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AGREEMENTS TO ALTER THE LIMITATION PERIOD IMPOSED BY U.C.C. SECTION 2-725: SOME OVERLOOKED COMPLICATIONS

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ABSTRACT

Uniform Commercial Code Section 2-725 sets forth the Statute of Limitations that is applicable to U.C.C. Article 2 sale-of-goods transactions. There is a fairly extensive body of literature that analyzes the numerous problems and litigation that this poorly drafted provision has created. However, such commentary overlooks several ambiguities presented by Section 2-725(1) with regard to agreements to depart from the provision's four-year limitation period default rule. This brief article will attempt to resolve these ambiguities.

Starting from the conventional premise that a statute's ambiguities should be interpreted so as to maximize the contractual freedom of the parties that are subject to that statute, absent compelling reasons otherwise, Section 2-725(1) should be interpreted to give effect not only to those agreements that impose symmetrical limitation periods within the permitted statutory range, but also to asymmetric agreements that impose different limitation periods upon the various parties to a contract, so long as all of the limitation periods fall within the statutorily permitted one-year to four-year range. Second, symmetrical agreements that establish a

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limitation period that lies outside of this permitted statutory range, and asymmetric agreements that impose one or more limitation periods that lie outside of that range, while clearly unenforceable under Section 2-725(1), should nevertheless be regarded as providing clear evidence of the parties' joint intent—and should therefore be given effect to the extent that the provision permits.

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I. INTRODUCTION

There is a fairly extensive body of literature regarding Section 2-725 of the Uniform Commercial Code (U.C.C.),[1] a widely adopted provision that imposes a limitation period on the filing of actions for the breach of

1. U.C.C. § 2-725 (2012). The text of U.C.C. § 2-725 is set forth below:

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when the tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective." *Id.*

contracts for the sale of goods.[2] That literature is quite critical of that provision and identifies numerous shortcomings[3] which have given rise to

2. *See generally* Carey A. Dewitt, *Action Accrual Date for Written Warranties to Repair: Date of Delivery or Date of Failure to Repair?*, 17 U. MICH. J.L. REFORM 713 (1984) (arguing that suits based on breach of repair warranties under Section 2-725 should not accrue until the seller has failed to repair the goods); Larry T. Garvin, *Uncertainty and Error in the Law of Sales: The Article Two Statute of Limitations*, 83 B.U. L. REV. 345 (2003) (detailing various aspects of Section 2-725 that give rise to a disproportionate amount of litigation); Richard R. Hyde, *Breach of Warranty Statute of Limitations Under the UCC*, 66 MICH. B.J. 504 (1987) (explaining how courts have struggled to reconcile when a cause of action accrues under Section 2-725 and what, if any, factors extend or lessen the limitation period); Jaqueline R. Kanovitz, *The Seller Fiddles and the Clock Ticks: Seller's Cure and the UCC Statute of Limitations*, 60 NOTRE DAME L. REV. 318 (1985) (proposing theories that would remove a Section 2-725 time bar from a buyer's suit if a part of the limitations period was consumed by seller's ineffective cure); Michael Schmitt & Kenneth Hanko, *For Whom the Bell Tolls—An Interpretation of the UCC's Exceptions as to Accrual of a Cause of Action for Future Performance Warranties*, 28 ARK. L. REV. 311 (1974) (explaining the confusion that the future performance exception of Section 2-725 has created and then proposing alternatives to achieve greater uniformity); Chris Williams, *The Statute of Limitations, Prospective Warranties, and Problems of Interpretation of Article Two of the UCC*, 52 GEO. WASH. L. REV. 67 (1983) (contending that the drafters' inadequate distinction between present and prospective warranties in Section 2-725 fails to balance the interests of buyers and sellers); Kevin D. Lyles, Note, *U.C.C. Section 2-725: A Statute Uncertain in Application and Effect*, 46 OHIO ST. L.J. 755 (1985) (illustrating the various shortcomings of Section 2-725 and proposing an amendment to address them); Alice M. Wright, Annotation, *What Constitutes Warranty Explicitly Extending to "Future Performance" for Purposes of UCC Section 2-725(2)*, 81 A.L.R.5th 483 (2000) (regarding what constitutes implied and express warranties within the context of future performance under U.C.C. Section 2-275(2)).

