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Richard E. Speidel

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# Revising UCC Article 2: A View from the Trenches

by  
RICHARD E. SPEIDEL\*

## Introduction

### A. Background

I participated in the process to revise Uniform Commercial Code (UCC) Article 2, Sales from 1987 until resigning in July, 1999, first as Chair of the Permanent Editorial Board of the Uniform Commercial Code (PEB) Study Group on Article 2<sup>1</sup> and then as Reporter to the Article 2 Drafting Committee, appointed by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) and the American Law Institute (“ALI”). This is the first time I have spoken in public about that experience.

Reporters work in the trenches. When things are going well, the trench is wide and not very deep and the view is excellent. In times of trouble, the trench narrows and deepens. Unless the Reporter is actively involved in negotiating with various interest groups or has a good flow of information about what is going on, the view from the trench is impaired.

There was plenty of trouble in the Article 2 process, much of it coming from decisions made by NCCUSL leadership outside of

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\* Beatrice Kuhn Professor of Law, Northwestern University School of Law; Visiting Professor, University of San Diego School of Law, Spring 2001. This paper is a revision of remarks made at the Association of American Law Schools program on *Perspectives on Revising the Uniform Commercial Code*, in San Francisco on January 4, 2001.

1. The PRELIMINARY REPORT OF THE UNIFORM COMMERCIAL CODE ARTICLE 2 STUDY GROUP is printed in 16 DEL. J. CORP. L. 981 (1991), along with an Appraisal by a Task Force of the A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the Uniform Commercial Code. This Appraisal and the continuing participation of the Task Force provided invaluable assistance to the process. See also Permanent Editorial Board of the Uniform Commercial Code, *PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. LAW. 1869 (1991) (a Report prepared for the PEB).

drafting committee meetings. My view from the trenches, therefore, was frequently impaired. Thus, I will speak about appearances when I had no first hand knowledge of what was going on. Speaking candidly about appearances will give other participants in this panel an opportunity to respond or to set the record straight about the politics of revising the UCC in general, and Article 2 in particular.

## B. The Partnership

Over the years, the ALI and NCCUSL<sup>2</sup> have had a successful partnership in the drafting, promulgation, and revision of the UCC. The UCC is an example of private lawmaking from the ground up rather than public law making from the top down. The result has been a remarkably uniform and flexible body of state commercial law.<sup>3</sup>

There is potential tension in the partnership because the partners have somewhat different goals. At the risk of over-simplification, the goal of the ALI is to “get it right” (on the merits) and the goal of NCCUSL is to “get it right enough to get it enacted.” Resolving this tension is not an easy task because of disagreements over what is “right” and how to get there.

Getting it “right” is complicated by several factors.

First, there are disagreements about the scope of the codification and the policies that ought to be pursued in the revision.<sup>4</sup> A common method of resolving these disagreements is to “put it in the comments” or “leave it to the courts.” Those opposed to consumer protection provisions in the UCC<sup>5</sup> might prefer to leave those issues to other state or federal law.

Second, a Drafting Committee rarely has any comprehensive empirical studies of commercial practices and needs or of the impact of any suggested changes. Thus, the Drafting Committee must be

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2. See generally *Symposium on the American Law Institute: Process, Partisanship, and the Restatements of Law*, 26 HOFSTRA L. REV. 576 (1998). But see Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 GEO. WASH. L. REV. 1212, 1214-15 (1993) (noting danger of “capture” by interest groups of uniform state law process).

3. See Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131 (1996) (explaining why State Legislatures might adopt uniform laws developed in a decentralized process producing a consensus influenced by interest groups).

4. For a monumental historical and comparative study of codification, see Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435 (2000).

5. See James J. White, *Comments at 1997 AALS Annual Meeting: Consumer Protection and the Uniform Commercial Code*, 75 WASH. U. L.Q. 219 (1997) (arguing against inclusion and suggesting that a UCC with consumer protection provisions will not be enactable).

satisfied by “second best” data such as that found in judicial opinions, law review articles, treatises, the experience of the Reporters, members of the Drafting Committee, and observers in and commentators on the process. Even with all interests represented in the process, the Drafting Committee will frequently be “shooting in the dark.”

Third, there is no such thing as a politically neutral revision. The experience of the participants is inevitably influenced by their own preferences or perceived best interests, whether or not they are paid to advocate a particular point of view. Reporters have their preferences and members of the Drafting Committee may align more with the goals of NCCUSL than the ALI and vice versa. Thus, the final product will usually be far from ideal. It will reflect the competing interests in and around the drafting process and, to some extent, the problems of enactability.

