construe and leading to conclusions which do not make much sense."[25] This difficulty has been compounded by the fact that the term "merchant" has a different meaning under the Code than it had at common law.[26] Because of the difficulty which the merchant definition presents, courts have examined section 2-104(1) in a myriad of ways to ascertain its meaning.

The courts that have found farmers are not merchants utilized more conventional concepts of the term's meaning than did the

239 Ark. 962, —, 395 S.W.2d 555, 556-57 (1965); Sierens v. Clausen, 60 Ill. 2d 585, —, 328 N.E.2d 559, 560 (1975); Campbell v. Yokel, 20 Ill. App. 3d 702, —, 313 N.E.2d 628, 629 (1974); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 547 P.2d 323, 325 (1976); Lish v. Compton, — Utah 2d —, —, 547 P.2d 223, 225 (1976).

24. Continental Grain Co. v. Brown, 19 U.C.C. Rept. Serv. 52, 57 (W.D. Wis. 1976); Continental Grain Co. v. Harback, 400 F. Supp. 695, 697 (N.D. Ill. 1975); Loeb & Co. v. Schreiner, 294 Ala. 722, —, 321 So. 2d 199, 201 (1975); Cook Grains, Inc. v. Fallis, 239 Ark. 962, —, 395 S.W.2d 555, 556 (1965); Sierens v. Clausen, 60 Ill. 2d 585, —, 328 N.E.2d 559, 560 (1975); Campbell v. Yokel, 20 Ill. App. 3d 702, —, 313 N.E.2d 628, 629-30 (1974); Sand Seed Serv., Inc. v. Poeckes, 249 N.W.2d 663, 664 (Iowa 1977); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, —, 547 P.2d 323, 327-28 (1976); Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n, Inc., 555 S.W.2d 61, 63 (Mo. App. 1977); Currituck Grain, Inc. v. Powell, 38 N.C. App. 7, —, 246 S.E.2d 853, 855 (1978); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 355 (Tex. 1977).

25. Newell, *The Merchant of Article 2*, VAL. U. L. REV. 307 (1973) (footnotes omitted).

26. Dolan, *supra* note 8, at 314; Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 573 (1950); 65 MICH. L. REV. 345, 346 (1966). *See* Corbin, *The Uniform Commercial Code—Sales; Should It be Enacted?*, 59 YALE L.J. 821, 822-25 (1950); *The Farmer, supra* note 6, at 589-590; 63 ILL. B.J. 271, 272 (1975).

An example the common law meaning of merchant can be found in *Magnolia Petroleum Co. v. City of Broken Bow*, 184 Okla. 362, —, 87 P.2d 319, 321 (1939). The court in this case defined a merchant as "one who buys to sell, or buys and sells, goods or merchandise in a store or shop." *Id.*

cases reaching the opposite result.[27] The most notable example of this is *Lish v. Compton.*[28] In that case, the Supreme Court of Utah relied on a dictionary definition of the word "merchant" to conclude as a matter of law that a farmer is not a merchant as that term is used in the Uniform Commercial Code.[29] Apparently, the court failed to recognize the difference between the Code and the common-law meaning of the word.

Other cases which have held farmers not to be merchants recognized the propriety of using the Code definition to resolve the issue.[30] Two of these courts, however, also used non-code sources to reinforce their interpretation of the Code's merchant definition.[31] In doing so, they may have been misled into unduly restricting the class which the term was intended to encompass.[32]

In the first of these cases, *Cook Grains v. Fallis,*[33] the Arkansas Supreme Court determined that the word merchant, as defined by section 2-104(1), was meant to apply only to professional traders.[34] The court found that a farmer who is merely selling the commodities he has raised is not a professional trader.[35] It supported that conclusion by examining common-law definitions of merchant and stating that the term must be given its plain and ordinary meaning.[36] The Supreme Court of Iowa, in *Sand Seed Service, Inc. v. Poeckes*[37] also cited common dictionary definitions of the term merchant and concluded that a farmer who annually sells only his own crop is not merchant *as that term is used in the Code.*[38]

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27. Dolan, *supra* note 8, at 14-16.
28. — Utah 2d —, 547 P.2d 223 (1976).
29. *Id.* at —, 547 P.2d at 226. The court concluded that a farmer who simply sells his crop annually is not a merchant since he does not buy and sell the products he raises with "such regularity that it forms at least a substantial part of his occupation." *Id.*
30. Loeb & Co. v. Schreiner, 294 Ala. 722, —, 321 So. 2d 199, 201-02 (1975); Cook Grains, Inc. v. Fallis, 239 Ark. 962, —, 395 S.W.2d 555, 556-57 (1965); Sand Seed Serv., Inc. v. Poeckes, 249 N.W.2d 663, 666 (Iowa 1977); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, —, 547 P.2d 323, 328-29 (1976).
31. Cook Grains, Inc. v. Fallis, 239 Ark. 962, —, 395 S.W.2d 555, 557 (1965); Sand Seed Serv., Inc. v. Poeckes, 249 N.W.2d 663, 666 (Iowa 1977).
32. See note 154 and accompanying text *infra.*
33. 239 Ark. 962, 395 S.W.2d 555 (1965).
34. *Id.* at —, 395 S.W.2d at 557.
35. *Id.*
36. *Id.*
37. 249 N.W.2d 663 (Iowa 1977).
38. *Id.* at 666. The Iowa court recited section 2-104(1) and then apparently equated the definition of merchant with the definitions provided by the dictionaries to reach the conclusion that a farmer selling his crops annually is not a merchant. 249 N.W.2d at 666.

Two other courts also held that a farmer is not a merchant.[39] These courts utilized the textual definition provided in section 2-104(1) and, to a limited extent, the comments that follow it.[40] Both cases relied heavily on the fact that the comments to 2-104 equate professionals and merchants.[41] The courts in these cases held that a farmer who sells his crop only annually is not a professional with respect to those sales and therefore is not a merchant under the Code.[42]

Courts finding that farmers are merchants utilized the comments more fully than did those courts that held farmers are not merchants.[43] The courts holding farmers to merchant status were influenced by comment 2's liberal description of who should be included within the merchant class.[44] They concluded that farmers who regularly market their crops are not casual buyers and sellers, but rather, are professionals and, hence, fall within the merchant classification.[45]

Continental Grain Co. v. Brown[46] exemplifies this position. In that case the court said:

it appears likely that the term "merchant" was intended to

39. Loeb & Co. v. Schreiner, 294 Ala. 722, 321 So. 2d 199 (1975); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 547 P.2d 323 (1976).

40. *See* Loeb & Co. v. Schreiner, 294 Ala. 722, —, 321 So. 2d 199, 201-02 (1975); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, —, 547 P.2d 323, 329 (1976).

41. Decatur Coop. Ass'n v. Urban, 219 Kan. 171, —, 547 P.2d 323, 328(1976); *see* Loeb & Co. v. Schreiner, 294 Ala. at —, 321 So. 2d at 202; U.C.C. § 2-104, Comments 1 and 2.

42. Loeb & Co. v. Schreiner, 294 Ala. 722, 321 So. 2d 199, 202 (1975); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, —, 547 P.2d 323, 328-29 (1976).

43. *See, e.g.*, Continental Grain Co. v. Brown, 19 U.C.C. Rept. Serv. 52, 58-59 (W.D. Wis. 1976); Campbell v. Yokel, 20 Ill. App. 3d 702, —, 313 N.E.2d 628, 630 (1974); Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n, Inc., 555 S.W.2d 61, 63, 65 (Mo. App. 1977); Currituck Grain, Inc. v. Powell, 38 N.C. App. 7, —, 246 S.E.2d 853, 855 (1978); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 356-58 (Tex. 1977). *Cf.* Loeb & Co. v. Schreiner, 294 Ala. 722, 321 So. 2d 199, 202 (1975); Cook Grains, Inc. v. Fallis, 239 Ark. 962, —, 395 S.W.2d 555, 557 (1965); Sand Seed Serv., Inc. v. Poeckes, 249 N.W.2d 663, 665 (Iowa 1977); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, —, 547 P.2d 323, 328 (1976).

