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The Eroding Uniformity of the Uniform Commercial Code

BY JOHN C. MINAHAN, JR.*

Although the Uniform Commercial Code was drafted in an effort to provide uniformity of commercial law in the United States, the uniformity which was initially engendered by the enactment of the Code is presently giving way to wide-spread disparity in the commercial law among the states. In this article John C. Minahan, Jr. explores the reasons for the failure to achieve uniformity of commercial law under the UCC and suggests means by which the uniformity mandate of the Code may be preserved.

I. INTRODUCTION

Several years ago Karl Llewellyn summarized the reasons favoring the enactment of the Uniform Commercial Code (UCC) in seven words: clarity, simplicity, convenience, fairness, completeness, accessibility, and uniformity.¹ Relative to pre-Code statutory and decisional law, the UCC project was highly successful when evaluated in terms of these criteria. Time has, however, worked to the Code's disfavor. Over the years the UCC's statement of the law has become less complete as state and federal legislators promulgate rules which supersede Code provisions. One result of such legislation is that commercial law becomes less accessible since one must canvass statutes extrinsic to the Code in search of superseding or supplementing provisions. The same observations may be made with respect to the developing body of decisional law. In a

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¹ Llewellyn, *Problems of Codifying Security Law*, 13 LAW & CONTEMP. PROB. 687 (1948). Llewellyn developed the same seven concepts before the New York Law Revision Commission. 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE 5-18 (1954) [hereinafter cited as N.Y.L.R.C. HEARINGS (1954)].

common law system it is the Code as construed by the courts which must be considered, and with the passage of time more and more conflicting decisional law dealing with the Code develops. The simplicity, clarity, accessibility and convenience of which Professor Llewellyn spoke are slowly yielding to complexity, obscurity and inaccessibility. Most disturbingly, the uniformity of law which the Code initially engendered is yielding to disparity among the enacting states. It has now been three-quarters of a century since the first uniform commercial statutes were promulgated by the National Conference of Commissioners on Uniform State Laws. During that time it has become evident that, at least in the United States,² complete uniformity of commercial law is a highly illusive objective.

A. *The Historical Objective of Uniformity of Commercial Law*

The necessity and desirability of uniform substantive rules governing commerce were early recognized in the United States. In 1891 the National Conference of Commissioners on Uniform State Laws was formed and immediately undertook a project to draft a Uniform Negotiable Instruments Law (UNIL), which was recommended for adoption in 1896. The UNIL was followed in 1906 by the Uniform Warehouse Receipts Act and the Uniform Sales Act, and in 1909 by the Uniform Bills of Lading Act and the Uniform Stock Transfer Act. In 1918 the Uniform Conditional Sales Act was completed, and in 1933 the Uniform Trust Receipts Act was completed. The American Bankers Association sponsored the Bank Collection Code, which was completed in 1929.

The quest for uniformity through the promulgation of the Uniform Acts by the National Conference of Commissioners did not, however, meet with success. The Acts were not widely enacted,³ and among enacting jurisdictions there was great var-

² Contrast the British experience under the Bills of Exchange Act and the Sale of Goods Act where, it has been suggested, substantial uniformity was achieved throughout the British Empire. Rossman, *Uniformity of Law: An Elusive Goal*, 36 A.B.A.J. 175, 176 (1950).

³ The Uniform Acts met with varying degrees of success in state legislatures:

iance in the judicial construction of particular provisions of the Acts. Decisional law involving the UNIL illustrates the problems which characterized the first stumbling steps toward codification. The UNIL was promulgated in 1896 and had been adopted in every state by 1924. However, by 1914 courts were reaching different substantive results under the UNIL and, in cases clearly controlled by the Act, courts often failed to cite the UNIL or cases decided under it.⁴ For example, on the issue of whether an antecedent debt constituted value, there had been some eighty-six cases decided by 1914 in jurisdictions which had enacted the UNIL. The decisions have been broken down as follows: In thirty-five cases UNIL Section 25, which was pertinent to the issue, was not even cited; of the fifty-one decisions which cited Section 25, only four of them cited any cases which had been decided under that section. Moreover, some opinions were in accord with the UNIL while others were not.⁵ By the time the UCC was prepared, there were conflicting judicial elaborations with respect to over eighty of the UNIL's 196 sections.⁶

B. *Uniformity Under the Uniform Commercial Code*

Enactment of the UCC during the 1950's and 1960's had the immediate effect of replacing the conflicting commercial

<i>Uniform Act</i>	<i>Number of States Enacting</i>
Uniform Negotiable Instruments Act	48
Uniform Warehouse Receipts Act	48
Uniform Sales Act	34
Uniform Bills of Lading Act	31
Uniform Stock Transfer Act	48
Uniform Conditional Sales Act	10
Uniform Trust Receipts Act	32
Bank Collection Code	18

⁴ Hargest, *Keeping the Uniform State Laws Uniform*, 76 U. PA. L. REV. 178, 182 (1927) (on the failure of courts to consider the Uniform Acts); Eaton, *The Attitude of the Courts with Reference to an Antecedent Debt as Constituting Value Under the Uniform Negotiable Instruments Law*, 23 YALE L.J. 293 (1914).

⁵ Eaton, *supra* note 4, at 316.

⁶ Schnader, *The New Commercial Code: Modernizing Our Uniform Commercial Acts*, 36 A.B.A.J. 179, 181 (1950). For an analysis of the "uniformity" provisions in the prior uniform acts and their effects upon the courts' obligations, see Sicherman, *Construction of Clause in Uniform State Laws Providing for Uniformity of Interpretation*, 2 A.B.A.J. 60 (1916).

law of the various states with a relatively uniform statute. The Code was drafted in

an effort . . . to break up . . . [the Uniform] Acts, to modernize them, to put them into a coherent and accessible form, to add to them a large body of material that should have been put into them before but was not, and to clarify the frequent case law disputes that have arisen.⁷

The enactment of the Code, however, did not provide permanent freedom from the problems of lack of uniformity which characterized the experience under the various Uniform Acts. Although there is today a great deal of uniformity in the commercial law of the states, there is at the same time an expanding amount of unjustified disparity in both statutory and decisional law under the Code.

Decisional law involving the Code is rapidly growing, yet an examination of the decisions of the past 5 years reveals that once again "the courts on identical statutes are reaching diametrically opposite conclusions. . . ."⁸ Consider the following illustrative issues upon which there are currently conflicts in decisional law: Does the sale of a radio station constitute a "sale of goods" within the scope of Article 2?⁹ Is an agreement to provide data processing services within the scope of Article 2?¹⁰ Are farmers "merchants" within the meaning of Section 2-

⁷ Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779 (1953) (address delivered at the 1952 convention of the Tennessee Bar Association).

⁸ Sicherman, *supra* note 6, at 61. Shortly after the promulgation of the UNIL, one commentator, disturbed by developing decisional law, remarked:

With the passage of time, these decisions began to reveal an unexpected and formidable peril. The whole fabric, the very conception of uniformity, was being menaced by the strange attitude of the courts. Once more the hydra-heads of uncertainty were showing themselves: the courts, on identical statutes, were reaching diametrically opposite conclusions; cases from other states on the precise point were being ignored, and matters clearly within its language were being disposed of on the bases of ancient decisions.