The difficulty in getting it right is eased when there are open drafting processes and balanced participation and where the art of compromise and adjustment is practiced. Sound drafting processes frequently produce balanced outcomes that are approved by both the ALI and NCCUSL. Those approved outcomes—the final drafts—can then be adjusted or varied through negotiation in order to secure uniform enactment by the States.<sup>6</sup>

In sum, “getting it right” does not mean an idealized product that cannot be enacted. Rather, the final product from an open process has been tested constantly by the expertise and experience of those participating and, to some extent, by the realities of enactment.<sup>7</sup>

Not everyone agrees that ALI-NCCUSL drafting processes are sound or produce good results. Professor Edward L. Rubin, for example, asserts that not all of the relevant interests were represented in the revision of Articles 3 and 4 (i.e., the banks called the shots) and that the result was a flawed statute that “allows serious market failures.”<sup>8</sup> He argues that efficiency “can only be achieved through a . . . balanced process in which all interests are represented” and concludes: “Either ALI and NCCUSL should be reformed, or their efforts should be preempted by federal legislation, as they have been for credit cards and consumer electronic payments.”<sup>9</sup>

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6. For example, Article 2A required substantial revision after it had been approved by the ALI and NCCUSL before it was enacted.

7. See Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707 (1998) (describing revision process).

8. Edward L. Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551, 560-70 (1991).

9. Edward L. Rubin, *Types of Contracts, Interventions of Law*, 45 WAYNE L. REV. 1903, 1925 (2000).

Professor Linda J. Rusch, the Associate Reporter to the Article 2 process, makes the same point:

NCCUSL needs to examine its method of doing business. Uniform enactability results when the act represents a balanced product forged in a process of consensus. If the process is not conducted in a manner that forges that consensus, but rather gives power to lobbying groups to have it their way, pursuit of the enactability goal runs roughshod over the reason why enactability is desirable—that the act represents good balanced policy.<sup>10</sup>

The trouble with the Article 2 process, however, did not arise from a lack of balance within the Drafting Committee. Rather, I believe that the Article 2 process was compromised by three decisions by NCCUSL leadership,<sup>11</sup> all of which were made without consideration or vote by the Drafting Committee, and all of which were made in response to lobbying pressure. But first some background.

## I. Revising Article 2

### A. Article 2 and the World Around It

The Article 2 process cannot be evaluated in isolation. There was simultaneous and overlapping action in other trenches. During the thirteen-year-life of the Article 2 process, the revision of UCC Article 9, Secured Transactions, and the drafting of former UCC Article 2B, now the Uniform Computer Information Transactions Act (UCITA), and the Uniform Electronic Transactions Act (UETA) were completed. Similarly, the Restatement (Third) of Torts, Products Liability, was completed by the ALI in 1998. At the same time, Article 1 was under revision (and still is) and Article 2A on leases was expected to conform, where feasible, with Revised Article 2. During this period, there were frequent skirmishes between occupants of the different trenches about the scope and content of each project. This required persistent but ad hoc efforts by NCCUSL to achieve maximum uniformity and style consistency—efforts that never resolved important disagreements between the Article 2 and UCITA processes.<sup>12</sup>

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10. See Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683, 1715 (1999). Professor Rusch, who was Associate Reporter to the Article 2 revision from 1996-1999, collects and classifies the growing literature on the UCC revision process. See *id.* at 1687 n.13.

11. By NCCUSL leadership I mean a group that usually included the Executive Director, the current and future President, and other influential Commissioners. The Chair of the Article 2 Drafting Committee, who is a Commissioner and a former President of NCCUSL, however, was not included in this group.

12. See discussion of the rise and fall of the “hub and spoke” concept *infra* Part I.B.1.

Nevertheless, each project had long and open drafting processes. Experienced, talented people were involved. There were preliminary studies, seemingly endless open meetings of Drafting Committees, a flow of public drafts and commentary, and, ultimately, decisions by qualified Drafting Committees. A lot of sunshine accompanied these lengthy drafting processes, the continued efforts to resolve border disputes, and the purported final drafts. But the outcomes for Article 9, UCITA, and Article 2 differed sharply.