44. Continental Grain Co. v. Brown, 19 U.C.C. Rept. Serv. 52, 59 (W.D. Wis. 1976); Campbell v. Yokel, 20 Ill. App. 3d 702, —, 313 N.E.2d 628, 630 (1974); Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n, Inc., 555 S.W.2d 61, 64-65 (Mo. App. 1977); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 356-58 (Tex. 1977); *see* note 65 *infra*.

45. Continental Grain Co. v. Brown, 19 U.C.C. Rept. Serv. 52, 59 (W.D. Wis. 1976); Campbell v. Yokel, 20 Ill. App. 3d 702, —, 313 N.E.2d 628, 630 (1974); Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n, Inc., 555 S.W.2d 61, 64-65 (Mo. App. 1977); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 357 (Tex. 1977); *see* Continental Grain Co. v. Martin, 536 F.2d 592 (5th Cir. 1976) (relying on Nelson v. Union Equity Coop. Exch., 536 S.W.2d 635 (Tex. Ct. App. 1976) in holding a farmer to be a merchant).

46. 19 U.C.C. Rept. Serv. 52 (W.D. Wis. 1976).

> apply to all but the consumer purchaser or the most casual and inexperienced seller. This interpretation is given weight by the Official Comment which notes . . . that the definition of merchant would except from the Statute of Frauds, "almost every person in business," . . . . It is reasonable to charge persons with the knowledge and skill of merchants if the persons create the impression of familiarity with particular products or practices. In this case, the size alone of the defendants' farming operation and the quantities of corn available for sale would have led plaintiff to believe that defendants were familiar with farm products or with the practices of selling farm products, or both.[47]

The court in *Campbell v. Yokel*[48] followed similar reasoning in deciding that farmers who regularly market their crops are professionals in that business and are merchants when they are selling their crops.[49] The *Campbell* court held that a farmer, who had grown and sold soybeans and other grains for several years, was a person who deals in goods of the kind.[50]

In *Nelson v. Union Equity Cooperative Exchange*,[51] the court also viewed an experienced farmer as being a professional.[52] The court held that the farmer in question was a merchant because he dealt in goods of the kind, having sold the crops he raised over a number of years.[53] It also found that the defendant, as an experienced farmer, was a merchant because he had specialized knowledge of the goods he sold[54] and because he had specialized knowledge of the practices involved in marketing them.[55]

The Missouri Court of Appeals, in *Rush Johnson Farms, Inc. v. Missouri Farmers Association*[56] also utilized comment 2 in holding that an experienced farmer should be considered a merchant.[57] The court, relying largely on the reasoning in *Nelson*,[58] stated that today's farmer is a sophisticated agribusinessman for whom the marketing of a crop is as important as raising it.[59] Underscoring its liberal interpretation of the merchant definition, the court went on

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47. *Id.* at 59.
48. 20 Ill. App. 3d 702, 313 N.E.2d 628 (1974).
49. *Id.* at 630.
50. *Id.*
51. 548 S.W.2d 352 (Tex. 1977).
52. *Id.* at 357.
53. *Id.* at 355-56.
54. *Id.* at 356.
55. *Id.* at 357.
56. 555 S.W.2d 61 (Mo. App. 1977).
57. *Id.* at 64-65.
58. *Id.* at 64.
59. *Id.*

to state that it would be an affront to the farmer's proven experience and capability to hold that he did not meet the simple requirement of the U.C.C.'s definition.[60]

Two courts held farmers are merchants without reference to comment 2's description of who should be included within the merchant class.[61] The farmers involved in these cases had such extensive experience and knowledge of grain transactions that the courts concluded the farmers were merchants without having to delve deeply into the comments.[62]

As a survey of the case law on the farmer-merchant issue reveals, the cases are inconsistent, not only in their results, but in their approach to the question as well. The confusing state of current case law is perhaps one of the reasons that the Nebraska Supreme Court has avoided resolving the farmer-merchant issue directly.

NEBRASKA CASE LAW

It became inevitable that the Nebraska Supreme Court would be confronted with the farmer-merchant issue when the court, in *Farmland Service Cooperative, Inc. v. Klein*,[63] restricted the ability of a grain purchaser to assert promissory estoppel as a means of avoiding the Statute of Frauds defense.[64] The *Klein* case involved a situation in which the plaintiff, a grain purchaser, brought an action against a farmer for breach of an oral futures contract.[65] In *Klein* no written memorandum confirming the contract had been sent by either party.[66] The plaintiff asserted the doctrine of promissory estoppel when the farmer raised the Statute of Frauds defense.[67] The plaintiff contended that the farmer in question should be estopped from denying the existence of the contract since he knew that the plaintiff would alter his position in reliance

60. *Id.*

61. *See* Continental Grain Co. v. Harback, 400 F. Supp. 695 (N.D. Ill. 1975); Sierens v. Clausen, 60 Ill. 2d 585, 328 N.E.2d 559 (1975).

62. *See* Continental Grain Co. v. Harbach, 400 F. Supp. 695, 698-99 (N.D. Ill. 1975); Sierens v. Clausen, 60 Ill. 2d 585, —, 328 N.E.2d 559, 561 (1975).

63. 196 Neb. 538, 244 N.W.2d 86 (1976). For a discussion of the ramifications of this case see 11 CREIGHTON L. REV. 12 (1977).

64. Farmland Serv. Coop., Inc. v. Klein, 196 Neb. 538, 544, 244 N.W.2d 86, 90 (1976). The doctrine of promissory estoppel is defined as "[a] promise which the promissor would reasonably expect to induce action or forebearance on the part of the promissee or a third person and which does induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 7, 1973).

65. 196 Neb. at 539, 244 N.W.2d at 88.

66. *Id.* at 543, 244 N.W.2d at 90.

67. *Id.* at 541-542, 244 N.W.2d at 88.

upon the agreement.[68] The court in *Klein*, determining that promissory estoppel is not within any of the exceptions listed in section 2-201, rejected promissory estoppel as a means of avoiding the Statute of Frauds defense.[69] The court declared that promissory estoppel would render the Statute of Frauds "meaningless and nugatory."[70] It indicated that promissory estoppel would apply only where one party specifically promised to abandon a legal right, thereby inducing the other party's reliance.[71] Thus, the court implied that promissory estoppel would avoid the Statute of Frauds only when a grain purchaser could show that he relied on a farmer's *express* promise not to raise the section 2-201(1) defense.[72]

In *Kimball County Grain Coop v. Yung*,[73] the Nebraska Supreme Court was again confronted with a suit by a grain purchaser against a farmer for breach of an oral futures contract.[74] The position that the Nebraska Supreme Court took in *Klein* helps to explain why the plaintiff in *Kimball* did not attempt to obviate the Statute of Frauds by relying on promissory estoppel. Instead, the grain purchaser in *Kimball* relied on the merchant exception of the Statute of Frauds.[75]

The plaintiff made several unsuccessful telephone calls in an attempt to remind the defendant of the futures contract which they had agreed to over the telephone.[76] The general manager of the elevator ultimately delivered a memorandum to the farmer but that was more than six months after the oral contract had been made and only one day before the contractual date of delivery.[77] The farmer neither signed the memorandum nor objected to its contents within ten days.[78] After the farmer failed to deliver his grain, the owner of the elevator sued the farmer for breach of contract.[79] The plaintiff sought to avoid the Statute of Frauds defense by claiming that the memorandum satisfied the Statute of Frauds under section 2-201(2).[80] Thus, it appeared that the Nebraska Supreme Court would, for the first time, be required to determine

68. *See id.* at 541-545, 244 N.W.2d at 89-90.
69. 196 Neb. at 544-45, 244 N.W.2d at 89-90.
70. *Id.*
71. *Id.*
72. *See id.*
73. 200 Neb. 233, 263 N.W.2d 818 (1978).
74. *Id.* at 234, 263 N.W.2d at 818-19.
75. *Id.* at 234, 263 N.W.2d at 819.
76. *Id.* at 235, 263 N.W.2d at 819.
77. *Id.* at 237, 263 N.W.2d at 820.
78. *Id.* at 235, 263 N.W.2d at 819.
79. *Id.* at 234, 263 N.W.2d at 818.
80. *See id.* at 234-35, 263 N.W.2d at 819-20.

