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CONSTRUING THE UNIFORM COMMERCIAL CODE: ITS OWN TWIN KEYS: UNIFORMITY AND GROWTH

Lawrence Vold†

INTRODUCTION

The purpose of this article is to identify and evaluate the keys provided by the Uniform Commercial Code for the construction and application of its provisions. Before undertaking this task, however, it is essential that the posture of the typical marketing lawsuit be described. Only by clearly identifying the basic problems involved in a marketing lawsuit—problems which as we shall see are common to the great majority of lawsuits—and the general expectations of the parties thereto, can we hope to assess the adequacy of the keys to Code interpretation.

I

ANGLO-AMERICAN JURISTIC BACKGROUND

Courts in Deciding Cases Must Somehow Choose What Version of the Facts to Accept as Correct and What Rule of Law to Apply to those Facts

Parties to lawsuits practically always disagree about the facts. This is as true of disputes in sales and marketing as elsewhere. Details of current marketing practices continually change and individual contract terms often differ from one deal to the next. So also, the details and shortcomings related to the performance of contracts give rise to disputes.[1]

Parties have conflicting versions of what happened. Courts and juries must choose what version of disputed facts to accept as correct.[2] Their guide in that choice? Truth, not falsehood. Accuracy, not distortion. That choice often is the most important decision in the case.[3] For any particular

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1 For an example of such difficulty, see Boeing Airplane Co. v. O'Malley, 329 F.2d 585, 587-88 (8th Cir. 1964) (conflicting testimony about alleged misleading representations inducing deal for an identified defective used plane to be flown back from Europe). For further examples, see note 4 infra.

2 Justice Peters made the following comment: "A lawsuit is not a game. It is an attempt to ascertain the true facts, and to apply the law to the true facts." Dowell v. Superior Court, 296 P.2d 97, 99 (Cal. Dist. Ct. App. 1956). A later hearing before the Supreme Court of California in this case, though vacating the opinion below, came to the same conclusion as to the relief sought. Dowell v. Superior Court, 47 Cal. 2d 483, 304 P.2d 1009 (1956).

3 Justice Irving R. Kaufman of the United States Court of Appeals made the following observations:

> The advocate's task is to help the judge and jury make the distinction between good and bad, true and false, by bringing forth the facts . . . . Any event, simple or

lawsuit the court and jury determine the facts subject to review on appeal.[4] Little question may then remain about which rule or principle of law should be applied in the dispute.[5]

Disputing parties often may still disagree, however, about which rule or principle of law correctly applies to the facts as thus determined. They do not see the underlying merits at stake the same way. Bias of self-interest strongly tends to distort their view. The tribunal deciding such a case thus willy-nilly faces a double choice. (1) What version of the facts to accept as correct?[6] (2) Which rule or principle of law is on the merits the correct one to apply to these facts?[7]

About underlying merits claimed by disputing parties, much may often be honestly asserted on both sides. The choice that correctly fits the case may be uncertain. Precedents exactly in point very often are lacking. Close analogies may be lacking or conflicting. Analogies more remote from the exact marketing facts in the dispute are usually inconclusive, often conflicting. What standard shall then guide the court to choose correctly what decision to give?[8]

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complex, is susceptible of an infinity of more or less reasonable—but honest—interpretations. This is made inevitable simply by the construction of the human mind and the fallibility of human judgment and perception.

. . . .

The trial lawyer presents one version or interpretation of the facts, the one most favorable to his client, and his opposing advocate does the same. Perhaps some place between the two versions is what actually happened. The system of adversary proceedings is based on the premise that the best presentation of both versions of the facts will result in a close enough approximation of truth so as to be classifiable as justice.

Kaufman, "The Trial Lawyer," 50 A.B.A.J. 25, 26 (1964).

The late Justice Robert H. Jackson was also concerned with this problem. See Jackson, "Advocacy Before the Supreme Court," 37 A.B.A.J. 801, 803 (1951):

The purpose of a hearing is that the Court may learn what it does not know, and it knows least about the facts . . . . [M]ost contentions of law are won or lost on the facts . . . . A large part of the time of conference is given to discussion of facts, to determine under what rule they fall. Dissents are not usually rooted in disagreement as to a rule of law but as to whether the facts warrant its application.

[4] In sales cases, as in other cases, the familiar rule is often applied that, though evidence is conflicting, verdicts or findings of fact that are supported by substantial competent evidence will not be reversed on appeal unless shown to be clearly wrong. Woodbine v. Van Horn, 29 Cal. 2d 95, 173 P.2d 17 (1946) (sale of wood); Maecherlein v. Sealy Mattress Co., 145 Cal. App. 2d 275, 302 P.2d 331 (Dist. Ct. App. 1956) (defective mattress); Dills v. Delira Corp., 145 Cal. App. 2d 124, 302 P.2d 397 (Dist. Ct. App. 1956) (contract for sale of interest in radio shows); Rosen v. Garston, 319 Mass. 390, 66 N.E.2d 29 (1946) (printed circulars).

[5] See notes 2-3 supra.

[6] See note 4 supra.

[7] Justice (later Chief Justice) Harlan F. Stone of the United States Supreme Court stated in "Common Law in the United States," 50 Harv. L. Rev. 4, 7-8 (1936):

[L]aw guided by precedent which has grown out of one type of experience can only slowly and with difficulty be adapted to new types which the changing scene may bring. . . . [T]he common-law rule of precedent is not an unyielding one . . . . [J]udicial decisions are but evidence of the law, which is sometimes misrepresented by a bad precedent. . . . Coke . . . had declared that inconvenience in the results of a rule established by precedent is strong argument to prove that the precedent itself is contrary to the law. . . . [T]he bad precedent must on occasion yield to the better reason.

See also Justice Cardozo, The Nature of the Judicial Process 10-17 (1921).

[8] [W]hen there is no decisive precedent . . . the judge . . . must then fashion law

A Basic Standard of Justice—Greatest Practicable Fulfilment of Human Wants With Least Practicable Frustration of Other Human Wants; More Loosely Said: Public Policy, Public Interest, Social Interest

Involved in every marketing lawsuit are conflicting human interests. They can be seen as conflicting claims, demands and desires.[9]

What is the basic standard for doing justice according to law where the merits are in doubt? Tentative answer: To satisfy such conflicting human interests as fully as practicable.[10]

As guides pointing toward reaching a correct decision, familiar maxims or slogans connote lofty but vague ideals of justice: understandingly, not blindly; wisely, not foolishly; fairly, not unfairly; reasonably, not arbitrarily; justly, not unjustly.

