

# U.C.C. § 2-201(2)--A Search for a Just Interpretation: Bazak International Corp. v. Mast Industries

Janet L. Raimondo

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## U.C.C § 2-201(2) — A SEARCH FOR A JUST INTERPRETATION: *BAZAK INTERNATIONAL CORP. v. MAST INDUSTRIES*

Under the statute of frauds provision of the Uniform Commercial Code (“U.C.C.”), a contract for the sale of goods in excess of \$500 must be evidenced by a writing.<sup>1</sup> Section 2-201(1) states the general rule that such a contract is unenforceable “unless there is

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<sup>1</sup> U.C.C. § 2-201 (1987). This section “states the formal requirements for a contract for the sale of goods.” 2 R.A. ANDERSON, *UNIFORM COMMERCIAL CODE* § 2-201:4, at 13 (3d ed. 1982). The Code defines “goods” as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale” and “includes the unborn young of animals and growing crops and other identified things attached to realty.” U.C.C. § 2-105(1) (1987). “A ‘sale’ consists of the passing of title from the seller to the buyer for a price” while a “‘contract for sale’ includes both a present sale of goods and a contract to sell goods at a future time.” *Id.* § 2-106(1). This section does not apply to the sale of services, realty, corporate stocks, bonds or choses in action. *See* J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* § 2-2, at 67-68 (3d ed. 1988).

The first statute of frauds, An Act for Prevention of Frauds and Perjuries, was enacted in England in 1677, *see* Costigan, *The Date and Authorship of the Statute of Frauds*, 26 HARV. L. REV. 329, 336-37 (1913), at a time when the interested parties were not permitted to testify, and juries were under no procedural controls. *See* Comment, *The Merchant’s Exception to the Uniform Commercial Code’s Statute of Frauds*, 32 VILL. L. REV. 133, 137 (1987). The statute’s writing requirement was designed to rectify the substantial abuses of the judicial system resulting from fraud and perjury. *Id.* In the absence of a writing, the English statute of frauds could be satisfied only by acceptance and receipt or part payment. *See* 3 R. DUESENBERG & L. KING, *BENDER’S UNIFORM COMMERCIAL CODE SERVICE* § 2.01, at 2-2 (1988).

The English Statute of Frauds relating to sales was preserved in the predecessor to the Uniform Commercial Code, the Uniform Sales Act of 1906, which by 1935 was adopted by a majority of jurisdictions in the United States. *See* Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 473-75 (1987). Some commentators therefore have argued that with the implementation of procedural jury controls and the allowance of the testimony of the parties to the litigation, the statute is no longer needed and perpetrates fraud rather than prevents it. *See* Comment, *supra* at 138-39. However, instead of abolishing the statute of frauds, the drafters of the Code decided to improve it. 3 R. DUESENBERG & L. KING, *supra*, at 2-5. The principal drafter, Karl Llewellyn, sought to modify the Uniform Sales Act statute of frauds by retaining the “better practice” of a writing requirement while eliminating the potential for fraud from those who would invoke the statute of frauds because of a change in market conditions. *See* Wiseman, *supra*, at 515. The primary innovations of § 2-201 were a “significant relaxation” of the writing required by the Uniform Sales Act, as well as an additional subsection applying specifically to merchants. *Id.* at 516.

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."<sup>2</sup> An exception to the signature requirement, applicable only "between merchants," allows a writing not signed by the party against whom enforcement is sought to satisfy the statute.<sup>3</sup> Section 2-201(2), the "merchant's exception," provides that a merchant who has received "a writing in confirmation of the contract and sufficient against the sender"<sup>4</sup> is denied the statute of frauds defense<sup>5</sup> unless the receiving merchant timely responds to the confirmatory memorandum.<sup>6</sup> Case law determining

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<sup>2</sup> U.C.C. § 2-201(1) (1987). This subsection provides:

Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

*Id.*

<sup>3</sup> *Id.* § 2-201(2). 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.

*Id.* A merchant is defined 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." *Id.* § 2-104(1). A transaction "between merchants" is one "with respect to which both parties are chargeable with the knowledge or skill of merchants." *Id.* § 2-104(3). The definition of merchants provided by the Code was meant to establish three classes of merchants based upon their "specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both." *Id.* § 2-104 comment 2.

<sup>4</sup> *Id.* § 2-201(2).

<sup>5</sup> *Id.* § 2-201 comment 3. The receiving merchant's failure to reply to a confirmatory memorandum takes away the statute of frauds defense, however, "the burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation is unaffected." *Id.* Therefore, the burden of proof remains on the sending merchant to prove that a contract was made before the writing was sent. See *Azevedo v. Minister*, 86 Nev. 576, 582, 471 P.2d 661, 665 (1970).

