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Uniformity of Commercial Law and State-by-State Enactment: A Confluence of Contradictions

By E. Hunter Taylor, Jr.*

Introduction

The drafting and state-by-state enactment of the Uniform Commercial Code was heralded as a major milestone, if not the ultimate solution, in the movement to make uniform the commercial laws of the United States. It has proven, in most respects, to be an excellently drafted statute. Yet, the Code, while producing more uniformity than existed previously, is proving incapable of effecting the degree of harmony needed between the commercial laws of the various states.

Both the text and the silences of the Code contain important seeds of nonuniformity. Some significant matters were simply not provided for, thereby leaving the various states to reach their own solutions. Other Code sections are worded in such a way as to delegate to each state the choice of which, as between competing interpretations, it wishes to embrace. Drafting mishaps contribute to nonuniformity. The unnecessary incompleteness in the formulation of legal rules and the inadvertent adoption of vague, ambiguous and competing rules produce inconsistent results in like cases.

Even with the most complete and consistent drafting possible, however, and even with a total absence of choice delegation, uniformity is improbable through the process of state-by-state enactment. State-by-state enactment is an invitation to local amendments because it gives each state legislature an opportunity to deviate from the "uniform" act. Unfortunately, the states have been unable to resist this tempting invitation to amend. Thus, by the time the various states en-

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acted the Code it ceased to be uniform. Local amendments are, however, only the first phase in the breakdown of uniformity. One kindred consequence of state-by-state enactment is that the courts of each state have primary responsibility for the interpretation of that state's code. Interpretational mishaps and legitimate interpretational differences are inescapable. With this legion of final arbiters, multiformity is inevitable.

Attainment of more substantial uniformity in commercial law will require significant federal participation in the effort and the accompanying abandonment of the state-by-state enactment model. The degree of federal participation might be as little as federal enactment of a commercial code with major jurisdiction over its application vested in the state courts. On the other hand, it could be in the form of a federal code with jurisdiction over it vested in the federal judiciary. Various interusions of these models are possible and the choice of the most appropriate model depends in large measure on the degree of uniformity that is sought. While opinions may differ as to the optimum degree of commercial law uniformity, prolonged Balkanization of commercial law is the certain consequence of continuing down the present path of state-by-state enactment.

A Brief History of the Movement to Make Uniform the Commercial Laws of the Various States

The early development of commercial law in this country was primarily influenced by English law. In spite of this consanguinity, however, substantive differences arose between the states. The differences stemmed in part from disparate methods of receiving English law in the states, varied perceptions of both the content and the meaning of the content of that which was received, the outgrowth of different rules from a common source, and diverse subsequent statutory enactments. By the late nineteenth century, substantial variation existed among the states. Because of these differences, there were calls for the enactment of a federal code of commercial law to govern interstate commerce.


4. See, e.g., Committee on Commercial Law, Report, in 10 A.B.A. Rep. 332-44 (1887). The common law was then perceived by the "liberal" constructionists as providing Congress with jurisdiction over only those commercial transactions involving two or more states. In 1890 a bill was introduced in the House of Representatives "to regulate commerce among the several states, and to codify the law relating to bills of exchange and other commercial
although others viewed such a code as beyond the scope of congres-

The movement to unify commercial law has been paradoxical from the outset. While its proponents have sought uniformity, the movement was born at the turn of the century at least partially out of fear of federal legislation dictating uniformity. Forty years later, when there was less reason for optimism on achieving homogeneity through state-by-state accord, the Uniform Commercial Code was conceived in response to the renewed threat of federal legislation.

The uniformity movement began in earnest with the organization in 1892 of the National Conference of Commissioners on Uniform State Laws.\footnote{HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1892).} Their first major project was the drafting of the Uniform Negotiable Instruments Law, which was recommended for adoption in 1896. The formulation of this Act began the succession of acts passed in the first unsuccessful stage of the uniformity progression. Next, in 1906, the Uniform Sales Act was approved by the Commissioners. This piecemeal approach continued with approval of the Uniform Warehouse Receipts Act (1906), the Uniform Bills of Lading Act (1909), the Uniform Stock Transfer Act (1909), the Uniform Conditional Sales Act (1918) and the Uniform Trust Receipts Act (1933).\footnote{A summary of the state-by-state enactment of the uniform acts is located in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 349-52, 360-63 (1976).}

Different pieces of uniform legislation were received with varying degrees of enthusiasm. For example, all states adopted the Uniform Negotiable Instruments Law, the Uniform Warehouse Receipts Act and the Uniform Stock Transfer Act. Thirty-four states ultimately adopted the Uniform Sales Act, while only ten states enacted the Uniform Conditional Sales Act.\footnote{Id.}

The failure to obtain unanimous adoption of several of the acts guaranteed that uniformity of commercial law would not be obtained. Conflicting judicial interpretations were another, and perhaps ultimately more alarming cause for the failure of the original movement. For example, of the 198 sections of the Uniform Negotiable Instruments Law, 76 had been subjected to different interpretations by 1948.\footnote{See Beutel's Brannan \textit{Negotiable Instruments Law} 89-92 n.40 (7th ed. 1948).} Finally, some of the uniform acts were changed by local amendment,
thereby further frustrating the goal of uniformity. The first stage of organized effort to obtain uniformity of commercial law was a disappointment.

By 1940 there was again serious congressional agitation toward federal legislation in the area of commercial law. During that year Congressman Herron Pearson of Tennessee introduced the Federal Sales Act in the House of Representatives. The alarm with which the federal act was perceived appears from two statements made at the Fiftieth Annual Meeting of the National Conference of Commissioners on Uniform State Laws in 1940. President William A. Schnader, in his opening address, declared:

If we are to be preserved from the epidemic of totalitarianism, which seems to be sweeping the world, the powers reserved to the states must be retained by them. But in order to be retained, they must be exercised wisely and efficiently. And, certainly in matters affecting the conduct of business on a nation-wide scale, efficient state government can be conducted only under uniform state laws.

President Schnader's concern was made more specific in a report of the Uniform Commercial Acts Section by Professor Karl N. Llewellyn:

During the year, the Executive Committee appointed and attached to the section a special committee... for the purpose of dealing with what had come to look like an emergency, to wit, the presence, with heavy backing, of a proposed and pending federal bill. As a result of that, your Committee got in touch with the people who were handling and backing the proposed federal bill and induced them to hold off until such action as this Conference might take at this meeting.

Later in the same meeting the Commissioners voted to begin work on a Revised Uniform Sales Act which was to be drafted in such a way as to make it suitable for incorporation in a comprehensive Uniform Com-


11. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 56 (1940).

12. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 89 (1940). This statement is somewhat puzzling in light of Professor Llewellyn's position on the Federal Sales Act published earlier in the same year. "And it would seem clear in consequence that to extend a Federal Sales Bill to cover interstate sales transactions would be to further effectively, the work of simplifying and unifying the law governing such transactions. . . ."

"Nor is there any alternative workable procedure. . . . The only practicable road to real uniformity in interstate sales transactions is by Congressional action, subject to the courts of the United States for further authoritative development." Llewellyn, The Needed Federal Sales Act, 26 VA. L. REV. 558, 561 (1940).
In light of the work of this independent committee, congressional consideration of the Federal Sales Act was delayed, and work began on the second stage of the effort to obtain uniformity of commercial law without federal legislation.

This second stage of the effort was to be time-consuming. Although a comprehensive commercial code was contemplated from the beginning, it was not until 1945, with the addition of the American Law Institute and its financial resources, that the project was expanded from a revised sales act to a commercial code. A final official draft was not approved by the two sponsoring organizations until 1952, and only Pennsylvania enacted this version of the Code. The New York Law Revision Commission studied the version from 1953 until 1955 and then recommended against its enactment in New York. Strongly influenced by the criticisms and suggestions of the New York Law Revision Commission, the editorial board produced a revised version of the Code which was published early in 1958. By the end of 1961, thirteen states, including Pennsylvania, had enacted the 1958 Official Text of the Code and the New York Law Revision Commission recommended its adoption by the New York legislature. However, as a harbinger of the current digressions from a uniform code, the New York legislature made a number of changes in the 1958 text. The Permanent Editorial Board for the Uniform Commercial Code studied the New York changes and the changes that had been made by other states enacting the Code. The approved changes were incorporated in what is called the 1962 Official Text of the Code. By 1967 every American state except Louisiana had enacted this version of the Code. In 1972 the Permanent Editorial Board recommended a substantially amended version of Article 9 on secured transactions. Thus far 23 states have adopted the 1972 amendment of Article 9. The remainder continue with the earlier version.