whether a farmer is a merchant under the Uniform Commercial Code.[81]

For a written memorandum to vitiate the Statute of Frauds defense, it must be sent within a reasonable time.[82] The Nebraska Supreme Court relied exclusively on this requirement in deciding the *Kimball* case.[83] The court held that the memorandum was not sent within a reasonable time because it was issued six months after the oral contract and only one day prior to the required date of delivery.[84] Since the memorandum in *Kimball* would not have been sufficient to avoid the Statute of Frauds, the court did not deem it necessary to decide whether a farmer is a merchant under section 2-201(2).[85]

Judge Brodkey, who wrote the majority opinion, also wrote a separate concurrence criticizing the majority's refusal to "squarely face and resolve" the question of whether a farmer is a merchant under section 2-201(2).[86] He said that "[l]ogically, the question of whether the defendant was a 'merchant' should be resolved before this court determines whether there has been compliance with other requirements in subsection (2) of section 2-201, U.C.C."[87] He then discussed the cases that have decided the farmer-merchant issue.[88] He noted that the cases that held a farmer not to be a merchant "concluded, often summarily, that a farmer who only sells his crop annually is not a 'professional' with respect to such sales, but is merely a 'casual seller.' "[89] Moreover, they emphasized the fact that the farmers in question sold only their own produce, and did not buy and resell the produce of others.[90] In addition, one of these courts stated that the drafters of the Uniform Commercial Code would have used clear and explicit language making a farmer a merchant had they intended such a result.[91]

Judge Brodkey then explained the rationale of the cases that

81. 200 Neb. at 236-37, 263 N.W.2d at 820.
82. U.C.C. § 201(2).
83. 200 Neb. at 237, 263 N.W.2d at 820.
84. *Id.* at 237-38, 263 N.W.2d at 820.
85. *Id.* at 237, 263 N.W.2d at 820.
86. *Id.* at 238, 263 N.W.2d at 821 (Brodkey, J., concurring).
87. *Id.* (Brodkey, J., concurring).
88. *Id.* at 239-41, 263 N.W.2d at 821-22 (Brodkey, J., concurring).
89. *Id.* at 240, 263 N.W.2d at 821 (Brodkey, J., concurring); *see* Decatur Coop. Ass'n v. Urban, 219 Kan. 171, —, 547 P.2d 323, 329 (1976); Lish v. Compton, — Utah 2d —, —, 547 P.2d 323, 326 (1976).
90. 200 Neb. at 240, 263 N.W.2d at 821 (Brodkey, J., concurring); *see* Loeb & Co. v. Schreiner, 294 Ala. 722, —, 321 So. 2d 199, 202 (1975); Sand Seed Serv., Inc. v. Poeckes, 249 N.W.2d 663, 666 (Iowa 1977).
91. 200 Neb. at 240-41, 263 N.W.2d at 821 (Brodkey, J., concurring); *see* Cook Grains, Inc. v. Fallis, 239 Ark. 962, —, 395 S.W.2d 555, 557 (1965).

classified farmers as merchants. He noted that these courts contended that "the practices involved in the marketing of crops are well known to, and widely followed by, farmers, and that the marketing of a crop is as important to the farmers as the raising of it."[92] Since they viewed farmers as agribusinessmen, these courts concluded that farmers are professionals with respect to the sales of their crops.[93] He said that they also relied upon section 2-104, comment 2 which says that for the purposes of the Statute of Frauds, almost any person in business is a merchant.[94]

After examining the reasoning in all of the cases, Judge Brodkey decided that the reasoning of those courts which held farmers are merchants was more persuasive.[95] He also believed that holding a farmer to be a merchant was more consistent with the purposes behind the merchant exception to the Statute of Frauds contained in section 2-201(2).[96] Hence, Judge Brodkey concluded that a farmer who is an established grain producer should be considered a merchant under the Code.[97]

The concurrence by Judge Brodkey drew a critical response from Judge Spencer.[98] Although wary of issuing an advisory opinion, Judge Spencer held that a farmer who only sells his crop annually is not a professional seller and, hence, not a merchant

92. 200 Neb. at 241-42, 263 N.W.2d at 822 (Brodkey, J., concurring); *see* Continental Grain Co. v. Brown, 19 U.C.C. Rept. Serv. 52, 57 (W.D. Wis. 1976); Sierens v. Clausen, 60 Ill. 2d 585, —, 328 N.E.2d 559, 561 (1975); Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n, Inc., 555 S.W.2d 61, 64 (Mo. App. 1977); Currituck Grain Inc. v. Powell, 28 N.C. App. 563, —, 222 N.E.2d 1, 3 (1978).

93. 200 Neb. at 242, 263 N.W.2d at 822 (Brodkey, J., concurring); *see* Continental Grain Co. v. Brown, 19 U.C.C. Rept. Serv. 52, 57-59 (W.D. Wis. 1976); Sierens v. Clausen, 60 Ill. 2d 585, —, 328 N.E.2d 559, 561 (1975); Currituck Grain v. Powell, 28 N.C. App. 563, —, 222 S.E.2d 1, 3 (1978).

94. 200 Neb. at 242, 263 N.W.2d at 822 (Brodkey, J., concurring); *see* Continental Grain Co. v. Harback, 400 F. Supp. 695, 700 (N.D. Ill. 1975); Continental Grain Co. v. Brown, 19 U.C.C. Rept. Serv. 52, 59(W.D. Wis. 1976); Campbell v. Yokel, 20 Ill. App. 3d 702, —, 313 N.E.2d 628, 630 (1974); Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n, Inc., 555 S.W.2d 61, 65 (Mo. App. 1977); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 365 (Tex. 1977).

95. 200 Neb. at 243, 263 N.W.2d at 823 (Brodkey, J., concurring).

96. *Id.* (Brodkey, J., concurring).

97. *Id.* at 239, 263 N.W.2d at 821. He cautioned, however, that:

> This is not to say that farmers, as a class, are merchants as a matter of law. The inquiry in each case must be whether the farmer in question is in fact engaged in the business of raising and selling crops for a profit, as evidenced by his individual experience and prior activities. If the facts relevant to this question are undisputed, the trial court may properly determined whether the farmer in question is, or is not, , a merchant as a matter of law. . . . Otherwise it is a question of fact to be determined by the trier of facts. . . .

Id. at 244, 263 N.W.2d at 823 (Brodkey, J., concurring).

98. *Id.* at 245, 263 N.W.2d at 824 (Spencer, J., concurring).

within the meaning of the Code.[99] He felt that to construe a farmer as a merchant in such circumstances would extend the definition of merchant beyond that intended by the drafters of the Code.[100] Nevertheless, Judge Spencer did indicate that a farmer should be considered a merchant when he deals with farm products raised by others.[101]

FRAMEWORK FOR ANALYSIS OF THE CODE

As a codification of commercial law, the Uniform Commercial Code differs from the Uniform Statutes it replaced.[102] In order to understand this difference, it is essential to examine the distinction between a code and a statute.