Id. A later commentator made the same general observations about decisional law under the Code. Note, *Disparate Judicial Construction of the Uniform Commercial Code—The Need for Federal Legislation*, 1969 UTAH L. REV. 722.

⁹ *Foster v. Colo. Radio Corp.*, 381 F.2d 222 (10th Cir. 1967) (yes); *Crooks v. Chapman Co., Inc.*, 185 S.E.2d 787 (Ga. 1971) (no); *Field v. Golden Triangle Broadcasting, Inc.*, 305 A.2d 689 (Pa. 1973) (no).

¹⁰ *Clements Auto Co. v. Serv. Bureau Corp.*, 444 F.2d 169 (8th Cir. 1971) (yes); *Computer Servicers, Inc. v. Beacon Mfg. Co.*, 328 F. Supp. 653 (D.S.C. 1970), *aff'd*, 443 F.2d 906 (4th Cir. 1971) (no).

201?¹¹ Does the Code require an "as is" disclaimer to be conspicuous?¹² Do implied warranties apply to injuries to animals?¹³ Does a payee have any interest in a negotiable instrument prior to delivery?¹⁴ Does postdating a check provide a transferee with notice of a defense?¹⁵ Does the "any person" language in UCC Section 3-406 apply to a certifying bank?¹⁶ Does the term "equipment" constitute a sufficient description of collateral in a security agreement?¹⁷ May an auto dealer who purchases cars from another auto dealer qualify as a buyer in the ordinary course of business?¹⁸ When does the 10-day grace period in UCC Section 9-312(4) commence to run if the collateral was in the possession of the debtor before the execution of a purchase money security agreement?¹⁹ These and other conflicts of authority²⁰ reflect an increasing lack of harmony in the

¹¹ *Loeb & Co. v. Schneiner*, 17 UCC REP. SERV. 897 (Ala. 1975) (no); *Sierens v. Clausen*, 328 N.E.2d 559 (Ill. 1975) (yes); *Ohio Grain Co. v. Swisshelm*, 318 N.E.2d 428 (Ohio 1973) (yes).

¹² *Osborne v. Genevie*, 289 So. 2d 21 (Fla. 1974) (yes); *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 7 UCC REP. SERV. 1257 (N.J. 1970) (yes); *Smith v. Sharpsteen*, 521 P.2d 394 (Okla. 1974) (no).

¹³ *Kassab v. Central Soya*, 246 A.2d 848 (Pa. 1968) (yes); *Leach v. Wiles*, 429 S.W.2d 823 (Tenn. 1968) (no).

¹⁴ *Rex Smith Propane v. Nat'l Bank of Commerce*, 372 F. Supp. 499 (N.D. Tex. 1974) (no); *Kampfe v. United States*, 14 UCC REP. SERV. 1371 (D. Mont. 1974) (no); *Kaufman v. Chase Manhattan Bank, Nat'l Ass'n*, 370 F. Supp. 276 (S.D.N.Y. 1973) (no); *Harris v. Hill*, 199 S.E.2d 847 (Ga. 1973) (yes).

¹⁵ *Briand v. Wilde*, 268 A.2d 896 (N.H. 1970) (yes); *Northern Currency Exch., Inc. v. Strickman*, 9 UCC REP. SERV. 705 (N.Y. 1971) (no).

¹⁶ *Brower v. Franklin Nat'l Bank*, 311 F. Supp. 675 (S.D.N.Y. 1970) (yes); *Wallach Sons, Inc. v. Bankers Trust Co.*, 7 UCC REP. SERV. 141 (N.Y. Civ. Ct. 1970) (no).

¹⁷ *Commercial Trading Co. v. Bassin (In re Laminated Veneers Co.)*, 471 F.2d 1124 (2d Cir. 1973) (no); *United States v. First Nat'l Bank*, 470 F.2d 944 (8th Cir. 1973) (yes); *Mammoth Cave Production Credit Ass'n v. York*, 429 S.W.2d 26 (Ky. 1968) (no).

¹⁸ *Sherrock v. Commercial Credit Corp.*, 277 A.2d 708 (Del. 1970) (no); *Bank of Utica v. Castle Ford, Inc.*, 317 N.Y.S.2d 542 (App. Div. 1971) (yes); *Associates Discount Corp. v. Rattan Chevrolet, Inc.*, 462 S.W.2d 546 (Tex. 1970) (yes).

¹⁹ *Compare James Talcott, Inc. v. Associates Capital Co.*, 491 F.2d 879 (6th Cir. 1974) with *Brodie Hotel Supply, Inc. v. United States*, 431 F.2d 1316 (9th Cir. 1970).

²⁰ Divergence in decisional law under the Uniform Commercial Code [hereinafter cited as UCC] before 1969 is discussed and documented in Note, *supra* note 8, at 774 app. Many controversies involve "basic building blocks" such as the definitional sections of the Code. Miller, *Hints and Helps to be Found in Article 1 Definitions*, 4 UCC L.J. 223 (1972). The annual survey of commercial law decisions provided by *The Business Lawyer* reflects many other conflicts in Code decisional law. See, e.g., 31 BUS. LAW. 1517-1605 (1976); 30 BUS. LAW. 847-919 (1975); 29 BUS. LAW. 1225-1314 (1974); 28 BUS. LAW. 805-71 (1973); 27 BUS. LAW. 735-73 (1972).

decisional law among the states. Thus, in an annual survey of UCC decisional law one commentator recently remarked:

Most of the Article 9 developments during the last year were in the mainstream of prior decisional law. However, this record of consistency and uniformity in interpreting and applying the Code was marred by a disturbing number of cases which failed to apply established Code principles in resolving secured transaction disputes. In some of these cases, the courts appear to have been guided by a desire to produce a result which would comport with a sense of justice and equity in the particular case. Others reflect a desire to prevent receipt of a windfall by one of the competing claimants. Unfortunately, however, the part of reasoning followed by these courts in resolving the particular disputes will spawn inevitable uncertainty and nonuniformity as the Code is applied to future cases.²¹

The disparity in decisional law is compounded by variance in the Code's language as it has been enacted in the various states. During the enacting years state legislatures freely amended the official text of the Code. In addition there has been a general reluctance on the part of state legislators to adopt the official amendments to the Code as they are periodically promulgated by the Code's Permanent Editorial Board. This has resulted in substantial variations in the text of the UCC in enacting states.²²

C. Existing Disparity in the Commercial Law Among the States

Uniformity of commercial law in the United States and, for that matter, among nations²³ is unquestionably a laudable objective. Absent important countervailing considerations, the

²¹ Burke, *Uniform Commercial Code Annual Survey: Secured Transactions*, 31 BUS. LAW. 1583 (1976).

²² See text accompanying notes 35-45 *infra* for a discussion of nonuniform state enactment of the UCC.

²³ The quest for uniformity of commercial law among states has an international counterpart in the Uniform Law on the International Sale of Goods and in the Uniform Law on the Formation of Contracts for the International Sale of Goods. Both are discussed in E. FARNSWORTH & J. HONNOLD, *COMMERCIAL LAW CASES & MATERIALS*, 14-15 (3d ed. 1976).

benefits of uniformity of law should not be ignored. There are, however, two considerations which militate against uniformity: (1) The uniqueness of a particular state's circumstances or policies and (2) pressures exerted by changing commercial practices.