<sup>6</sup> U.C.C. § 2-201(2) (1987). The purpose of the "merchant's exception" was to correct the pre-Code inequity which existed where a merchant sent a confirmatory memorandum sufficient to deny him a statute of frauds defense, but insufficient against the receiving merchant who had not signed it. See 2 UNIFORM COMMERCIAL CODE DRAFTS § 14 comment subsection (2) at 120 (E. Kelly ed. 1984). The receiving merchant, therefore, could enforce the contract at will according to prevailing market conditions. *Id.* This comment, the first published after the "merchant's exception" was introduced by Karl Llewellyn, states that the purpose was to "remedy antecedent injustice." *Id.* "It prevents a merchant who has received a written confirmation from continuing to hold the other party bound, while he

the sufficiency of the confirmatory memorandum under the merchant's exception has generally applied the same standards as those applied to writings that purport to satisfy subsection one of the U.C.C. statute of frauds provision.<sup>7</sup> Some courts and commentators, however, have suggested that a stricter standard should be employed when judging the sufficiency of the content of the writing required by the merchant's exception.<sup>8</sup> Recently, in *Bazak International Corp. v. Mast Industries*,<sup>9</sup> the New York Court of Appeals held that the same standard applies to both subsections of 2-201<sup>10</sup> and that confirmatory writings under the merchant's exception are "sufficient so long as they afford a basis for believing that they reflect a real transaction between the parties."<sup>11</sup>

On April 22 and 23, 1987, Bazak, the buyer, and Mast, the seller, negotiated an oral agreement for the sale of textiles,<sup>12</sup> with Mast assuring Bazak that written invoices would be delivered

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remains silent and watches the market." *Id.* This gave the receiving merchant an economic advantage, especially where success or failure of a transaction depended on the happening of a future event. See W. HAWKLAND, SALES AND BULK SALES 36 (3d ed. 1976). The threat of speculation on the receiving merchant's part discouraged merchants from writing down their deals and encouraged unethical fraudulent behavior among merchants trying to achieve competitive advantages. See Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1157 (1985). See generally J. WHITE & R. SUMMERS, *supra* note 1, § 2-3, at 71-72 (providing detailed example on mechanics of pre-Code mercantile setting).

<sup>7</sup> See, e.g., *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7, 15-16 (N.D. Miss. 1978); *Ace Concrete Prods. v. Charles J. Rogers Constr. Co.*, 69 Mich. App. 610, 613, 245 N.W.2d 353, 355 (1976); *Howard Constr. Co. v. Jeff-Cole Quarries, Inc.*, 669 S.W.2d 221, 227 (Mo. Ct. App. 1983); *Azevedo*, 86 Nev. at 582, 471 P.2d at 665; *Harry Rubin & Sons v. Consol. Pipe Co.*, 396 Pa. 506, 511-12, 153 A.2d 472, 476 (1959); see also R. ANDERSON, *supra* note 1, § 2-201:130, at 77 ("The content of a confirmatory writing must satisfy the same standard of a memorandum described by UCC § 2-201(1)"); J. WHITE & R. SUMMERS, *supra* note 1, § 2-4, at 79 ("the confirmatory memo under 2-201(2) must satisfy 2-201(1)").

<sup>8</sup> See *Norminjl Sportswear Corp. v. TG&Y Stores Co.*, 644 F. Supp. 1, 4 (S.D.N.Y. 1985) (test is "whether a reasonable merchant, seeing the memorandum in question would understand it to be a confirmation of a consummated oral agreement"); *Trilco Terminal v. Prebilt Corp.*, 167 N.J. Super. 449, 454, 400 A.2d 1237, 1240 (1979) (to satisfy subsection two, a memorandum must clearly be in confirmation of an oral agreement), *aff'd* 174 N.J. Super. 24, 415 A.2d 356 (1980); see also 3 R. DUESENBERG & L. KING, *supra* note 1, § 2.04[2], at 2-85 (stricter standard is justified by difference in statutory language between subsections (1) and (2), and by fact that receiving merchant who has not signed the writing loses statute of frauds defense); 2 A. SQUILLANTE & J. FONSECA, *WILLISTON ON SALES* § 14-8, at 268 (4th ed. 1974) (reasonable to impose a stricter standard on merchants).

<sup>9</sup> 73 N.Y.2d 113, 535 N.E.2d 633, 538 N.Y.S.2d 503 (1989).

<sup>10</sup> *Id.* at 120, 535 N.E.2d at 636, 538 N.Y.S.2d at 506.

<sup>11</sup> *Id.* at 123, 535 N.E.2d at 638, 538 N.Y.S.2d at 508.

<sup>12</sup> *Id.* at 116, 535 N.E.2d at 634, 538 N.Y.S.2d at 504.

shortly.<sup>13</sup> When no invoices arrived, Bazak went to Mast's parent company in New York City, and, following Mast's instructions, telecopied five purchase orders to Mast's Massachusetts office.<sup>14</sup> Mast acknowledged receipt of the purchase orders, but made no objection.<sup>15</sup> When the textiles were never delivered, Bazak sued for breach of contract.<sup>16</sup> Mast moved to dismiss for failure to state a cause of action<sup>17</sup> on the grounds that no alleged writing satisfied the statute of frauds and, more specifically, the purchase orders were insufficient memoranda under the merchant's exception.<sup>18</sup> After the Supreme Court denied Mast's motion to dismiss,<sup>19</sup> the Appellate Division reversed, holding that the claim was barred by the statute of frauds.<sup>20</sup> The Court of Appeals, however, reversed the Appellate Division and held that the purchase orders qualified as confirmatory writings sufficient under the merchant's exception.<sup>21</sup>

Writing for the court, Judge Kaye<sup>22</sup> rejected Mast's argument

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<sup>13</sup> *Id.* The court, for purposes of the dismissal motion, assumed the facts alleged by the plaintiff. *Id.*