Though they are often treated as synonymous, there is a vast difference between a code and a statute.[103] A true code such as the type utilized in civil law countries,[104] is a pre-emptive, systematic, and comprehensive enactment of a whole field of law.[105] It is promulgated by a legislative authority to form an interlocking, integrated body of law[106] and is assumed to cover all of the questions that might arise within its purview.[107]

A statute, on the other hand, is a particular law enacted by the legislature declaring, commanding, or prohibiting something specific.[108] It is neither pre-emptive, systematic, nor comprehensive.[109] Rather, it is restrictive in scope and covers only a particular portion of a limited area of law.[110]

In a common-law country a statute has the effect of displacing judge-made decisional law but only to the extent of the parameters of the statute.[111] Thus, when a court is presented with a case be-

99. *Id.* (Spencer, J., concurring).
100. *Id.* (Spencer, J., concurring).
101. *Id.* at 247, 263 N.W.2d at 825 (Spencer, J., concurring).
102. Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461, 472 (1967); *see* Hawkland, *Uniform Commercial "Code" Methodology*, 14 U. ILL. L.F. 291, 293-99 (1962); Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367, 372 (1957).
103. Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1042-43 (1961); Hawkland, *supra* note 102, at 291.
104. 9 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 214 (1968). *See generally* H. GUTTERIDGE, COMPARATIVE LAW (1949).
105. Gilmore, *supra* note 103, at 1043; Hawkland, *supra* note 102, at 292.
106. Hawkland, *supra* note 102, at 92.
107. Gilmore, *supra* note 103, at 1043; Hawkland, *supra* note 102, at 292. *See generally* Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 L. AND CONTEMP. PROB. 330 (1951).
108. BLACK'S LAW DICTIONARY 1581 (4th rev. ed. 1968).
109. Hawkland, *supra* note 102, at 292.
110. Gilmore, *supra* note 103, at 1043; Hawkland, *supra* note 102, 292.
111. Gilmore, *supra* note 103, at 1043; Hawkland, *supra* note 102, at 292; *see* H.

yond the confines of a statute, the court will reason its way to a decision according to common law tenets.[112] One of the basic principles deeply embodied in common law methodology is the doctrine of stare decisis.[113] Under stare decisis judicial opinions construing a statute become an integral part of the meaning of the statute.[114] Consequently, the language of an enactment is just one of the components used to determine the statute's meaning.[115]

In civil law countries that utilize true codes, the effect of a legislative enactment is much different.[116] A true code entirely preempts the field of law with which it is concerned.[117] It is comprehensive enough to contain its own methodology; that is, it is sufficiently inclusive to be administered in accordance with its own basic policies.[118] Thus, when a court is faced with a problem not foreseen by the code's drafters, its duty is to find by extrapolation and analogy a solution consistent with the codifying law.[119] The code at all times is the best evidence of its own meaning.[120] Prior cases interpreted under it "may be interesting, persuasive, cogent, but each new case must be referred for decision to the undefiled code text."[121]

As a codification of commercial law, the Uniform Commercial Code relies more heavily on civil law methodology than it does on the methods of common law to resolve the disputes which fall

GUTTERIDGE, *supra* note 104, at 105; Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. CHI. L. REV. 427, 427-28 (1950).

112. Gilmore, *supra* note 103, at 1043; Hawkland, *supra* note 102, at 292; 65 COLUM. L. REV. 880, 880-81 (1966).

113. Gilmore, *supra* note 103, at 1043; Hawkland, *supra* note 102, at 292; 65 COLUM. L. REV. 880, 881 (1966); *see* H. GUTTERIDGE, *supra* note 104, at 113.

114. Nastasi v. State, 194 Misc. 449, —, 86 N.Y.S.2d 635, 644 (1949); State v. Ballance, 229 N.C. 764, —, 51 S.E.2d 731, 733 (1949); Staten v. State, — Tenn. —, —, 232 S.W.2d 18, 19 (1950).

115. Gilmore, *supra* note 103, at 1043.

116. H. GUTTERIDGE, *supra* note 104, at 107. *See generally* Franklin, *supra* note 107, at 340.

117. H. GUTTERIDGE, *supra* note 104, at 77; Gilmore, *supra* note 102, at 465; Gilmore, *supra* note 103, at 1043; Hawkland, *supra* note 102, at 292; *see* Franklin, *supra* note 107, at 337.

118. H. GUTTERIDGE, *supra* note 104, at 78; Franklin, *supra* note 107, at 334; Gilmore, *supra* note 103, at 1043; Hawkland, *supra* note 102, at 292; *see* Schlesinger, *The Uniform Commercial Code in Light of Comparative Law*, 1 INTER-AM. L. REV. 11, 48 (1959); Gilmore, *supra* note 102, at 465. "Whereas an English lawyer seeking to interpret a legal principle will just look to its pedigree, a continental lawyer will search for its policy." H. GUTTERIDGE, *supra* note 104, at 77.

119. H. GUTTERIDGE, *supra* note 104, at 104; Franklin, *supra* note 107, at 334; Gilmore, *supra* note 103, at 1043; Hawkland, *supra* note 102, at 292; Schlesinger, *supra* note 118, at 48.

120. Gilmore, *supra* note 103, at 1043; Hawkland, *supra* note 102, at 292; Schlesinger, *supra* note 118, at 48; *see* Franklin, *supra* note 107, at 334.

121. Gilmore, *supra* note 103, at 1043; *accord*, H. GUTTERIDGE, *supra* note 104, at 114.

within its purview.[122]

> In scope [the U.C.C.] covers the entire area of commercial law and, in major part, constitutes a compendium for the whole field. It incorporates and revises several uniform acts previously drafted and enacted, and, in addition, substantially extends the area of commercial law covered by statute. In thus covering new areas of commercial law and integrating into one comprehensive code previously existing and new legislation on commercial law, the Code substantially moves away from the concept of the evolutionary development of law toward the concept of an *a priori* determination of law. It contains numerous new definitions, terminology and legal concepts, altering materially those presently existing.[123]

The influence of civil law methodology is evident in the language of the Code itself.[124] Section 1-102(1) provides that "[t]his act shall be liberally construed and applied to promote its underlying purposes and policies."[125] Comment 1 to that section further provides that:

> This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in light of unforeseen and new circumstances and practices.[126]

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122. Hawkland, *supra* note 102, at 313; Malcolm, *The Proposed Commercial Code*, 6 BUS. LAW. 113, 114 (1951); Malcolm, *The Uniform Commerical Code in the United States*, 12 INT'L COMP. L.Q. 226, 245 (1963); Rabel, *supra* note 111, at 427-29; *see* Franklin, *supra* note 107, at 334; Schnader, *The New Movement Toward Uniformity in Commercial Law—The Uniform Commercial Code Marches On*, 13 BUS. LAW. 646, 650 (1958). *Contra*, Kripke, *The Principles Underlying the Drafting of the Uniform Commerical Code*, 14 U. ILL. L.F. 321, 331 (1962). Professor Kripke, relying on instances where the comments to the Code seem to him to state rules going beyond what can be found in the text, states: "The draftsmen did not intend that the solution to problems within the ambit of the Code must be found in the confines of the statute." *Id.*

123. Malcolm, *The Proposed Commerical Code*, 6 Bus. Law. 113, 114 (1951).

124. Franklin, *supra* note 107, at 333; Hawkland, *supra* note 102, at 302-03; *see* Malcolm, *The Uniform Commercial Code in the United States*, 12 INT'L COMP. L.Q. 226, 241-42 (1963); Rabel, *supra* note 111, at 429.

125. U.C.C. § 1-102(1). The methodology utilized in Germany for construing statutes is quite similar: "[when] the meaning of a statute is ambiguous, the judge must adopt the interpretation which accords most closely with the social or economic purpose . . . of the statute." H. GUTTERIDGE, *supra* note 104, at 102.

126. U.C.C. § 1-102, Comment 1. Comment 1 has been called the most important comment of the Code. Skilton, *Some Comments on the Comments to the Uniform Commerical Code*, 1966 WIS. L. REV. 597, 609. Professor Franklin states that comment 1 "makes possible the development of the purpose of the . . . text, so that such purpose controls the determination of controversies brought about by the course of social development." Franklin, *supra* note 107, at 334-35; *accord*, Kripke, *supra* note 122, at 330-31.

In fact, comment 1 endorses the application of the provisions of the Code to "subject matter which was not expressly included in the language of the act" and to cases where the "subject matter had been intentionally excluded" where reason and policy so require.[127]

The net effect of all of this is that the U.C.C. not only has the force of law but is also a source of law.[128] It should be used as a premise for judicial reasoning in lieu of prior case law.[129] When the Code text falls short of deciding a controversy or problem, a court should resolve the question by making well-reasoned analogies from the policies underlying relevant code sections.[130]

Accordingly, the Code encourages a decision making process based on a thorough examination of the merits of each case.[131] When a novel controversy develops, a court should look to the U.C.C. itself for the answer.[132]

> The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.[133]

Despite the fact that it borrows extensively from code methodology, the Uniform Commercial Code does not fully embrace the methodology of the civil law.[134] In fact, section 1-102(1) stipulates

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127. U.C.C. § 1-102, Comment 1; Skilton, *supra* note 126, at 609.