Revised Article 9, a complete and complex revision of an already difficult Article, was approved by the ALI and NCCUSL and has now been enacted by several States. There was virtually no opposition in the ALI or NCCUSL. Apparently the Partnership got it right and may get it enacted in most states.<sup>13</sup>

UCITA, a new, complex, and controversial Act dealing with transactions in computer information, met opposition at the ALI (and, in fact, was never presented for final approval) but was approved after a difficult session by NCCUSL and is now being pushed for adoption by the States as a free standing act. The road ahead for UCITA is rocky, however, for there are those who still assert that UCITA did not get it right and should not be enacted.<sup>14</sup>

What about Revised Article 2? After twelve years of effort (including the PEB Study), the May, 1999 Draft was approved by the ALI. Officers of NCCUSL<sup>15</sup> supported the revision on the floor of the 1999 ALI annual meeting. Revised Article 2 had apparently gotten it right! During the final reading at the 1999 annual meeting of NCCUSL, however, the ALI-approved draft was pulled from the agenda<sup>16</sup> by the same NCCUSL leadership that had previously supported it<sup>17</sup> and deferred until the 2000 annual meeting. At this point, I resigned as Reporter in protest.

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13. See *Conference on Revised Article 9 of the Uniform Commercial Code*, SFO1 ALI-ABA 1 (2000) (discussion of all aspects by leading experts); see also Harry C. Sigman & Edwin E. Smith, *Revised UCC Article 9 Overview*, SFO6 ALI-ABA 1 (2000). But see Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569 (1998).

14. See, e.g., Jean Braucher, *Uniform Consumer Information Transactions Act (UCITA): Objections from the Consumer Perspective*, 5 No. 6 GLCY Law 2 (2000). For a reply, see James C. McKay, Jr., *UCITA and the Consumer: A Response to Professor Braucher*, 5 No. 8 GLCY Law 9 (2000). See also Michael L. Rustad, *Making UCITA More Consumer-Friendly*, 18 J. MARSHALL J. COMPUTER & INFO. L. 547 (1999).

15. More specifically, the Executive Director and the President.

16. According to my notes, the draft was pulled just before lunch on the first day of reading. At that point, the sections on warranties were being read. Up to that time, each of the objections to the draft, save one, had been rejected by the membership. We were on a roll.

17. The official reason was that the agenda was crowded and that there were more pressing matters to consider. The Executive Director of NCCUSL had the gall to restate this "official reason" at the Workshop. The reason apparent to the Reporters and others

Thereafter, the Drafting Committee was reconstituted and a new Chair and Reporter were appointed.<sup>18</sup> In the eighteen months since that debacle, the July, 1999 draft has been re-conformed to the current Article 2 with a few notable exceptions.<sup>19</sup> Then the same ALI which had approved the withdrawn draft in May, 1999 heard reports on the new revision at the May, 2000 annual meeting and, unless the entire project is shelved, will be asked (again) to approve the revised draft at the May, 2001 annual meeting. The ALI reasoning appears to be that the issue is whether the latest revision is better than the current Article 2, not whether it is better or worse than the May, 1999 draft. Fair enough. But remember, the process must be repeated with a new draft and with different players because of lobbying pressure against the July, 1999 draft, not because of any considered decision on the merits.

## B. What's Going on Here?

Why did I resign in protest? Why not stick it out to the bitter end? There are three basic reasons and all involve unilateral action by NCCUSL's leadership. These actions fuel the growing critique of the ALI-NCCUSL processes and disclose a public choice nightmare.

### *(1) Rise and Fall of Hub and Spoke and the Hostile Aftermath*

The first disruption came early in the process. In March, 1995 NCCUSL tentatively approved a "hub and spoke" configuration for Revised Article 2 and the proposed Article 2B, dealing then with licenses of software. The "hub" was to consist of principles common to both sales and licenses and the spokes were to consist of principles that were unique to each transaction. With the approval of NCCUSL leadership and the Article 2 Drafting Committee, a prototype "hub and spoke" draft was prepared for reading at the 1995 annual meeting

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was that a group of "strong sellers" strongly suggested that if the July, 1999 draft was approved by NCCUSL, the group would oppose it in every State Legislature. Welcome to NCCUSL spin city.

18. Both the new Chair and the Reporter had served with distinction on the earlier Drafting Committee. Both are law professors who specialize in commercial law and Commissioners.