The two versions of Article 9 currently in effect, in themselves, create a significant diversity in commercial law. This, however, is not the only disparity among the various states' enactments. As Mr.

13. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 166-67 (1940).
15. Id.
18. Except for Louisiana which has not adopted Article 9. Id. at 1.
Schnader reported to the Annual Conference of Commissioners on Uniform State Laws in 1966, before the 1972 Amendment of Article 9:

Of the Code's 399 sections 195 have not been amended by any Code jurisdiction. And 76 additional sections of the Code have been amended by only a single state. This makes the picture look somewhat better but, nevertheless, the fact is that as the Code stands on the statute books of 49 jurisdictions, it is not a uniform Code.\(^{20}\)

**Drafting and Interpretational Development of the U.C.C.—Further Steps Away from Uniformity.**

The nonuniformity produced by two versions of Article 9 and the local amendments is compounded by the manner in which some of the uniform portions of the Code were drafted and by the way in which some courts have interpreted the Code. The present discussion examines the drafting and interpretation of Article 2 of the Code to determine the extent to which its theoretical potential for producing uniformity could have been realized, and how it is, in fact, being realized.

The reasons for this focus on Article 2 are threefold: First, the author does not have as his purpose to catalog all examples of nonuniformity under the Code, but rather to suggest the types of nonuniformity that are occurring; second, while Article 2 is perhaps more "open-textured" in its content than any other article, its structure is representative of the entire code; third, Article 2 is relied upon in commercial transactions and cited by courts perhaps more frequently than any other article of the Code.\(^{21}\)

\(^{20}\) Handbook of the National Conference of Commissioners on Uniform State Laws 152 (1966).

\(^{21}\) Of an examined sample of 493 cases decided in 1970, 1971, 1974 and 1975 which were reported in volumes 8, 9 and 16 of the *U.C.C. Reporting Service*, 206 or 42% prominently involved Article 2. Article 9 was prominently involved in 163 or 33%; Article 3 in 90 or 18%; Article 4 in 19 or 5%; Article 8 in 16 or 3%; Article 6 in 6 or 1%; Article 7 in 4 or less than 1%, and Article 5 in 4 or less than 1%. The breakdown of cases by article equals more than the total of 493. While an effort was made to determine which article was predominantly involved in each case, in some instances, of course, more than one article had to be included as prominently involved. The breakdown of the survey for the two two-year periods involved is as follows:

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<td>1970-71</td>
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Professor J.J. White recently conducted an empirical study of three jurisdictions, each surveyed for a one-year period. Professor White found 55 of 219 citations to Article 2
Some of the more significant categories of diversity producing factors in the Code\textsuperscript{22} will be illustrated in this Article by examples from statutory language in Article 2 and from case decisions interpreting Article 2.

Drafting

Sanctioning of Nonuniformity

The drafters, in the general statement of purpose of the Code, call for the liberal construction and application of the Act, "to make uniform the law among the various jurisdictions."\textsuperscript{23} Yet total uniformity on matters of significance was doomed at the outset by the drafters themselves. A blatant example of almost direct sanctioning of nonuniformity on a point of substantial importance is found in section 2-318 on third-party beneficiaries of warranties in the area of product liability.\textsuperscript{24}

Under pre-Code law the issue of warranty and privity was in a state of chaos. The confusion existed at two levels. The first concerned vertical privity: from whom in the vertical chain of distribution, other than the buyer's immediate seller, did warranties run to the buyer? Some jurisdictions held that warranty protection ran from remote sellers such as manufacturers and wholesalers to the ultimate

\textsuperscript{22} The author does not suggest that his categories are exhaustive. For example, another potentially meaningful category of nonuniformity not explored in this Article is nonuniformity resulting from differences in application of § 1-103 supplementary principles of law and equity to Code transactions. See Young, Book Review, 66 COLUM. L. REV. 1571 (1966).

\textsuperscript{23} U.C.C. § 1-102(1), (2)(c). One can ponder whether there is any significance in the order in which the basic "underlying purposes and policies" of the Act are set out in § 1-102(2). On this subsection, see also note 115 infra.

\textsuperscript{24} U.C.C. § 2-318.
buyer. Still other jurisdictions continued to recognize privity as a requisite in warranty actions, but utilized fictions to allow the buyer to recover against remote sellers. A few jurisdictions were beginning to replace traditional warranty reasoning with a strict tort liability theory, under which neither privity nor disclaimers were relevant. The second level of confusion, as to which the same degree of discord obtained, concerned horizontal privity: to whom apart from the immediate buyer did the seller's warranty liability run? The traditional view was that the seller was not liable to anyone with whom he had no contractual relationship. Other courts utilized fictions to circumvent the privity requirement in this context.


27. See, e.g., Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936) (retailer assigned its warranty from the manufacturer when it sold to consumer); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928) (consumer is a third-party beneficiary of the retailer's contract with the manufacturer and, alternatively, retailer is an agent of the manufacturer when sale is made to consumer); Wisdom v. Morris Hardware Co., 151 Wash. 86, 274 P. 1050 (1929) (retailer is consumer's agent when purchase is made from the manufacturer). See generally Gillam, Products Liability in a Nutshell, 37 ORE. L. REV. 119 (1958) (29 theories).


29. Vertical privity refers to the remote sellers (e.g., manufacturers and wholesalers) who passed the goods through the chain of distribution down to the buyer's immediate seller. Horizontal privity refers to those other than the actual buyer who are entitled to the same warranty protection afforded the seller. For example, this group might include members of the buyer's family, guests, or bystanders who are affected by the goods.

30. See, e.g., Torpey v. Red Owl Stores, 129 F. Supp. 404 (D. Minn. 1955) (warranty did not run to buyer's sister); Prinsen v. Russos, 194 Wis. 142, 215 N.W. 905 (1927) (warranty did not run to companion with whom buyer was travelling).

Against this background of confusion, the drafters were totally silent on the important matter of vertical privity and took a most cautious position on the issue of horizontal privity:

A seller’s warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.\textsuperscript{32}

Official Comment 3 explains:

This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. \textit{Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller’s warranties, given to his buyer who resells, extend to other persons in the distributive chain.}\textsuperscript{33}

Left basically undisturbed, pre-Code lack of uniformity on warranty matters continued.

In 1966 the Permanent Editorial Board added the two current additional alternative versions of section 2-318. The first new alternative extends the seller’s warranty liability “to any natural person who may reasonably be expected to use, consume, or be affected by the goods and who is injured in person by breach of the warranty.”\textsuperscript{34} The second alternative is even less restricted. It deletes the “natural person” limitation and the requirement of personal injury, thereby extending the coverage to business entities and allowing recovery for property loss.\textsuperscript{35}

Some states have now adopted each one of the alternatives. Other states have substituted their own version of section 2-318. Most jurisdictions have dropped the vertical privity requirement for recovery in warranty; the requirement still remains in a few jurisdictions. To further exacerbate the differences, a substantial number of jurisdictions have simply replaced the warranty theory with strict tort liability as the primary method for solving problems of product liability.\textsuperscript{36} Even within the strict tort liability jurisdictions, the scope of the liability often differs. Thus, Article 2 has not only not produced uniform prod-

\textsuperscript{32} U.C.C. § 2-318 (1958 version) (designated as Alternative A after 1966).
\textsuperscript{33} U.C.C. § 2-318, Official Comment 3 (1958 version) (emphasis added).
\textsuperscript{34} U.C.C. § 2-318, Alternative B (added in 1966 version).
\textsuperscript{35} U.C.C. § 2-318, Alternative C (added in 1966 version).
ucts liability principles among the various states,37 but it may also have encouraged fruition of the discord which was present in prior case law.

