Washington University Law Review

Volume 75
Issue 1 *Consumer Protection and the Uniform Commercial Code*

January 1997

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Jean Braucher
University of Cincinnati College of Law

Washington University
Law Quarterly

VOLUME 75 NUMBER 1 1997

FOREWORD: CONSUMER PROTECTION AND THE UNIFORM COMMERCIAL CODE

JEAN BRAUCHER*

The sponsors of the Uniform Commercial Code ("UCC" or "Code") are nearing the end of a decade-and-a-half long process of revising and expanding it.[1] By the summer of 1998, the National Conference of

* Gustavus H. Wald Research Professor of Law, University of Cincinnati College of Law, and 1996 Chair, Section on Commercial and Related Consumer Law of the Association of American Law Schools, which sponsored the Symposium. Professor Braucher is a member of the American Law Institute and its consultative groups for Revised UCC Articles 2 and 9 and serves as an Institute representative on the drafting committee for Revised UCC Article 2A.

I wish to thank the editors of the *Washington University Law Quarterly*, particularly editor-in-chief Kevin Cooney and executive articles editor Matthew Hammond, for their dedication and hard work on this project.

Thanks also are due to the members of the 1996 executive committee of the AALS Section on Commercial and Related Consumer Law, Lissa Broome, Pat Fry, Sarah Jenkins, Veryl Miles and Bill Woodward, who gave valuable advice and planning assistance. Many of the articles in this Symposium formed the basis for the section's program on January 4, 1997, at the AALS annual meeting in Washington, D.C. Tapes of the program are available from Recorded Resources Corp., Millersville, Maryland.

The Symposium is a forum for the exchange of points of view, and the opinions expressed are those of the authors. The AALS takes no position on the issues addressed here.

1. The first expansion of the UCC was the addition of Article 2A on personal property leasing, and the first drafting committee meeting for that project was held in December 1982. Amelia H. Boss, *The History of Article 2A: A Lesson for Practitioner and Scholar*, 39 ALA. L. REV. 575, 591 (1988). Since then, the UCC's sponsors have revised Article 2A (with a second revision now in progress); recommended the repeal of Article 6 on bulk sales, or alternatively a revision of it; amended Article 3 on commercial paper and Article 4 on bank deposits and collections; added a new Article 4A on funds transfers; revised Article 5A on letters of credit; and revised Article 8 on investment securities. The projects that are still in the drafting process are discussed in the text.

Commissioners on Uniform State Laws ("Conference") and the American Law Institute ("Institute") are scheduled to complete the last of the drafting work—revisions of UCC Articles 1 (general provisions), 2 (sales of goods), 2A (leases of personal property), and 9 (secured transactions),and drafting of a new Article 2B (licenses of software and information).[2] State-by-state enactment will follow. Treatment of consumer transactions is a contested and potentially consensus-breaking question in all five of these projects. Much could change in the final months of drafting, and the enactment phase may also produce surprises and controversy.

The Section on Commercial and Related Consumer Law of the Association of American Law Schools, of which I was chair in 1996, organized this Symposium in conjunction with the editors of the *Washington University Law Quarterly* to examine how well the UCC drafting process and its products are dealing with consumer transactions. The questions addressed include: Are the Conference and the Institute, two "private legislatures," appropriate bodies to develop consumer law? Has the focus on consumer protection polarized the drafting process? How could the process be improved? Should consumer protection be left to federal and nonuniform state law? Are the new consumer provisions in the drafts significant improvements in the law? What implications does an examination of the consumer provisions have for the general validity of the process that produces the UCC?

As of this spring, the drafts include some new special consumer provisions, but the sponsors have attempted to keep these to a minimum and to leave the job of consumer protection primarily to other state law and to federal law.[3] Their objectives are to minimize controversy and maximize the chances of quick and uniform enactment of consensus-based legislation.[4] Their method is to attempt to strike a balance, doing enough to satisfy

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2. *See* Jean Braucher, *The UCC Gets Another Rewrite*, A.B.A. J., Oct. 1996, at 66, 67.

3. Fred H. Miller, *Consumers and the Code: The Search for the Proper Formula*, 75 WASH. U. L.Q. 187, 210-11, 213-14 (1997).

4. *See* Carlyle C. Ring Jr., *The UCC Process—Consensus and Balance*, 28 LOY. L.A. L. REV. 1801, 1816-19 (1994) (arguing that what is in the public interest is in the eye of the beholder and defending enactability as a criterion of the public interest). *But see* Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993); Donald J. Rapson, *Who is Looking Out for the Public Interest? Thoughts about the UCC Revision Process in the Light (and Shadows) of Professor Rubin's Observations*, 28 LOY. L.A. L. REV. 601 (1994).

consumer advocates and consumer-oriented state legislators but not so much that they incense affected industries.