Doing its duty, the court tries to administer justice correctly according to law. In doing so, the court necessarily must somehow appraise or weigh conflicting human interests. This it must do according to some scale of values, according to some standard of justice which for controlling application in the instance the court finds acceptable in reason.[11]

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for the litigants before him. In fashioning it for them, he will be fashioning it for others . . . . If the judge is to pronounce it wisely, some principles of selection there must be to guide him among all the potential judgments that compete for recognition. . . . Not all the progeny of principles begotten of a judgment survive . . . to maturity. Those that cannot prove their worth and strength by the test of experience . . . are thrown into the void. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.

Cardozo, supra note 7, at 21-23 (quoting Munroe Smith). Reference might also be made to Judge Schettino's concurring opinion in Sofman v. Denham Food Serv. Inc., 37 N.J. 304, 313, 181 A.2d 168, 173 (1962) ("Judge-made law is always subject to re-examination"); Pound, Law Finding Through Experience and Reason 1 (1960) ("Law is experience developed by reason and corrected by further experience").

Justice Harlan F. Stone, supra note 7, at 10-11 observed:

It is just here, within the limited area where the judge has freedom of choice of the rule which he is to adopt, and in his comparison of the experiences of the past with those of the present, that occurs the most critical and delicate operation in the process of judicial law making. Strictly speaking, he is often engaged not so much in extracting a rule of law from the precedents . . . as in making an appraisal and comparison of social values, the result of which may be of decisive weight in determining what rule he is to apply. . . .

. . . . Law performs its functions adequately only when it is suited to the way of life of a people. With social change comes the imperative demand that law shall satisfy the needs which change has created, and so the problem, above all others, of jurisprudence in the modern world is the reconciliation of the demands, paradoxical and to some extent conflicting, that law shall at once have continuity with the past and adaptability to the present and the future.

[9] Pound, "A Survey of Social Interests," 57 Harv. L. Rev. 1 (1943), reprinted in Vanderbilt, Studying Law 439 (1945). See also Pound, supra note 8.

[10] Among the most notable works on how judges decide cases are Cardozo's three booklets: Paradoxes of Legal Science (1928), The Growth of the Law (1924), and The Nature of the Judicial Process (1921). See also, Pound, "The Theory of Judicial Decision," (pts. 1-3), 36 Harv. L. Rev. 641, 802, 940 (1922-1923) and note 8 supra.

[11] See note 8 supra.

Our Anglo-American system of justice does not accept brute force as a standard of justice.[12] Neither does it accept the arbitrary will of the ruler,[13] nor of the judge.[14] What is arbitrary is deeply felt as tyrannical and unjust—the opposite of what is fair, reasonable, and just. All this can be seen as readily in marketing disputes as elsewhere.

From the Golden Rule[15] to the maxims of equity to the now repudiated requirement of privity for warranty liability,[16] Anglo-American jurisprudence abounds with examples of general principles for the settlement of legal disputes. Such generalized ideals, however, are abstract and vague and seldom, if ever, directly answer the difficult and doubtful questions of application with respect to conflicting human interests. Counsel therefore must prepare to answer for the court this question: In this particular dispute, how do such ideals of justice correctly apply?

Our system, it seems, has long used a familiar juristic process of weighing conflicting human interests to find which of the available rules best fits the dispute in question. This process involves two distinct aspects: (1) Attempt to point out what overlapping conflicting human interests, individual and social, are at stake in the actual dispute. (2) Attempt to weigh or balance these conflicting interests according to the scale of their understood social value or importance.

"Interests" as used in this connection means "claims or demands or desires which human beings . . . seek to satisfy."[17] Which of the conflicting human claims, demands, and desires at stake in the case are least valuable? Which are most valuable? For "the greatest practicable fulfilment of human wants," how far must one interest give way to the other?[18]

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12 During World War II many nations took part in resisting the bluntly declared brute-force dogma: "The Might of the Conqueror . . . alone makes right." Hitler, Mein Kampf 949 (1924).

13 On this issue, three well-known royal examples: Charles I lost his head on the scaffold; James II lost his throne; George III lost the American Colonies that became the United States of America.

14 Judicial action is, in our system, subject to appeal as to its correctness. For personal misconduct individual judges are subject to the same legal accountability, both civil and criminal, as other persons.

15 Jesus, as reported in Matthew 7:12; Luke 6:31; see also Leviticus 19:17.

16 Warranty actions were originally limited to those between the original buyer and original seller. However, subsequent cases ignored the formalistic privity requirement and extended the protection of the warranty to members of the buyer's household. Moreover, recent cases have permitted a remote business buyer to bring an action against the manufacturer. See Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963); Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

17 See note 9 supra.

18 Chief Justice Hughes, writing for the Court in United States v. Chambers, 291 U.S. 217, 226 (1934), stated that "it is a familiar maxim of the common law that when the reason for a rule ceases the rule also ceases." Similarly, Justice Cardozo, in Clark v. United States, 289 U.S. 1, 13 (1933) commented:

> The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a court

This balance[19] must be struck in the light of the applicable individual interests, public interests, and social interests: often tagged with the more familiar but less precise term of public policy. The court's grasp of underlying merits, under whatever label tagged, guides the trend of judicial decisions.[20]

Under Anglo-American Justice According to Law, a Lawsuit Attempts To Apply to the True Version of the Available Facts the Available Law That Really Fits the Case. For This the Lawyer at the Outset in Advising His Client Must Make the Basic Choices That Are Necessary

More closely analyzed, a lawsuit is a triple attempt[21]: (1) to correctly ascertain the true version of the relevant facts; (2) to correctly find out what rules or principles of law are available for possible application to the dispute; and (3) to correctly—that is, fairly, reasonably, and justly—(a) choose, (b) interpret, (c) construe, and (d) apply to the correct (true)

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to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process.

19 See note 9 supra.

20 Justice Holmes, The Common Law (1881), made the following observations:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Id. at 1.

> The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigations is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.