3. All of the critics cited above note the difficult problem that Section 2-725(2) poses for determining when causes of action for breach of warranties accrue. *See* Carey A. DeWitt, *Action Accrual Date for Written Warranties to Repair: Date of Delivery or Date of Failure to Repair?*, 17 U. MICH. J.L. REFORM 713, 717 (1984) ("[S]everal courts have concluded that repair warranties do not explicitly extend to future performance of the goods under Code section 2-725(2) so that the statute of limitations begins to run at delivery."); Larry T. Garvin, *Uncertainty and Error in the Law of Sales: The Article Two Statute of Limitations*, 83 B.U. L. REV. 345, 347 (2003) (noting the frequency of cases that are litigated in regards to this section of the Code indicates uncertainty on the facts of the cases and reflects uncertainty on the law); Jaqueline R. Kanovitz, *The Seller Fiddles and the Clock Ticks: Seller's Cure and the UCC Statute of Limitations*, 60 NOTRE DAME L. REV. 318, 322–37 (1985) ("The chief obstacle to a broad application of the future performance warranty exception has been the interpretation of 'explicitly' in Section 2-725(2)."); Chris Williams, *The Statute of Limitations, Prospective Warranties, and Problems of Interpretation of Article Two of the UCC*, 52 GEO. WASH. L. REV. 67, 68–69 (1983) ("The article contends that the drafters' resort to mechanical and procedural rules, as embodied in section 2-725, is an unsatisfactory method of dealing with statute-of-limitations defenses to breach-of-warranty claims because such rules do not adequately allow consideration for the substantive issues that underlie these disputes."); Kevin D. Lyles, Note, *U.C.C. Section 2-725: A Statute Uncertain in Application and Effect*, 46 OHIO ST. L.J. 755, 756 (1985) ("Two principle problems have arisen from the language of section 2-725. The first stems from the fact that section 2-725 offers no guidance on when a warranty 'explicitly extends to future performance.' . . . A second problem concerns the applicability of section 2-725. This problem is caused by the intersection of strict product liability and warranty liability."). Some of these critics also note the problem that Section 2-725 poses for determining its proper scope of application. In addition, Larry Garvin, by far the most insightful and the most thorough of these critics, notes a number of other difficult interpretive problems that

a great deal of litigation—perhaps more litigation than any other provision of U.C.C. Article 2.[4] Many of these critics have recommended various amendments to Section 2-725 that may remedy some or all of those defects.[5] None of those writers, however, have addressed several difficult interpretive questions that can arise under Section 2-725(1) with regard to attempts to alter the length of the limitation period away from the four-year default limitation period that the provision imposes. This short Article will attempt to complement the existing literature regarding Section 2-725 by addressing and resolving these questions.

Section 2-725(1) is a rather succinct provision that states the following: "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it."[6]

Sections 2-725 poses, including: the question of whether the pertinent sale for statute of limitation purposes is the first sale by a manufacturer or a later sale by an intermediary to the final end user of the good; whether testing or installation or attempted testing or installation of a good tolls the statute; how to treat non-privity warranties; whether promises to repair qualify as warranties; when a cause of action under a related indemnification agreement accrues; when, if ever, estoppel may apply; as well as noting the problem posed by the fact that there have been an unusually large number of non-uniform enactments of Section 2-725 by the states. *See* Larry T. Garvin, *Uncertainty and Error in the Law of Sales: The Article Two Statute of Limitations*, 83 B.U. L. REV. 345 (2003) (discussing the scope of Section 2-275 in depth); *see also* Kevin D. Lyles, Note, *U.C.C. Section 2-725: A Statute Uncertain in Application and Effect*, 46 OHIO ST. L.J. 755, 767 (1985) (stating that a claimant must commence an action for breach of a contract for sale within two years after the claimant has discovered or should have discovered it). I will not attempt to address any of these interpretive questions and problems in this short article, which focuses only on the two overlooked questions that are posed.