19. For example, sections 2-313A and 2-313B of the October 5, 2000 draft, prepared for the Council of the American Law Institute, retain in revised form provisions in the July, 1999 draft which extended express warranties in carefully defined situations from sellers to remote buyers. Other examples include a higher floor (\$5,000) for the statute of frauds, Rev. 2-201(a), and more exacting requirements to disclaim implied warranties in consumer contracts, Rev. 2-316(b).

of NCCUSL. At that time, both Ray Nimmer, the Reporter for Article 2B, and I cautiously embraced this approach.<sup>20</sup>

After the annual meeting, NCCUSL leadership announced that the “hub and spoke” prototype was dead and that a separate Drafting Committee for Article 2B would be appointed.<sup>21</sup> Although “hub and spoke” created special challenges, it offered an opportunity to achieve legitimate harmony between the two projects through a centralized process. Its demise, however, killed any realistic chance to maximize consistency and uniformity. Once the 2B (now UCITA) drafting process became entrenched and achieved a life of its own, the reluctance of UCITA to conform to Article 2 and vice versa became palpable. Despite heroic efforts by Boris Auerbach, the Chair of the Article 1 Drafting Committee, to harmonize the drafts, there were now two processes with different agendas and politics proceeding at their own pace. Harmonization could not be achieved.<sup>22</sup>

Another negative effect was that certain strong software producers who opposed “hub and spoke” instinctively reinforced the efforts of strong sellers to oppose proposed revisions in Article 2 that appeared to favor buyers and consumers. Neither group wanted any part of these changes. It is reported, for example, that the Software Publishers Association (SPA) criticized the Article 2 draft as “being skewed in favor of the consumers” and that a counsel to General Electric attributed much of the pro-consumer bias of the Article 2 Drafting Committee to law professor members who had a pro-consumer bias, “or are liberals.”<sup>23</sup> General Electric, of course, was one of the most consistent and persistent opponents to Revised Article 2 throughout the process. The anti-Article 2 synergy was apparent to all.

It now appears that the continuing disagreement over the respective scope of Revised Article 2 and UCITA flows from this process. UCITA supporters are unwilling to accept the risk that Article 2 will apply to computer information embodied in disks or embedded in other (“smart”) goods. Assuming that the current revision of Article 2 is better than the current Article 2 and should be

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20. See Raymond T. Nimmer, *Intangibles Contracts: Thoughts of Hubs, Spokes, and Reinvigorating Article 2*, 35 WM. & MARY L. REV. 1337, 1384-1403 (1994) (cautiously optimistic); Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1313-15 (1994) (daunting questions still open to debate).

21. Some of this history is recounted in McKay, *supra* note 14.

22. See Rusch, *supra* note 10, at 1714, who describes the harmonization meetings as “excruciating” and explains how decentralized drafting processes going at their own pace failed to harmonize provisions “that should be harmonized.” I was there and I agree.

23. Michael Rustad & Lori E. Eisenschmidt, *The Commercial Law of Internet Security*, 10 HIGH TECH. L. J. 213, 301, n.301 (1995).

enacted, it is now being held hostage by UCITA. To put the matter more directly, even though UCITA does not achieve broad enactment, its proponents want a scope provision that keeps Article 2 out of the computer information game.<sup>24</sup>

(2) *The Distinction Between Negotiated Terms and Standard Terms*

The claim that Revised Article 2 was put together by a group of liberal law professors who exalted consumer protection over the interest of sellers must now be addressed. Consider the balance in the current Article 2.

First, Article 2 drapes its framework of standards and rules over all contexts where goods are sold. The starting point is the same whether the contract involves natural gas, new cars, or factory equipment. The parties may, of course, vary the effect of the framework by agreement. More importantly, the broad concept of agreement links the particular bargain to trade usage and prior course of dealing in the commercial context. Despite objections by the so-called "new formalists," neither the July, 1999 nor the current draft of Revised Article 2 retreat from this approach. To this extent, freedom to vary the effect of Article 2 by agreement and Karl N. Llewellyn's jurisprudence—the best *extant* example of realist thinking—remains intact.<sup>25</sup>

Second, although Article 2 singles out merchant sellers and buyers for special treatment, all other parties to contracts for sale are subject to the same rules. Strong parties who are not merchants, small businesses, and consumers are treated the same.

Third, no distinction is drawn between negotiated and non-negotiated contracts or terms in the text of Article 2. Thus, standard forms or terms are treated the same as negotiated or "dickered" terms. This is true even though UCC section 2-207 purportedly deals with the so-called "battle of the forms" in transactions where there are both negotiated and non-negotiated terms.