Id. at 35-36. The process in actual operation can readily be seen on comparing majority and dissenting opinions in the Supreme Court of the United States in dealing with issues of great public importance. See, e.g., Reid v. Covert, 354 U.S. 1 (1957) (constitutionality of a Uniform Code of Military Justice provision extending jurisdiction of court martial to civilians accompanying forces abroad in peace time; note particularly the diverse views of the judges touching the grave underlying issues in question); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (illegality of President Truman's executive seizure of steel mills without statutory authority); Dennis v. United States, 341 U.S. 494 (1951) (constitutionality of the Smith Act directed at conspiracy to teach or advocate the overthrow of the Government by force or violence); Smith v. Allwright, 321 U.S. 649 (1944) (unconstitutionality of state restrictions excluding Negroes from voting in primary election for nomination of Democratic candidates for the United States Senate and House of Representatives); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (constitutionality of the National Labor Relations Act); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (illegality of sitdown strikes involving seizure of employer's plant and related physical violence; such conduct by striking employees not protected activity under the National Labor Relations Act).

21 See note 7 supra.

version of the relevant facts (e) that available law (f) which really fits the case.[22]

The purpose of this analysis of a lawsuit is to illustrate the basic pattern of what the lawyer in giving legal advice needs to find out and to do. In this respect the lawyer is from the outset "on the spot." Parties to disputes, actual or expected, come to him for advice. Their particular dispute has never been before any court or jury. At the outset, the lawyer must make the basic choices necessary to guide the client correctly in what course of action to take. For giving correct advice, the before-mentioned pattern points to what the lawyer needs to find out and do.

In this respect the choices that can become the most difficult to make come in category three mentioned above. This type of choice has many ramifications. To choose correctly in this respect the lawyer must go beyond rigid and inflexible rules of law. He needs to be aware of the choices opposing parties can persuasively urge the court to make and also how those choices may fulfil or frustrate conflicting wants. He must also be aware, under the existing circumstances, of the relative weight or importance of these conflicting human interests according to the scale of their social value which the court in reason may recognize and accept as correct.[23]

If the matter comes to court instead of being earlier settled, the lawyer then needs in addition to be able and ready understandingly to inform the court both *what* and *why*; more precisely stated, that his choice is correct under the existing circumstances, and why it is correct.[24]

The Court's Choices, Informed by Counsel, in Weighing or Balancing Conflicting Human Interests Largely Guide the Policy Trends of Their Judicial Decisions

Some of the basic "arguable" questions that commonly come up in lawsuits can be generally answered as follows[25]:

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[22] See notes 2-3, 7 supra.

[23] See notes 3, 7-8 supra.

[24] Justice Frankfurter made the following comment:

> Human society keeps changing. Needs emerge, first vaguely felt and unexpressed, imperceptibly gathering strength, steadily becoming more and more exigent, generating a force which, if left unheeded and denied response so as to satisfy the impulse behind it at least in part, may burst forth with an intensity that exacts more than reasonable satisfaction. Law as the response to these needs is not merely a system of logical deduction, though considerations of logic are far from irrelevant. Law presupposes sociological wisdom as well as logical unfolding.

Frankfurter, "The Process of Judging in Constitutional Cases," in An Autobiography of the Supreme Court 270 (Weston ed. 1963). See also notes 3, 7 supra.

[25] Justice Peters (the Presiding Justice of the California District Court of Appeal, later a Justice of the Supreme Court of California) observed that "in most cases the chief difficulty of the brief writer is not to prove a certain legal proposition, but to demonstrate that that proposition is applicable to the specific facts of the case in hand." 22 Cal. State Bar J. 175, 180 (1947). See also note 3 supra.

1. What is "that available law which really fits the case?" Answer: That rule (or principle) whose requisites for liability or its absence the correct version of the facts really fulfil.

2. What does "applying that rule of law to the facts" mean? Answer: The facts shown support claims made if they fulfil that rule's requisites for liability; if not, they do not. "Applying that rule to the facts" means deciding whether or not the facts shown fulfil that rule's requisites for liability.

3. In its application, how is the rule (or principle) that really fits the case to be construed? Answer: As broadly or narrowly as reasonably required to achieve the purpose (or redress the mischief) toward which that rule (or principle) is aimed.[26]

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[26] Justice Frankfurter contended: "Nor, indeed, has much been added by way of generalities to the wisdom of the resolutions in Heydon's Case, as reported in the robust English of Coke's Reports." Frankfurter, "Foreword to Symposium on Statutory Construction," 3 Vand. L. Rev. 365 (1950).

The "mischief rule" thus proclaimed by Sir Edward Coke, to which Justice Frankfurter refers is reported in 2 Coke Rep. 7, 76 Eng. Rep. 637, 638 (1584) as follows:

> [F]or the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: 1st. What was the common law before the making of the Act? 2nd. What was the mischief and defect for which the common law did not provide? 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth, and 4th. The true reason of the remedy; and then the office of all Judges is always to make such construction as shall suppress the mischief, and advance the remedy . . . .

Stone, supra note 7, at 12-15 stated:

> Judge-made law, which at its best must normally lag somewhat behind experience, was unable to keep pace with the rapid change, and it could find in the law books no adequate pattern into which the new experience could be readily fitted. It was inevitable that the attempt should be made to supply the unsatisfied need by recourse to legislation.
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> . . . .
>
> . . . . The reception which the courts have accorded to statutes presents a curiously illogical chapter in the history of the common law. Notwithstanding their genius for the generation of new law from that already established, the common-law courts have given little recognition to statutes as starting points for judicial law-making comparable to judicial decisions. . . .
>
> The attitude of our courts toward statute law presents a contrast to that of the civilians who bave been more ready to regard statutes in the light of the thesis of the civil law that its precepts are statements of general principles, to be used as gnides to decision. Under that system a new statute may be viewed as an exemplification of a general principle which is to take its place beside other precepts, whether found in codes or accepted expositions of the jurists, as an integral part of the system, there to be extended to analagous situations not within its precise terms. With the modern practice of drawing a statute as a statement of a general rule, I can perceive no obstacle which need have precluded our adoption of a similar attitude except our unfamiliarity with the civilian habit of thought.
>
> . . . I can find in the history and principles of the common law no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning. We have done practically that with our ancient statutes, such as the statutes of limitations, frauds and wills, readily molding them to fit new conditions within their spirit, though not their letter. . . . [T]he social policy and judgment, expressed in legislation by the law-making agency which is supreme, would seem to merit that judicial recognition which is freely accorded to the like expression of judicial precedent. . . .
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> . . . . It is difficult to appraise the consequences of the perpetuation of incongruities and injustices in the law by this habit of narrow construction of statutes and by the failure to recognize that, as recognitions of social policy, they are as significant and rightly as much a part of the law, as the rules declared by judges.