4. *See* Larry T. Garvin, *Uncertainty and Error in the Law of Sales: The Article Two Statute of Limitations*, 83 B.U. L. REV. 345, 346 (2003) (citing James J. White, *Evaluating Article 2 of the Uniform Commercial Code: A Preliminary Expedition*, 75 MICH. L. REV. 1262, 1270 (1977)) (reporting the findings of Professor James White, a noted U.C.C. scholar, who "observed . . . that there were more cases involving the Article Two statute of limitations in his [broad] sample than there were involving any other section of Article Two").

5. Most of the critics focus primarily on the problem posed by Section 2-725(2) for determining when a cause of action for breach of warranty accrues. A popular reform proposal is to change the statute to provide for a two-year default limitations period, more closely matching most local tort statutes of limitation and also allowing for a tort-like discovery rule regarding the commencement of the limitations period. *See id.* at 397–98 ("If, for instance, the statute were converted entirely to discovery with perhaps a two-year limitations period, all of subsection (2) could be omitted, and with it the confusing case law about when an express warranty explicitly extends to future performance."); *see also* Kevin D. Lyles, Note, *U.C.C. Section 2-725: A Statute Uncertain in Application and Effect*, 46 OHIO ST. L.J. 755, 767 (1985) ("An action for breach of any contract for sale must be commenced within two years after the claimant has discovered, or in the exercise of due diligence should have discovered the breach.").

6. U.C.C. § 2-725(1) (2012). This provision has been adopted, sometimes with variations from the official version, by a substantial number of states. Larry T. Garvin, *Uncertainty and Error in the Law of Sales: The Article Two Statute of Limitations*, 83 B.U. L. REV. 345, 347 (2003). In particular, there are

Section 2-725(1) thus explicitly provides the parties with some limited flexibility to depart from the four-year limitation period default rule.[7] The first question addressed in this brief article is whether this provision allows the parties to a contract to implement an asymmetric agreement that would provide each of them with a limitation period of different length for asserting any claims, so long as all of those limitation periods fall within the statutorily permitted one-year to four-year range? Is such an asymmetric agreement enforceable, or must any agreement between or among the parties to a sale of goods contract concerning the duration of the limitation periods provide each party with a limitation period of the same length?

A second issue to consider is what, if any, impact upon the length of the applicable limitation period would result from an agreement to establish a symmetrical limitation period that was either shorter or longer than the statutorily permitted one-year to four-year limitation period range? For example, would a symmetrical agreement for a limitation period for each party of *less* than one year result in a one-year limitation period being imposed, or would this instead result in a four-year limitation period? Similarly, what would be the effect of a symmetrical agreement for a limitation period of *more* than four years? Finally, combining these questions, what would be the effect of an asymmetric limitation period agreement for which at least one of the limitation periods is outside of the statutorily permitted one-year to four-year range?

Before I turn to these questions, let me first note that I will conduct my analysis starting from the conventional premise that the U.C.C. in general, and Section 2-725 in particular, should be interpreted to give the parties the broadest possible freedom of contract consistent with its language[8] unless a more paternalistic and restrictive interpretation is adequately justified on the basis of the interests of one or more of the parties to the contract, or on the basis of broader public interests implicated by the contract at issue. Starting from this premise, I have reached the following overall conclusions which I will later discuss in more detail.

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some states that only permit those persons who qualify as "merchants" under the U.C.C. to alter the limitation period. *See, e.g.*, Cnty. of Milwaukee v. Northrop Data Sys., Inc., 602 F.2d 767, 770 (7th Cir. 1979) (noting this nuance of Wisconsin law); *see also* CAL. COM. CODE ANN. § 2-725 (West 2012) (prohibiting parties from altering the limitation period).

7. *See* U.C.C. § 2-725(1) (2012) (authorizing the parties to agree to shorter, and not longer, limitation periods).

8. *See* Addison Express, LLC v. Medway Air Ambulance, Inc., No. Civ. 3:04-CV-1954-H, 2006 WL 1489385, at *6 (N.D. Tex. May 19, 2006) (recognizing that courts "weigh[] in with strong policy favoring freedom of contract").