Where local circumstances are sufficiently unique to mandate a rule different from that contained in the official text of the Code, one may properly conclude that the interest of national uniformity is outweighed. The drafters of the Code perceived this limitation upon uniformity and provided for local variations with respect to particular Code provisions. This is illustrated in Section 2-318,²⁴ which takes a neutral position on vertical privity; in Comment 4 to Section 3-202, where the legal effect of a partial assignment is left to local law; and in Comments 4 and 6 to Section 3-305,²⁵ where illegality, duress, and infancy are declared to be of local concern and policy. In addition to areas carved out by the drafters for local variation, the state judiciary and legislatures have declined to follow the official text of the Code for reasons of perceived local policy considerations.²⁶ There should be no objection to the disparity created by variance in either statutory language or by decisional law if the lawmaker has engaged in a careful balancing of interests and has concluded that the uniformity mandate²⁷ is outweighed by clearly articulated local policy considerations. Such interests correctly limit the objective of uniformity.

A second factor which militates against uniformity of law among the states is the pressure exerted by changing commercial practices. Indeed, the inevitability of change in commercial practice was a major reason for the obsolescence of the Uniform Acts which preceded the UCC.²⁸ Seeking to avoid or

²⁴ UCC § 2-318 (1962 Official Text) and Comment 3.

²⁵ Comment 4 to UCC § 3-305 (1962 Official Text) provides, in reference to the defense of infancy: "Such questions are left to the local law, as an integral part of the policy of each state as to the protection of infants." Comment 6 declares that duress and illegality "are matters of local concern and local policy."

²⁶ See text accompanying notes 35-45 *infra* for a discussion of nonuniform enactment of the UCC.

²⁷ One of the Code's declared purposes is "to make uniform the law among the various jurisdictions." UCC § 1-102(2) (c) (1962 Official Text).

²⁸ Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 *YALE L.J.* 1341, 1341-47 (1948); Comment 1 to UCC § 3-101 (1962 Official Text).

to minimize the impact of future changes in practice upon the utility of the Code, the draftsmen provided that one of the underlying purposes of the Code was "to permit the continued expansion of commercial practice through custom, usage and agreement of parties."²⁹ This purpose is further stated as follows:

This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the Courts in light of unforeseen and new circumstances and practices.³⁰

In the abstract, the Code's twin aims of growth and uniformity³¹ are to be achieved through a liberal construction which promotes the Code's purposes and policies.³² The immediate problem, of course, is that the underlying purposes and policies of the Code are not in complete harmony. Uniformity implies certainty in law and, to some extent, inflexibility in judicial decision making. Uniformity thus limits the mandate to construe liberally,³³ particularly in the context of autonomous jurisdictions. If, however, the courts take too wooden a view of precedent or if they blindly follow the decisions of sister states, and if the legislatures of the states mechanically follow the pronouncements of the Code's Permanent Editorial Board, the Code could become obsolete within a short period of time. There is a need to keep the Code responsive to the needs of a constantly-changing commercial environment. An inevitable

²⁹ UCC § 1-102(2) (b) (1962 Official Text).

³⁰ UCC § 1-102, Comment 1 (1962 Official Text).

³¹ Vold, *Construing the Uniform Commercial Code: Its Own Twin Keys: Uniformity and Growth*, 50 CORNELL L.Q. 49 (1964).

³² UCC § 1-102(1) (1962 Official Text) provides that: "This Act shall be liberally construed and applied to promote its underlying purposes and policies." Further emphasis is placed upon construction:

The Act should be construed in accordance with its underlying purpose and policies. The text of each section should be read in 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.

UCC § 1-102, Comment 1 (1962 Official Text).

³³ This limitation was recognized in a federal case, *In re Broward Auto Brokers, Inc.*, 11 UCC REP. SERV. 402, 404 (S.D. Fla. 1972).

by-product of providing for change, however, is a degree of disparity in the commercial laws of the states.

If the current disparity in commercial law were entirely attributable to variance in local policy and to changing commercial practice, there would be no need for concern. However, a great deal of the divergence in commercial law cannot be justified in terms of these important interests and should therefore be eliminated. Many of the litigated issues are fairly pedestrian and do not involve important policy considerations.³⁴ In such cases there is a strong need for a clear statement of uniform rules which will be given force and effect in all states.

II. THE FAILURE TO ACHIEVE UNIFORMITY OF COMMERCIAL LAW UNDER THE UNIFORM COMMERCIAL CODE

It is important to examine in detail the various factors which account for the current variance in the commercial law of the states in order to consider what can and ought to be done in the interest of greater uniformity.

A. *State Legislation*

Measured by the interest of national uniformity, the state legislatures have failed in three ways: The official version of the Uniform Commercial Code has been too freely amended; official amendments to the UCC as periodically promulgated by the Code's Permanent Editorial Board have not been enacted; and new state statutes which vary or supersede Code provisions have been promulgated.

1. *Nonuniform Enactment*

The UCC was not enacted as promulgated by the National Conference of Commissioners and the American Law Institute³⁵

³⁴ See text accompanying note 9 *supra* for an example of a litigated issue which does not involve important policy considerations.

³⁵ Although the first integrated draft of the Code was completed in 1949 and an amended version was approved by both the American Law Institute and the National Conference of Commissioners on Uniform State Laws in 1951, it was not until 1952 that the first "Official Text" was promulgated. The 1952 Official Text was followed in 1955 with Supplement No. 1 to the 1952 Official Text. During the enacting years amended versions of the Code appeared as follows: 1957 Official Text, 1958 Official Text, 1962

due to the fact that legislatures of the various states freely amended its provisions during the enacting process.³⁶ Although the Code had been adopted by only six states³⁷ between 1953 and 1960, it was apparent by 1961 "that almost every state enacting the Code was making its own amendments, thus very largely imperiling the primary object of the Code which is UNIFORMITY in the laws of the various states regulating commercial transactions."³⁸ Because of this emerging problem, a Permanent Editorial Board (PEB) for the UCC was formed by agreement between the American Law Institute and the National Conference of Commissioners.³⁹ The PEB was charged

Official Text, 1966 Official Recommendations for Amendments. The uniformity problem was compounded by the fact that the states enacted different versions of the Official Text. For example, in 1963, a year after the publication of the 1962 Official Text, Nebraska enacted the 1958 Official Text.

³⁶ Approximately 775 nonuniform amendments had been made by the time the Code was enacted in 49 states. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 10 (1967). "By November of 1966 there had been 337 nonuniform amendments to the various sections of Article 9." PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REP. NO. 3, at X (1966) [hereinafter cited as PEB REP. NO. 3]. Nonuniform amendments to Article 9 of the UCC provided one of the primary motives for the 1972 revision of that Article:

The revision of Article 9 is the result of several years' work by the Article 9 Review Committee and the Permanent Editorial Board for the Uniform Commercial Code. The study that produced the revised version of Article 9 was initiated by the Permanent Editorial Board after consideration of a report showing that more than 300 nonuniform, nonofficial amendments had been made to various sections of Article 9 in the adopting jurisdictions. The Board regarded this as a "distressing situation." The Board also took note of suggestions in articles and textbooks for improvements in Article 9. A "re-study in depth of Article 9" was recommended, and the Article 9 Review Committee was appointed to undertake it.

UCC REP. SERV., State Correlation and Code Index Vol., Appendix to Article 9 at page 1.

³⁷ In chronological order, the UCC was adopted by Pennsylvania, Massachusetts, Kentucky, Connecticut, New Hampshire, and Rhode Island; 1961 saw the Code adopted by eight additional states.