The Symposium's authors include participants in the drafting process, some of whom defend it and its products and some of whom are more critical, as well as nonparticipants who can view the consumer proposals with more detachment. Most of the authors, as well as the law review's editors, have had to struggle with the task of evaluating moving targets, as draft upon draft in each project produced changes large and small.[5]

The opening piece in the Symposium takes a critical perspective on the UCC's treatment of consumers. Professor Edward Rubin argues that the Code's inhospitability to consumer protection is conceptually embedded in its reliance on common-law style enforcement through privately initiated judicial trials.[6] Consumers have difficulty bringing suits because, in contrast to businesses, they do not have continuing relationships with lawyers. Finding a lawyer to handle an isolated and often small-dollar-amount dispute, in light of the expense of litigation and the rarity of full compensation even upon victory, creates a barrier to redress that is insurmountable for most consumers. Rubin argues for enhanced consumer remedies in the UCC, such as attorneys' fees, statutory damages, self-help, and public enforcement. He criticizes the UCC's sponsors for failure to reconceptualize commercial law to take into account the lessons of the consumer movement, law and economics, and for not making use of the resources of the administrative state.

Gail Hillebrand, a lawyer with Consumers Union who serves as an observer to the drafting committees for both Revised Article 2 and Revised Article 9, describes in detail most of the consumer issues taken up in those projects and in the drafting of new Article 2B.[7] She also discusses the structural barriers in the UCC drafting process to achieving results that are fair to consumers. These include the expense to consumer representatives of participation in a multiyear effort involving meetings held in cities around the country, the dominance of industry representatives among the observers, and

5. The Article 2B revision has gone through over nine full drafts since February 1996. Nat'l Conference of Comm'rs on Uniform State Laws, *Drafts of Uniform State Laws*: Official Site (visited Apr. 14, 1997) <http://www.law.upenn.edu/library/ulc/ulc.htm>.

6. Edward L. Rubin, *The Code, the Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L.Q. 11 (1997).

7. Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B, and 9 Be Fair to Consumers?*, 75 WASH. U. L.Q. 69 (1997).

the paucity of experience representing consumers among the commissioners. She urges the Conference and the Institute to gather and analyze information on the impact of proposed legal changes on consumers and other underrepresented groups. She also urges the UCC's sponsors to provide funding for the time and travel of consumer advocates and to establish a public advisor to participate in drafting projects on behalf of underrepresented groups, including consumers.

Professor Fred Miller, executive director of the Conference, discusses that body's efforts to consider consumer issues in the Code revision process.[8] The goals have been to build consensus through exchange of views and thus attempt to ensure rapid, uniform enactment. He argues that special consumer provisions should be added to the UCC only when there is broad consensus for them.

In his AALS annual meeting remarks, published here in a lightly edited version, Professor James J. White analyzes the prospects for enactment of Revised Articles 2 and 9 in light of deep disagreement about the fairness and efficiency of proposed new consumer protection rules.[9] He argues that nothing is terribly wrong with the existing versions of these two articles and that as a result no one is dying from them to be revised. He predicts that neither revision will be enactable in fifty states if it adds significant new consumer protection provisions that affected industries oppose.

Taking a holiday from sober assessment of policy and institutions (or should I call it a blackout binge?), Professor Norman Silber imagines a parallel universe in which consumer advocates capture the drafting process.[10] In one scene, experienced consumer lawyers dominate the drafting room crowd, committee, and observers alike. They speak so persuasively and effectively that they reduce the few industry observers to resentful silence and acquiescence. In another, a drafting meeting is held at a Super 8 Motel in Akron, Ohio, and the committee is brought to tears by a single mother's account of having her car repossessed just twenty dollars short of debt retirement. A law professor, whose identity is concealed to protect his reputation for seriousness, dreams that he spurs a drafting committee into fervor for consumer-oriented reform with his brilliant arguments and

8. Miller, *supra* note 3.

9. James J. White, *Comments at 1997 AALS Annual Meeting: Consumer Protection and the Uniform Commercial Code*, 75 WASH. U. L.Q. 219 (1997).

10. Norman I. Silber, *Substance Abuse at UCC Drafting Sessions*, 75 WASH. U. L.Q. 225 (1997).

expensive, flawless empirical studies.

The meaning and role of assent in the consumer context are explored in three articles. Professor William Woodward critiques the argument for "party autonomy" in choice of law and choice of forum, a position that is based on a vision of legal consumers who shop for laws and forums.[11] He discusses the economic irrationality of one-shot, as opposed to repeat-players, spending the resources to understand what it means for the law of a remote jurisdiction to apply. In short, this market fails. He also makes the point that the market failure analysis, which should be accepted as obvious when applied to consumers who make deals without legal advice, applies to many one-shot business deals as well.