<sup>14</sup> *Id.* The first four purchase orders contained orders for various quantities of fabric; the fifth summarized the complete order. *Id.* at 118, 535 N.E.2d at 635, 538 N.Y.S.2d at 505. "All [were] dated April 23, 1987—the date of the alleged oral contract." *Id.* Each purchase order contained the handwritten words: "As presented [sic] by Karen Fedorko." *Id.* Karen Fedorko was Mast's agent who met with Bazak. *Id.* at 116, 535 N.E.2d at 634, 538 N.Y.S.2d at 504. At the bottom of each purchase order were small lines of type stating "[a]ll claims must be made within 5 days after receipt of goods. No allowances or returns after goods are cut. This is only an offer and not a contract unless accepted in writing by the seller, and subject to prior sale." *Id.* at 118, 535 N.E.2d at 635, 538 N.Y.S.2d at 505. Each purchase order ended with the two signature lines, one for Bazak, signed by its agent and one for "Customer's Acceptance," left blank. *Id.* at 118-19, 535 N.E.2d at 635, 538 N.Y.S.2d at 505. Finally, an inter-office memorandum stated that the purchase orders were telecopied to Mast's Massachusetts office from Mast's New York City parent company. *Id.*

<sup>15</sup> *Id.* at 116, 535 N.E.2d at 634, 538 N.Y.S.2d at 504.

<sup>16</sup> *Id.* Bazak also sued for fraud. *Id.*

<sup>17</sup> *Id.* at 116-17, 535 N.E.2d at 634, 538 N.Y.S.2d at 504. Mast's dismissal motion was based on the lack of documentary evidence pursuant to New York's Civil Practice Law and Rules § 3211(a)(7). *Id.*

<sup>18</sup> *Id.* at 117, 535 N.E.2d at 634, 538 N.Y.S.2d at 504.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* The appellate division rejected Bazak's argument that the purchase orders were sufficient under the merchant's exception since the purchase orders, "by their own language, limit[ed] themselves to simply being an offer to contract." *Bazak Int'l Corp. v. Mast Indus., Inc.*, 140 App. Div. 2d 211, 212, 528 N.Y.S.2d 62, 63 (1st Dep't 1988), *rev'd*, 73 N.Y.2d 113, 535 N.E.2d 633, 538 N.Y.S.2d 503 (1989). The appellate court found the language at the bottom of the purchase orders—"This [is] only an offer and not a contract unless accepted in writing by the seller"—dispositive in establishing that each purchase order was an offer and not a writing sent in confirmation of an agreement. *Id.*

<sup>21</sup> *Bazak*, 73 N.Y.2d at 116, 535 N.E.2d at 633-34, 538 N.Y.S.2d at 503-04.

<sup>22</sup> Chief Judge Wachtler and Judges Titone and Bellacosa concurred. *See id.* at 132, 535

that the standard for a writing under the merchant's exception is stricter than that required by U.C.C. section 2-201(1).<sup>23</sup> Consequently, the memoranda did not have to contain express references to a prior agreement or explicit words of confirmation in order to satisfy the merchant's exception.<sup>24</sup> Rather, Judge Kaye, relying on the official comment to 2-201(1)<sup>25</sup> and the majority of courts and commentators,<sup>26</sup> concluded that the same standard applies to both subsections of 2-201.<sup>27</sup> The court found some merit in the goal of a stricter merchant's exception standard—to prevent a sending merchant from unilaterally depriving a receiving merchant of a statute of frauds defense because no response was made to an unsolicited, ambiguous purchase order<sup>28</sup>—but concluded that this rationale overlooked safeguards inherent in section 2-201.<sup>29</sup> Thus, the court rejected a stricter standard and held that in view of the

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N.E.2d at 643, 538 N.Y.S.2d at 513.

<sup>23</sup> *Id.* at 120, 535 N.E.2d at 636, 538 N.Y.S.2d at 506.

<sup>24</sup> *Id.* at 123, 535 N.E.2d at 638, 538 N.Y.S.2d at 508.

<sup>25</sup> *Id.* at 120, 535 N.E.2d at 636, 538 N.Y.S.2d at 506. The official commentary to U.C.C. 2-201(1) explains the standard for the writing requirement: “[A]ll that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction.” U.C.C. § 2-201 comment 1 (1987).

<sup>26</sup> *Bazak*, 73 N.Y.2d at 120-21, 535 N.E.2d at 636, 538 N.Y.S.2d at 506; *see also supra* note 7 (citing cases following majority rule).

<sup>27</sup> *Bazak*, 73 N.Y.2d at 120, 535 N.E.2d at 636, 538 N.Y.S.2d at 506.

<sup>28</sup> *Id.* at 121-22, 535 N.E.2d at 637, 538 N.Y.S.2d at 507. The proponents of the stricter standard felt that in order to ensure that the receiving merchant was aware that the sender was “asserting the existence of a contract,” it was essential that the writing contain express language of confirmation in order for the receiving merchant to have a “‘meaningful opportunity’ to exercise the right of objection found in UCC 2-201(2).” *Id.*; *see Trilco Terminal v. Prebilt Corp.* 167 N.J. Super. 449, 454, 400 A.2d 1237, 1240 (1979), *aff’d*, 174 N.J. Super. 24, 415 A.2d 356 (1980).