Open delegation to the states, through incomplete drafting, is not the only technique resulting in such conflicts. It has a covert sister: a section can be drafted in such a way as to appear comprehensive and certain but, at the same time, to invite significant differences in interpretation. One example is section 2-202, which is the Article 2 pronouncement of the parol evidence rule:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

To appreciate the lack of uniformity that this section has generated, it is only necessary to consider the wording of section 2-202 in light of the various general contract theories of the parol evidence rule. Each such theory has as its stated purpose ascertainment of the intent38 of the parties. Perhaps the most frequently applied approach has been that of Professor Williston, which determines the intended finality of a writing by its appearance. If it appears final and complete on its face, the parties intended it as final.39 Another widely used approach is that of Professor Wigmore, who purported to reject the Willistonian approach: “[I]ntent must be sought where always intent must be sought . . . ,


38. The key as to intent, of course, is whether subjective or objective intent is the referent. Wigmore and Williston refer almost exclusively to objective. See notes 39 & 40 infra. Corbin emphasizes subjective but gives the objective a role in proving subjective. See note 42 infra. As to the possibility of distortion of actual intent when objective intent is the standard, see E.B. Pashukanis, Theory of Law and Marxism in Soviet Legal Philosophy 187-88 (H.W. Babb trans. 1951); Franklin, A Precis of the American Law of Contract for Foreign Civilians, 39 Tul. L. Rev. 635, 635-44 (1965).

namely, in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice.\footnote{9} According to Wigmore, the factor to determine whether to admit evidence of an extrinsic agreement "is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing."\footnote{41} In other words, the judge must categorize the extrinsic agreement by subject matter, then must look to the writing to determine whether the subject is therein treated. If it is, the parties intended the writing as final on that subject, and evidence of the extrinsic agreement would not be admitted. A third approach was advanced by Professor Corbin. He urged that the court actually attempt to ascertain the intent of the contracting parties:

This is not to say that the defendant's testimony must be believed. Without doubt, the form of the instrument tends to corroborate the plaintiff. Surrounding circumstances and the conduct of the parties should be given due consideration. The finding of the trial court, with or without a jury, should seldom be set aside by an appellate court. But the court should not dodge the determination of the weight of the evidence by appealing to a "parol evidence rule" and finding that a written integration exists without listening to testimony that it does not.\footnote{42}

The text of section 2-202 is susceptible to two interpretations: It may adopt a combination of the Williston-Wigmore views or it may adopt the more subjective Corbin theory. If the word "intended" is interpreted to mean objectively intended, as it traditionally has been in the law of contracts,\footnote{43} section 2-202 may be nothing more than a codification of the Wigmore-Williston theories. The first portion of section 2-202, which focuses on terms "intended by the parties as a final expression of their agreement with respect to such terms as are included therein," can be read to adopt the Wigmore theory of partial integration. If the writing touches on the subject area of the alleged extrinsic agreement, evidence of that agreement would be inadmissible because the parties "intended" the writing to be final on the subject in question. Williston's appearance test is as easily incorporated in the final part of (b). That provision allows supplementation of the agreement by way of "consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement."\footnote{44} According to the Williston view, if it appears final, the parties "intended" it as final. Thus if the subject matter of the extrinsic agreement is dealt with in the writing, the first part

\footnote{9} 9 Wigmore on Evidence § 2430, at 98 (3d ed. 1940).
\footnote{41} Id.
\footnote{42} 3 Corbin on Contracts § 577 at 396-400 (1960).
\footnote{43} See, e.g., Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911).
\footnote{44} U.C.C. § 2-202(b).
of section 2-202 keeps out evidence of the extrinsic agreement; and, if
the writing appears final, the last part of section 2-202 prevents the
writing from being added to.

On the other hand, section 2-202 can just as easily be read to adopt
the Corbin view. All that is necessary to adopt the Corbin view is for
“intended” to be interpreted to mean actually, or subjectively, in-
tended. In such case, both the appearance of finality and the fact that
a particular subject has been referred to in writing could be given con-
siderable weight, but neither would be automatically decisive.

The only hint as to what the drafters intended is contained in
Comment 3: “If the additional terms are such that, if agreed upon, they
would certainly have been included in the document in the view of the
court, then evidence of their alleged making must be kept from the trier
of fact.”

It can be inferred from this that evidence of the extrinsic
agreement should be considered unless there is no reasonable possibil-
ity that the parties could have made the agreement and not included it
in their writing. From the comment it thus appears that section 2-202
was probably intended to adopt an approach closely akin to that urged
by Professor Corbin.

Yet, if this is the design of the section, there is nothing in the text
to suggest it. The likely explanation for this otherwise curious omissi-
on is that it was viewed as tactically wise in gaining support for adop-
tion of the Code. Powerful commercial parties with the advantage of
preparing their own contract forms required that a strict, objective, pa-
rol evidence rule be enacted to preserve that advantage. The support
of these commercial parties was crucial in obtaining widespread enact-
ment of the Uniform Commercial Code, particularly in such commer-
cially-active states as New York.

Thus, there emerged a clear,

45. U.C.C. § 2-202, Official Comment 3 (emphasis added).
46. Some support for this theory can be derived from the selected comments to section
15 of the Proposed Final Draft No. 1 of the Uniform Revised Sales Act (Sales Chapter of
Proposed Commercial Code), April 27, 1944. Section 15 contained a version of the parol
evidence rule substantially the same as that contained in § 2-202 of the 1962 Official Text.
The comment explained: “The question is for the court whether the oral term—real or al-
leged—was so unreasonable to omit from the particular writing that evidence on the matter
must be kept from the trier of fact. . . . The ‘unless’ clause of paragraph (b) [substantially
the same as (b) of 2-202] requires the taking [sic] of a distinction. It is both parties who
must have intended the writing as a complete and exclusive statement of the terms agreed
upon, and printed forms prepared by one party are not commonly so examined by the other
as to evidence the kind of intention which can properly be held to result in excluding from
the trier of fact evidence of additional terms consistent with those actually dickered about
and recorded specifically in the particular contract.” No such strong interpretational gui-
dance appears in the Official Comments to § 2-202.

Another theory, not altogether inconsistent with the one advanced in the text to this
note, may explain the nebulousity of § 2-202. According to Professor David Carroll, Profes-
sor Llewellyn, and other academics, in the effort to formulate a socially balanced commer-
formal statement, but one of nebulous content, of the parol evidence rule—one that eventually could be given content by the courts of the various states.\footnote{Although a more liberal version of the rule might slowly evolve, in many jurisdictions the dominant objective tests of the rule will certainly continue to have effect in the interpretation of the section.}{\footnote{7}}

Some legal principles either inherently cannot be, should not be, or are not yet ready to be, formulated with the degree of precision necessary to obtain uniform interpretation when considered by a substantial number of separate jurisdictions. A prime example of a formulation which would seem to fit all three categories is section 2-\text{302}, which declares:

\begin{quote}
(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.
\end{quote}

Although perhaps the concept of “unconscionability” could have been better explained in the Official Comments than it was,\footnote{See Carroll, \textit{Harpooning Whales}, of Which Karl N. Llewellyn is the Hero of the Piece; or Searching for More Expansion Joints in Karl’s Crumbling Cathedral, 12 B.C. IND. & COM. L. REV. 139 (1970).} the nature and purpose of the concept prescribe against its precise definition. It is designed to prevent “oppression” that is not gross enough to be recognized as duress, and “unfair surprise” that falls short of being legally-recognized fraud, and thus injects into the law of contracts an enlarged standard of decency. As a bargain-policing device, the concept is a

\cite{footnote:47}

\cite{footnote:48}

\cite{footnote:49}
direct descendant of the traditional concept of fraud. And as Lord Chancellor Hardwicke so aptly said of that concept back in 1745:

The court very wisely hath never laid down any general rule beyond which it will not go, lest other means of avoiding the equity of the court should be found out: Therefore they always determine upon the particular circumstances of each case; and wherever they have found the least tincture of fraud in any of these oppressive bargains, relief hath always been given.\footnote{Lawley v. Hooper, 3 Atk. 278, 279, 26 Eng. Rep. 962, 963 (1745).}

Likewise today with the concept of unconscionability, a precise definition, if it did not invite circumvention, would at least tempt contract drafting to the very limits of conscionability, thereby tending to defeat its basic purpose.