4. Each of several divergent rules (or principles) may literally fit the case. Where so, by what standard of merit is one rule rather than another chosen for application? Substantially the same answer may be given in two alternative forms:

a. Under Anglo-American common law, (1) choose that rule or principle deemed most likely to achieve the greatest practicable fulfilment of human wants with the least practicable frustration of other human wants; (2) the choice should be made reasonably, guided not by emotion, but by reason as informed by known experience.[27]

b. Under the provisions of the Uniform Commercial Code, (1) choose the provision (or interpretation based thereon) deemed most likely to achieve the purpose (or redress the mischief) toward which that provision of the Uniform Commercial Code was aimed.[28]

The lawyer's job in effectively giving advice includes making vital choices. Without litigation, by advice based on correct choices, the lawyer can best keep clients out of trouble. His advice, of course, may be challenged by lawsuit. If so, he can then show the court why on the merits his advice was correct.[29]

As pictured in the words of a noted modern jurist: "Any problem can be solved if only one principle is involved but . . . unfortunately all controversies of importance involve if not a conflict at least an interplay of principles."[30] This difficulty is accentuated by the nature of the marketing process. Not only are marketing practices continually changing but also public attitudes toward current marketing practices are also apt to change. Underlying assumptions about what is long-run sound marketing policy are constantly being challenged and re-examined afresh.

Here, then, is a deep-seated but very important question in sales cases. Will this decision as a precedent help the useful process of buying and selling, that is, does this decision help to move goods from original maker to final user? If so, this decision will prima facie tend toward greatest fulfilment of human wants with least practicable frustration of other human wants, and, according to that standard of justice, the decision would seem to be basically right.[31] If not, it may be on the merits questionable.

Examples of this process of balancing the interests described above, can

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. . . . [A] statute is not an alien intruder in the house of the common law, but a guest to be welcomed and made at home there as a new and powerful aid in the accomplishment of its appointed task of accommodating the law to social needs.

See also note 52 infra.

[27] See notes 8-9 supra.

[28] See note 26 supra and note 52 infra.

[29] See note 20 supra.

[30] Frankfurter, "The Supreme Court in The Mirror of Justice," 44 A.B.A.J. 723, 802 (1958).

[31] See notes 8-10 supra.

be seen in cases involving: the Statute of Frauds;[32] Technical cash sales;[33] Future goods;[34] Insistent groping in sales disputes for increased negotiability of goods;[35] Protection of original owners against fraudulent buyers and their good faith purchasers or creditors;[36] and, so-called warranty disputes.[37]

II

Buyers' Common Purpose in Marketing Deals

Buyers' Common Purpose in Marketing Deals—To Get Goods He Needs When and Where He Needs Them

A buyer buys goods or he contracts ahead for goods. Normally all goes well and there is no serious dispute. More often there is no dispute at all. The buyer gets the goods he needs when and where he needs them. The other party has fully performed.

With but little change in wording this general description still fits the facts where the buyer is a dealer. He buys or contracts ahead for goods to sell again to customers at his store. So, too, where the buyer is a manufacturer, canner or other processor. He buys or contracts ahead for raw materials: ore, steel, wire, pears, peaches, etc. These he will make into finished products for the market. Here, too, in ordinary deals, all usually goes well. No serious disputes. No lawsuits.

For the marketing process as a whole this individual purpose is common to all kinds of deals in all kinds of goods. The buyer expects full performance of the deal as made,[38] not default and a valid claim for damages. For the marketing process as a whole the broader common general purpose can be seen which each individual buyer and seller has more or less consciously shared: to move the goods another step along their marketing road from original maker to final user for the fulfilment of human needs. Moreover, the needs which the marketing process as a whole aims to fulfil continually change and grow.

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[32] See the forthcoming Uniform Commercial Code edition of Vold, Sales §§ 15-23.
[33] Id. §§ 30-31.
[34] Id. §§ 49-52.
[35] Id. §§ 31, 89.
[36] Id. §§ 90-93.
[37] Id. §§ 94-104.
[38] Some of the basic functions of the marketing process are described in an editorial in the Wall St. Journal, Aug. 8, 1961, p. 12, col. 1, reprinted in 41 PG & E Progress 4 (May 1964). See also remarks of Frederick R. Kappel, Chairman of American Telephone and Telegraph Company, at Annual Meeting of Share Owners, April 15, 1964 (see Annual Report at 7).
Mr. Donner, Chairman and Chief Executive Officer of General Motors, commented: "To meet the challenge of the market place, we must recognize changes in customer needs and desires far enough ahead to have the right products in the right places at the right time and in the right quantity." Quoted in Sloan, My Years With General Motors 440 (1964). See also notes 45, 55 infra and accompanying text.

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Importance of This Common Purpose on How To Construe and Apply Code Law In Marketing Deals

For users to get goods needed when and where needed—this common purpose may be very important on how to construe and apply Code law in particular marketing disputes. Life's currently changing and growing needs stimulate voluntary current adaptation of marketing practices to fulfil these needs. The Code recognizes the problems raised by this ever-changing market pattern in section 1-106(1):

> The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed. . . .

Examples of changing marketing practices abound for all to see who care to look. Each of us, going through life's successive stages, is a living example of changing and growing needs. Our changing and growing needs in any one of these stages are hardly recognizable in many of the details we need in the next. Each passing generation goes through life-stages roughly similar in outline, but widely differing in many of the details needed.

Parties voluntarily adapt their current marketing practices to fulfil currently changing and growing needs pursuant to the common purpose to furnish the goods when and where needed. The terms of current deals have their own surrounding circumstances. Often both terms and circumstances differ widely from those among other parties ten years ago, or even a year ago. Legal precedents between other parties at earlier times may not closely fit current terms or circumstances which aim to fulfil presently changing and growing needs.[39]

Disputes in current deals arise. One or the other party can readily and persuasively claim that the rule from an earlier precedent does not apply. Prima facie, if the reason for the rule still fits, the rule still applies. If its reason now fails, the reverse is true.[40]

Such common-law arguments, it seems, are familiarly phrased on the pattern of certain vague abstract ideals about reason or justice. These abstract ideals are often expressed in sweeping universalized legal max-

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[39] Ways, "The Era of Radical Change," Fortune, May 1964, p. 113 stated:
For many changes come about through the business system, which has an active role to play between the discoverers on one hand and the consumers on the other. . . . A larger and more intricate mediation of values and purposes occurs in "the market," meaning thousands of interconnected markets, where the public exercises ever increasing power through billions of daily decisions. The resultant of all these corporate and consumer decisions alters the very conditions of life.