³⁸ PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REP. NO. 1, at 8 (1962) [hereinafter cited as PEB REP. NO. 1].

³⁹ The Agreement is dated August 5, 1961, and is reproduced in PEB REP. NO. 1, *supra* note 38, at 11 *et seq.* In pertinent part, the Agreement provided that:

It shall be the policy of the Board to assist in attaining and maintaining uniformity in state statutes governing commercial transactions and to this end to approve a minimum number of amendments to the Code. Amendments shall be approved and promulgated when

(a) It has been shown by experience under the Code that a partic-

with the obligation to "assist in attaining and maintaining uniformity in state statutes governing commercial transactions" ⁴⁰ The agreement provided that the PEB would approve or promulgate amendments to the official text of the UCC in very limited circumstances. ⁴¹ However, there is very little that can be done, either by the PEB or by the National Conference of Commissioners, to prevent legislators of the various states from adopting nonuniform amendments to the Code. ⁴² Although the PEB has systematically rejected the vast majority of local amendments to the official text of the Code, ⁴³ the PEB and the National Conference are without authority to impose their ideas upon state legislatures. ⁴⁴ In addition, there are no means by which either the PEB or the National Conference of Commissioners can compel the states to adopt the uniform amendments to the official text which have been approved by the PEB. ⁴⁵

2. *Failure to Follow Recommendations of the Permanent Editorial Board*

If the state legislatures were to defer to the pronounce-

ular provision is unworkable or for any other reason obviously requires amendment; or

(b) Court decisions have rendered the correct interpretation of a provision of the Code doubtful and an amendment can clear up the doubt; or

(c) New commercial practices shall have rendered any provisions of the Code obsolete or have rendered new provisions desirable.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² For an analysis of nonuniform amendments, see Schnader, *The Permanent Editorial Board for the Uniform Commercial Code, Can It Accomplish Its Objects?*, 3 AM. BUS. L.J. 137 (1965); Braucher, *The Uniform Commercial Code—A Third Look*, 14 W. RES. L. REV. 7 (1962).

⁴³ See PEB REPORTS for 1962, 1964, and 1966.

⁴⁴ When the PEB determines that amendments are called for, the National Conference of Commissioners on Uniform State Laws is charged with the responsibility for subsequent enactment. PEB REP. NO. 1, *supra* note 38, at 13 (Agreement, paragraph "Eighth").

⁴⁵ The PEB has considered the problem of getting such amendments adopted. For example, in rejecting all nonuniform amendments in its *Report No. 2* of 1964, the Board states: "But experience has taught those interested in the uniformity of our statutory law that it has been much easier to get 'uniform laws' on the books in the first instance than it has been to interest legislatures in bringing them up to date by amendment." PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REP. NO. 2, at 12 (1964).

ments of the Permanent Editorial Board, the lack of uniformity in statutory language among the states could be periodically removed by the simple expedient of repealing the old, somewhat adulterated versions of the Code and substituting a uniform revision. Unfortunately, however, the recommendations of the PEB go unheeded,⁴⁶ as is vividly illustrated by the current disposition of the 1972 Official Text of the Code. The 1972 version contains the first major revisions of Article 9, Secured Transactions;⁴⁷ yet, as of July, 1976, it has been enacted in less than one-third of the states.⁴⁸ Ironically, therefore, the promulgation of the 1972 Official Text may have an effect exactly the opposite of that intended: it may prove to be a permanent source of disparity in commercial law since it produces substantial variance between enacting and non-enacting states.

3. *Superseding State and Federal Legislation*

The Code has become superseded and supplemented by both state and federal legislation. While the Code's uniformity mandate is not ill-served by the enactment of other "uniform"

⁴⁶ *Id.*

⁴⁷ See generally Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477 (1973); Dawson, *The 1972 Amendments to Article Nine of the Uniform Commercial Code: Attachment and Enforceability, Future Advances, and Proceeds*, 54 ORE. L. REV. 251 (1975).

⁴⁸ It was recently reported that the following states have adopted the 1972 revision: Arizona (Laws of 1975, Ch. 65), effective January 1, 1976. Arkansas (Acts of 1973, Act 116), effective January 1, 1974. California (Statutes of 1974, Ch. 997), effective January 1, 1976. Connecticut (Pub. Act. no. 76-369), effective October 1, 1976. Illinois (Laws of 1972, Pub. Act. No. 77-2810), effective July 1, 1973. Iowa (Acts of 1974, Senate File 1315), effective January 1, 1975. Kansas (Laws of 1975, S.B. 271), effective January 1, 1976. Minnesota (Laws of 1976, Ch. 135), effective January 1, 1976. Nevada (Laws of 1973, Ch. 569), effective July 1, 1975. North Carolina (Sess. Laws 1975, Ch. 862), effective July 1, 1976. North Dakota (Laws of 1973, Ch. 343), effective January 1, 1974. Oregon (Laws of 1973, Ch. 504), effective January 1, 1974. Texas (Laws of 1973, Ch. 400), effective January 1, 1974. Virginia (Laws of 1973, Ch. 509), effective July 1, 1974. West Virginia (Laws of 1974, Ch. 143), effective July 1, 1974. Wisconsin (Laws of 1973, Ch. 215), effective July 1, 1974.

UCC REP. SERV. State Correlation and Code Index Vol., Appendix to Article 9 at page 2.

state statutes or by federal legislation,⁴⁹ the uniformity of law under the UCC is damaged every time a state legislature enacts a nonuniform statute which supersedes or supplements Code provisions. Today, there is more and more legislation of this type, particularly in the regulation of consumer transactions. The impact of such statutes upon uniformity is compounded by the judicial tendency to construe the Code as *in pari materia* with non-Code legislation.⁵⁰ Thus, the Supreme Court of Ohio managed to avoid the clear language of Section 9-310 and to give a security interest priority over a common law artisan's lien by reasoning based on other state statutes.⁵¹ In construing the Code *in pari materia* with the Texas Certificate of Title Act, the Texas courts have found that the Act takes precedence over the general provisions of Section 9-110,⁵² but that Section 9-307 takes precedence over the Act.⁵³ A referee in bankruptcy refused to read the Connecticut Certificate of Title Act as requiring that a security agreement be dated,⁵⁴ but a referee in Florida concluded that a state statute outside the Code required a future advance clause to specify the maximum amount of advance as a condition to validity.⁵⁵ Other courts have, however, taken the correct position that the Code, in general, is not to be varied by reference to other statutes.⁵⁶ Yet,

⁴⁹ The Code has been superseded by federal law since the outset. *See, e.g.*, G. GILMORE, 1 SECURITY INTERESTS IN PERSONAL PROPERTY 401-34 (1965). An example of more recent legislation that supersedes the UCC is the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-12 (1975). The impact of this Act upon UCC § 2-318 is explored in Note, *Horizontal Privity Under the Magnuson-Moss Warranty Act: A Practitioner's Guide*, 51 NOTRE DAME LAW. 775, 781-84 (1972-73). Another illustration of how UCC provisions are varied by federal legislation may be seen in recent amendments to the Packers and Stockyards Act of 1921. *See* Act of Sept. 13, 1976, Pub. L. No. 94-410, § 206(a), 90 Stat. 1251 (1976). Section 206(a) (to be codified as 7 U.S.C. § 195) purportedly would change the effect of UCC § 2-702.