This is not to say that the concept should forever be the "baseless fabric of a vision."\footnote{W. SHAKESPEARE, THE TEMPEST, Act IV, scene 1, line 151.} Rather as experience in its application is accumulated, it should begin to acquire more precise meaning.\footnote{On how the concept should acquire more precise meaning, see generally Llewellyn, Book Review, 52 HARV. L. REV. 700 (1939).} Yet, it is important that it not become rigidified. Professor Sanford Kadish's observation concerning due process is equally applicable to unconscionability: "Freezing the meaning of due process, which in the final analysis is more of a moral command than a strictly jural precept, destroys the chief virtue of its generality: its elasticity."\footnote{Kadish, Methodology and Criteria in Due Process Adjudication, 66 YALE L.J. 319, 340-44 (1957).} Flexibility is essential if unconscionability is to achieve its purpose. Although it must have enough content both to discourage undesirable contractual conduct and to provide a guideline for decisionmaking, it should also, like a chalice, remain ready to receive new content as societal attitudes toward contractual decency change or become in need of stimulation for change.\footnote{Professor White's empirical study showed § 2-302 to have been the most frequently cited single section in one jurisdiction surveyed and the second most frequently cited in the second jurisdiction; the section was not enacted in California, the third jurisdiction surveyed. White, supra note 15, at 1269. "Good faith" is another Article 2 concept quite similar in this regard to unconscionability. On how the law does not and should not reflect just social reality, but should also influence change of that reality, see Jones, The Creative Power and Function of Law in Historical Perspective, 17 VAND. L. REV. 135 (1963).}

Other Article 2 sections should also remain as nebulous as the section 2-302 doctrine of unconscionability. Among the more prominent of these other Article 2 sections are the sections containing "reasonableness" as their operative standard.\footnote{See, e.g., U.C.C. §§ 2-103(1)(b), 2-305(1) & (3), 2-306(1), 2-309(1) & (3), 2-311(1), 2-}
situation.\textsuperscript{56} Because no two fact situations are ever the same, one could conclude that it is inappropriate to discuss uniformity or lack of uniformity in the context of determinations of "reasonableness." To a very significant extent this is true; yet, detectable differences in perceptions of "reasonableness" in like kinds of cases are inescapable. For example, section 2-602 requires that a rejection of goods must take place within "a reasonable time after their delivery," or if it does not, section 2-606 declares the occurrence of an acceptance. In \textit{Carl Beasley Ford, Inc. v. Burroughs Corporation},\textsuperscript{57} the seller by June had completed delivery of an electronic accounting machine and thirteen programs. When the machine did not perform properly, the seller made efforts to correct the malfunction and assured the buyer in September that the buyer's accounting records would be current by November 1. When that failed to come to pass, on December 11 plaintiff's counsel wrote a letter to defendant rejecting the machine. The court held "notice of rejection, written six weeks after the November 1 date passed, was reasonable."\textsuperscript{58} A somewhat stricter approach to rejection was taken in \textit{Gardner & Beedon Co. v. Cooke}.\textsuperscript{59} The goods, also apparently electrical equipment, were delivered to the buyer on November 15. Finding the occurrence of an acceptance in that case, the court declared: "This action was commenced on December 16 . . . . The difference between the two dates, being more than 20 days, represents, in our opinion, a reasonable time within which any inspection and rejection should have been made of goods of the type involved here."\textsuperscript{60}

A similar difference in definition of "reasonableness" is revealed by cases interpreting section 2-607(3)(a) which provides, as a requisite for recovery for breach of warranty, that "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." In \textit{Romedy

\textsuperscript{56} There cannot and, of course, should not be a strict definition of "reasonableness." Corbin states that "[r]easonableness is no more absolute in character than justice or morality. Like them it is an expression of the customs and mores of men—the customs and mores that are themselves complex, variable with time and place, inconsistent and contradictory. Nevertheless, the term is useful, giving direction to judicial research, and producing workable results." \textit{1 Corbin on Contracts} § 1 (1963).


\textsuperscript{58} \textit{Id.} at 331.

\textsuperscript{59} 267 Or. 7, 513 P.2d 758 (1973).

\textsuperscript{60} \textit{Id.} at 12, 513 P.2d at 760-61. The goods involved were electrical equipment. For another rather sharp difference as to the reasonable time frame within which a rejection must take place, \textit{compare} Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968) \textit{with} Rozmus v. Thompson's Lincoln-Mercury Co., 209 Pa. Super. Ct. 120, 224 A.2d 782 (1966).
v. Willett Lincoln-Mercury Inc., the court held, as a matter of law, that failure by the buyer, apparently a consumer, to notify the dealerseller of an alleged breach of warranty for three weeks after knowledge of the defect precluded satisfaction of section 2-607(e). In Matsushita Electric Corporation v. Sonum Corporation, notice by a commercial buyer to a commercial seller within one month of acquiring knowledge of the alleged defect was viewed as sufficient to satisfy the reasonable time requirement of section 2-607(3).

Drafting Mishaps

When a committee engages in drafting a comprehensive piece of legislation, some slips of the pen are inevitable. Such drafting mishaps in the Uniform Commercial Code are of two general types. In some instances there is simply an unnecessary lack of precision which invites nonuniform interpretation. In other instances there is an apparent lack of consistency which creates competing interpretational possibilities.

One prime example of unnecessarily imprecise drafting is section 2-102, which declares the scope of Article 2: "Unless the context otherwise requires, this Article applies to transactions in goods . . . ." In addition, most Article 2 sections are formulated to be applicable to sales or contracts for sale. Thus, so long as a transaction involves nothing more than a sale of goods, Article 2 is clearly applicable. Yet frequently sale of goods transactions have additional dimensions. For example, services may be an integral part of the contract. Article 2 offers no real help in determining to which hybrid transactions it ought to be applied, and several differences in approach have already developed.

One approach that has been frequently applied can be described as the "final product" test. If the final product being sold consists of

62. The trial judge directed a verdict for the defendant buyer because "the plaintiff buyer, although having an opportunity to do so, failed to inspect the automobile for four or five days after delivery, failed to notify the defendant seller of the alleged breach for three weeks thereafter, and continued to make payments with knowledge of the defects." The Court of Appeals held that the trial judge did not err in directing the verdict. Id. at 67, 220 S.E.2d at 75.
64. Actually, as the text indicates, § 2-102 makes Article 2 applicable to "transactions in goods." However, many important Article 2 sections are worded so as to require an actual sale or a contract for sale. See, e.g., U.C.C. §§ 2-204, 2-305, 2-314. Others refer specifically to buyer or seller. See, e.g., U.C.C. §§ 2-507, 2-607, 2-704, 2-712. Thus, as a practical matter, much of the applicability of Article 2 is limited to sales of goods and contracts for the sale of goods. Other sections, given their wording and the wording of § 2-102, could apply to any type of contractual transaction involving goods such as a contract to repair, install or lease. See, e.g., U.C.C. §§ 2-207, 2-209.
goods, then Article 2 applies without regard to the substantial portion of the consideration that could be attributed to the services expended in the preparation of the final product.\(^{65}\) Other courts have attempted to ascertain which element of the transaction, for example services or sale of goods, is dominant from an economic point of view. For Article 2 to be applicable, one of two criteria must be met. If the dominant economic element is a sale of goods, Article 2 will apply.\(^{66}\) If the contract is divisible so as to separate the sale of goods dimension from the remainder, Article 2 is applicable to the sale of goods portion.\(^{67}\) Still other courts have adopted the view that any hybrid transaction substantially involving goods is subject to Article 2.\(^{68}\) The net result of the differing approaches is that Article 2 has a much more expansive scope in some jurisdictions than it does in others. As a result, there is nonuniformity even as to what transactions the uniform law applies.\(^{69}\)

\(^{65}\) Thus, in Carpel v. Saget Studios, Inc., 326 F. Supp. 1331 (E.D. Pa. 1971), a contract to supply wedding pictures was held to be within the scope of Article 2. In Lake Wales Publishing Co. v. Florida Visitor, Inc., 335 So. 2d 335 (Fla. Dist. Ct. App. 1976), a contract for the compiling, editing, and publishing of vacation advertising pamphlets was held to be within Article 2.

\(^{66}\) Thus, in For Children, Inc. v. Graphics Int'l, Inc., 11 U.C.C. Rep. Serv. 1176 (S.D.N.Y. 1972), a contract to produce and print a large quantity of children's "pop-up" books was held to be primarily a contract for the sale of services, thus not within the scope of Article 2.