[40] See notes 7-8 supra.

ims or epigrams omitting any reference to practical limitations on their application as learned from experience.

Such maxims or epigrams are by themselves not dependable guides on how to construe and apply law correctly. Experience has shown this abundantly.[41] A great number of maxims and epigrams can be found. Maxim can answer maxim. Epigram can repel epigram.[42] As guides on how to construe and apply law correctly, common law maxims and epigrams prove frustratingly elusive.

Applied as guides in deals aimed to fulfil changing and growing needs, such maxims and epigrams produce neither uniformity nor certainty. All too often their application ignores the basic purpose of parties in marketing deals—to get goods to the user when and where he needs them to fulfil his changing and growing needs. Though this basic purpose is recognized by the directive of Uniform Commercial Code section 1-106(1) that Code remedies shall "be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed," the technical and unduly narrow interpretation of prior remedial legislation often gave rise to fresh conflict of available legal authorities and great uncertainty in marketing deals rather than fulfiling these basic needs.[43] Our separate so-called Uniform Acts at times seem to intensify rather than to cure, both these difficulties

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41 Experience has abundantly shown that reasoning does not always employ reason reasonably. See Pound, Law Finding Through Experience and Reason ix (1960).

42 Llewellyn, The Common Law Tradition 521-35 (1960), reprinted in part from Llewellyn & Driscoll, "Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to be Construed," 3 Vand. L. Rev. 395-406 (1950) which contains 26 examples on "Thrust" and "Parry." Nineteen other examples on "Thrust" and "Counter-thrust" were gathered for the 1960 volume by J. A. Spanogle, Jr.

"Thrust" and "Parry" are illustrated by Llewellyn, supra, at 528, example 28:

Thrust. A proviso qualifies the provision immediately preceding. State ex rel. Higgs v. Summers, 118 Neb. 189, 223 N.W. 957 (1929).

Parry. It may clearly be intended to have a wider scope. Reuter v. San Mateo County, 220 Cal. 314, 30 P.2d 417 (1934).

An example of "Thrust" and "Counterthrust" is found in id. at 529, example 3:

Thrust. The meaning of a word may be ascertained by reference to the meaning of words associated with it. International Rice Milling Co. v. NLRB, 183 F.2d 21, 25 (5th Cir. 1950).

Counterthrust. A word may have a character of its own not to be submerged by its association. Russell Motor Car Co. v. United States, 261 U.S. 514, 519 (1923).

A recent vivid example of opposing epigrams in the same trial and in the same appeal is Bell v. United States, 181 F. Supp. 668 (1960), rev'd, 366 U.S. 393 (1961) (application of U.S. Army regulations pursuant to a statute in the ease of allied prisoners captured in the Korean War who had been brainwashed by the Communists).

43 E.g., the Negotiable Instruments Law was enacted practically word for word in all American jurisdictions. Nevertheless, conflict of authority resulted with respect to over 80 of its 196 sections. The highest courts of different jurisdictions had construed them differently. Hawkland, Commercial Paper (Negotiable Instruments—Under the Uniform Commercial Code) v (1959). On the same point, see Malcolm, "The Uniform Commercial Code," 39 Ore. L. Rev. 318, 319 (1960); Schnader, "Why the Commercial Code Should be Uniform," 69 Com. L.J. 117, 118 (1964).

despite their concern "to make uniform the laws of those states which enact [the particular Act]. . . ."[44]

III

UCC Purposes and Policies Serve to Fulfil Buyers' Common Purpose

The Uniform Commercial Code's Own Twin Keys on How To Construe and Apply Its Own Provisions—Uniformity and Evolutionary Growth—Important for Fulfiling Buyers' Common Purpose

The Uniform Commercial Code furnishes its own twin keys on how to construe and apply Code law to disputes in marketing deals. (1) Uniformity, and (2) Evolutionary Growth.

The Code in section 1-102 expressly recognizes the inherent need for both of these keys. Construed and applied with use of both, the Code clearly affords greatly improved adaptation of the law to the common purpose of parties in marketing deals. The Code thus provides a much better adaptation than do our separate Uniform Acts whose provisions for construing their terms sharply single out uniformity but largely ignore evolutionary growth.

Uniformity: For Stability and Reasonable Certainty in Commercial Dealings

The Code expresses one of its main purposes and policies as follows: "to make uniform the law among the various jurisdictions." Section 1-102(2)(c).

Moreover, the Code "shall be liberally construed and applied to promote" this underlying purpose and policy. Section 1-102(1).

Thereby the Code strongly supports stability in commercial relations. The same idea is familiar under other labels—reasonable certainty in commercial dealings; security of transactions. Users need performance of deals when and where needed, not merely a valid claim for damages.[45]

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[44] The two most important, Sales and Negotiable Instruments, were drafted respectively in 1906 and 1892, and have persisted substantially unaltered since, despite the enormous changes in the scope and form of commercial and financial activity. The various interpretations of these old statutes have also seriously undermined the original concept of uniformity among the states. N.J. Comm'n on the UCC 19 (2d Rep't 1960) prepared by Professor Hawkland.

Marko v. Sears, Roebuck & Co., 24 N.J. Super. 295, 299-303, 94 A.2d 348, 350-52 (Super. Ct. 1953) reviews sharply conflicting decisions from other jurisdictions on how to construe and apply Sales Act, §§ 69(2), 70 on the question of whether damages may also be recovered after rescission for breach of warranty.

For further examples relating to the NIL, see Schnader, "The New Commercial Code," 36 A.B.A.J. 179 (1950).

[45] It is an old cliche that with increased speeds of communication and transportation

In this underlying policy of uniformity we would usually find the best prima facie guide for construing the Code's other provisions.[46] However, unlike our separate Uniform Acts, the Code, as a basic guide to construing its other provisions also emphasizes evolutionary growth.

Evolutionary Growth: 1. To Modernize Applicable Law and Expand Commercial Practices: To Vary the Effect of Most Code Provisions May Be Varied by Agreement

Parallel with uniformity as an underlying Code purpose and policy, as recited in the before-mentioned section 1-102(2)(c), the Code in section 1-102(2) recites two other "underlying purposes and policies" as follows:

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties. . . .