⁵⁰ *See, e.g.*, General Motors Acceptance Corp. v. Whisnant, 4 UCC REP. SERV. 1016 (5th Cir. 1968); *In re McGovern*, 6 UCC REP. SERV. 234 (D. Conn. 1969); Associates Discount Corp. v. Rattan Chevrolet, Inc., 462 S.W.2d 546 (Tex. 1970); GMC Superior Trucks, Inc. v. Irving Bank & Trust Co., 463 S.W.2d 274 (Tex. Civ. App. 1971).

⁵¹ Commonwealth Loan Co. v. Berry, 207 N.E.2d 545 (Ohio 1965).

⁵² GMC Superior Trucks, Inc. v. Irving Bank & Trust Co., 463 S.W.2d 274 (Tex. Civ. App. 1971).

⁵³ Associates Discount Corp. v. Rattan Chevrolet, Inc., 462 S.W.2d 546 (Tex. 1970).

⁵⁴ *In re McGovern*, 6 UCC REP. SERV. 234 (D. Conn. 1969).

⁵⁵ *In re Sanelco*, 7 UCC REP. SERV. 65 (Fla. 1969).

⁵⁶ For example, within a year of the effective date of the Code in Kentucky, the

the enactment of statutes which supersede or supplement Code provisions and the *in pari materia* construction of the Code with such statutes provide real threats to uniformity of law among the states.

B. *Judicial Decisions*

The lack of uniform commercial law among the states is not due solely to the actions and inactions of state legislatures; the judiciary has also disserved Code objectives by its failure to develop a technique of decision-making on Code questions which is highly responsive to the uniformity mandate. This is reflected in the conflicting interpretations and constructions of identical statutory language.⁵⁷

In seeking to draft a "semi-permanent piece of legislation"⁵⁸ with its "own machinery for expansion,"⁵⁹ a code which could be applied flexibly to unforeseen transactions,⁶⁰ the draf-

Kentucky Court of Appeals addressed the issue of whether various state statutes imposed requirements for the perfection and recording of security interests in addition to those contained in the UCC. Despite the fact that the statutes had not been expressly repealed, the Court adopted the following position:

The Code represents an entirely new approach in several areas of commercial law, and especially as to security transactions. Its adoption in this state signifies a legislative policy to join with other states in achieving uniformity. Code § 1-102(2)(c). The realization of this purpose demands that so far as possible the meaning of the law be gathered from the instrument itself, unfettered by anachronisms indigenous to the respective jurisdictions in which it is in force. Accepting that principle, we adopt as a rule of construction that the Code is plenary and exclusive except where the legislature has clearly indicated otherwise (citations omitted).

Lincoln Bank & Trust Co. v. Queenan, 334 S.W.2d 383, 385 (Ky. 1961). A similar approach to construction was taken in an opinion of the Attorney General of Nebraska:

If there appears to be some conflict between the filing provisions of this act and other general statutes, the provisions of the Uniform Commercial Act will control. The act is a new, independent and complete act dealing with a special subject and in such cases prevails over statutes general in nature which may be in conflict with the special act.

OP. ATT'Y GEN. NO. 118-65, 3 UCC REP. SERV. 110 (Neb. 1965). See also OP. ATT'Y GEN. NO. 70-261, 8 UCC REP. SERV. 430 (Okla. 1970) (concluding that the Code takes precedence over an Oklahoma statute requiring formal acknowledgment as a condition to the effective filing of an instrument affecting real estate).

⁵⁷ See text accompanying notes 8-20 *supra* for examples of issues upon which there are currently conflicts in decisional law.

⁵⁸ UCC § 1-102, Comment 1 (1952 Official Text).

⁵⁹ *Id.*

⁶⁰ *Id.*

ters had little choice but to formulate the Code in general language.⁶¹ Because the Code provides only a general framework and often establishes rules and standards without elaboration, the application of the Code to particular factual situations results in questions of both interpretation and construction.⁶² In their efforts to reconcile ambiguous Code provisions and to elaborate and apply the Code's general framework to specific cases, the courts may consult a wide variety of materials which include Code Comments, state legislative history, pre-Code statutory and decisional law, prior versions of the Code and its Comments, and the decisional law of sister states.⁶³

It is the obligation of the courts to elaborate and apply the law in a reasonable, consistent and uniform manner, but the courts have failed to fulfill this responsibility with respect to

⁶¹ In an early article, Grant Gilmore found it a "matter of vital importance that the Code as a whole be kept in terms of such generality as to allow an easy and unstrained application of its provisions to new patterns of business behavior." Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341, 1355 (1948).

⁶² The term "interpretation" usually refers to ascertaining the meaning of statutory language, while the term "construction" refers to determining whether the statute has application to a given transaction or occurrence.

⁶³ An additional aid to the interpretation and construction of the Code may be found in the work of the New York Law Revision Commission (N.Y.L.R.C.). This work is particularly significant since the Code was redrafted in light of criticisms voiced before the N.Y.L.R.C. The Commission published its works in several volumes and separate reports: 1-2 STATE OF NEW YORK, N.Y.L.R.C. HEARINGS (1954), *supra* note 1; 1-3 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE (1955) [hereinafter cited as N.Y.L.R.C. STUDY (1955)]; STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION, REPORT RELATING TO THE UNIFORM COMMERCIAL CODE (1956).

The work of the N.Y.L.R.C. is discussed in Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 803 (1958). See also Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 8-9 (1967); Beutel, *Interpretation, Construction, and Revision of the Commercial Code: The Presumption of Holding in Due Course*, 1966 WASH. U.L.Q. 381, 382.

The 1956 Official Text of the Code contained changes in over two-thirds of the 1952 sections. Many of the changes were expressly in response to criticism by the N.Y.L.R.C. See Beutel, *supra*, at 384 nn. 19 & 20, wherein he states:

The actual percentage of changes was 69%, divided as follows: Article 1, General Provisions, 59%; Article 2, Sales, 61%; Article 3, Commercial Paper, 48%; Article 4, Bank Collections, 77%; Article 5, Letters of Credit, 100%; Article 6, Bulk Transfers, 80%; Article 7, Documents of Title, 72%; Article 8, Investment Securities, 80%; Article 9, Secured Transactions, 95%; Article 10, Effective Date and Repealer, 50% . . . Out of 228 changes where sources of criticism are mentioned 134 (or 59%) refer to the N.Y.L.R.C. by name.

the interpretation and construction of the Code. Their failure may be attributed in part to their lack of a reasoned approach to dealing with the various aids to interpretation and construction of the Code. It is therefore necessary to examine the judicial use of Code Comments, pre-Code statutory and decisional law, and the decisional law of sister states.

1. *Code Comments*

Official texts of the UCC have always been accompanied by drafters' Comments. Although the current text of the Code makes no reference to the Comments,⁶⁴ the Comments provide a means for substantial uniformity of Code construction.⁶⁵ Yet from the perspective of interpretation and construction of the Code, the Comments have several shortcomings. The "official" Comments cannot be regarded as expressing the intent of the state legislatures: they were not enacted by the state legislatures; they were not formally considered by the legislatures prior to the Code enactment; and, in fact, some Comments were drafted only after the enactment of the Code.⁶⁶ Further-

⁶⁴ The 1952 edition of the Code included Section 1-102(3)(f), which declared, "The Comments of the National Conference of Commissioners on Uniform State Laws and the American Law Institute may be consulted in the construction and application of this Act but, if text and Comment conflict, text controls." Throughout the drafting of the Code, the Comments ran into difficulties, aptly characterized by the following statement: "The decision to give an official quasi-statutory status to the Comments is unfortunate. The statutory draftsman, like the common law dog, is entitled to only one bite. Statutes should not come equipped with an elaborate law-review apparatus" Gilmore, *supra* note 28, at 1355.