<sup>29</sup> *Bazak*, 73 N.Y.2d at 122, 535 N.E.2d at 637, 538 N.Y.S.2d at 507. According to the court, the first safeguard was that the sending merchant still could be held to the contract. *Id.* The majority noted that under § 2-201(2) the confirmatory writing must be “sufficient against the sender;” thus, the sender could not invoke the statute of frauds if the receiving merchant chose to enforce the contract. *Id.* The second safeguard was that the writing must still be sufficient to satisfy § 2-201(1). *Id.* Under § 2-201(1) the writing must be “sufficient to indicate that a contract for sale has been made.” U.C.C. § 2-201(1). The majority specifically stated that while a purchase order “standing alone” would probably not meet this test, a purchase order containing “additional evidence that it [was] based upon a prior agreement” was, as a policy matter, sufficient to require an objection from a receiving merchant. *Bazak*, 73 N.Y.2d at 122, 535 N.E.2d at 637, 538 N.Y.S.2d at 507. The final safeguard was that in such situations, the burden of proving that the contract was made remains with the sending merchant. *Id.* Judge Kaye explained that if the receiving merchant failed to make a timely objection, he would still be free to argue that a contract was not made. *Id.*; *see supra* note 5 and accompanying text.

highly specific terms of the purchase order,<sup>30</sup> the hand-written reference to the "presentation" by Mast's agent,<sup>31</sup> and the memorandum evidencing that the purchase orders were telecopied from Mast's parent company,<sup>32</sup> the writing "adequately indicated confirmation of a pre-existing agreement."<sup>33</sup>

Writing in dissent, Judge Alexander<sup>34</sup> argued that it was unnecessary to reach the issue of whether a stricter standard should be employed because the purchase orders failed to meet the standard set forth in 2-201(1).<sup>35</sup> The dissent interpreted 2-201(1) as requiring that the "writing must at least allow for the reasonable inference that a contract was made and therefore that the writing rests on a real transaction."<sup>36</sup> According to the dissent, the purchase orders were ambiguous; even if their plain language of an offer could be disregarded, they did not sufficiently identify an existing contract.<sup>37</sup> Moreover, the dissent reasoned that requiring a

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<sup>30</sup> *Bazak*, 73 N.Y. at 124, 535 N.E.2d at 638, 538 N.Y.S.2d at 508. The court found that the provisions stating the "precise quantities, descriptions, prices per unit and payment terms" were so specific as to provide a basis for believing an agreement was reached between the parties. *Id.*

<sup>31</sup> *Id.* The court held that the printed language declaring that the orders represented offers only was without effect. *Id.* The court found that it was "plain from the face of these documents that the printed matter was" irrelevant because the language was "clearly all referable to a transaction in which Bazak was the seller." *Id.* Since in this case Bazak was the buyer not the seller, the court found that to record the purchase from Mast, Bazak was simply using the same forms it used when it was a seller. *Id.*

<sup>32</sup> *Id.* at 124, 535 N.E.2d at 638-39, 538 N.Y.S.2d at 508-09. Judge Kaye found it significant that Bazak telecopied the purchase order from the office of Mast's parent company, which suggested "that the forms were not merely unsolicited purchase orders." *Id.*

<sup>33</sup> *Id.* Judge Kaye concluded that the sum of these factors were dispositive and that each factor alone would have been insufficient to establish a writing. *Id.*

<sup>34</sup> Judges Simons and Hancock joined in the dissent. *Id.* at 132, 535 N.E.2d at 643, 538 N.Y.S.2d at 513.

<sup>35</sup> *Id.* at 127, 535 N.E.2d at 640, 538 N.Y.S.2d at 510 (Alexander, J., dissenting).

<sup>36</sup> *Id.* at 128, 535 N.E.2d at 641, 538 N.Y.S.2d at 511 (Alexander, J., dissenting).

<sup>37</sup> *Id.* at 130, 535 N.E.2d at 642, 538 N.Y.S. at 512 (Alexander, J., dissenting). According to the dissent, the fact that Bazak used forms designed for use by a seller was "not properly considered in evaluating the sufficiency of the documents on their face." *Id.* (Alexander, J., dissenting) (citation omitted). In addition, the dissent found that reference to a prior presentation by Mast's agent did not indicate that an agreement was reached. *Id.* at 131, 535 N.E.2d at 642-43, 538 N.Y.S.2d at 512-13 (Alexander, J., dissenting). Further, the terms of the purchase order, according to the dissent, did not contain any "delivery terms or other special requirements" that would indicate the existence of an agreement. *Id.* at 131, 535 N.E.2d at 643, 538 N.Y.S.2d at 513 (Alexander, J., dissenting). Finally, the dissent found it insignificant that the purchase orders were sent from the office of Mast's parent company in determining "whether the parties had reached an agreement." *Id.* (Alexander, J., dissenting).

The dissent noted that even a "liberal construction" of § 2-201(1) would require that

response to writings which do not indicate the existence of a contract unfairly burdens receiving merchants and places the sending and receiving merchants on unequal footing contrary to the "purpose and intent of U.C.C. § 2-201(2)."<sup>38</sup>

In rejecting a stricter standard for a writing "in confirmation of a contract" under 2-201(2), it is submitted that the *Bazak* majority correctly concluded that the 2-201(1) requirement of a writing "sufficient to indicate that a contract for sale has been made" applies to both subsections of 2-201.<sup>39</sup> It is suggested, however, that the court's interpretation of the standard in 2-201(1) was overly broad and unfairly permitted ambiguous memoranda to be deemed writings in confirmation of a prior agreement. This Comment will analyze the rationale underlying application of the 2-201(1) standard to the merchant's exception. It then will review the approaches taken by the courts in applying the standard of 2-201(1) to confirmatory writings under 2-201(2). Finally, this Comment will suggest an alternative articulation of the requirements of 2-201(2) confirmatory memoranda that focuses on the receiving merchant's perspective and is better suited to modern commercial practices.