Evolutionary growth—through these two underlying Code purpose and policy aspects stated in subdivisions (a) and (b) of subsection (2) —makes its distinct statutory trumpet call. Moreover, the Code, through section 1-102(1), "shall be liberally construed and applied to promote" these two "underlying purposes and policies."

In addition, the Code, in section 1-102(3), strongly supports evolutionary growth by expressly providing that:

(3) The effect of provisions of this Act may be varied by agreement, [and] . . . the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

We can look at these "underlying purposes and policies," as above recited in Code section 1-102 in its two subdivisions (a) and (b) of sub-

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the world grows smaller every day. So also do the United States and the several states in the United States. With business, commerce and financing becoming increasingly interstate, it is seriously inefficient to have the degree of variation in rules of commercial law presently existing between one state and another. Commerce does not flow nearly as smoothly as it might and a major objective of the Code is to modernize the rules and make them uniform in the several states so that commerce, business and finance can operate more efficiently.

Malcolm, "The Uniform Commercial Code," 13 Bus. Law. 490, 491 (1958). For further particulars on this theme, see Schnader, supra note 43, at 118.

46 Merrill, "Uniform Correct Construction of Uniform Laws," 49 A.B.A.J. 545, 546 (1963); Schnader, supra note 44. In this respect Professor Merrill's article is especially notable. Professor Merrill convincingly insists on the necessity of "uniform correct construction" from the outset by courts dealing with the Code in order to maintain the uniformity required by the Code's own provisions. To that end he thereupon sets forth a series of resources available for lawyers to use to aid the courts in achieving such "uniform correct construction" of the Uniform Commercial Code.

section (2), in the light of current continually changing marketing facts. We can look, also in the same light, at subsection (3) of section 1-102.

In such a look, what can we see? A powerful triple combination of "underlying purposes and policies": 1. to modernize obsolescent and outdated law that frankly no longer fits current marketing facts (section 1-102(2)(a)); 2. to permit current expansion of commercial practices through custom, usage and agreement of parties, thereby promoting current adaptation of marketing practices to continually changing and growing needs of buyers (section 1-102(2)(b)); 3. to let parties by agreement, in order to fit their changing needs, vary the effect of most Code provisions (section 1-102(3)). All these "underlying purposes and policies" are included in Code section 1-102.

Taken together, these provisions go far beyond the single acknowledged purpose of construing to promote uniformity which is found in both subdivision (c) of subsection (2) of section 1-102 and in our separate Uniform Acts. No longer is the primary aim merely uniformity with prior law and practice, however obsolescent. Under the Code, but not under our separate Uniform Acts, the frankly acknowledged purpose and policy is that of change and growth with changing times, circumstances and needs of buyers. Devotion to uniformity with the receding and perhaps obsolescent past shall not under Code law interfere unduly with present evolutionary growth with its focus on current changing and foreseeable needs of buyers.

Under section 1-102(1), the Code "shall be liberally construed and applied to promote" these "underlying purposes and policies." This liberal construction of the Code's triple combination of underlying purposes and policies tends powerfully to move goods more freely to market. It tends to achieve the common purpose of parties to get the goods to the buyers when and where they need them "as if the other party had fully performed" (as quoted in Code Section 1-106(1)). This perspective, too, is shown in the Code comment to section 1-102—matter dealt with in the following discussion.

Evolutionary Growth: 2. To Fill Unforeseen Gaps, Analogize Directly From Code's Own Provisions

The Uniform Commercial Code, in section 1-102(1), expressly provides that "This Act shall be liberally construed and applied to promote its underlying purposes and policies." This provision manifestly was intended by its draftsmen to mean what it literally says: "liberally construed and applied to promote ...." As explained in its Code comment 1:

> It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices. However, the proper construction of the Act requires that its interpretation and application be limited to its reason.
>
> . . . .
>
> The Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.

Included in Code comment 1 to section 1-102 are examples of analogizing by our courts directly from provisions in our separate Uniform Acts. For emphasis these examples may be severally numbered as follows, though recited in the comment's own words:

> *1.* They have recoguized the policies embodied in an act as applicable in reason to subject-matter which was not expressly included in the language of the act. Commercial Nat. Bank of New Orleans v. Canal-Louisiana Bank & Trust Co., 239 U.S. 520, 36 S. Ct. 194, 60 L.Ed. 417 (1916) (bona fide purchase policy of Uniform Warehouse Receipts Act extended to case not covered but of equivalent nature).
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> *2.* They have done the same where reason and policy so required, even where the subject-matter had been intentionally excluded from the act in general. Agar v. Orda, 264 N.Y. 248, 190 N.E. 479 (1934) (Uniform Sales Act change in seller's remedies applied to contract for sale of choses in action even though the general coverage of that Act was intentionally limited to goods "other than things in action."). They have implemented a statutory policy with liberal and useful remedies not provided in the statutory text.
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> *3.* They have disregarded a statutory limitation of remedy where the reason of the limitation did not apply. Fiterman v. J. N. Johnson & Co., 156 Minn. 201, 194 N.W. 399 (1923) (requirement of return of the goods as a condition to rescission for breach of warranty; also, partial rescission allowed).

To these specific examples this Code comment adds the following general observation:

> Nothing in this Act stands in the way of the continuance of such action by the courts.

With but slight change in wording subsection (1) has been a part of the Uniform Commercial Code, section 1-102, from its first tentative draft in 1949 to its enactment as it stands today. So, too, has its Code comment explanation and its examples set out above.

Legislatures enacted without change section 1-102, including its subsection (1). They did so "in reliance on the recommendations of the sponsor organizations and without detailed study."[47] The foregoing

[47] Kripke, "The Principles Underlying the Drafting of the Uniform Commercial Code," 1962 U. Ill. L.F. 321, 328.

quoted words, particularly "in reliance . . . without detailed study personally by the legislators themselves," seem to correctly summarize the legislative history of the actual enactment of the Uniform Commercial Code.[48]

What does this legislative history show with respect to how the Code itself requires—or at least authorizes—its provisions to be construed? Whether expressed in terms of "legislative intent" or of "legislative purpose," the general legislative agreement with the purposes and policies expressed by the Code's draftsmen supports the Code requirement that its provisions be liberally construed and applied to promote evolutionary growth as well as uniformity of law.