128. Franklin, *supra* note 107, at 333; Hawkland, *supra* note 102, at 302.

129. 65 COLUM. L. REV. 880, 887 (1966); *see* Franklin, *supra* note 107, at 333; Hawkland, *supra* note 102, at 303. Professor Hawkland contends that

> [c]ases construing the Code should be given high credit, but it should not be forgotten that the Code itself is its own best evidence of what it means. If cases construing it are determined to be "wrong," courts should be free to say so and to effectuate prompt rectification by going to the Code itself, rather than be resorting to the semi-covert technique of distinction. Cases decided in other Uniform Commercial Code jurisdictions have only persuasive force, and if they are determined by the forum to be "wrong," they will be accorded little credit. This is the established and wholly proper method which has evolved for handling incorrect foreign decisions.

Id. at 319.

130. Franklin, *supra* note 107, at 333; Hawkland, *supra* note 102, at 302; *The Farmer, supra* note 6, at 589; 65 COLUM. L. REV. 880, 887 (1965).

131. *The Farmer, supra* note 6, at 589.

132. Franklin, *supra* note 107, at 333; Hawkland, *supra* note 102, at 317; 65 COLUM. L. REV. 880, 887 (1966).

133. U.C.C. § 1-102, Comment 1. The Nebraska Supreme Court in *Putnam Ranches, Inc. v. Corkle*, 189 Neb. 533, 203 N.W.2d 502 (1973), endorsed the concept that the Uniform Commercial Code is to be construed and applied "liberally to promote its underlying purposes and policies." *Id.* at 535, 203 N.W.2d at 503.

134. Franklin, *supra* note 107, at 339; *see* Hawkland, *supra* note 102, at 319; Malcolm, *The Proposed Commercial Code*, 6 BUS. LAW. 113, 114 (1951). *See generally* Schlesinger, *supra* note 118.

that the development of the Code is justified only "to promote its underlying purposes and policies."[135] This is reiterated in comment 1, which says "the proper construction of the Act requires that its interpretation and application be limited to its reason."[136] Thus, the resort to analogy is limited somewhat.[137]

When the formulation of a resolution to a particular case exceeds the bounds of the rationale embodied in the comments, the common law process should be utilized to fill the gaps.[138] Consequently, when resolving a controversy that has arisen under the Code, a court should first stay within the confines of the Act. It should examine the purposes behind the relevant code sections and the policies behind the Code as a whole, and then should resolve the controversy in a manner consistent with both.[139] Stare decisis and other elements of common-law methodology should be applied only when analogy from relevant code sections would exceed the bounds of the rationales embodied in the comments to those sections.[140]

To the extent that an examination of the merchant definition results in ambiguity, it is important for a court to examine the policies underlying the merchant exception to the State of Frauds and the Uniform Commercial Code generally. The court should then resolve the issue in a manner which is consistent with both.

ANALYSIS

The express goal of the drafters in establishing special rules for merchants was to distinguish between professionals in a given field and casual buyers and sellers.[141] To do this they borrowed a term which has a common law foundation in the "law merchant."[142] The law merchant, which was the law governing

135. U.C.C. § 1-102.

136. U.C.C. § 1-102, Comment 1.

137. Franklin, *supra* note 107, at 335; *see* Rabel, *supra* note 111, at 428.

138. Hawkland, *supra* note 102, at 311-12; 65 COLUM. L. REV. 800, 888 (1966); *see* U.C.C. § 1-103. As Professor Hawkland has said, "much of our common law will be called upon to supplement the general law of the Code. . . ." Hawkland, *supra* note 102, at 319.

139. 65 COLUM. L. REV. 880, 888 (1966); *see* notes 129-133 and accompanying text *supra*. Reliance upon the purposes and policies of the Code is not unlimited: "In order to avoid inappropriate application of the U.C.C., courts must use the statute as a premise for reasoning only when the case involves the same considerations that gave rise to the *Code* provisions and an analogy is not rebutted by additional antithetical circumstances." 65 COLUM. L. REV. 880, 888 (1965).

140. Hawkland, *supra* note 102, at 311-12.

141. Newell, *supra* note 25, at 317; *see* U.C.C. § 2-104, Comment 1.

142. U.C.C. § 2-104, Comment 2; Dolan, *supra* note 8, at 1; 65 MICH. L. REV. 345 (1966).

mercantile transactions of the day, originated and developed from the customs and usage of early international trade.[143] Its principles were gradually applied to farmers as they began to use the documents of merchants and came to know or had reason to know merchant customs and rules.[144] The fact that farmers were subject to some of the rules of the law merchant may help to explain why some early commentators on the Uniform Commerical Code were able to state almost casually that the section 2-104(1) definition "would include farmers and others not now thought of as merchants."[145] Commentators agree that the code definition of merchant is broader than the commonly understood definition of the term.[146] In fact, they indicate that merchant status should be imposed upon everyone in the conduct of general business, unless doing so would result in harshness or unfair surprise.[147]

THE FARMER AND THE SECTION 2-104(1) MERCHANT DEFINITION

To better understand who should be included within the merchant class, courts and commentators have attempted to simplify section 2-104(1) be reducing it to its component parts.[148] The initial breakdown has often resulted in the following general groupings: (1) one who deals in goods of the kind; (2) one who, by his occupation, holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction; and (3)

143. Miller v. Miller, 296 S.W.2d 684, 686 (Ky. 1956); *see* Corbin, *supra* note 26, at 823.

144. Corbin, *supra* note 26, at 823.

145. Hall, *Article 2—Sales—"From Status to Contract"?*, 1952 WIS. L. REV. 209, 212. Professor Williston wrote in 1950: "If a farmer or a school teacher engages in buying or selling goods or otherwise deals in merchantile transactions, he is, under the present law, and should continue to be, entitled to the same rights and subject to the same duties as if he were a merchant." Williston, *supra* note 26, at 572-73.

146. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 289 (1972); Dolan, *supra* note 8, at 37; *The Farmer, supra* note 6, at 589-90.

147. Braucher, McCurdy, Sutherland, & Kaplan, *Report on Article 2—Sales by Certain Members of Faculty of Harvard Law School*, 6 BUS. LAW. 151, 154 (1951); Kripke, *supra* note 122, at 325-26; Corbin, *supra* note 26, at 823-24; *The Farmer, supra* note 6, at 590; Newell, *supra* note 25, at 312; *see Meeting of Counsel January 13-14, 1951; Hearing Before Enlarged Editorial Board January 27-29, 1951*, 6 BUS. LAW. 164, 183 (1951).

148. *See* Continental Grain Co. v. Harback, 400 F. Supp. 695, 697 (N.D. Ill. 1975); Loeb & Co. v. Schreiner, 294 Ala. 722, —, 321 So. 2d 199, 201-02 (1975); Sand Seed Serv., Inc. v. Poeckes, 249 N.W.2d 663, 666 (Iowa 1977); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, —, 547 P.2d 323, 328 (1976); Currituck Grain, Inc. v. Powell, 38 N.C. App. 7, —, 246 S.E.2d 853, 855 (1978); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 355-56 (Tex. 1977); 1 R. ANDERSON, UNIFORM COMMERICAL CODE 220 (2nd ed. 1970); J. WHITE & R. SUMMERS, *supra* note 146, at 289; Kripke, *supra* note 122, at 325-26; Newell, *supra* note 25, at 329-30; *The Farmer, supra* note 6, at 591-94; 63 ILL. B.J. 271, 272 (1975); 65 MICH. L. REV. 345, 346-48 (1966).

one to whom such knowledge or skill may be attributed by his employment of an agent, broker or other intermediary who holds himself out as having knowledge or skill peculiar to the particular practices or goods involved in the transaction.[149]

The requirements for merchant status under category one are very similar to those under category three.[150] Because of this similarity, these two categories will be joined for purposes of this discussion.