#### APPLICATION OF THE 2-201(1) STANDARD TO THE "MERCHANT'S EXCEPTION"

The purpose of the merchant's exception is to prevent the pre-Code inequity of permitting a merchant who has received a writing in confirmation of a contract to speculate on market conditions and unilaterally decide whether the contract will bind him.<sup>40</sup> As a result of the merchant's exception, the sending and receiving merchants are on equal footing<sup>41</sup> since upon the failure to assert a

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the writing make the existence of a contract "more probable than not." *Id.* (Alexander, J., dissenting); see J. WHITE & R. SUMMERS, *supra* note 1, § 2-4, at 79. The dissent contended that this minimum standard was necessary to serve the Code's dual purpose of "preventing fraud without unduly burdening commercial transactions." *Id.* at 128, 535 N.E.2d at 641, 538 N.Y.S.2d at 511 (Alexander, J., dissenting).

<sup>38</sup> *Id.* at 131, 535 N.E.2d at 643, 538 N.Y.S.2d at 513 (Alexander, J., dissenting).

<sup>39</sup> See *supra* note 6 and accompanying text.

<sup>40</sup> See *R.S. Bennett & Co. v. Economy Mechanical Indus.*, 606 F.2d 182, 185-86 (7th Cir. 1979). In enacting § 2-201(2), the drafters intended to prevent the section from operating as an "instrument of fraud," binding a party who received the memorandum but failed to object. See *R.S. Bennett*, 606 F.2d at 186; *Doral Hosiery Corp. v. Sav-A-Stop, Inc.*, 377 F. Supp. 387, 389 (E.D. Pa. 1974) (depriving receiving merchant of statute of frauds defense also estops him from refusing "to honor the contract if it were to his detriment").

<sup>41</sup> See *R.S. Bennett*, 606 F.2d at 185. The court explained that the purpose of 2-201(2)

timely objection to the confirmatory memorandum, neither the receiving merchant nor the sending merchant can invoke the statute of frauds defense against the other.<sup>42</sup> It is submitted that since 2-201(2) removes the pre-Code inequities that existed between merchant buyers and sellers, merchants' confirmatory memoranda should not be held to a higher standard than other writings which satisfy the statute of frauds.

Courts and commentators customarily rely on three reasons to support a stricter standard under the merchant's exception. First, they point to the difference in language between 2-201(1)'s requirement of a writing "sufficient to indicate that a contract for sale has been made" and 2-201(2)'s requirement of "a writing in confirmation of the contract and sufficient against the sender."<sup>43</sup> The second reason is that the receiving merchant is being bound to a writing he did not sign.<sup>44</sup> Finally, these courts and commentators argue that a receiving merchant who is unaware that a contract is being asserted in a memorandum is denied a meaningful opportunity to reject the contract and, consequently, is saddled with the onerous

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"is to make memos of a contract that would be binding on the sender under 2-201(1) equally binding on the party receiving the memo in the absence of objection." *Id.* If the receiving merchant does not make timely objection to a sufficient confirmatory memorandum, neither he nor the sending merchant can invoke the statute of frauds because: 1) the receiving merchant is deemed to have satisfied the requirements of 2-201(1); and 2) the sending merchant has sent out a memorandum sufficient against himself. *See* U.C.C. § 2-201(2). If the receiving merchant does object, however, both parties may invoke the statute of frauds. *See* *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7, 14 (N.D. Miss. 1978). This equality in treatment "encourage[s] the sending of writings to confirm oral contracts." *Id.*

<sup>42</sup> *See* Comment, *supra* note 1, at 179-80. This commentator describes a situation where the receiving merchant could invoke the statute of frauds while the sending merchant remains bound. *Id.* This situation arises when a stricter standard is required under 2-201(2) because it is possible for a merchant to send a confirmatory memorandum sufficient against him under 2-201(1), but insufficient to satisfy the more stringent standard of subsection (2). *Id.* Thus the pre-Code inequity which the merchant's exception sought to eliminate would resurface. *Id.* at 180.

<sup>43</sup> *See, e.g.,* *Trilco Terminal v. Prebilt Corp.*, 167 N.J. Super. 449, 454-55, 400 A.2d 1237, 1240 (1979), *aff'd*, 174 N.J. Super. 24, 415 A.2d 356 (1980); 3 R. DUESENBERG & L. KING, *supra* note 1, § 2.04[2], at 2-85 ("if no difference were intended, it would have been a simple matter for the language of subsection 2 to read ' . . . a writing sufficient against the sender' "); 2 A. SQUILLANTE & J. FONSECA, *supra* note 8, § 14-8, at 268 (because of difference in statutory language, "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)").

<sup>44</sup> *See, e.g.,* *Trilco*, 167 N.J. Super. at 454-55, 400 A.2d at 1240; 3 R. DUESENBERG & L. KING, *supra* note 1, § 2.04[2], at 2-85 (since receiving merchant did not sign, but merely failed to make timely objection to memorandum, more detailed writing requirement is warranted under subsection (2)).

burden of responding to every unsolicited purchase order.<sup>45</sup>

The difference in statutory language between the two subsections appears to be the most compelling justification for a stricter standard for determining the sufficiency of a writing under subsection two.<sup>46</sup> However, it is suggested that this difference in statutory language was not intended to create a stricter standard.