The N.Y.L.R.C. objected to the Code's explicit reference to the Comments. 1 N.Y.L.R.C. STUDY (1955), *supra* note 63, at 156-63.

In response to such criticisms, the 1956 Recommendations of the Editorial Board deleted all textual references to the Comments, explaining only that by 1956, the 1952 Comments "were out of date and it [was] not known when new ones could be prepared." 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 3 (1957) (section 1-102(3)).

⁶⁵ Notwithstanding the expressed reasons for including the Comments, they were at least in part attributed to the experience with Williston's treatises on sales, which had been regarded as stating the legislative intent of the Uniform Sales Act. Braucher, *supra* note 63, at 808. See also S. WILLISTON, SALES (1909); S. WILLISTON, SALES (rev. ed. 1948).

⁶⁶ See E.A. FARNSWORTH & J. HONNOLD, COMMERCIAL LAW, CASES AND MATERIALS, 8, 10 (2d ed. 1968), in which, after describing the Comments as "[a] hazard for the lazy mind, and a help for the responsible lawyer . . .," the authors go on to state:

Embarrassing questions multiply if one subjects the Comments to the standards often imposed for recourse to legislative history. In some states the

more, Comments often are misplaced, expand the text, are inconsistent with the text, and have even referred to non-existent text sections.⁶⁷

One source of the lack of uniform decisional law under the Code has been the divergent judicial treatment of the Code Comments. States are divided on such basic questions as whether it is even appropriate for courts to consult the Comments. The Georgia Court of Appeals has made it clear that the Comments are entitled to considerable weight. Indeed, in one case that court suggested that the Comments were binding.⁶⁸ In contrast, the courts of Colorado are barred from considering the Comments by a statute which provides that "[t]he inclusion of said nonstatutory matter [the official Comments] shall be for the purpose of information and no implication or presumption of legislative intent shall be drawn therefrom."⁶⁹ The Colorado Court of Appeals has apparently acquiesced in the prohibition.⁷⁰ Still other courts find the Comments persuasive but not binding.⁷¹ Many courts have found that the Comments

revised Comments had not yet been drafted at the time of the Code's adoption. In others it is highly doubtful that the Comments were laid before the legislators in the form of a committee report explaining the legislation which the legislators were asked to adopt.

⁶⁷ For an extended discussion and analysis of many problems with the Comments, see Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 Wis. L. REV. 597. In a non-exhaustive categorization of the Comments on a functional basis, Professor Skilton found them to be of three overlapping types: "(1) Expository—seeking to describe the meaning and application of a section of the Code and its relationship with the other sections, or (2) Gap-filling—seeking to suggest answers to questions not precisely covered by the text, or (3) Promotional and argumentative—seeking to 'sell' a controversial section." *Id.* at 608.

⁶⁸ In *Kramer v. Johnson*, 176 S.E.2d 108 (Ga. App. 1970), the Georgia Court of Appeals stated, "The legislature had the benefit of the drafter's interpretations when it enacted the Code and we cannot say that it intended something else." *Id.* at 109. For other Georgia cases, see *Jinright v. Russell*, 9 UCC REP. SERV. 455 (Ga. App. 1971); *Warren's Kiddie Shoppe, Inc. v. Casual Slacks, Inc.*, 171 S.E.2d 643 (Ga. App. 1969).

⁶⁹ COLO. REV. STAT. § 135-4-73(2) (Perm. Cum. Supp. 1965).

⁷⁰ *American Nat'l Bank of Denver v. Tina Marie Homes, Inc.*, 476 P.2d 573, 577 (Colo. Ct. App. 1970) (the quoted language of the statute is repeated in the "Preface").

⁷¹ *Bickett v. W. R. Grace & Co.*, 12 U.C.C. REP. SERV. 629 (W.D. Ky. 1972), contains a typical statement: "The official Comments, while not binding upon the courts, are persuasive matters of interpretation to help further the underlying purposes of the Uniform Commercial Code of making the law uniform among the various jurisdictions." *Id.* at 642 [citations omitted]. See also *Thompson v. United States*, 498 F.2d 1075 (8th Cir. 1969); *Burchett v. Allied Concord Financial Corp.*, 396 P.2d 186 (N.M. 1964).

are of assistance,⁷² or should be considered,⁷³ or that they provide a guide for Code construction.⁷⁴ Federal courts have found the Comments to be "powerful dicta"⁷⁵ and an appropriate source of federal law.⁷⁶ Yet, these declarations show little more than that the Comments are generally considered relevant.

An examination of cases in which the courts have discussed the Comments reveals a disturbing fact: generally, the courts do not feel obligated to engage in an express and reasoned discussion as to why a particular Comment should or should not be followed. Too frequently, judges do not identify the reasons which explain their following or bypassing of an interpretation suggested by unambiguous Code Comments. The judicial failure to expressly discuss the weight given to the Code Comments was first revealed in a series of Pennsylvania lower court decisions dealing with the question of whether the sale of a restaurant was within the scope of Article 6, Bulk Transfers. In the first Code case the court relied upon pre-Code decisional law and found the restaurant covered by Article 6.⁷⁷ The court considered neither the language of Section 6-102 nor the Comments to this section, which clearly state that a restaurant is not within the scope of the Article. Five years later in another restaurant case, a Pennsylvania lower court rejected an argument based on the Comment by saying, "Notwithstanding such comment, it suffices to say that it is not controlling and that the courts have not followed the comment."⁷⁸

In a case dealing with the privity requirement and breach of warranties, the Pennsylvania Supreme Court followed suit by refusing to consider or to give weight to the Comments to Section 2-318, stating, "The comment to the Code . . . which is the basis for the argument that the language of Section 2-

⁷² *Farley v. Clark Equipment Co.*, 484 S.W.2d 142, 148 (Tex. Civ. App. 1972).

⁷³ *Warren's Kiddie Shoppe, Inc. v. Casual Slacks, Inc.*, 171 S.E.2d 643 (Ga. Ct. App. 1969).

⁷⁴ *In re Rivet*, 299 F. Supp. 374 (E.D. Mich. 1969).

⁷⁵ *In re Varney Wood Products, Inc.*, 458 F.2d 435 (4th Cir. 1972); *In re Yale Express System, Inc.*, 370 F.2d 433 (2d Cir. 1966).

⁷⁶ *In re Laboratory Precision Products, Inc.*, 4 UCC REP. SERV. 1139 (S.D.N.Y. 1969).

⁷⁷ *Uhr v. 3361, Inc.*, 1 UCC REP. SERV. 314 (Pa. Com. Pl. 1960).

⁷⁸ *Zinni v. One Township Line Corp.*, 3 UCC REP. SERV. 305 (Pa. Com. Pl. 1965).