First, I have concluded that Section 2-725(1) should be interpreted to allow for asymmetric limitation period agreements in sale of goods contracts, since there are no compelling reasons to interpret the ambiguous language of this provision more restrictively so as to limit the parties' contractual freedoms in this regard. Second, if the parties to a sale of goods contract enter into an unenforceable symmetrical agreement that calls for a limitation period of less than one year, I believe that the courts should nevertheless attempt to give force to the intent of the parties that is evidenced by such an agreement to the greatest possible extent by imposing a one-year limitation period—the shortest limitation period that the provision allows.[9] If the parties instead enter into a symmetrical agreement that provides for a limitation period of more than four years, the courts should impose a four-year limitation period—not because this is the statutory provision's default period, but because that time period best reflects the intent of the parties, as evidenced by their agreement, within the applicable statutory constraints. Finally, courts should enforce asymmetric limitation period agreements for which one or more of the agreed limitation periods are outside of the permitted statutory range. Moreover, courts should do so in the same manner as I recommend for symmetrical agreements where the agreed limitation period lies outside of the permitted range. Each of these questions will now be addressed.

II. ASYMMETRIC AGREEMENTS WHERE ALL OF THE LIMITATION PERIODS ARE WITHIN THE PERMITTED RANGE

Outside of the U.C.C., courts will generally enforce contractual agreements to alter—usually to shorten, in practice—the length of the limitation period for filing actions imposed by the applicable general statute of limitations, absent any provisions in that statute of limitation that preclude such contractual alteration, so long as the particular alteration is not unreasonable, unconscionable, or against public policy.[10]

9. *See* U.C.C. § 2-725(1) (2012) (indicating that parties may shorten "the period of limitation to not less than one year").

10. *See* Holcomb Condominium Homeowners' Ass'n v. Stewart Venture, LLC, 300 P.3d 124, 128 (Nev. 2013) ("[I]n other jurisdictions, 'it is well established that, in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided the shorter period itself shall be a reasonable period.'" (quoting Order of Travelers v. Wolfe, 331 U.S. 583, 608 (1947))); *see also* W. Filter Corp. v. Argan, Inc., 540 F.3d 947, 952 (9th Cir. 2008) (echoing that, in California, parties may stipulate to a shorter period of limitation, provided the stipulation is reasonable and not in the face of public policy). *See generally* B. H. Glenn, Annotation, *Validity of Contractual Time Period, Shorter than Statute of Limitations, for Bringing Action*, 6

Turning to the U.C.C., Section 2-725(1) goes beyond most statutes of limitation in that it expressly provides the parties to a sale of goods contract with some flexibility[11] to alter its four-year default limitation period, but with the flexibility constrained to agreements imposing limitation periods falling within the range of one to four years.[12] That provision, however, does not specifically address whether the parties to a sale of goods contract are left free to agree to different limitation periods for each party, so long as all of the limitation periods fall within this permitted range. Nor is the possibility of such asymmetric agreements addressed in the Official Comment of this Section.

The use of the singular term "period" rather than the plural term "periods" in Section 2-725(1) suggests that the drafters may have envisioned that agreements departing from the four-year default limitation period would only be given force if they were symmetric—if the same limitation period was imposed on each party.[13] There is no specific evidence that either the original drafters of the U.C.C. or those who participated in its later revision efforts ever considered the question of the enforceability of asymmetric limitation period agreements, but the use of a singular "period" term originally and throughout all revision efforts suggests that they may have intended to preclude them, although it certainly does not alone mandate this conclusion. This ambiguity needs to be resolved. I believe that, absent compelling reasonableness or public policy considerations that would suggest otherwise, the constraints imposed by Section 2-725(1) on alteration of the four-year default rule period should be interpreted narrowly so as to preserve the parties' freedom of contract to the greatest possible extent. The unexplained use of the term "period" rather than "periods" in the statute, standing alone, is too slender a basis to justify a more restrictive interpretation.