Category One: One Who Deals in Goods of the Kind

Whether a farmer deals in goods of the kind when he sells his crop is undecided by case law. Three of the cases concluding that farmers are merchants found that the farmer in question did in fact deal in goods of the kind.[151] The courts in these cases suggest that the amount of experience a farmer has in selling his crop is important to this determination.[152] The farmer in each of these cases had sold his crops for several years.[153] In contrast, four courts specifically held that a farmer was not a merchant under this category.[154] These courts indicated that a person who sells his own product on an annual basis does not deal in those goods, and therefore is not a merchant under this category.[155]

Exactly when a person deals in goods of the kind is unclear.[156] The Uniform Commercial Code does not define the term deal,[157] and many of the cases that have utilized this category to determine merchant status have done little more than quote section 2-104(1) and conclude that the person involved was or was not a merchant.[158]

149. *See* note 148 *supra*.

150. Under the third category, one who engages the services of a person who is a merchant under category two becomes a merchant himself under category three.

151. *See* Campbell v. Yokel, 20 Ill. App. 3d 702, —, 313 N.E.2d 628, 630 (1974); Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n, Inc., 555 S.W.2d 61, 64 (Mo. App. 1977); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 355-56 (Tex. 1977).

152. *See* note 151 *supra*.

153. *Id.*

154. *See* Loeb & Co. v. Schreiner, 294 Ala. 722, —, 321 So. 2d 199, 202 (1975); Cook Grains, Inc. v. Fallis, 239 Ark. 962, —, 395 S.W.2d 555, 556-57 (1965); Sand Seed Serv., Inc. v. Poeckes, 249 N.W.2d 663, 666 (Iowa 1977); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, —, 547 P.2d 323, 328 (1976).

155. *See* note 154 *supra*.

156. *The Farmer, supra* note 6, at 591.

157. *See* Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 355 (Tex. 1977).

158. *See* Bickett v. W.R. Grace & Co., 12 U.C.C. Rept. Serv. 629, 636-37 (W.D. Ky. 1972); Donald v. City Nat'l Bank of Dothan, 329 So. 2d 92, 95 (Ala. 1976); A & G Constr. Co. v. Reid Bros. Logging Co., 547 P.2d 1207, 1216 (Alas. 1976); Gable v. Silver, 258 So. 2d 11, 17-18 (Fla. 1972); Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n, 555 S.W.2d 61, 64 (Mo. App. 1977); Tumber v. Automation Design & Mfg. Corp., 130 N.J. Super. 5, —, 324 A.2d 602, 606 (1974); Leasco Data Processing Equip. Corp. v. Starline

The Code does, however, give very general indications of who should be included within this group.[159] Dealing in goods of the kind does not encompass those who are casual buyers and sellers,[160] nor does it encompass those who engage in isolated sales.[161] Though very little has been written on this category, dealing in goods appears to be limited to those who sell goods on a daily or continual basis such as wholesalers or retailers.[162] While it has been argued that a farmer who depends on the successful sale of his crop for his livelihood is not a casual seller,[163] it is unlikely that a farmer who only sells a crop annually sells with sufficient regularity to be among those contemplated to fall within this group.[164]

Category Two: One Who Holds Himself Out

The second category of the merchant definition is somewhat less mystifying than the first, due mainly to comment 2 of section 2-104. Nevertheless, it is not without its difficulties.

Comment 2 of section 2-104 states that the type of knowledge necessary for merchant status under category two depends upon the nature of the provision that employs the term.[165] Thus, in

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Overseas Corp., 74 Misc. 2d 899, —, 346 N.Y.S.2d 2-8, 290 (1973); Rose v. Epley Motor Sales, — N.C. —, —, 215 S.E.2d 573, 577 (1975); Allen v. Savage Arms Corp., 2 U.C.C. Rept. Serv. 975, 978 (Pa. Ct. C.P. 1967); Gaudle v. Sherrard Motor Co., 525 S.W.2d 238, 241 (Tex. Ct. Civ. App. 1975).

159. *The Farmer, supra* note 6, at 591.

160. *Id.*; *see* U.C.C. § 2-104, Comment 2.

161. *The Farmer, supra* note 6, at 591; *see* U.C.C. § 2-314, Comment 3.

162. Safeway Stores, Inc. v. L.D. Schreiber Cheese Co., 326 F. Supp. 504, 509 n.12 (W.D. Mo. 1971); Newton-Waltham Bank & Trust Co. v. Bergen Motors, Inc., 68 Misc. 2d 228, —, 327 N.Y.S.2d 77, 80 (1971); J. WHITE & R. SUMMERS, *supra* note 146, at 289; Kripke, *supra* note 122, at 325; Newell, *supra* note 25, at 319; *The Farmer, supra* note 6, at 591.

163. *The Farmer, supra* note 6, at 605.

164. As the text states, "dealing in goods of the kind" includes those who sell on a daily or continual basis. In this regard it has been said that category one "captures the jeweler, the hardware store owner, the haberdasher and others selling from inventory." J. WHITE & R. SUMMERS, *supra* note 146, at 289. Unlike these people, who presumably engage in sales transactions quite regularly, a farmer only sells his harvest once a year. Consequently, it is unlikely a farmer was contemplated as being one who deals in goods of the kind.

165. U.C.C. § 2-104, Comment 2 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 . . ." since the practices involved in the transaction are nonspecialized business practices such as answering mail. In this type of provision, banks or even universities, for example, well may be "merchants." But even

some of the thirteen code sections that have special rules for merchants, merchant status depends on knowledge of the *practices* involved in the transaction.[166] In others, merchant standing depends on knowledge of the *goods* involved.[167] For a third group of sections, status as a merchant turns on either type of knowledge.[168]

Section 2-201(2) falls into that category in which merchant standing rests on knowledge of the *practices* involved in a transaction.[169] The practices that comment 2 refers to are "normal business practices which are or ought to be typical of and familiar to any person in business."[170] Consequently, for purposes of section 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 nonspecialized business practices such as answering mail."[171]

Since all that is required for merchant status under this section is knowledge of basic business practices, such as answering mail, only the most inexperienced farmers would fall outside the merchant class.[172] In fact, almost all farmers would be merchants under category two[173] since a farmer who depends upon the successful sale of his goods and must, by economic necessity, be familiar with the practices involved in marketing his product.[174]

A few of the courts that found a farmer was a merchant by

> these sections only apply to a merchant in his mercantile capacity; a lawyer or bank president buying fishing tackle for his own use is not a merchant.

Id.

166. The sections emphasizing knowledge of the business practices involved are sections 2-201(2), 2-205, 2-207, and 2-209. U.C.C. § 2-104, Comment 2.

167. *Id.* The sections emphasizing knowledge of the goods involved are sections 2-314, 2-402(2), and 2-403(2). U.C.C. § 2-104, Comment 2.

168. *Id.* The sections emphasizing knowledge of practices and goods are sections 2-103(1)(b), 2-327(1)(c), 2-603, 2-605, 2-509, and 2-609. U.C.C. § 2-104, Comment 2.

169. *Id.*

170. *Id.*

171. *Id.*

172. Continental Grain Co. v. Brown, 19 U.C.C. Rept. Serv. 52, 59 (W.D. Wis. 1976); Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n, Inc., 555 S.W.2d 61, 64 (Mo. App. 1977); *see* Sierens v. Clausen, 60 Ill. 2d 585, —, 328 N.E.2d 559, 561 (1975); Campbell v. Yokel, 20 Ill. App. 3d 701, —, 313 N.E.2d 628, 630 (1974); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 355-56 (Tex. 1977). In contrast the courts that did not hold farmers to be merchants did not utilize this portion of comment 2 in reaching that result. See note 43 and accompanying text *supra*.

173. *The Farmer, supra* note 6, at 606; 63 ILL. B.J. 271, 272-73 (1975); *see* 65 MICH. L. REV. 345, 347-48 (1966).