Finally in bargains between merchant sellers and small business or consumer buyers, there is a presumption of validity that arises from the buyer's objective assent to the bargain unless unconscionability can be established. But the defense of unconscionability requires a costly judicial determination under a vague, open-ended standard. Moreover, state and federal consumer protection laws are limited in scope and vary widely from State to

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24. The "game" has made it to the Wall Street Journal. See Thomas E. Weber, *Software Warranty Law Spurs Fears We'll Soon See Bugs Everywhere*, WALL ST. J., Dec. 11, 2000, at B1.

25. See Imad D. Abyad, *Commercial Reasonableness in Karl N. Llewellyn's Uniform Commercial Code Jurisprudence*, 83 VA. L. REV. 429 (1997).

State. Thus, even if many consumers are well informed and have market choices, the gaps in protection for consumers and small businesses in transactions with strong buyers are large.

My conclusion from this (and the Drafting Committee apparently agreed) is that the current Article 2 favors strong sellers. They have power to disclaim warranties and limit remedies if the buyer objectively assents. A well informed buyer with market choices may or may not agree, but if the limitations are in standard forms and are presented on a take-it-or-leave-it basis, there is a risk of information asymmetry—i.e., unfair surprise—if the buyer assents and there is a substantive imbalance favoring the seller in the terms themselves. Concededly, the market over time provides some balance in the content of standard terms, and other factors, such as reputation, may induce strong sellers to adopt buyer friendly practices. But not every seller responds or is responsible and, if there are market failures, Article 2 as administered by courts is of little help.

The Drafting Committee's initial strategy was to create incentives for the greater disclosure of information by differentiating between standard form and negotiated contracts and providing a limited number of special rules for consumer contracts.<sup>26</sup> Thus, the November, 1996 draft defined "standard contracts" and "standard terms" and used the new definitions in section 2-206, dealing with standard form records in consumer contracts, and section 2-207, entitled the "effect of varying terms." In both sections, the presence of a standard form or term signaled the risk of unfair surprise which was neutralized if the term was "expressly agreed" to. This put the onus on a strong seller to disclose the term and obtain informed consent.<sup>27</sup>

At the November, 1996 meeting of the Article 2 Drafting Committee, the Drafting Committee and the Reporter were directed by the Executive Director of NCCUSL to delete from the draft all definitions and rules that turned on the defined terms. I protested then and continued to protest this unilateral decision throughout the process. Nevertheless, the drafting changes were made and in the May and July, 1997 revisions there were no references to standard forms or terms.

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26. This strategy is best exemplified in the November, 1996 draft of Revised Article 2. See also the July, 1996 Draft where the legislative history is detailed. The distinction between standard form and negotiated terms is a persuasive ground to regulate against unfair surprise. See Rubin, *supra* note 9.

27. To no one's surprise, Professor White objected to this approach, particularly one proposed version of Revised section 2-206. See James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315 (1997).

Despite this, many rules applicable to consumer contracts survived this purge and are found in the latest draft of Revised Article 2.<sup>28</sup> In addition, other revisions, notably the extension of express warranties in sections 2-313A and 2-313B provide expanded protection to all buyers. Nevertheless, the purge of the distinction between negotiated and non-negotiated terms created its own mischief.

First, Revised section 2-207 now becomes a giant “knockout” rule, regardless of whether the terms knocked out were standard terms. This masks the reasons for the original section 2-207, which was designed to protect against unfair surprise and opportunistic behavior when parties dealing at a distance exchanged standard forms and terms. Unless reigned in by the courts, the result is overkill.

Second, Revised section 2-206 in the 1996 draft, which dealt with standard form records in consumer contracts, was hung out to dry. Even though successor drafts limited application to consumer contracts, no one could agree on a standard for unfair surprise or oppression without a statutory recognition that the cause of the problem was standard terms drafted by sellers and offered on a take it or leave it basis. The result was that Revised section 2-206 was deleted in the July, 2000 draft and protection for consumers and small businesses was left to section 2-302 and the comments.