This recommendation for a narrow interpretation of the Section 2-725(1) constraints on freedom of contract in this context is consistent with the judicial stance generally taken with regard to such disputes falling outside of the U.C.C., where agreements regarding limitation periods that apply to only one of the parties to a contract (and not the other(s)) are

A.L.R.3d 1197 (1966 & Supp. 2014) (providing an extensive list of cases pertaining to the issue of stipulations of limitation period agreements).

11. *See* U.C.C. § 1-102(1) cmt. 1 (2012) (expressing that "[t]his Act is drawn to provide flexibility").

12. *See id.* § 2-725(1) (permitting parties to contractually shorten their limitation period, but within statutory limits).

13. *See id.* ("[T]he parties may reduce the period of limitation to not less than one year but may not extend it.").

regarded as reasonable, and not unconscionable, and are therefore enforceable.[14] Moreover, contractual provisions that are enforced in non-U.C.C. contracts sometimes limit only one party's time period for filing an action, and are therefore even more radically asymmetric than are asymmetric agreements conforming to the constraints of Section 2-725(1) that impose limitation periods ranging between one and four years for all of the parties to the contract.[15] The absence of preclusive language in Section 2-725(1) or elsewhere in the U.C.C., combined with non-U.C.C. case law that provides persuasive support for enforcing asymmetric limitation period agreements under Section 2-725(1), suggests these asymmetric agreements should be regarded as valid.

I have been unable to locate any judicial precedents where the parties have specifically litigated the validity of an asymmetric limitation period agreement under Section 2-725(1). The dearth of such cases may simply reflect the fact that such asymmetric agreements are not often included in sale of goods contracts.[16] Alternatively, it may instead reflect the fact that contracts are not likely to contain such relatively unusual asymmetric limitation agreements unless the contracting parties have specifically negotiated for them. Where the parties have done so they are likely to have a common understanding of such an agreement's consequences and are not likely to later dispute its effect.[17] It may be the case that both of

14. *See* Capehart v. Heady, 23 Cal. Rptr. 851, 854 (Dist. Ct. App. 1962) (indicating a contractual limitation period that operates on claims of one party but not the other "does not make the period unreasonable"); *see also* B. H. Glenn, Annotation, *Validity of Contractual Time Period, Shorter than Statute of Limitations, for Bringing Action*, 6 A.L.R.3d 1197, 1203 (1966 & Supp. 2014) (emphasizing particular cases where courts have held "the applicable contractual limitation period was not rendered unreasonable because it applied to only one of the parties"); *cf.* Pokorny v. Quixtar, Inc., 601 F.3d 987, 1001 (9th Cir. 2010) (finding an asymmetrical limitation period in an arbitration agreement to raise substantive unconscionability concerns because of its "lack of mutuality").

15. Under an agreement that imposed a limitation period upon some but not all of the parties to a contract, the limitation period that would be applicable to the party or parties not so limited would presumably be the default limitation period imposed by the applicable statute of limitations upon contracts of that nature, which under some circumstances could exceed four years in some jurisdictions. *See* 1303 Webster Ave. Realty Corp. v. Great Am. Surplus Lines Ins. Co., 471 N.E.2d 135, 136 (N.Y. 1984) (noting the six-year default limitation period can be applicable in certain fire insurance policy circumstances).

16. This could well be because, given the relatively unusual nature of asymmetric agreements regarding limitation periods in sale of goods contracts, the proposal of such an agreement by the party thereby favored would likely be rejected by the other party as being unfair; thus, in order to obtain the other party's agreement under such circumstance, the proposing party would probably offer other concessions whose negative impact on that party would likely outweigh the relatively small perceived benefits gained from the proposed limitation agreement.

17. Such a relatively unusual asymmetric limitation period agreement could only be reached through discussion by the parties, and given that prior discussion and the relative clarity of such an

the above factors contribute to the absence of litigation on this question.

Are there considerations of reasonableness, unconscionability, or public policy that would call for interpreting Section 2-725(1) so as to limit the parties' contractual freedom in this regard, a more restrictive interpretation than courts generally favor with regard to statutes of limitation outside of the U.C.C.?[18] Since Section 2-725(1) explicitly imposes a one-year to four-year range constraint on agreements to depart from the four-year default rule limitation period, the greatest possible imbalance of rights that the parties could impose through such an asymmetric agreement would be that one or more parties to the contract would be subject to a one-year limitation period, while one or more of the other parties would have up to four years to file a cause of action.