In disputed claimed applications of various provisions of the Code those two basic purposes may either conflict or interplay with each other. In such events, how does the Code itself require, or at least authorize, its provisions to be construed?

The answer to this basic question is suggested in the Code comments to section 1-102:

> UCC § 1-102, comment 1: The Act should be construed in accordance with its underlying purposes and policies [and] . . . the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.
>
> However, the proper construction of the Act requires that its interpretation and application be limited to its reason.
>
> UCC § 1-102, comment 2: But the Code seeks to avoid the type of interference with evolutionary growth found in [case cited] . . . .

This answer—uniformity expanded by the necessity of evolutionary growth—was prepared by the Code draftsmen and accepted and supported by the sponsor organizations. It has been a part of the Code's legislative history, in practically unchanged form, from the outset.

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[48] Drafting stages of the UCC tested out many controversial and divergent proposals about what its provisions should include. For informative details touching many vivid examples of such proposals, and what happened to them, see Braucher, "Legislative History of the Uniform Commercial Code," 58 Colum. L. Rev. 799-814 (1958); Kripke, supra note 47, at 321-32.

For New York, of course, the most elaborate single presentation of this drafting process appears in the six volumes of reports of the New York Law Revision Commission: 1954, two volumes; 1955, three volumes; 1956, one volume.

For California the most extensive single presentation of this process now available appears in the Cal. Senate Fact Finding Committee on Judiciary, Report No. 6, 316-815 (1959-1961). This report covers the Uniform Commercial Code. From page 316 to page 815 it presents some five hundred pages of studies and reports on controversial and divergent proposals about what the UCC provisions should include. At page 815 came the end, so far as the 1961 session of the Legislature was concerned. The Judiciary Committee voted to refer the bill to the Interim Committee for further study.

In 1963, after this "further study," the bill for enacting the UCC in California unanimously passed both the Assembly and the Senate, without debate, on roll call. Cal. Senate Jour. 1104 (March 27, 1963) (vote: 29-0); Cal. Assembly Jour. 2874 (May 3, 1963) (amended by unanimous consent); Cal. Assembly Jour. 3611 (May 20, 1963) (vote: 66-0); Cal. Senate Jour. 2920 (May 22, 1963) (Assembly amendments concurred in, vote: 32-0).

As was previously stated, the legislatures and legislators enacted the Code "without detailed study" by themselves personally, but "in reliance on the recommendations of the sponsor organizations."[49] Was their "reliance" confined to the mere above-mentioned words[50] of section 1-102 and its comment? Of course not. It extended also to their meaning and purpose as consistently explained from the outset by the sponsor organizations,[51] including in appropriate cases analogizing directly from the Code's own provisions.[52] That would seem a highly significant inference.[53]

[49] See note 47 supra.

[50] See notes 15-18 supra.

[51] Kripke, supra note 47, at 327-28. Note the following excerpts:

The Code was "lawyers legislation," largely outside the potential understanding of most members of state legislatures, and too big to be grasped by even the studious lawyer members. Difficult legislation like this without popular appeal can seldom be passed without a broad consensus of agreement of interested parties . . . . The Code would have been a sitting duck target for any determined special interest of combination of special interests who chose to attack one or more features of the bill persistently . . . .

There was no demand for a revolutionary reshaping of commercial law, but only for an effort to modernize and to regain uniformity. The result is in keeping with the general nature of the work of the sponsor organizations and with the expectations of many state legislatures and individual legislators who have approved the Code in reliance on the recommendation of the sponsor organizations and without detailed study.

[52] In this connection analogizing directly from the statute deserves some special attention. See Braucher, supra note 48, at 810 and the footnote material there cited. As § 1-102 stood in 1950 and in earlier preliminary drafts, it provided expressly in subsection 3, as it then stood, for analogizing directly from the statute "when the circumstances and underlying reasons justify the extending its application." Earlier this had also been coupled with a provision for analogical extension or limitation by judicial decision like other common-law principles. In support of these tentative draft provisions, the prepared official comment recited at some length the same judicial decisions that now appear in comment 1 to § 1-102. The above mentioned express language of subsection 3 as it then stood was later deleted. This was done in deference to argument that it led to uncertainty. This deletion was understood by the sponsors, says Professor Braucher, as leaving the matter open, rather than reversing the policy. Braucher, supra note 48, at 810. The text of §§ 1-102(1)-(2) was thereafter completed as they now stand. Section 1-102, comment 1 still refers to the same earlier cited precedents for extension or limitation by analogy as justified by its underlying reason—precedents under our separate Uniform Acts—adding for good measure "nothing in this Act stands in the way of the continuance of such action by the courts." See also notes 7, 8, 26 supra and accompanying text.

As a California lawyer, let me add some purely personal words. The California Civil Code codifies certain familiar maxims of jurisprudence:

Sec. 3510. When the reason of a rule ceases, so should the rule itself.

Sec. 3511. Where the reason is the same, the rule should be the same.

These were enacted in 1872 as copied, from the proposed Field Code for New York, the well-known proposed codification of that time for Anglo-American common law.

These sections of the California Civil Code are found in division 4, part 4 of the Civil Code as a whole. These sections are not included among the Civil Code sections specifically repealed or modified by the enactment of the Uniform Commercial Code in Cal. Stat. 1963 ch. 819. Its repealer and specially amending sections directly touching other California statutes, namely sections 2 to 52, inclusive, appear at pages 1997-2015. Nowhere in these eighteen pages are these two Civil Code sections mentioned; nor is part 4 or division 4, of which they are a part.

The maxims of Anglo-American jurisprudence expressed in the above-mentioned sections of the California Civil Code still stand as statutory law in California.

[53] Example from 1963 regular session of the California Legislature in enacting the Uniform Commercial Code.

That statute as enacted, became Cal. Stat. 1963 ch. 819. It covers 166 printed pages and is one of 2181 statutes enacted at this regular session. Those 2181 statutes enacted cover 3963 printed pages.

Evolutionary Growth: 3. To Provide Equitable "Safety Valves" Against Undue Harshness—Also To Analogize Directly From the Code's "Safety Valve" Provisions to Appropriate New Applications

Freely bargained and changing marketing practices confront many perils in present-day evolutionary growth. Styles in clothing change. Cars wear out, or give way to later more desired models. So do refrigerators, television sets, many kinds of musical instruments, railroad cars, and highway trucks. Transcontinental piston-driven planes give way to larger and faster jets. Already supersonic transportation and communication satellites prod at marketing's near-future prospects.[54]

Time and change can happen to them all.[55] This evolutionary marketing race is not always to the swift. Business uncertainties abound. Mistaken business judgment as to future prospects makes many a contract unprofitable. Many a business is wrecked.[56] Also, in such a freely bargained race, sharp practice and hard bargains can readily occur. Such individual calamities beset evolutionary growth in marketing practices.