\(^{67}\) The failure to provide a price breakdown between labor and materials, plus the fact that the dominant dimension of the contract was viewed to be services, led to a holding that Article 2 was inapplicable to a contract to install an above-ground swimming pool in Gulash v. Stylarama, Inc., 33 Conn. Supp. 108, 364 A.2d 1221 (C.P. 1975). For a decision that might be interpreted to stand for the proposition that a hybrid transaction involving any substantial nonsale of goods element is not within the ambit of Article 2, see J & R Elec. Div. of J.O. Mory Stores, Inc. v. Skoog Constr. Co., 38 Ill. App. 3d 747, 348 N.E.2d 474 (1976).


\(^{69}\) While total precision would not be possible in this case, more precision is clearly possible. It is possible that the failure to attempt formulation of more concrete guidelines in § 2-102 was purposeful. Opponents of the uniform-law movement frequently viewed the effort as a threat to state sovereignty or more particularly as a threat to the right of a state to develop its own private law. An expansive version of Article 2 could easily have been perceived as a threat to the general contract law of the various states. For a thoughtful discussion of the various approaches to the scope of Article 2, see Note, 9 Rut.-Cam. L.J. 303 (1978).
One example of the type of drafting inconsistency that produces nonuniform interpretation is present in section 2-316(2) and (3):

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description of the face hereof."

(3) Notwithstanding subsection (2)

(a) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage or trade.

One apparent problem is that what section 2-316(2) gives in the way of the conspicuousness requirement, section 2-316(3) seems to take away. In reading the conspicuousness requirement into (3) and thereby refusing to interpret (3) literally, the court in Fairchild Industries v. Maritime Air Service, Ltd. declared:

Yet, the words "as is," even if buried in the fine print of a lengthy document, would exclude all implied warranties. We fail to see how this anomalous result would further the avowed purpose of §2-316 to protect a buyer from unexpected and unbargained language of disclaimer. The words "as is" are sufficient to put the buyer on notice that there are no implied warranties, but only when they are brought to the attention of the buyer.

One argument for no requirement of conspicuousness in (3) is the one advanced by the dissenting judge in Fairchild.

70. Another problem with § 2-316 is that subsection (2) seems to say that any effective disclaimer of the implied warranty of merchantability must specifically mention the word merchantability. Subsection (3) appears to override totally that provision of subsection (2). Compare Admiral Oasis Hotel Corp. v. Home Gas Indus., Inc., 68 Ill. App. 2d 297, 216 N.E.2d 282 (1965) (disclaimer must specifically use word "merchantability" to be effective) with Gilliam v. Indiana Nat'l Bank, 337 So. 2d 352 (Ala. Civ. App. 1976) (need not mention merchantability if "as is" is used).

71. 274 Md. 181, 333 A.2d 313 (1975).

72. Id. at 187, 333 A.2d at 316-17.
"If Parliament does not mean what it says, it must say so." ... I simply remain unpersuaded that the prepositional phrase "Notwithstanding subsection (2)" with which subsection 2-316(3) of the Uniform Commercial Code begins means anything other than all implied warranties are excluded when goods are sold "as is" or "with all faults," in spite of the conspicuousness required for the exclusion or modification of an implied warranty of merchantability or of fitness by § 2-316(2).73

Interpretation

Interpretational Mishaps

Even when the drafting of a statutory provision is clear, some interpretational mistakes are inevitable. For example, if a case is within the ambit of section 2-201, Article 2's statute of frauds, the basic requirements of subsection (1) must be met or the case must fall within one of the four exceptions contained in the remainder of the section. Otherwise the party claiming the existence of the contract is not entitled even to introduce evidence of the existence of the contract.74 Once
the statute is satisfied, the party claiming the existence of the contract is entitled to introduce evidence to support the claim, but the burden is on that party to establish the existence of the contract. In other words, satisfaction of the statute does not prove the existence of the contract, it only opens the door to introduction of evidence to prove the contract.

One example of a misinterpretation of the statute involved section 2-201(2), which declares:

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.

The intended effect of this subsection is reiterated in Official Comment 3: "The only effect . . . is to take away from the party who fails to answer the defense of the Statute of Frauds; the burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation is unaffected." Section 2-201(2) does not state that the terms of a written confirmation are themselves binding. In the face of the wording of the section and the explanation of it in the comment, the Nevada Supreme Court in Campanelli v. Conservas Atamira, S.A. held: "If a buyer-merchant fails to object to the written confirmation of an agreement from a seller-merchant, within ten days of its receipt, the writing becomes a binding contract. . . . The 'advice of sale' became a binding contract between the parties and they were bound by the arbitration clause which it contained."776

Another, and perhaps the most frequently cited, example of a serious interpretational error is the reasoning of the court in Roto-Lith, Ltd. v. F.P. Bartlett & Co.77 In that case, the common-law "last shot" doctrine of contract formation managed to survive despite the clear language of section 2-207. In Roto-Lith the buyer fired the "first shot" by ordering goods. The seller returned an acknowledgement and an invoice containing a clause limiting its liability to replacement of any

77. 297 F.2d 497 (1st Cir. 1962). This discussion of Roto-Lith is in large part a summary of Taylor, U.C.C. Section 2-207: An Integration of Legal Abstractions and Transactional Reality, 46 U. Cin. L. Rev. 419, 428-31 (1977).

Roto-Lith may well represent an example of intentional misinterpretation. In places in the opinion, one gets the impression that the court simply could not believe that the legislature intended what it said when it adopted § 2-207. Thus, the court may have committed an interpretational error in an effort to undo what it perceived as a drafting mishap. See 297 F.2d at 500.
defective goods. The buyer did not respond in any way to the seller’s acknowledgement. All indications from the case are that the parties had not had significant previous dealings with each other. The goods were delivered, received, paid for and used. The buyer subsequently sued to recover damages for loss caused by the alleged unmerchantability of the goods. The seller answered that such recovery was precluded by the limitation of liability term in the contract. The trial court directed a verdict for the defendant-seller, and the decision was affirmed on appeal. The buyer focused on section 2-207(1) and (2), arguing that the seller’s acknowledgement was a definite and seasonable expression of acceptance, that the additional limitation of warranty liability term was materially altering and therefore excluded by section 2-207(2)(b) and that, therefore, the section 2-314 implied warranty of merchantability was operative in this transaction. The court, obviously influenced by its common-law background, reasoned that the seller did not intend to contract on the buyer’s terms so those terms should not control the content of the contract.

To reconcile its decision with the statute the court engaged in some tortuous interpretational gymnastics. It focused on the last clause of subsection (1) which precludes application of the earlier acceptance provision of that section if the “definite and seasonable expression of acceptance” is “expressly made conditional on assent to the additional or different terms.” As to this last clause, the court declared: “To give the statute a practical construction we must hold that a response which states a condition materially altering the obligation solely to the disadvantage of the offeror is an ‘acceptance... expressly... conditional on assent to the additional... terms.’”

In other words, the court decided that impliedly conditional can be expressly conditional if the response is materially altering in a manner “unilaterally burdensome” to the offeror. Following from this was the court’s conclusion that the seller’s response was a counteroffer which was accepted by the buyer when it received the goods without objection. Thus, in *Roto-Lith* the “last-shot doctrine” lived on in the strange disguise of section 2-207.

Although the court was probably correct in determining that no contract should be found under section 2-207(1), because that section and its content-determining corollary, subsection (2), are intended to operate only in those instances in which the agreement process is meaningfully employed to produce a concurrence of intent sufficient to be called a bargain. However, rather than characterizing the seller’s response as a counteroffer because it set out new terms unilaterally burdensome to the buyer, the court should have used section 2-207(3) to
determine contract formation and content. Subsection (3) presupposes no substantially complete agreement in a bargained sense, but instead bases contract formation on a pattern of conduct by the parties which reflects an intent to be bound contractually, for example, delivery and receipt of goods. As in implied-in-fact contracts generally, formation is decided on the basis of intent derived from conduct. The problem of contract content is addressed in the last sentence of subsection (3): "[T]he terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

Thus the court in *Roto-Lith*, in effect, rewrote section 2-207(1) and repealed subsection (3). Fortunately, the decision does not seem to be producing progeny.