However, the resulting imbalance of rights under such an asymmetric contractual provision is likely to be quite modest in its effects—certainly not sufficient to raise unconscionability concerns. A period of one full year after the cause of action accrues will generally be more than sufficient for injured persons to initiate lawsuits in the large majority of breach of contract situations, where the breach is generally immediately apparent to the injured party.[19] Having as long as four years to initiate such actions would not, therefore, appear to confer a very significant advantage on the contractual party or parties that may have relatively longer limitation periods.[20] As noted above, outside of the U.C.C. courts have generally

agreement, it is unlikely that it would subsequently be litigated, absent a possible assessment that a court might regard such an agreement as unenforceable.

18. *See, e.g.*, *Capehart*, 23 Cal. Rptr. at 854 (indicating a contract providing a shorter statute of limitations can be valid, as long as it satisfies the requirement "that the period fixed is not in itself unreasonable or is not so unreasonable as to show imposition or undue advantage").

19. *See* Carey A. DeWitt, *Action Accrual Date for Written Warranties to Repair: Date of Delivery or Date of Failure to Repair?*, 17 U. MICH. J.L. REFORM 713, 715 (1984) (noting the major exception to breach of warranty claims, which under Section 2-725(2) generally accrue at the time of delivery, and where discovery of the defect at issue may not occur until substantially later).

20. *See id.* (explaining that most express warranties do not include this exception). Note that one can easily envision a sale of goods contract where the seller, through an asymmetrical limitation, period agreement, is subject to a four-year limitation period, while the buyer, under the same agreement, is subject to a shorter one-year limitation period. If under this contract a seller had sold defective goods with an express warranty of the sort that does *not* qualify under the "explicitly extend[ing] to future performance" exception—as most express warranties do not—the buyer would then be subject to a limitation period bar of an otherwise valid breach of warranty cause of action, if the defect in the goods was first discovered within the warranty period but more than one-year after the delivery of the goods. All the while, the seller is not likely to encounter any limitation period difficulties regardless of the nature of the buyer's breach. *See* U.C.C. § 2-725(2) (2001) (providing the discovery rule exception). While this situation may well appear to be unfair to the buyer, the problem is not a result of the asymmetric nature of the limitation period agreement, since the same problem would be posed for the buyer by a symmetric agreement for a one-year limitation period. In other

found that even those asymmetric agreements that go so far as to impose a limitation period on one party but not on the other party to be reasonable, despite the facial advantage thereby conferred on the party that is not subject to such a limitation period.[21]

Moreover, those persons seeking a relatively longer time period to file claims would likely have to offer some other modest concessions in return during the contract negotiations in order to induce assent to that agreement by party or parties who would be subject to shorter limitation periods. An asymmetric limitation period term that perhaps provided some minor advantage to the favored party would likely have to be paid for through some other concessions in the contract. Such an agreement, when its limitation period effects are considered along with those offsetting concessions, would likely result in at most a very modest net advantage to the party or parties so favored, and would likely have no noticeable impact at all on persons who are not parties to the contract. Therefore, it does not appear that there is a sufficient reasonableness, unconscionability, or other public policy justification for departing from a permissive and plausible interpretation of Section 2-725(1) that would allow for enforcement of such asymmetric agreements—an interpretation that is consistent with the non-U.C.C. jurisprudence on this question[22]—and would maximize the parties' freedom of contract within the express one-year to four-year limitation period constraints of that provision.

Section 2-725(1) should therefore be interpreted to allow the parties to a sale of goods contract to agree to an asymmetric limitation period as one of its terms, so long as each party to the contract is given no less than one year and no more than four years to file an action after their cause of action has accrued, absent some special circumstances that would render

words, the problem posed for buyers by breach-of-warranty product defects that cannot be discovered during a short limitation period may call for an amendment of Section 2-725(2) to allow for a discovery rule for the accrual of causes of action for all breaches of warranties, or for constraints on the ability of the parties to agree to limitation periods of less than four years, rather than for preclusion of asymmetric limitation period agreements. *See* Larry T. Garvin, *Uncertainty and Error in the Law of Sales: The Article Two Statute of Limitations*, 83 B.U. L. REV. 345, 359–62 (2003) (discussing that the problem with limitation periods could disappear with the adoption of a discovery rule).