174. *See The Farmer, supra* note 6, at 606; 63 ILL. B.J. 271, 272-73; 65 MICH. L. REV. 345, 347-48 (1966).

virtue of his specialized knowledge of the practices involved in marketing his product went one step further in their analysis and found the farmer was a merchant because he also had specialized knowledge of the *goods* involved in the transaction.[175] According to comment 2, this finding is immaterial since the salient criterion for determining merchant status under section 2-201(2) is knowledge of the practices involved.[176]

Although the comments are useful in helping to determine when a person is a merchant, ambiguities remain. The main source of ambiguity is the Code definition's use of the words "by his occupation holds himself out as having knowledge or skill."[177] The words by his occupation suggest that the merchant status of any given individual must be analyzed solely according to the norms of the occupation to which that individual belongs.[178] The consequence of this interpretation is that once one farmer is or is not found to be a merchant under section 2-201(2), all farmers would thereafter be bound by that holding.[179]

The rigidity of such an interpretation contravenes the flexibility that the Code was intended to foster.[180] It also conflicts with the drafters conception of an a priori determination of law based

175. Contintental Grain Co. v. Brown, 19 U.C.C. Rept. Serv. 52, 57-59 (W.D. Wis. 1976); Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n, Inc., 555 S.W.2d 61, 65 (Mo. App. 1977); Currituck Grain, Inc. v. Powell, 38 N.C. App. 7, —, 246 S.W.2d 853, 855 (1978); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 356 (Tex. 1977).

176. U.C.C. § 2-104, Comment 2. Intuitively, this makes sense. To effectively object to a written confirmation of an oral contract under section 2-201, a party must know of the advisability of such practices as opening his mail. In comparison, a party's specialized knowledge of goods will be of little value to him if he is not familiar with the practices that will enable him to reject a confirmation under section 2-201(2).

177. *See* U.C.C. § 2-104(1).

178. Comment, *The U.C.C Merchant Sections: Reasonable Commercial Standards of Fair Dealing in the Trades*, 14 TULSA L.J. 190, 194 (1978).

179. *See* Dolan, *supra* note 8, at 5-6; Comment, *The U.C.C. Merchant Sections: Reasonable Commerical Standards of Fair Dealing in the Trades*, 14 TULSA L.J. 190, 192 (1978). Courts that found farmers not to be merchants typically looked at the occupational group involved rather than the particular individual involved. *See* Loeb & Co. v. Schreiner, 294 Ala. 722, —, 321 So. 2d 199, 202 (1975); Cook Grains, Inc. v. Fallis, 239 Ark. 962, —, 395 S.W.2d 55, 556 (1964); Lish v. Commpton, — Utah 2d —, —, 547 P.2d 223, 226 (1976). The courts that held farmers to be merchants have deviated from this only slightly. They indicate that only *experienced* farmers represent a certain level of knowledge by their occupation. *See* Continental Grain Co. v. Brown, 19 U.C.C. Rept. Serv. 52, 59 (W.D. Wis. 1976)); Sierens v. Clausen, 60 Ill. 2d 585, —, 328 N.E.2d 559, 561 (1974); Rush Johnsons Farms, Inc. v. Missouri Farmers Ass'n, Inc., 555 S.W.2d 61, 64 (Mo. App. 1977); Currituck Grain, Inc. v. Powell, 38 N.C. App. 7, —, 246 S.E.2d 853, 855 (1978); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352, 356 (Tex. 1977). *See also* Kimball County Grain Coop. v. Yung, 200 Neb. 233, 243, 263 N.W.2d, 818, 823 (1978) (Brodkey, J., concurring).

180. See note 127 and accompanying text *supra*.

on the merits of each case.[181] Therefore, the ruling in each instance must depend upon the knowledge and characteristics of the individual involved.[182]

Although the representations that a person makes by his occupation should not control the determination of his merchant status, it is one of the factual circumstances to be considered when making that determination.[183] A farmer can meet the standard of knowledge requisite to merchant status in two additional ways: by actually possessing such knowledge or by holding himself out as having such knowledge in an individual capacity.[184]

As a practical matter most experienced farmers are familiar with the basic business practices requisite to merchant status under section 2-201(2) since they have utilized them when marketing their crops.[185] Thus, most experienced farmers will be merchants by virtue of the representations they make by their occupation. In spite of that representation, if the farmer in question actually possesses such knowledge or holds himself out as having such knowledge in his individual capacity, he should be considered a merchant for the purposes of section 2-201(2).

POLICY CONSIDERATIONS

The trouble with the farmer-merchant issue arises when courts "ignore the underlying reason of a particular section and look to the definitional section as a kind of polestar, fixed outside the realm of commerce."[186] Despite the problems inherent in the code definition of merchant, only two courts have taken the next step and examined the reasons underlying the adoption of section 2-201(2).[187] When the purposes and policies underlying this sec-

181. See note 124 and accompanying text *supra*.

182. Williston, *supra* note 26, at 573; 65 MICH. L. REV. 345, 347 (1966); *see* Dolan, *supra* note 8, at 23-24.

183. *The Farmer*, *supra* note 6, at 592-93; *see* ANDERSON, *supra* note 148, at 220; Newell, *supra* note 25, at 325-26; 65 MICH. L. REV. 345, 346-48 (1966).

184. ANDERSON, *supra* note 148, at 220; *The Farmer*, *supra* note 6, at 593; 65 MICH. L. REV. 345, 347 (1966); *see* Newell, *supra* note 25, at 335-37. *Contra*, Comment, *The U.C.C. Merchant Sections: Reasonable Commercial Standards of Fair Dealing in the Trades*, 14 TULSA L.J. 190, 200 (1978).

185. See notes 171-73 and accompanying text *supra*.

186. Dolan, *supra* note 8, at 6.

187. *See* Campbell v. Yokel, 20 Ill. App. 3d 702, —, 313 N.E.2d 628, 629-30 (1974); Currituck Grain, Inc. v. Powell, 28 N.C. App. 563, —, 222 S.E.2d 1, 3-4 (1976). *Currituck* made indirect references to the purposes and policies underlying U.C.C. section 2-201(2), asserting: "[o]bviously if the defendant were a non-merchant under the circumstances he was in a most desirable position of being free to sell on the open market if prices went up, but having the option to enforce the written confirmation if prices fell below the contract price." *Id.* at —, 222 S.E.2d at 4.

The reasoning of *Campbell* was adopted in a general sense by Sierens v. Clau-

tion are examined, the view that a farmer should be held to be a merchant is reaffirmed.

The Purposes Underlying U.C.C. Section 2-201(2)

The Statute of Frauds was originally enacted when few rules of evidence existed and unreliable juries made fraud and perjury all too common in the courts of seventeenth century England.[188] These problems were compounded by the fact that parties to an action were held to be incompetent witnesses.[189] Despite changes in the conditions which warranted the original Statute of Frauds[190] and criticism of its continued use and application,[191] the drafters of the Uniform Commercial Code adopted a version of the statute into the Code.[192]

The Statute of Frauds in the Uniform Commercial Code differs from the Statute of Frauds at common law in at least one important respect. The Code version contains a provision, section 2-201(2), which is designed to make a letter of confirmation a safe and normal way to satisfy the requirement for a writing.[193] The reason for the inclusion of this provision can best be understood in light of the fraud it was designed to combat:

> Consider the following situation. S and B enter into an oral contract by telephone. S immediately sends B a letter confirming the deal and stating all of its terms. This letter is a 'memorandum,' and it binds S, who signed it, in such a way that he cannot set up the Statute of Frauds [as a defense]. On the other hand, S's letter does not bind B. B has signed nothing, and if the deal is a marginal one, he has the power to stand by and watch the market. If it goes the right way for him, he can confirm and hold S; if it goes the wrong way, he can reject S's memo and escape from a bad deal.[194]

Since letters of confirmation often had the effect of providing a

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sen, 60 Ill. 2d 585, 328 N.E.2d 559 (1975) and Continental Grain Co. v. Harback, 400 F. Supp. 695 (N.D. Ill. 1975), but no reference was explicitly made to the purposes and policies underlying U.C.C. section 2-201(2) in either of these cases. *See* 400 F. Supp. at 699; 60 Ill. 2d at —, 328 N.E.2d at 561.

188. Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U. PA. L. REV. 440, 441 (1931).

189. *Id.*

190. 2 A. CORBIN, CONTRACTS § 275, at 8-9 (1950).