**Legitimate Differences**

Statutory drafting cannot provide for every contingency. As Professor Grant Gilmore so well expressed it: "[T]here is a point beyond which it is unprofitable for even the most resolute and ingenious draftsman to chase the wild goose."

Legitimate interpretational differences are inevitable if there is not one final arbiter of the meaning of a statute.

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Other rather clear examples of statutory misinterpretation are cases applying the § 2-315 implied warranty of fitness for a particular purpose where the defect affects ordinary use. See, e.g., Larbrace Tank Corp. v. Burrough, 476 P.2d 346 (Okla. 1970) (leaky gasoline storage tank held not fit for the storage of gasoline); Walker v. Decora, Inc., 225 Tenn. 504, 471 S.W.2d 778 (1971) (floor that gave off offensive odor might not be fit for its particular purpose). Other cases have made the distinction between particular purpose and ordinary purpose. See, e.g., Blockhead, Inc. v. Plastic Forming Co., 402 F. Supp. 1017 (D. Conn. 1975); Recreatives, Inc. v. Myers, 67 Wis.2d 255, 226 N.W.2d 474 (1975). Of course, there is a case to be made for the misinterpretation. If the distinction is made, it could prevent a buyer from recovering against a nonmerchant seller who sells a good not fit for its ordinary purpose. Section 2-314 would not be applicable because the seller was not a merchant. Section 2-315 would not apply because no particular purpose was involved.

For another example of likely misinterpretation, see Keystone Diesel Engine Co. v. Irwin, 441 Pa. 222, 191 A.2d 376 (1963) (seems to hold that seller must have tacitly agreed to assume liability for the particular consequential damage before buyer can recover consequential damages under § 2-715).

81. 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 22.9, at 631 (1965)

82. This is not to suggest that one interpretation is not arguably better than another; it is to suggest that reasonable people might differ on which is better. In fact, proper interpretational methodology will usually point to one interpretation. For an example, see notes 88-90 & accompanying text infra. On code interpretational methodology, see Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 330 (1951).
One such interpretational difference has developed in the application of the buyer's revocation of acceptance remedy under section 2-608 where the buyer continues to use the goods after giving notice of revocation. Some courts, reasonably enough, at least from an interpretational point of view, have held that such continued use precludes revocation of acceptance. That result is reached via section 2-608(3), which contains the general declaration that "[a] buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them." Under section 2-606(1)(c) an "act inconsistent with the seller's ownership" is an acceptance and under section 2-607(2) acceptance precludes rejection. From this it is reasoned that the act of continued use, because it would preclude rejection at the outset, also precludes revocation of acceptance after discovery of the defect. 83

Other courts have been persuaded by the fact that nowhere in section 2-608 is it provided that continued use after knowledge of a defect bars revocation of acceptance. It has been held, particularly in situations where the revoking buyer continued to use the defective goods in good faith, that continued use does not bar revocation of acceptance. 84 This result is defensible conceptually under at least two theories. First, section 2-608(3) speaks of "rights and duties," and while continued use might be a breach of duty, there is no clear statutory mandate that the consequence of that breach of duty be the same as continued use in the acceptance-rejection context. Second, these cases are likely to be explainable under a traditional estoppel rationale. Where the buyer's claim of a "substantially impairing" defect is well-grounded, it is the seller's refusal to accept back the goods and to return the purchase price that frequently necessitates the continued use, so the seller should be estopped from asserting the "continued use" against the buyer.

Article 2's theory of express warranty represents another point on which a substantial and legitimate difference in approach is developing. Under section 2-313(1) any "affirmation of fact," "description of

84. See, e.g., Jorgensen v. Pressnall, 274 Or. 285, 545 P.2d 1382 (1976); Fablok Mills, Inc. v. Cocker Machine & Foundry Co., 125 N.J. Super. 251, 310 A.2d 491 (App. Div. 1973) (seller was the only domestic manufacturer of the type machine that buyer continued to use); Stroh v. American Recreation and Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975) (buyer continued to occupy mobile home in which he lived after giving notice of revocation). In Stroh the court held that the buyer's continued occupancy entitled the seller to set off the value of the continued use against the purchase price to be returned.
the goods,” “sample or model” which becomes part of the “basis of the bargain” is an express warranty. The paramount problem is the meaning of “basis of the bargain.” Under the Uniform Sales Act, to recover on an express warranty theory the buyer had to prove reliance on the warranty. Notwithstanding a suggestion to the contrary in the Official Comments, some courts have held reliance essential in proving a case of breach of warranty under section 2-313. This result is defensible when one thinks of bargain as connoting inducement (hence reliance).

Other courts, however, have perceived bargain as used in section 2-313 to be synonymous with contract as that term is used in Article 2, and have held that reliance is not a requisite to recovery for breach of express warranty. Such a result is consistent with the Article 2 emphasis on protection of the “expectancy” interest without the necessity of a bargained-for-exchange. In other words, no particular element

88. Bigelow v. Agway, Inc., 506 F.2d 551 (2d Cir. 1974) (representation made after a sale created express warranty); Young & Cooper, Inc. v. Vestring, 214 Kan. 311, 521 P.2d 281 (1974); Interco, Inc. v. Randustrial Corp., 533 S.W.2d 257 (Mo. Ct. App. 1976). Perhaps the most daring decision to date on the matter of “basis of the bargain” is Winston Indus., Inc. v. Stuyvesant Ins. Co., 55 Ala. App. 525, 317 So. 2d 493 (Ct. App. 1975). In Winston Industries, the plaintiff not only did not rely on the warranty but apparently it was not delivered to him at the time of the sale and he did not become aware of its existence until after the dispute over the quality of the goods arose. The court held that the warranty issued to plaintiff’s benefit. A strong dissenting opinion declared: “I am unable to determine how a warranty can be created without knowledge of its existence by the purchaser. Creation of an express warranty requires affirmation of fact or promise by the seller to the buyer relating to the goods, which affirmation or promise becomes part of the basis of the bargain. Such affirmation or promise must be made known to the purchaser if it is to form any basis for the bargain.” Id. at 532, 317 So. 2d at 499. To the contrary, the majority’s position is quite defensible, though their reasoning may not be. If “basis of the bargain” is synonymous with legitimate expectancy interest, the ordinary reasonable person might well expect to be protected by any standard warranty on the product even though he or she is unaware of the warranty. In Winston Industries, the warranty of which plaintiff was unaware was a standard one that had not been delivered to him at the time of the sale. Thus it may well be that plaintiff had a legitimate expectancy interest deserving protection under the concept of “basis of the bargain.”
89. See, e.g., U.C.C. §§ 2-209, 2-205, 2-207.
The expectancy interest approach to § 2-313 is not totally dissimilar to the older reliance requirement for express warranties, for it, too, contains an element of inducement. Ordinarily, the reasonable expectation must be induced by words or conduct of the seller. For an exceptional case to the contrary, see the discussion of Winston Industries, note 88 supra. What is being changed is that the legally protected reasonable expectation can arise without there being a detrimental change of position in reliance on the representation.


92. See, e.g., Thomas, The Federal Sales Bill as Viewed by the Merchant and the Practitioner, 26 VA. L. REV. 537 (1940) (author favored enactment of bill). Even those who viewed Congress as having such power at this time viewed it as being limited to interstate transactions. See, e.g., McCurdy, Uniformity and A Proposed Federal Sales Act, 26 VA. L. REV. 572 (1940).

93. The then Chief Justice of the Tennessee Supreme Court, A.B. Neil, in an article entitled The Uniform Commercial Code, 27 TENN. L. REV. 12 (1959), strongly opposed en-
Because of the perceived uniqueness of each state, uniformity, while sought, can never be totally attained. The accommodation of the states' rights attitude requires that an overall scheme of harmony in accord with the uniqueness of each state must be the goal. Thus local amendments are inevitable, and there is a need to emphasize, or at least to be free to emphasize, local interests in the application of legal principles. A fifth consideration in the continuing vitality of the states' rights philosophy is the perception that the states' rights philosophy is more consonant with individual liberty and is thus a buffer against the threat of tyranny inherent in a large central government. Those embracing this view fear that federal intrusion into state commercial law could only be a step on the path to overall federal domination of the states. Sixth, the state-by-state approach is said to provide the necessary flexibility for experimentation by one state that could produce a better means for treating a particular type of problem for all the states.