21. *See Capehart,* 23 Cal. Rptr. at 854 (finding that a contractual limitation favoring one side is not necessarily unreasonable); *see also* B. H. Glenn, Annotation, *Validity of Contractual Time Period, Shorter than Statute of Limitations, for Bringing Action*, 6 A.L.R.3d 1197, 1203 (1966 & Supp. 2014) (identifying cases where courts held a contractual limitation period as reasonable even though the limitation period was applicable to only one party).

22. *See id.* ("Under California law, as long as the contractually shortened statute of limitations period is not unreasonable or not so unreasonable as to indicate undue advantage or imposition, the contract will be valid.").

such an agreement unconscionable with regard to the parties subjected to the shorter limitation periods.

III. SYMMETRICAL AGREEMENTS THAT ESTABLISH A LIMITATION PERIOD THAT FALLS OUTSIDE OF THE STATUTORILY PERMITTED RANGE

What legal effect, if any, should be given to an agreement between the parties to a sale of goods contract that establishes a symmetrical limitation period that lies outside of the one-year to four-year limitation period range allowed for by Section 2-725(1)?

First, consider the effect of an agreement that imposes a limitation period of less than one year. Since enforcement of such an agreement is clearly precluded by Section 2-725(1), the question becomes: what weight, if any, should a reviewing court give to such an unenforceable agreement in determining the appropriate limitation period within the permitted one-year to four-year range?

One reasonable possibility, of course, is for the court to simply ignore the unenforceable agreement as a nullity—as if it had never taken place—and then impose the Section 2-725(1) default rule of a four-year limitation period. Another reasonable possibility would be for the court to recognize that the parties' agreement, while unenforceable, nevertheless evidences their joint intent to have a relatively short limitation period, and then facilitate that intent to the extent possible by imposing the one-year limitation period—the shortest allowed under Section 2-725(1).[23]

This issue of the interpretive weight to be given to statutorily unenforceable contract terms is a broad jurisprudential question that goes well beyond the U.C.C. Section 2-725(1) context. The latter approach noted above of taking unenforceable agreements into account as evidence of joint intent in construing a contract should be favored, here as well as elsewhere. Even an unenforceable term of a contract may provide valuable guidance as to what the parties are validly intending to accomplish through their agreement, and therefore should not be ignored altogether.

There are other areas of law where unenforceable agreements sometimes provide valuable evidence of the parties' joint intent, which courts often use for guidance in resolving matters where such intent may be legally relevant. For example, while an oral agreement to convey real estate is generally unenforceable under the local Statute of Frauds

23. *See* 4B LARY LAWRENCE, LAWRENCE'S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-275:157 (3d ed., rev. vol. 2010) (noting that these possibilities appear to be the two most reasonable interpretations of Section 2-725(1) for one to choose between with regard to limitation period agreements that fall outside of the provision's permitted range).

provisions applicable to real estate transactions, such an unenforceable agreement still may have other important legal consequences,[24] such as providing relevant evidence for adjudicating trespass suits filed against a buyer where the intent of being on a seller's property is at issue.[25] Similarly, an unenforceable agreement for a limitation period of less than one year for a sale of goods contract clearly indicates that the contracting parties each favor having a limitation period shorter than the Section 2-725(1) four-year default period. Therefore courts should accommodate this joint intent to the extent that Section 2-725(1) permits, which would be accomplished by imposing a one-year limitation period.