Victims of business misfortune, as also "underdogs" whose rosy bargains become thorny burdens—companion types in business distress—cry out for relief. Merely mechanical application of legal rules can in such cases operate very harshly. If a deal is regarded as taking "a pound of flesh," its enforcement is widely resented as unjust. In our Anglo-American legal tradition, need for "tempering such winds to the shorn lamb" has long been recognized.[57] Equitable principles, despite their elusive boundaries, are widely used to mitigate unduly harsh literal application

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Senate Bill No. 118 by enactment became Cal. Stat. 1963 ch. 819: the UCC. The Cal. Senate Jour. 4879 (1963) indexes Senate action on this bill.

For this regular session the Cal. Senate Jour. covers 4847 printed pages and the Cal. Assembly Jour., 6346 pages—a total, of 11,193 printed pages.

There were, of course, several thousand other bills for proposed statutes or amendments which failed of enactment. Enough said.

54 Ways, supra note 39; "Special Report: The Airlines' Golden Age," Business Week, March 28, 1964, p. 52.

55 No company ever stops changing. Change will come, for better or worse. . . . No fixed, inflexible rule can ever be substituted for the exercise of sound business judgment in the decision-making process.

. . . .

Each new generation must meet changes. . . . The work of creating goes on. Ways, supra note 39, at 443-44.

56 Example. The well-known loss of market leadership by Ford Motor Co. with its perennial static Model T utility car in the 1920's. See Sloan, supra note 38, at 162-63. Another example. Ford's marketing debacle with its intermediate bulky Edsel in the late 1950's after market demand shifted sharply away from that type, and toward such light compact cars as Corvair and Falcon. See Sloan, supra note 38, at 441-43; "Special Report: Market Research: Scouting the Trail for Marketers," Business Week, April 18, 1964, p. 90.

57 Example. The centuries old invention by English Chancellors of the "equity of redemption," familiar in real property mortgage law, refusing literal enforcement of unconscionable forfeiture agreements clogging this equity of redemption.

of legal rules. "When the reason of a rule ceases, so should the rule itself."[58]

What does the Code do "to temper such winds to the shorn lamb" in marketing practices? Notably, two things: 1. It provides equitable safety valves. 2. It makes them authoritative for construing the Code as a whole.

The Code enacts various leading historical safety valves of equitable principles which are declaratory of flexible "equity law." Code provisions make their ramifications throughout the Code readily findable. The following are leading examples:

> Section 1-102(3): . . . the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.
>
> Section 1-103: Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

Various other instances of enactment of such equitable safety valves can readily be pointed out throughout the Code. Conspicuous among them is section 2-302(1) which provides that:

> 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.

Comment 1 to section 1-102 expressly gives these equitable safety valves the Code's controlling force on how in application correctly to construe and apply the entire Code itself: "narrowly or broadly, as the case may be, in conformity with the purposes and policies involved." This interpretation is expressly authorized by other provisions, notably in article 1,[59] the general article on how to construe and apply the Code as

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[58] See notes 18, 52 supra and accompanying text.

[59] See notes 18, 26, 52 supra. Consider the following passages from Nutting & Elliott, Cases on Legislation 294-95 (3d ed. 1964):

> Statutory interpretation as a component of the judicial task and function is not—and indeed in its nature it cannot be—an exact science. It calls for the exercise of judicial discretion and judicial statesmanship of a high order. To aid the courts in the proper and wise performance of this function, a basic rule of construction like the "mischief rule" should be accorded preference over a too-rigid adherence to the strict letter of the law with its concomitant policy of "letting the chips fall where they may."
>
> Flexible use of the canons and maxims of grammatical usage, and flexible interpretation of particular words, as already manifest in a great and growing body of English and American decisions, should continue. All component parts of the official text of an enacted law—its punctuation, its title, its preamble, its chapter and section

a whole. Though these provisions have been previously referred to in this article, it will be helpful to here restate them together:

> Section 1-102(3): . . . the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement . . . .
>
> Section 1-102(1): This Act shall be liberally construed and applied to promote its underlying purposes and policies.
>
> Section 1-103: Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant . . . shall supplement its provisions.
>
> Section 1-106(1): The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . .

Various sections in other articles of the Code further set out how in certain circumstances correctly to construe and apply certain particular provisions. A few examples are mentioned in the footnote.[60]

General Conclusions

The Code sets out two basic general purposes for construing its own provisions: uniformity of law and evolutionary growth. Both appear very clearly in section 1-102 and its Code comment, supplemented by the other above-mentioned provisions in article 1.

These are the most authoritative general Code sources on how to construe and apply its own provisions in current marketing disputes.

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headings, its context as a whole, as well as illustrations and marginal notes—should be regarded as legitimate guides in resolving doubt or clarifying ambiguities.

Finally, extrinsic aids—not only background history, but also parliamentary proceedings, reports of committees, legislative debates, other statutes, and prior and contemporaneous construction—are often available as permissible sources of information and enlightment. Given full access to these resources, judges can be counted on to use them wisely, to balance them fairly, and thereby to assist in clarifying the legislative intent and in achieving, wherever possible, the ultimate fulfillment of the legislative purpose.

[60] The following examples of the Uniform Commercial Code sections, with brief wording on content of each, are listed in numerical order. 1. § 1-203, good faith; 2. § 1-204, reasonable time, seasonably; 3. § 1-208, limits on option to accelerate, and burden of proof on good faith therein; 4. § 2-103, "good faith" includes reasonable commercial standards in case of merchants; 5. § 2-105, commercial usage in the relevant market determines what is a "commercial unit"; 6. § 2-302, courts may refuse to enforce unconscionahle deals or clauses in deals; 7. § 2-716, specific performance may be decreed, not only where goods are unique but also in other proper circumstances; 8. § 2-718(1), limit standards spelled out for liquidated damages; 9. § 2-719(3), deals may limit consequential damages unless unconscionable, and certain prima facie differences between cases recognized in its application; 10. § 9-207, various matters included in "reasonable care" in the custody of collateral in secured party's possession.