318 is precatory only was never enacted by the Pennsylvania legislature."⁷⁹ Two years later, again faced with the vertical privity issue and the Comment to Section 2-318, the court reached a result different from its earlier decision.⁸⁰ In so doing, the Pennsylvania Supreme Court declared:

The answer to this question is provided in the clearest of language by the drafters of the code in comment 3 to Section 2-318. Merely to say that our Legislature never enacted the comments into law does not, of course, preclude this Court from examining them to ascertain the proper meaning of a statute.⁸¹

In 1971, the Pennsylvania Supreme Court found that "[i]t is settled in this Commonwealth that the official comments of a commission drafting legislation *may* be given weight. . . ."⁸² The next year, a Pennsylvania Superior Court faced with a dissenting opinion which relied upon the Comments to Section 3-403, stated that "[w]e should not overlook [the fact] that the text of the Code was enacted by the legislature; the comments were not."⁸³

The defect in these Pennsylvania decisions is not that they either should or should not have followed the Comments; rather, it is the haphazard approach by which the courts found that the Comments *could* be considered, but that, since they were not enacted, they could also be ignored. Such an approach is in breach of the judicial obligation to decide cases in a reasoned manner. Uniformity is an objective of the codification of commercial law, and the Comments were made available to assist in reaching that objective. When relevant, Comments should *always* be considered.⁸⁴ Whether they should be followed is an entirely separate question. If a Comment is not to

⁷⁹ *Miller v. Preitz*, 221 A.2d 320, 325 (Pa. 1966).

⁸⁰ *Kassab v. Central Soya*, 246 A.2d 848 (Pa. 1968).

⁸¹ *Id.* at 855. In support of its consultation of the Comments, the court cited *In re Tarlo's Estate*, 172 A. 139, 140-41 (Pa. 1934).

⁸² *Young v. Kaye*, 279 A.2d 759, 765 n.3 (Pa. 1971) (emphasis added).

⁸³ *Trenton Trust Co. v. Klausmann*, 296 A.2d 275, 277 (Pa. Super. Ct. 1972).

⁸⁴ A reasoned approach to the UCC comments may be seen in several cases. See, e.g., *In re Bel Air Carpets, Inc.*, 9 UCC REP. SERV. 1313 (9th Cir. 1971); *Wright v. Bank of Cal.*, 6 UCC REP. SERV. 1165 (Cal. App. 1969) (plain language of § 3-405 cannot be varied by reference to Comments); *Burchett v. Allied Concord Financial Corp.*, 396 P.2d 186 (N.M. 1964).

be followed, the courts should expressly state the reasons therefore in their written opinions. This approach would further uniformity by providing both practitioner and judge not with an arbitrary picking and choosing among Comments, but with a firm understanding of the criteria by which a court decides to follow or bypass the interpretations and constructions suggested by the Comments.

2. *Pre-Code Statutory and Decisional Law*

The use of pre-Code statutory and decisional law as an aid to Code interpretation and construction tends to perpetuate the lack of uniformity which characterized the commercial law of the past. Although several courts have recognized this threat to uniformity,⁸⁵ others have resolved Code questions by resort to the pre-Code law of their state⁸⁶ under the authority of Sec-

⁸⁵ The Supreme Court of Oregon recently stated:

One of the prime purposes of the Code was to create a statutory scheme incorporating within its provisions the complete regulation of certain types of commercial dealings. This purpose would be blunted if the rules created by some pre-Code decisions and not expressly provided for in the statutory scheme were nevertheless grafted onto the Code by implication. In *Evans Products v. Jorgensen*, 235 Ore. 362, 372, 421 P.2d 978 [3 UCC Rep. 1099] (1966), we held generally that we would not engage in this practice.

Seattle-First National Bank v. Oregon Pacific Indus., Inc., 22 UCC REP. SERV. 270, 272 (Ore. 1972).

Many other courts have refused to apply pre-Code statutory and decisional law. *See, e.g.*, *General Motors Acceptance Corp. v. Colwell Diesel Service & Garage, Inc.*, 12 UCC REP. SERV. 226 (Me. 1973) (to read a consent requirement into § 9-310 would deprive that Section of the Act of any meaning); *Nickell v. Lambrecht*, 185 N.W.2d 155 (Mich. Ct. App. 1970) (court refused to apply pre-Code decisional law that required consent of secured party as a requisite to artisan acquiring a lien). Other courts, without mentioning the threat to uniformity of law, have refused to apply pre-Code decisions: *First State Bank of Nora Springs v. Waychus*, 183 N.W.2d 728 (Iowa 1971) (pre-Code constructive notice cases under former chattel mortgage recording acts found not to be authoritative under the Code); *Thompson Maple Products, Inc. v. Citizens National Bank of Correy*, 234 A.2d 32 (Pa. Super. Ct. 1967) (language of the new Act is determinative in all cases arising under it; pre-Code law would not be applied).

⁸⁶ Numerous courts have looked to pre-Code law. *See, e.g.*, *Safeway Stores, Inc. v. L. D. Schreiber Cheese Co.*, 326 F. Supp. 504, 509 n.13 (W.D. Mo. 1971), *rev'd on other grounds*, 457 F.2d 962 (8th Cir. 1972) (court cited § 1-103 in support of the proposition that pre-Code Missouri cases should be considered as supplementary to the Code); *Carpel v. Saget Studios, Inc.*, 326 F. Supp. 1331 (E.D. Pa. 1971) (court found support in the common law of Pennsylvania which is "retained by the Commercial Code as authoritative where not expressly superseded by it"); *Kaiser Trading Co. v. Associated Metals & Minerals Corp.*, 321 F. Supp. 923 (N.D. Cal. 1970) (prior case law

tion 1-103 which provides that "[u]nless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions."

When a court refers to pre-Code law as supplementing the Code, it is necessary to distinguish between two quite different approaches. In the first, pre-Code decisional and statutory law is deemed to fill the gaps of the Code and to assist in the interpretation and construction of the Code in much the same way as do the other aids to interpretation and construction.⁸⁷ This is an arguably correct approach, although in the interest of uniformity, one might counter, reasoning by analogy⁸⁸ from the Code is a preferable way to fill the gaps, and matters of interpretation and construction should be resolved by resorting to aids which are not local in character. In the second approach, the court deems pre-Code statutory and decisional law to be the accurate statement of the law unless clearly displaced by the Code.⁸⁹ This approach is simply another way of stating that statutes in derogation of the common law should be strictly construed; it obviously militates against uniformity and should, therefore, be abandoned.

3. *Decisional Law of Sister States*

On UCC questions there is no "supreme court" which can reconcile variance in state decisional law. In the absence of such a central authority, uniformity can be approached as a

considered in conjunction with decisions in other jurisdictions); *Universal C.I.T. Credit Corp. v. State Farm Mut. Auto Ins. Co.*, 493 S.W.2d 385, 390 (Mo. Ct. App. 1973) (citing § 1-103, the court looked to the common law of Missouri to determine the liability of an auctioneer for breach of warranty of title); *Chaq Oil Co. v. Gardner Machinery Corp.*, 500 S.W.2d 877 (Tex. Civ. App. 1973) (citing § 1-103, the court assumed that pre-Code law controls on the question of whether the seller of second-hand merchandise warrants the goods).

⁸⁷ See, e.g., *Safeway Stores, Inc. v. L. D. Schreiber Cheese Co.*, 326 F. Supp. 504 (W.D. Mo. 1971), *rev'd on other grounds*, 457 F.2d 962 (1972).