There is some judicial support for such an interpretation of Section 2-725(1)—imposing a one-year, rather than a four-year, limitation period when the parties have agreed to an (unenforceable) limitation period of less than one year—to be found in the non-U.C.C. limitation period case law. In *1303 Webster Avenue Realty Corp. v. Great American Surplus Lines Insurance Co.*,[26] various fire insurance policies were issued that imposed one-year limitation periods on the policyholders for filing breach of contract claims.[27] The one-year limitation period contained in those policies were deemed to be unenforceable by the reviewing courts because the applicable statute of limitations only allowed the parties to reduce the statutory six-year default rule limitations period down to at least a two-year period, but no shorter a period than this.[28] The New York Court of Appeals, however, ruled that under those circumstances the applicable policy limitation period was two years—the shortest time period allowed by the statute—and not the six-year default rule period.[29] There is no language in the U.C.C. precluding the use of *Webster*'s non-U.C.C. judicial guidance to interpret Section 2-725(1) as giving substantial weight to

24. *See* E. ALLAN FARNSWORTH, CONTRACTS 401 (4th ed. 2004) ("[I]f one promise is within the statute, the entire contract is within the statute, and no part of the contract is enforceable unless the statute is satisfied.").

25. *See id.* (excepting that a contract which fails to satisfy the Statute of Frauds, though unenforceable, may have "other effects" such as admissibility in evidence for purposes other than its enforcement).

26. 1303 Webster Ave. Realty Corp. v. Great Am. Surplus Lines Ins. Co., 471 N.E.2d 135 (N.Y. 1984) (per curiam).

27. *Id.* at 136.

28. *See id.* (holding that the shortest limitation period permitted by law is two years).

29. *See id.* (noting that an erroneous coverage limitation—i.e., shorter than permitted by standard fire insurance—in a policy will be enforceable as if it had conformed to the statutory standard). Plaintiff's action against the insurance company would have been timely only if the six-year default limitation period had been applicable. The plaintiffs in this case had filed suit after the applicable two-year limitation period had passed. *Id.*

limitation period agreements that are too short to be enforceable under the applicable statute of limitations.

If the parties to a sale of goods contract instead agree to a symmetrical limitation period that exceeds four years, presumably all persons would agree that under Section 2-725(1) a reviewing court should impose the maximum four-year limitation period that the provision allows. However, as discussed above, the proper rationale for a court doing so would not be to ignore the unenforceable limitation period agreement as a nullity, so as to impose the provision's four-year default rule as if that agreement had not taken place, but instead to impose the four-year limitation period on the alternative basis that this four-year period best reflects the parties' joint intent—as evidenced by their agreement—to the extent that Section 2-725(1) permits.

IV. ASYMMETRIC AGREEMENTS THAT ESTABLISH ONE OR MORE LIMITATION PERIODS THAT FALL OUTSIDE OF THE STATUTORILY PERMITTED RANGE

Finally, if the parties to a sale of goods contract were to enter into an asymmetric agreement under which one or more of the limitation periods established lies outside of the statutorily permitted one-year to four-year range, then for the same reasons discussed above for symmetrical agreements of this nature the courts should set those limitation periods of impermissible length at the appropriate "end points" of the permitted one-year to four-year range. Again, the rationale for this is that such an agreement provides evidence of the parties' joint intentions with regard to the desired length of the applicable limitations periods, and courts should give force to that intent to the extent that Section 2-725(1) permits.

V. CONCLUSION

The substantial existing literature on U.C.C. Section 2-725 overlooks several ambiguities presented by Section 2-725(1) with regard to agreements to depart from the provision's four-year limitation period default rule. Starting from the conventional premise that a statute's ambiguities should be interpreted so as to maximize the contractual freedom of the parties that are subject to that statute, absent compelling reasons otherwise, Section 2-725(1) should be interpreted to give effect to asymmetric agreements to impose different lengths of limitation periods for different parties, so long as all of the limitation periods fall within the statutorily permitted one-year to four-year range. Furthermore, while both symmetrical and asymmetric agreements that establish a limitation period

or periods that fall outside of the permitted range are unenforceable under Section 2-725(1), both of these kinds of unenforceable agreements should nevertheless be regarded as evidence of the parties' joint intent and should therefore be given effect to the extent that the provision permits. While amendments to Section 2-725(1) could surely be made to more clearly mandate these conclusions, even absent such amendments there is adequate support for these interpretations to be found in existing law.