A majority of courts have held that the "sufficient against the sender" prong of the merchant's exception is satisfied when 2-201(1) is satisfied.<sup>47</sup> Supporters of a stricter standard set forth the "writing in confirmation" prong as the language which compels a stricter standard for compliance with subsection 2-201(2).<sup>48</sup> The merchant's exception was drafted to prevent the inequity resulting from the mercantile practice of sending written confirmations after a deal had been concluded and the resulting unenforceability of the confirmation against the receiving merchant,<sup>49</sup> as well as to en-

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<sup>45</sup> See, e.g., *Trilco*, 167 N.J. Super. at 454-55, 400 A.2d at 1240. The court reasoned that a stricter standard would assure that the receiving merchant "is or should be aware that an agreement is being confirmed." *Id.* As a result, he is "afforded a meaningful opportunity to exercise the right of objection expressly provided in the statute." *Id.* Further, the standard ensures that 2-201(2) will apply "to its intended area of operation" by denying the statute of frauds defense only to those merchants who "unreasonably" neglect to timely respond. *Id.*; see also *Triangle Mktg., Inc. v. Action Indus.*, 630 F. Supp. 1578, 1581 (N.D. Ill. 1986) ("To say otherwise would mean a seller is obliged to respond to every purchase order received out of the blue on pain of finding itself obliged to deliver on the order's terms").

<sup>46</sup> See *supra* note 43 and accompanying text. The second justification for a stricter standard—the receiving merchant is bound to a writing he did not sign—is not as persuasive since the sending merchant still has the burden of proving that a contract was made. See *supra* note 5 and accompanying text. Moreover, the third reason supporting a stricter standard—the receiving merchant's burden of responding to unsolicited purchase orders—is also not as persuasive since the writing must still satisfy U.C.C. § 2-201(1). See *Bazak*, 73 N.Y.2d at 122, 535 N.E.2d at 637, 538 N.Y.S.2d at 507; *supra* note 7 and accompanying text. The *Bazak* court explained that the writing could not satisfy subsection (2) unless it met the test stated in subsection (1). *Bazak*, 73 N.Y.2d at 122, 535 N.E.2d at 637, 538 N.Y.S.2d at 507. Further, even if the liberal "more probable than not" standard were employed, see *supra* note 37 and accompanying text, the writing should be sufficient to put the receiving merchant on notice. See *Bazak*, 73 N.Y.2d at 128, 535 N.E.2d at 641, 538 N.Y.S.2d at 511 (Alexander, J., dissenting). Judge Alexander noted that since the receiving merchant must have reason to know the contents of the confirmatory memorandum to be bound under subsection (2), "the writing must at least put the receiving merchant on notice that the sender believes that a contract was made." *Id.*

<sup>47</sup> See *infra* note 54 and accompanying text.

<sup>48</sup> See *Trilco*, 167 N.J. Super. at 454-55, 400 A.2d at 1240.

<sup>49</sup> See *supra* note 40 and accompanying text. The drafters of the Code were aware that businessmen "frequently concluded deals over the telephone." See Hillinger, *supra* note 6, at 1156. As a result, the merchant's exception was drafted. *Id.* The merchant's exception became a means to eliminate fraud from the merchant practice while furthering the sound business practice of sending memoranda in confirmation of oral contracts. *Id.*

courage the better practice of evidencing contracts by a writing.<sup>50</sup> It appears that the intent of the drafters of the "writing in confirmation" prong of U.C.C. § 2-201(2) was not to impose a writing requirement stricter than that of 2-201(1), but to provide a legal mechanism for an established business custom.

#### ANALYSIS OF CASES APPLYING 2-201(1) STANDARD TO THE MERCHANT'S EXCEPTION

A majority of courts have held that the same requirements under 2-201(1) apply to confirmatory writings under the merchant's exception.<sup>51</sup> The case law has developed three general approaches to the interpretation of a writing under the merchant's exception focusing on the two prongs of 2-201(2).<sup>52</sup> The first approach focuses on the difference in statutory language between the two subsections and defines either the "sufficient against the sender" or the "writing in confirmation" prong of 2-201(2) in terms of the requirements of 2-201(1).<sup>53</sup> The second option ignores the express language of the merchant's exception and simply adopts the standard stated in 2-201, comment 1.<sup>54</sup> The third approach de-

<sup>50</sup> See Hillinger, *supra* note 6, at 1156-57. According to Hillinger, Karl Llewellyn was aware that he was "creating business duties," *i.e.*, a duty on the part of a merchant to send out confirmations that would make his oral contract enforceable. *Id.* Llewellyn's goal in drafting the merchant's exception was to "retain enough of the [English] Statute [of Frauds] to encourage what he considered to be the better practice of writing down agreements, while at the same time eliminating the rewards to 'sharper' who would invoke the Statute of Frauds to benefit from changes in market price." See Wiseman, *supra* note 1, at 515.

<sup>51</sup> See *supra* note 7 and accompanying text. A writing under subsection (1) must be signed, state a quantity, and be "sufficient to indicate that a contract for sale has been made." U.C.C. § 2-201(1). Comment 1 to § 2-201 states that "[a]ll that is required is that the writings afford a basis for believing that the offered oral evidence rests on a real transaction." *Id.* official comment 1.

<sup>52</sup> See *supra* note 43 and accompanying text.