⁸⁸ On reasoning by analogy from the Code, see Comment 1 to § 1-102; Note, *Uniform Commercial Code Commentary, Uniformity of the Commercial Code*, 8 B.C. IND. & COM. L. REV. 568 (1967); Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880 (1965).

⁸⁹ See *Leasco Data Processing Equip. Corp. v. Atlas Shirt Co.*, 323 N.Y.S.2d 13 (Civ. Ct. N.Y. 1971). Commenting on decisions in other jurisdictions, the court notes that in some of the jurisdictions, decisional law had developed under the Uniform Sales Act, and "the failure to refer to it and to describe how it had been changed by the new statutory language surely undermines the authority of those cases." *Id.* at 17.

matter of decisional law only through a process in which the courts give reasoned consideration to the decisional law of sister states. A mechanical following of such decisions is not to be advocated; still, there are few situations in which such decisions should not be followed.⁹⁰

The courts have taken clearly divergent positions with respect to the decisional law of sister states. At one extreme some courts have felt compelled to consult⁹¹ or to follow⁹² such decisions, while at the other extreme relevant decisions of sister states have been ignored.⁹³ In the vast middle ground, there has been a multiplicity of approaches: some courts simply note the uniformity provision and follow the decisions of sister states;⁹⁴ others have found such decisions to be entitled to weight⁹⁵ or to be of more than persuasive authority;⁹⁶ still other courts simply find it proper that they be considered.⁹⁷

The failure of courts to consider the decisional law of sister states in a reasoned manner places an almost insurmountable barrier in the path of attaining uniformity of decisional law among the states. Such decisions should be considered the

⁹⁰ See text accompanying notes 23-34 *supra* for a discussion of the situations in which the decisions of sister states should not be followed.

⁹¹ See, e.g., *In re Carmichael Enterprises, Inc.* 334 F. Supp. 94, 99 n.7 (N.D. Ga. 1971), *aff'd mem.*, 460 F.2d 1405 (5th Cir. 1972) (the absence of any Georgia decisions on the issue, coupled with the desire for uniformity, "compels the court to examine the decisions of other Uniform Commercial Code jurisdictions").

⁹² See, e.g., *Needle v. Lasco Indus., Inc.*, 89 Cal. Rptr. 593, 595 (Ct. App. 1970) (since uniformity is an objective, decisions of other jurisdictions are "compelling authority which we accept"); *L.V. Co. v. Asch*, 297 A.2d 285, 288 (Md. Ct. App. 1972) (in a case of first impression, and in light of the uniformity provision, the court will not depart from the "impressive array of authorities").

⁹³ See *Moss v. Polyco, Inc.*, 13 UCC REP. SERV. 809 (Okla. Ct. App. 1973) (criticized by the editors of the *UCC Reporting Service*, the case ignores relevant nonforum decisions, notwithstanding citation to the uniformity provision).

⁹⁴ See, e.g., *Bank of America Nat'l Trust & Sav. Ass'n Security Pac. Nat'l Bank*, 100 Cal. Rptr. 438 (Ct. App. 1972); *Helvey v. Wabash County REMC*, 278 N.E.2d 608 (Ind. Ct. App. 1972).

⁹⁵ See *Layton Inv. Co. v. Harris (In re Fed. Wholesale Meats & Frozen Foods, Inc.)*, 168 N.W.2d 70, 73 (Wis. 1969) (citing the uniformity provisions, the court followed a Pennsylvania case, declaring that the case "is properly given weight").

⁹⁶ See *A. J. Armstrong Co. v. Janburt Embroidery Corp.*, 234 A.2d 737, 744 (N.J. Super Ct. 1967) (in light of the uniformity provision, "sister-state interpretations of the Code are more than mere persuasive authority").

⁹⁷ See, e.g., *In re Glenwood Packing Co.*, 4 UCC REP. SERV. 884 (S.D. Iowa 1967); *In re Osborn*, 6 UCC REP. SERV. 227 (W.D. Mich. 1969); *Evans v. Everett*, 179 S.E.2d 120 (N.C. Ct. App. 1971), *rev'd on other grounds*, 183 S.E.2d 109 (N.C. 1971).

most compelling authority. The second court to address an issue should be concerned with determining whether or not the decision of its sister state is acceptable in light of the Code's language, purposes, and policies and in light of the various aids to the interpretation and construction of the Code. If the decision of a sister state withstands this analysis,⁹⁸ it should be followed even though the second court favors an approach or construction which is arguably better. Uniformity, in short, requires that judges not feel free to treat Code questions as matters of first impression when the issues have been previously addressed in the courts of another state. Such deference to the opinions of judges in other states would help eliminate a great deal of disparity in decisional law. When the inevitable conflicts of authority do arise, it should be the PEB which assumes the role of arbiter, resolving the dispute by the promulgation of official amendments to the Code.

III. CONCLUSION

As the states of the nation have become more economically interdependent and as transactions have become more interstate in character, uniformity of commercial law has become essential. Yet the uniformity which was initially engendered by the widespread enactment of the Code has started to erode, to the extent that, if current trends continue, the day may arrive when the so-called Uniform Commercial Code will no longer perform adequately its most basic function of providing uniformity in commercial law. In that event, federal enactment of a commercial code will provide the only realistic means by which commercial transactions will come to be governed by uniform national rules.⁹⁹ Such an eventuality is undesirable since the underlying premises of federalism are better served if uniformity is achieved through the vehicle of uniform state statutes. A great deal of unnecessary disparity in commercial

⁹⁸ For an example of a reasoned opinion which does *not* follow nonforum decisions, see *Kane-Miller Corp. v. Tip Tree Corp.*, 303 N.Y.S.2d 273 (1969) (rejecting Pennsylvania cases holding the sale of a restaurant subject to Article 6, Bulk Transfers).

⁹⁹ Federal enactment of the UCC has been the subject of extended discussions over the years. The topic was recently addressed in Kennedy, *Federalism and the Uniform Commercial Code*, 29 Bus. Law. 1225 (1974).

law could be readily eliminated if state legislators and judges were to direct their energies to such a goal.

State legislators should refrain from enacting statutes which supersede or supplement the Code without first carefully considering the impact of such legislation upon the Code's uniformity mandate. Furthermore, the legislators should enact the official amendments to the text of the Code as promulgated by the PEB, since such amendments serve the dual purpose of updating the law and removing variance in decisional law. Local statutory variations should be tolerated only where the uniformity objective is outweighed by important local policy considerations or by local variations in commercial practice. In terms of the Code's twin aims of providing for uniformity and growth in the law, the state legislatures have the ultimate responsibility for insuring the necessary uniformity.

The courts too must share in the responsibility for uniformity in commercial law. It is therefore suggested that judges endeavor to take a more reasoned approach to Code comments and to the decisional law of sister states.¹⁰⁰ The judges, however, have an additional role to play, for upon their shoulders must rest the UCC mandate that it be construed in light of "unforeseen and new circumstances" and in light of new commercial practice. It is the task of the courts, therefore, to reconcile the uniformity objective with the emerging needs for change. From the standpoint of both state legislators and judges, however, the road to uniformity demands a yielding of autonomy and a greater recognition of the community of interest among states.

¹⁰⁰ This latter task is greatly facilitated by the existence of the Uniform Commercial Code Reporting Service which, currently in 20 volumes, presents UCC-related decisional law from all states.