Third, the decision complicated correcting the misinterpretation of the UCC by the *Gateway* case<sup>29</sup> and finding a solution to the treatment of material terms first disclosed to a buyer after payment for and shipment of the goods. As a result, no solution to this

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28. The October 5, 2000 draft of REVISED Article 2 retains some special rules for consumers. See, e.g., Revised U.C.C. § 2-102(a)(11)(12) (October 5, 2000 draft Revised Article 2 on file with Author) (“consumer” and “consumer contract” defined); *id.* at § 2-104(a)(2) (Article 2 subject to any applicable law establishing a different rule for consumers); *id.* at § 2-316(b) (disclaimer or implied warranties); 2-502(a)(1) (pre-paying consumer buyer); *id.* at § 2-508(b) (no cure in consumer contract after buyer revokes acceptance); *id.* at § 2-716(a) (agreed specific performance remedy not applicable in consumer contract); *id.* at § 2-718(a) (liquidated damages); *id.* at § 2-719(c) (effect of exclusion of liability for personal injuries where consumer goods); *id.* at § 2-725(a) (agreement reducing period of statute of limitations not effective in consumer contract).

The high-water mark for consumer protection was the November 1, 1996 draft, prepared for the Council of the American Law Institute.

29. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) limited the application of UCC § 2-207 to cases where both parties used standard forms and construed Article 2 to create a rolling contract in which the offer was proposed by the seller after payment and shipment in the forms sent with the goods. The buyer accepted the terms, including an arbitration clause, by using the goods without objection. This reading of Article 2 was rejected in *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1322 (D. Kan. 2000), an action which was later dismissed for lack of subject matter jurisdiction, 2000 WL 1372886 (D. Kan. Sept. 6, 2000). The so-called *Gateway* issues are discussed in James J. White, *Autistic Contracts*, 45 WAYNE L. REV. 1693 (2000).

controversial problem appeared in either the July, 1999 or the current draft of Revised Article 2. A proposed solution requiring a seller who proposes standard terms to a buyer after the goods have been paid for to either disclose those terms or warn that they are forthcoming<sup>30</sup> created a storm of controversy and was rejected.<sup>31</sup>

(3) *The Fall of the July, 1999 Draft*

In both Article 9 and UCITA, substantial economic interests supported the legislation. Whether these interests captured the project I cannot say, but, clearly, there was consistent interest by asset based lenders in completing the Article 9 revisions and by software producers in having comprehensive, separate legislation dealing with transactions in computer information. Although consumer interests were represented in both projects, for many commentators those interests were not adequately reflected in the final drafts. In short, both processes are open to the charge that not all interests were adequately represented in the final product, especially the interests of consumers and small business debtors and licensees of software.

In contrast, there was never a group of sellers or buyers or consumers (or anyone) who strongly supported and pushed for the revision of Article 2. Most agreed that Article 2 needed some revision, but there was persistent disagreement about how much. Except for the Drafting Committee and the Reporters, no one devoted much effort to systematic advocacy for revision. This relative indifference made it easy for the strong sellers that opposed the revision either to block the project or recycle the revision until it died an unnatural death.

The "strong sellers," such as General Electric, the American Automobile Manufacturer's Association, and other manufacturers, were well represented in the Article 2 drafting process. They participated actively and helpfully in the discussions and prepared careful memos after each meeting of the Drafting Committee. They were also well represented in the ALI and lobbied extensively against the revision before NCCUSL.<sup>32</sup> But despite many revisions in the drafts to respond to their concerns and efforts by members of the

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30. See REVISED U.C.C. § 2-207(e) (February 1, 1999 draft. Revised Article 2 on file with Author).

31. This drafting history is described in White, *supra* note 29, at 1694 n.1. In retrospect, Professor White suggests that the rejected solution would have been easy for a seller to satisfy and doubts the wisdom of the opposition to it.

32. My friend and collaborator, James J. White, was a leader of the opposition to Revised Article 2. As a sometimes consultant to the automobile industry, a member of the American Law Institute, and, later in the game, a Commissioner from Michigan, he opposed much of Revised Article 2 in print, on the floor of the ALI and NCCUSL, and in strategy sessions with strong sellers outside of the process.

Drafting Committee and NCCUSL leadership to negotiate with them, they never proposed (to my knowledge at least) any revisions which, if agreed to by the Drafting Committee, would close the deal. The attitude was do it our way or else, but there was no indication of what their way was. Those who negotiated for NCCUSL were bargaining against themselves.<sup>33</sup> Despite losing on the merits before the Drafting Committee and the ALI (and, in all probability, before NCCUSL membership), the strong sellers opposed the revision and, it appears, threatened to oppose it when proposed for enactment by the States. At this point, NCCUSL leadership knuckled under and pulled the draft that they and the ALI concluded had "gotten it right."