Apart from the philosophical sacrifice of states' rights interests by enactment of a federal commercial code, the tenth amendment itself would probably not prevent the constitutional enactment of such a code under Congress' broad commerce power. The recent case of National League of Cities v. Usery indicates, as Justice Frankfurter once said, that the tenth amendment can be "invoked not simply as a redundant reminder that what the Constitution did not give it withheld, but as a generating principle of restriction upon the affirmative grants of national power." While National League of Cities may breathe
life into the tenth amendment, that amendment's new vitality is no threat to a federal commercial code. Unlike National League of Cities, which held that the application to state and municipal employees of a federal minimum-wage regulation enacted under the commerce clause violated the state's tenth amendment right "to structure integral operations in areas of traditional governmental functions," a federal commercial code would interfere only with the scope of private law formulation previously controlled by state courts and legislative bodies. Impressive support is available for such an extension of congressional power. For example, protection against criminal acts taking place entirely within one state has ordinarily been perceived as a local problem. Yet in Perez v. United States, the defendant was convicted of "loan sharking" under the Federal Consumer Credit Act for making threats of violence in collecting a debt from a local merchant. In upholding the conviction, the court noted that one category of problems reached by the commerce clause was those affecting interstate commerce. The court then concluded: "Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce. . . . Loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations." If Congress can regulate intrastate crimes that affect interstate commerce, certainly Congress can regulate intrastate commercial transactions which inescapably must affect the sum total of national commerce.

Darby, 312 U.S. 100 (1941): "The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. . . . From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." Id. at 124.

99. 426 U.S. at 852.
100. See Bradley v. Public Utilities Comm'n, 289 U.S. 92, 95 (1933).
102. Id. at 150.
103. Id. at 154. See generally G. Gunther, Cases and Materials on Constitutional Law 194-203 (9th ed. 1975). Mr. Justice Stewart was the lone dissenter in Perez, urging that application of the statute in this intrastate instance contravened the ninth and tenth amendments. 402 U.S. at 157-58.
104. No serious constitutional questions have arisen concerning the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1975), which covers a portion of that which would be included in a comprehensive federal commercial code.
Federal and Mixed Models

As is almost always the case with any legal goal, uniformity of commercial law can be pursued in a number of different ways. The choice of which way is intricately interwoven with difficult value judgments balancing between conflicting themes. Varying degrees of either uniformity or individual state power must be sacrificed depending upon the approach selected.

One approach is a federal commercial code. Of course, such a code would not need to go beyond those matters in which uniformity is perceived as essential. Thus, it could leave substantial leeway for the enactment of supplementary local rules. One method of maximizing uniformity of the essentials of commercial law would be to limit jurisdiction in cases arising under the federal code to the federal courts. Such a drastic shift of state power to the federal government would be politically unattainable, perhaps philosophically unwise, and in any event practically unfeasible because of the effect it would have on the already overcrowded federal courts.105

A more practical variation of the federal enactment model would be adoption of the sort of judicial jurisdictional division contained in the Magnuson-Moss Warranty Act.106 There jurisdiction over actions arising under a federal statute is vested in both state and federal courts. However, the jurisdiction of the federal courts is severely restricted by a substantial jurisdictional amount requirement.107

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105. On the overcrowded condition of our federal courts, see Chief Justice Burger's 1977 Report to the American Bar Association, 63 A.B.A.J. 504 (1977); Burger, Annual Report On the State of the Judiciary, 62 A.B.A.J. 443 (1976); Burger, The State of the Judiciary, 61 A.B.A.J. 439 (1975); Carrington, Crowded Dockets and the Courts of Appeal: The Threat to the Function of Review and the National Law, 82 Harv. L. Rev. 542 (1969); Stolz, Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity, 64 Calif. L. Rev. 943, 950-59 (1976). Of course, the impact that any federal commercial code might have on the case load of federal courts would be softened significantly if the proposed abolition of federal diversity jurisdiction passes Congress. This proposal has currently been passed in the House of Representatives. N.Y. Times, Mar. 1, 1978, at B14, col. 1. However, abolition of diversity jurisdiction might destroy one of the more significant covertly unifying forces of general law in the United States. See Thomas, The Erosion of Erie in the Federal Courts: Is State Law Losing Ground? 1977 B.Y.L. Rev. 1 (1977), where it is suggested, in a critical manner, that federal judges frequently ignore state law in diversity cases and that this tendency is contributing to the nationalization of law in this country. For additional support for the importance of federal diversity jurisdiction, see Moore & Weckstein, Diversity Jurisdiction: Past, Present, and Future, 43 Tex. L. Rev. 1, 30 (1964); Wright, The Federal Courts and the Nature and Quality of State Law, 13 Wayne L. Rev. 317, 330-33 (1967). Perhaps purposeful selection of the areas of law that should be nationalized, such as commercial law, is preferable to the sort of haphazard nationalization that is inevitable when the process occurs in diversity cases.


107. While the statute grants concurrent jurisdiction to the federal and state courts, to be brought in federal court the amount in controversy must equal at least $50,000 and, in addi-
On first blush such an approach might seem insufficient to accomplish the desired degree of uniformity because it would still leave the courts of the various states to interpret the code. This approach, however, would preclude local amendments on the essentials of commercial law, and because the Code would not have to be sold on a state-by-state basis, it is likely that more precise drafting could be accomplished on some of the more controversial matters. Thus several important factors contributing currently to nonuniformity would be precluded simply by the enactment of a federal code. Unquestionably, some nonuniformity would be produced through varying interpretations by state courts. Yet, even the interpretationally inspired nonuniformity might well be less than it is today if a federal code were enacted. Professor Grant Gilmore has noted an important outgrowth of *Swift v. Tyson*, in which the Supreme Court held that federal courts would apply the general law of commerce rather than state law in general commercial law cases:

During the second half of the nineteenth century the Supreme Court of the United States became a great commercial court: the rules which it announced were, in nine cases out of ten, gladly followed by the state courts as well as, of course, by the lower federal courts. A remarkable degree of national uniformity in the law applicable to commercial transactions was in fact achieved over a remarkably long period of time. If a federal code rather than state law becomes the primary source of our commercial law, it is not at all unlikely that state courts would give considerable deference to federal court decisions.

Of course, as long as there is no ultimate arbiter of interpretational differences, some differences are inevitable. As long as the various state supreme courts have the final word in a vast majority of commercial cases some variations in the interpretation of a federal code will be inescapable. Perhaps the number of such variations that would persist under this approach would be negligible.

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4. Involvement of the federal courts in the interpretation of a federal code might do more than just contribute to uniformity. Professor White, on the basis of data gathered in his recent empirical study of Article 2, has expressed doubt about the quality of interpretation and application of Article 2 in the three states studied. White, *supra* note 22, at 1278-82. If the speculations of some are correct that federal judges are on the whole more able than their state counterparts, expanded federal involvement should improve the quality of interpretation and application of a commercial code. See generally Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 23 (1964); Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 327 (1967).
On the other hand, if an even higher degree of uniformity is thought desirable, there would seem to be a way to accomplish it, and still leave the great bulk of commercial litigation in the state courts. While Congress has never vested general appellate jurisdiction over state courts in any federal court other than the Supreme Court, the language of article III suggests that there would be no constitutional problem with such a measure. Such an approach, of course, could not guarantee uniformity from circuit to circuit, but certainly the potential degree of nonuniformity possible under such a scheme is considerably lessened. Furthermore, with the availability of certiorari jurisdiction from the Courts of Appeals to the United States Supreme Court, vital questions upon which nonuniformity between circuits had developed could be resolved by the Supreme Court.

Conclusion

What has happened with the Uniform Commercial Code, when considered along with the history of earlier uniform statutes, suggests that we are again moving toward significant nonuniformity. Because of state-option, alternative sections and local amendments, the Code originated with nonuniformity, and the subsequent decisional process has evolved more and more nonuniformity, to the point of the very multiformity that necessitated the two previous uniformity movements.

Perhaps this is the best possible course. Because of this Code's inevitable breakdown, it guarantees another reexamination and reformulation of commercial law. Each old code will periodically be replaced by a new streamlined uniform code. State-by-state enactment satisfies the needs of the states' rights theme. While it does not accomplish uniformity, it does achieve a degree, though an ever diminishing degree, of basic harmony.