<sup>53</sup> See *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7, 16 (N.D. Miss. 1978); *A&G Constr. Co. v. Reid Bros. Logging*, 547 P.2d 1207, 1216 (Alaska 1976); *Evans Implement Co. v. Thomas Indus. Inc.*, 117 Ga. App. 279, 280, 160 S.E.2d 462, 463 (1968). Some courts have ignored the "sufficient against the sender" prong and have defined the "writing in confirmation" prong solely in terms of the requirements of 2-201(1). See, *e.g.*, *Ace Concrete Prod. Co. v. Charles J. Rogers Constr. Co.*, 69 Mich. App. 610, 613, 245 N.W.2d 353, 355 (1976) ("written confirmation pursuant to 2 201(2) must satisfy the requirements of a writing under 2 201(1)"); *Howard Constr. Co. v. Jeff-Cole Quarries*, 669 S.W.2d 221, 227 (Mo. App. 1983) ("courts have found that the § 2-201(2) confirmatory memorandum must satisfy the 'sufficient to indicate' requirement of § 2-201(2)"); *Azevedo v. Minister*, 86 Nev. 576, 582, 471 P.2d 661, 665 (1970) (confirmation requirement is satisfied by applying requirements of 2-201(1)).

<sup>54</sup> See, *e.g.*, *Apex Oil Co. v. Vanguard Oil & Serv. Co.*, 760 F.2d 417, 423 (2d Cir. 1985)

finds the standard in language that paraphrases the "sufficient to indicate that a contract has been made" requirement of 2-201(1).<sup>55</sup>

Although the courts have varied in their articulation of the requirements under 2-201(2), the results in decisions applying these differing approaches have been uniform.<sup>56</sup> A common denominator exists: the core consideration is always whether the writing is "sufficient to indicate that a contract for sale has been made."<sup>57</sup> It is suggested that the differing approaches articulated in the case law have clouded this basic requirement of 2-201(1) and led the *Bazak* court to find an ambiguous writing sufficient under the merchant's exception.

#### SYNTHESIS OF THE VARYING APPROACHES—"THE ORDINARY MERCHANT"

In *Trilco Terminal v. Prebilt Corp.*,<sup>58</sup> the court found the re-

(2-201(2) requires basis for believing real transaction existed under the standard stated in comment 1); *Dura-Wood Treating v. Century Forest Indus.*, 675 F.2d 745, 749 (5th Cir.) (to satisfy "strictures" of statute of frauds, apply comment 1), *cert. denied*, 459 U.S. 865 (1982); *M.K. Metals, Inc. v. Container Recovery Corp.*, 645 F.2d 583, 591 (8th Cir. 1981) (official comment 1 to 2-201(2) adopted); *Harry Rubin & Sons, Inc. v. Consolidated Pipe Co.*, 396 Pa. 506, 511-12, 153 A.2d 472, 476 (1959) (writing must satisfy comment 1).

<sup>55</sup> See, e.g., *Triangle Mktg. Inc. v. Action Indus.*, 630 F. Supp. 1578, 1580 (N.D. Ill. 1986) (confirmations need not specifically state they are "confirmations, but must refer to an existing contractual agreement"); *Rockland Indus., Inc. v. Frank Kashmir Assoc.*, 470 F. Supp. 1176, 1178 (N.D. Texas 1979) (confirmation "need not expressly state that it is sent in confirmation of the prior transaction, but it must state that a binding or completed transaction has actually been made"); *Doral Hosiery Corp. v. Sav-A-Stop, Inc.*, 377 F. Supp. 387, 389 (E.D. Pa. 1974) (same).

<sup>56</sup> Courts have consistently found sufficient under the merchant's exception writings that were unambiguous or that reasonably could have been interpreted as evidencing a binding agreement. See, e.g., *Apex Oil*, 760 F.2d at 420 ("This is to confirm APEX will purchase"); *Dura-Wood Treating*, 675 F.2d at 749 ("Confirming our conversation, please enter our order"); *Azevedo*, 86 Nev. at 580-81, 471 P.2d at 664-65. (language evidenced binding agreement where periodic accountings asked buyer when balance of hay was to be hauled). Conversely, courts have found ambiguous writings or tentative agreements insufficient. See, e.g., *R.S. Bennett & Co. v. Economy Mechanical Indus., Inc.*, 606 F.2d 182, 185 (7th Cir. 1979) (letters containing language "for your consideration" insufficient); *Alice v. Robbett Mfg. Co.*, 328 F. Supp. 1377, 1380 (N.D. Ga. 1970) ("confirming our telephone conversation, we are pleased to offer" insufficient), *aff'd*, 445 F.2d 316 (5th Cir. 1971). Accordingly, courts have found buyer purchase orders sufficient under the merchant's exception when the writings contained unambiguous language of confirmation, see *Leonard Pevar Co. v. Evans Prod. Co.*, 524 F. Supp. 546, 549 n.14 (D. Del. 1981), terms reflecting prior dealings, see *M. K. Metals, Inc. v. Container Recovery Corp.*, 645 F.2d 583, 591 (8th Cir. 1981), or language referring to a prior order. See *Harry Rubin*, 396 Pa. at 309-10, 153 A.2d at 475-76.

<sup>57</sup> See *supra* note 2 and accompanying text.