A cynic might characterize these strong sellers as poor losers who bargained in bad faith and never came to grips with the merits of the proposed revision. Their vocal opposition in public (as opposed to their participation before the Drafting Committee) was infused by high rhetoric, and many assertions were, quite frankly, false. But let's be practical. The public rhetoric concealed the reality that, as strong sellers, they were very pleased with the current Article 2. Limited only by the porous doctrines of unconscionability and good faith, strong sellers are able to shape the contract to fit their interests, particularly where small business and consumers are involved. Given this preference for the status quo (and with no interest group lobbying for revision), the strong sellers were content to dig in their heels and resist any change of substance, especially if it improved the position of weaker buyers.<sup>34</sup>

### Conclusion

In my opinion, the latest draft of Revised Article 2 is better than the current Article 2 and, if agreement can be reached with UCITA's leadership on the scope provision, should be approved by the membership of NCCUSL and the ALI.

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33. As the Reporter, I did not participate in these negotiating sessions. My role was to shape the agenda (at least in the early going), express my opinion of what the law was and should be, and to draft text and comments that responded to decisions by the Drafting Committee. Yes, I had a point of view on many issues and, perhaps, expressed it more often than many would have liked. But in the final analysis, I was a Reporter not a negotiator. The role of Reporter as negotiator may be influenced by the Chair of the Drafting Committee. With a strong Chair, the Reporter may have a greater role in negotiating. Article 2 had a knowledgeable but relatively passive Chair.

34. A persistent strategy was to resist any changes in the statute to which they did not agree, and to urge that the matter be addressed in the comments or left to the courts. The comments, however, were to be negotiated with and approved by them. Moreover, leaving it to the courts worked to the disadvantage of consumers and small businesses who concluded that the cost of litigation was not worth the result.

Nevertheless, from my limited view in the trenches, it appears that the conduct of NCCUSL leadership (not the Executive Committee or the membership), responding to pressure from strong sellers, software producers and other lobbyist, seriously compromised the Article 2 drafting process in three ways.

First, the leadership rejected the hub and spoke draft because software producers and others wanted their own drafting process and statute. The software producers opposed Article 2's stance on buyer protection. Throughout the process, NCCUSL imposed pressure on both projects to conform substance in circumstances where that was not possible. Once hub and spoke was dead, the hope for substantial conformity went with it. More importantly, the software producers aligned with strong sellers to oppose the allegedly pro-buyer stance of Revised Article 2.

Second, having released UCITA from the confines of "hub and spoke," the leadership then purged the standard form and standard term provisions from the November, 1996 draft of Revised Article 2, apparently again responding to pressure from the strong sellers. Once purged, the ability to deal with issues where the distinction was essential was impaired. Ironically, UCITA retained the distinction, although its substantive provisions today depend less on it than did earlier drafts.<sup>35</sup>

Third, having purged the standard form rules, the leadership, without a vote from the Executive Committee, then withdrew the July, 1999 draft from the agenda because of continued opposition from the strong sellers and their threats to oppose enactment. This deprived the membership of the opportunity to vote on the merits. If the membership vote was "no," then a total redraft of the July, 1999 draft would have been justified. But if the membership voted "yes," a probable result, then NCCUSL leadership would have been in a stronger position to test the strength of the supposed opposition and to bargain for justified changes. Moreover the approved final draft could be studied and critiqued by scholars and others without having to dig into the electronic bins of legislative history.

Finally, how persuasive is it for the ALI to reconsider the July, 1999 draft (which got it right) on the ground that the issue is whether the latest revision is better than the current Article 2 not whether it is worse than the July, 1999 Draft? Is this a cop out that fails to consider the opportunity costs of not standing by its guns in the face of interest group lobbying? These are challenging questions for a respected institution whose members are expected to "check their clients at the door." Why reconsider the latest draft of Revised Article 2 when that

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35. See UCITA § 102(a)(60) (2001) ("standard form" defined).

compromised draft is the result of lobbying pressure from lawyers who represented their strong seller clients all too well?

In my judgment, none of the challenges made or questions asked in this paper were adequately addressed in the comments of the ALI and NCCUSL speakers on this panel. A grudging conclusion is that the partnership has succumbed to the notion that what's good for General Electric and other strong sellers *is* good for the American law of sales.