In the quest for uniformity, the maximum of state power is preserved by the state-by-state enactment approach that we have now. At the same time the degree of uniformity attained is the lowest among the various approaches that could be described as pursuits of uniformity.

Of course, the record of the federal courts in interpreting the Uniform Commercial Code is not unscathed. See notes 77-79 & accompanying text supra.


112. If a National Court of Appeals is established as recommended by COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975), it could be utilized to review state court decisions based on a federal commercial code and thereby attain a high degree of commercial law uniformity. For a brief description of how such a court might operate, see Rosenberg, Planned Flexibility to Meet Changing Needs of the Federal Appellate System, 59 Cornell L. Rev. 576, 591-95 (1974). But see Goldberg, There Shall Be "One Supreme Court," 3 Hastings Const. L.Q. 339 (1976).
This is not to say that the approach does not produce an important degree of uniformity; it does. The highest degree of uniformity has been achieved with the simplest rules, which for one reason or another have not been subjected to local amendment. For example, in Article 2 cases, consideration is no longer essential for the modification of a contract. Also, unless the parties agree otherwise and unless the goods are identified and known by the parties to be located elsewhere, the general rule as to place for delivery under a sale of goods contract is the seller’s place of business, unless there is none, in which case it is the seller’s residence. Beyond this type of rule, uniformity begins to break down because of local amendments and the various other factors discussed above that produce nonuniformity. Even within the breakdown, the degree of nonuniformity, at least on a per rule basis, falls short of anything that could be described as chaotic. In fact, in a majority of instances the nonuniformity breaks down into simply a choice between two alternatives, such as, for example, whether continued use of goods after discovery of a defect precludes a section 2-608 revocation of acceptance or whether it does not. Of course, when one figures the number of combinations possible in light of the number of instances of nonuniformity and the number of individual states, the commercial law of each state appears labyrinthine. Yet there is a substantial degree of harmony. Every Code state is operating within the same general framework, and while a specific case might be decided differently from one state to another, one who understands the law of one state has the basis for understanding the law of the other.

Still, persuasive arguments can be made in favor of a federally-enacted commercial code. Although leeway could be allowed for state enactment of ancillary principles covering matters of local interest, the text of the basic commercial code would be one throughout the nation, making commercial law more readily known and more predictable for business interests. Multi-state business would certainly prefer to use one form and confront only one body of law. Theoretically, a federal code should be a benefit to commerce, which in turn should contribute to overall commercial prosperity. The federal approach would also fulfill the psychological need for symmetry, which is certainly as strong

113. U.C.C. § 2-308.
114. See notes 83-84 & accompanying text supra.
115. If the present course is continued, more honesty about the true nature of the approach would be refreshing. Perhaps “uniform” should be replaced by “model” in the title of the Code. Certainly, the change made by Louisiana in its version of § 1-201 is a contribution to honesty and would be in order for all the states. The Louisiana version of § 1-201(2)(c) declares: “The purposes and policies of this Title are . . . to promote uniformity of the law among the various jurisdictions.” LA. REV. STAT. ANN. § 10:1-102(2)(c) (West Supp. 1978). The Official Text declares the purpose and policy to be “to make uniform the law among the various jurisdictions.”
as some of the psychological needs inherent in the states’ rights theme. In addition, a federal code would represent recognition of the fact that in a vast majority of commercial cases the “reasonable expectations” of a citizen of one American state are the same as those of a citizen of another state. This, of course, is increasingly the case, given the steady and dramatic rise in the mobility of our citizenry. Finally, a federal code seems to be an idea with history on its side. Though private law remains to a substantial extent a bastion of the states, the trend of this century in American legal history has been toward more and more centralization. As Professor Lawrence Friedman so aptly put it: “Internally, this has been an age of central, national power. The relative strength of the states has melted away; the federal government has grown to a giant size. The federal Caesar fed on the meat of social upheaval, the two great wars and the cold war, a vast depression and a technological revolution.”116 Thus it may be that the time for a federal commercial code has arrived.

Credit Scoring and the Equal Credit Opportunity Act  
By David C. Hsia

Table of Contents

<table>
<thead>
<tr>
<th>I. The Reasons for Credit Scoring</th>
<th>372</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Judgmental systems</td>
<td>372</td>
</tr>
<tr>
<td>B. Scoring systems</td>
<td>375</td>
</tr>
<tr>
<td>C. Public interest in credit scoring</td>
<td>377</td>
</tr>
<tr>
<td>D. Private interest in credit scoring</td>
<td>379</td>
</tr>
<tr>
<td>II. Scientific principles of credit scoring</td>
<td>382</td>
</tr>
<tr>
<td>A. The future will resemble the past</td>
<td>382</td>
</tr>
<tr>
<td>B. Groups of individuals have predictable behavior</td>
<td>383</td>
</tr>
<tr>
<td>C. A set of measurements can distinguish between two groups</td>
<td>384</td>
</tr>
<tr>
<td>III. System construction</td>
<td>387</td>
</tr>
<tr>
<td>A. Definition of system scope</td>
<td>388</td>
</tr>
<tr>
<td>B. Classification of accounts</td>
<td>389</td>
</tr>
<tr>
<td>C. Sampling</td>
<td>389</td>
</tr>
<tr>
<td>D. Coding</td>
<td>391</td>
</tr>
<tr>
<td>E. Attribute classing</td>
<td>392</td>
</tr>
<tr>
<td>F. Rejects</td>
<td>393</td>
</tr>
<tr>
<td>G. First characteristic selection</td>
<td>398</td>
</tr>
<tr>
<td>H. First score calculation</td>
<td>398</td>
</tr>
<tr>
<td>I. Second characteristic selection</td>
<td>398</td>
</tr>
<tr>
<td>J. Second score calculation</td>
<td>399</td>
</tr>
<tr>
<td>K. Subsequent characteristic selection and score calculation</td>
<td>399</td>
</tr>
<tr>
<td>L. Score transformation</td>
<td>402</td>
</tr>
<tr>
<td>M. Validation</td>
<td>402</td>
</tr>
<tr>
<td>N. Compilation of the repayment probability table</td>
<td>403</td>
</tr>
<tr>
<td>IV. ECOA and scoring</td>
<td>404</td>
</tr>
<tr>
<td>A. Demonstrably and statistically sound, empirically derived credit systems</td>
<td>405</td>
</tr>
<tr>
<td>B. Negative factor or value</td>
<td>409</td>
</tr>
<tr>
<td>C. Reasons for adverse action</td>
<td>412</td>
</tr>
<tr>
<td>D. Effects test</td>
<td>416</td>
</tr>
<tr>
<td>1. Allocation of proofs</td>
<td>421</td>
</tr>
<tr>
<td>2. Tradeoffs between protected classes</td>
<td>422</td>
</tr>
<tr>
<td>3. Degree of discrimination reduction</td>
<td>424</td>
</tr>
<tr>
<td>4. Degree of increased losses</td>
<td>427</td>
</tr>
<tr>
<td>E. Inclusion of judgmental elements</td>
<td>428</td>
</tr>
<tr>
<td>F. Borrowed systems</td>
<td>430</td>
</tr>
<tr>
<td>V. Discrimination and scoring</td>
<td>431</td>
</tr>
<tr>
<td>A. Per se discrimination</td>
<td>431</td>
</tr>
<tr>
<td>B. Other discriminatory characteristics</td>
<td>432</td>
</tr>
<tr>
<td>C. Multiple systems</td>
<td>434</td>
</tr>
<tr>
<td>D. Overrides</td>
<td>437</td>
</tr>
<tr>
<td>E. Prescreening</td>
<td>438</td>
</tr>
<tr>
<td>F. Cutoff scores</td>
<td>442</td>
</tr>
<tr>
<td>G. Assuming consistency</td>
<td>443</td>
</tr>
<tr>
<td>VI. Potential technical objections to scoring</td>
<td>444</td>
</tr>
<tr>
<td>A. Mandatory income consideration</td>
<td>445</td>
</tr>
<tr>
<td>B. Joint applications</td>
<td>446</td>
</tr>
<tr>
<td>C. Assumption of normality</td>
<td>447</td>
</tr>
<tr>
<td>VII. Conclusion</td>
<td>448</td>
</tr>
</tbody>
</table>