191. J. WHITE & R. SUMMERS, *supra* note 146, at 64; Corbin *supra* note 26, at 829, Rabel, *supra* note 111, at 433-34.

192. *See* U.C.C. § 2-201.

193. 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.1201, at 26 (1964).

194. *Id.* The Statute of Frauds was created to prevent the enforcement of alleged promises that were, in fact, never made, not to justify the repudiation of

vehicle which facilitated fraud instead of offering a mechanism which could prevent it,[195] many businessmen adopted a policy of not writing memorandums of their agreements.[196] Consequently, "the most natural and probative way of memorializing the oral contract was driven out of safe use and often was replaced by less efficacious methods of satisfaction. . . ."[197] Section 2-201(2) was adopted to prevent the situation in which one party to a transaction is bound by an agreement while the other is free to sit back and play the market.[198] In short, the merchant exception was designed to bring equality to the law.[199] If the recipient of a confirming memorandum does not object to its contents within ten days, neither party can rely on the Statute of Frauds as a defense; conversely, if the recipient does object, both parties are afforded the protection which the Statute provides.[200]

As an examination of section 2-104(1) revealed, most farmers would be merchants for the purposes of section 2-201(2). The purpose and policies underlying section 2-201(2) are consistent with such a conclusion.[201] By holding farmers to be merchants under this provision, the type of fraud that section 2-201(2) was designed to prevent would be curtailed. Although the thirteen cases dealing with the merchant exception involved the very situation that section 2-201(2) was directed at,[202] only two mentioned the policies

agreements that were actually entered into. J. WHITE & R. SUMMERS, *supra* note 146, at 50-51; Corbin, *supra* note 26, 829.

195. 1 W. HAWKLAND, *supra* note 193, at 26; J. WHITE & R. SUMMERS *supra* note 146, at 47-48; *see* Dolan, *supra* note 8, at 13.

196. 1 W. HAWKLAND, *supra* note 193, at 25-26. *See generally* J. WHITE & R. SUMMERS, *supra* note 146.

197. 1 W. HAWKLAND, *supra* note 193, at 26; *accord*, J. WHITE & R. SUMMERS, *supra* note 146, at 48.

198. 1 W. HAWKLAND, *supra* note 193, at 25; *The Farmer, supra* note 6, at 605; *see* 63 ILL. B.J. 271, 272 (1975). *See generally* J. WHITE & R. SUMMERS *supra* note 146.

199. 1 W. HAWKLAND, *supra* note 193, at 25; *see* J. WHITE & R. SUMMERS *supra* note 146, at 48; *The Farmer, supra* note 6, at 605; Newell, *supra* note 25, at 335.

200. 1 W. HAWKLAND, *supra* note 193, at 25; J. WHITE & R. SUMMERS, *supra* note 146, at 48.

201. Section 2-201(2) was designed to prevent fraud by eliminating the situation in which one party is bound by an agreement while the other is free to pay the market. Set note 198 and accompanying text *supra*. It does this by binding the recipient of a confirmation to the contract unless he objects to the confirmation within ten days. U.C.C. § 2-201(2). The potential for fraud is minimized when the merchant class of 2-201(2) is read inclusively. See note 200 and accompanying text *supra*. Consequently, the purposes and policies underlying section 2-201(2) are consistent with holding farmers who have knowledge of minimum business practices to be merchants. It can be argued, however, that the purposes and policies behind 2-201(2) would also be consistent with holding all farmers to be merchants because more fraud would then be eliminated.

202. See note 17 and accompanying text *supra*.

underlying this exception.[203] Both found a farmer to be a merchant.[204]

The General Purposes Underlying the Uniform Commercial Code

The purposes and policies behind the Uniform Commerical Code as a whole also support finding a farmer to be a merchant. U.C.C. section 1-102(1) states, "[t]his act shall be liberally construed and applied to promote its underlying purposes and policies." Section 1-102(2) goes on to state that the purposes and policies underlying 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 . . . ."[205]

The Uniform Commerical Code was drafted to bring order, simplicity, and rationality to commercial transactions.[206] It was also designed to adopt rules of law conforming with the way business is actually carried on.[207] Consequently, a principle which runs throughout the Code is the concept that the practices of those engaged in business are important in construing their contracts, actions, rights, and liabilities.[208]

In Nebraska and elsewhere farmers and grain dealers have come to rely on oral futures contracts to avoid speculation and loss on the commodities market. When farmers are not given merchant status for the purposes of section 2-201(2), this well-established practice is put in considerable jeopardy. Such a holding permits a farmer to bind grain dealer to a quoted price while enabling the farmer to play the market. This increases the potential for a judicially sanctioned breach of contract to occur. Since contracts throughout the marketing chain are consummated rapidly, transactions through the entire chain are susceptible to disruption. Moreover, a grain dealer cannot be expected to continually suffer the consequences of breaches without returning to spot transactions or requiring written commodity contracts.[209]

Excluding farmers from the merchant class tends to contra-

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203. See note 187 and accompanying text *supra*.

204. *See* Campbell v. Yokel, 20 Ill. App. 3d 202, —, 313 N.E.2d 628, 630 (1974); Currituck Grain, Inc. v. Powell, 28 N.C. App. 563, —, 222 S.E.2d 1, 3-4 (1976), *aff'd on rehearing*, 38 N.C. App. 7, —, 246 S.E.2d 853, 855 (1978).

205. U.C.C. § 1-102(2). U.C.C. section 1-102(2)(c) adds: "to make uniform the law among the various jurisdictions." *Id.*

206. U.C.C. § 1-102(2)(a).

207. U.C.C. § 1-102(2)(b); Corbin, *supra* note 26, at 824; Kripke, *supra* note 122, at 330; Malcolm, *The Proposed Commercial Code*, 6 BUS. LAW. 113, 126 (1951).

208. Malcolm, *The Proposed Commercial Code*, 6 BUS. LAW. 113, 125-26 (1951).

209. See notes 7-14 and accompanying text *supra*.

vene rather than promote the policies of the Code. It creates the potential for upsetting grain transactions rather than simplifying and clarifying them. It also may complicate and retard commercial practices instead of expanding them. A marketing system which custom and usage has developed would thus be threatened with disruption in favor of practices which would impair commodity transactions.[210] Consequently, the purposes and policies of the code as a whole are best advanced by holding a farmer to be a merchant.

CONCLUSION

As a codification of commercial law, the Uniform Commercial Code requires the application of a slightly different methodology than common-law judges traditionally apply in contract disputes. In the first instance, the U.C.C. text and official comments should be fully utilized in reaching a result. If the text and comments reveal an ambiguity, the Uniform Commerical Code itself should serve as the premise for judicial reasoning, not prior case law. Thus, when the resolution to a commercial dispute is unclear, a court should examine the purposes behind the relevant Code sections, together with the policies underlying the U.C.C. as a whole, and then resolve the controversy in a manner consistent with both.

The cases that have dealt with the farmer-merchant issue have arrived at their conclusions in a variety of ways. As a whole, the courts that have faced the farmer-merchant issue have not exhibited a complete understanding of how the Uniform Commerical Code has altered conventional common law methodology. Many have utilized non-Code sources to reach their results, while others have employed the official comments ineffectively and incompletely.

When the issue is properly analyzed, it appears that most farmers will be merchants under section 2-201(2). Although few farmers deal in goods of the kind, all but the most inexperienced of farmers have or hold themselves out as having knowledge of the basic business practices requisite to merchant status under section 2-201(2). The policies underlying section 2-201(2) are consistent with this determination. The merchant exception to section 2-201 was designed to prevent the very situation which has so often given rise to the farmer-merchant issue. Moreover, the fraud perpetrated by this situation is most effectively curtailed when section 2-201(2) is read as expansively as possible.

210. Dolan, *supra* note 8, at 24 n.170; *see* Brief of Amicus Curiae at 2.

Holding farmers to be merchants under section 2-201(2) is also consistent with the purposes and policies of the Code as a whole. It simplifies the law governing commodity transactions and perpetuates and expands commercial practices developed by custom and usage.

Charles R. Gentile—'80