<sup>58</sup> 167 N.J. Super. 449, 400 A.2d 1237 (1979), *aff'd*, 174 N.J. Super. 24, 415 A.2d 356 (1980).

quirements of 2-201(2) more demanding than those of 2-201(1) and stated that the "writing in confirmation" prong of the merchant's exception was not satisfied if "an ordinary merchant could not surmise from a writing that its sender was asserting the existence of a contractual relationship between the parties."<sup>59</sup> In describing the stricter standard, however, the court stated that express confirmatory language was not necessary; all that was required was that the writing indicate to the ordinary merchant "that a binding or completed transaction ha[d] been made."<sup>60</sup> Nevertheless, the *Bazak* court read *Trilco* as requiring a written confirmation to contain express confirmatory language or express references to the prior agreement.<sup>61</sup> It is submitted that, contrary to *Bazak's* interpreta-

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<sup>59</sup> *Id.* at 454, 400 A.2d at 1240. The court, however, did not apply the stricter standard to the facts because the writings were insufficient under 2-201(1). *Id.* at 449, 400 A.2d at 1241. The *Trilco* court specifically distinguished its approach from that articulated in *Harry Rubin & Sons v. Consolidated Pipe Co.*, 396 Pa. 506, 153 A.2d 472 (1959). *Trilco*, 167 N.J. Super. at 456, 400 A.2d at 1241. In *Rubin*, the court equated "the writing in confirmation" prong of the merchant's exception with the requirements of 2-201(1) and articulated a standard based on the official comment accompanying 2-201. *Rubin*, 396 Pa. at 511, 153 A.2d at 476. The *Trilco* court justified the existence of a stricter standard in 2-201(2) by the difference in statutory language between the two subsections, the fact that subsection (2) binds a merchant to a writing he did not sign, and the different role a writing must play under subsection (2). *Trilco*, 167 N.J. Super. at 454-55, 400 A.2d at 1240.

<sup>60</sup> *Trilco*, 167 N.J. Super. at 454, 400 A.2d at 1240. The court explained its stricter "ordinary merchant" standard: "This is not to say that the confirmation must 'expressly state that it is sent in confirmation of [a] prior transaction,' but rather that it must at least 'indicate that a binding or completed transaction has been made.'" *Id.* Although the *Trilco* court rejected the standard applied in *Rubin* and suggested a stricter standard should exist under 2-201(2), it is submitted that, like *Rubin*, the *Trilco* court's explanation of its stricter standard raised the same issues that have been raised under the general requirements of 2-201(1). The issues raised by case law arising under the two subsections are parallel. *See* 3 R. DUESENBERG & L. KING, *supra* note 1, § 2.04[2], at 2-85. These issues include: "Does the writing refer to a previous agreement or completed transaction [and] does it use such terms as 'in confirmation of' when referring to a prior transaction." *Id.* at 2-85 to -86. Therefore, the *Trilco* court's explanation of its stricter "ordinary merchant" standard, it is submitted, paraphrases the requirements of 2-201(1). *Trilco's* articulation of its standard is remarkably similar to that articulated by other courts not asserting a stricter standard. *See supra* note 52 and accompanying text. Further, it is similar to the statutory requirement of 2-201(1) that the writing be "sufficient to indicate that a contract for sale has been made." U.C.C. § 2-201(1) (1987). Finally, it is submitted that the language of *Trilco's* stricter subsection (2) standard is very similar to the purportedly more liberal subsection (1) standard that the court relied upon in finding the writing insufficient.

<sup>61</sup> *See Bazak*, 73 N.Y.2d at 119, 535 N.E.2d at 636, 538 N.Y.S.2d at 506. The *Bazak* court concluded that the cases cited by the seller—*Trilco* and *Norminjl Sportswear Corp. v. TG&Y Co.*, 644 F. Supp. 1 (S.D.N.Y. 1985)—stood for the proposition that a more "exacting standard" should be imposed under 2-201(2). *Bazak*, 73 N.Y.2d at 119, 535 N.E.2d at 636, 538 N.Y.S.2d at 506. The *Norminjl* court, however, did not decide that a stricter standard should be employed under subsection (2), but rather that when examining confirma-

tion, the *Trilco* court's "ordinary merchant" standard is not a stricter standard but merely a restatement of the differing approaches articulated in the existing case law.<sup>62</sup> Furthermore, adoption of the *Trilco* court's "ordinary merchant" approach will promote clarity and uniformity since, as this Comment has suggested, the present articulations of the merchant's exception have clouded the basic 2-201(1) requirement that a writing be "sufficient to indicate that a contract for sale has been made." The ordinary merchant approach will ensure that ambiguous purchase orders will not constitute confirmatory memoranda under the merchant's exception because this method focuses on the receiving merchant's perspective without requiring the sending merchant to adhere to a standard stricter than that previously required under the general rule of 2-201(1).

#### CONCLUSION

The *Bazak* court correctly concluded that the standard to be applied to a confirmatory memorandum under the "merchant's exception" is the same required by the general rule of 2-201(1). However, it is submitted that the interpretation of this standard was flawed. Concerned with the unfairness of denying a sending merchant an opportunity to prove the existence of an alleged oral contract, the court found that an ambiguous purchase order was a writing sufficient to deprive a receiving merchant the statute of frauds defense. This Comment has suggested an alternative formulation of the standard applicable to a writing under the merchant's exception that is better suited to the mercantile practice of sending and receiving writings in confirmation of oral contracts. By focusing on the perception of an "ordinary" receiving merchant, without applying a standard stricter than that of 2-201(1), the New York courts would minimize the danger of unfairly depriving a merchant who is unaware that an ambiguous writing was intended as a confirmatory memorandum the protection of the statute of frauds.

*Janet L. Raimondo*

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tory writings, an "ordinary merchant" standard should be used. *Norminjl*, 644 F. Supp. at 4. Further, the *Norminjl* court did not require express confirmatory language, but read *Trilco* "for the proposition that a memorandum under subsection two must clearly be 'in confirmation' of a previous oral contract, not simply an offer or a price quotation." *Id.*

<sup>62</sup> See *supra* note 56 and accompanying text.