Professor Michael Greenfield looks at assent in Articles 2 and 9 and the revisions of each.[12] He concludes that both the old and new versions of these Articles reflect a recognition that assent is particularly hard to come by in consumer adhesion contracts. He praises the current revisers for their efforts to enhance the likelihood of genuine consumer assent, although he thinks they could have gone further to do so in several provisions.

In contrast, Professor James J. White takes a critical perspective on a proposed provision in Revised Article 2, Section 2-206(b), that would set a higher standard for assent in consumer adhesion contracts and make unenforceable form terms that a consumer "could not reasonably have expected."[13] He traces the proposed provision to a similar one in the *Restatement (Second) of Contracts*.[14] Examining the cases citing that *Restatement* section, he concludes that it provides an unpredictable and inefficient mechanism for courts to undo the deal reflected in a form. Throwing down the gauntlet, Professor White declares, "Believing that consumers are smarter, more cunning, and far less honest than their advocates make them out to be, I fear that Revised 2-206(b) will give many sympathetic and well-coached consumers deals for which they did not pay."[15]

Another three articles focus on warranty issues under revised Article 2.

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11. William J. Woodward, Jr., *"Sale" of Law and Forum and the Widening Gulf Between "Consumer" and "Nonconsumer" Contracts in the UCC*, 75 WASH. U. L.Q. 243 (1997).

12. Michael M. Greenfield, *The Role of Assent in Article 2 and Article 9*, 75 WASH. U. L.Q. 289 (1997).

13. James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315 (1997).

14. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

15. White, *supra* note 13, at 356.

With technical viruousity, Professor Curtis Reitz provides a thorough analysis of the many issues that would need to be addressed for Revised Article 2 explicitly to cover warranties given to consumers by manufacturers, as well as related remedial issues.[16] He remains agnostic on whether it would be a good idea to do. Taking up that question, Professor Donald Clifford advocates inclusion of manufacturer's warranties in Revised Article 2.[17] He notes that the courts often now apply Article 2 beyond its scope and that it would be preferable to have provisions explicitly fashioned for the context of manufacturers' warranties.

Professor Jay Feinman tackles the overlap of implied warranty and products liability concepts.[18] He argues that the proposed *Restatement of the Law of Torts: Products Liability*,[19] with its "risk-utility" approach, has wrongly rejected a strand in product liability case law that is based on consumer expectations created by manufacturers' representations. He believes that the best place to correct the problem is in the *Restatement*, but barring that solution, Article 2 should continue to play a residual role in products liability law. He also situates the debate about this one issue within the broader contexts of litigation about the proper spheres of contract and tort and of popular political debate about "tort reform" to limit individuals' legal redress against businesses.

Two articles focus on debtors' remedies under Article 9, without limiting their suggested reforms exclusively to consumer transactions. Donald Rapson, an in-house creditor's lawyer and officer at The CIT Group, Inc., recounts his efforts as a member of the Revised Article 9 drafting committee to get the committee to address the issue of the adequacy of price obtained in a creditor's disposition of collateral, particularly when a secured party seeks a deficiency based on its own "credit bid" at a foreclosure sale where there are no other bidders.[20] Rapson has been a tireless advocate for a "fair value" standard for dispositions of collateral when calculating deficiencies, and his

16. Curtis R. Reitz, *Manufacturers' Warranties of Consumer Goods*, 75 WASH. U. L.Q. 357 (1997).

17. Donald F. Clifford, *Express Warranty Liability of Remote Sellers: One Purchase, Two Relationships*, 75 WASH. U. L.Q. 413 (1997).

18. Jay M. Feinman, *Implied Warranty, Products Liability, and the Boundary Between Contract and Tort*, 75 WASH. U. L.Q. 469 (1997).

19. (Tentative Draft No. 2, Mar. 13, 1995).

20. Donald J. Rapson, *Deficient Treatment of Deficiency Claims: Gilmore Would Have Repented*, 75 WASH. U. L.Q. 491 (1997).

work shows promise of producing a compromise provision in Revised Article 9. His article provides an insider's view of the give and take that occurs within a UCC drafting committee and also serves to undercut any crude notion that business representatives are necessarily anticonsumer.

My own article in the Symposium argues for codification of a definition of and a remedy for "breach of the peace" in self-help repossessions.[21] The analysis of this one issue illustrates and develops themes in several other Symposium pieces, including those of Professors Rubin, Hillebrand, and Woodward. By leaving breach-of-the-peace law to case-by-case adjudication, Article 9 makes it hard for consumers or small businesses to obtain redress. Uncertainty about the legal standard applied to repossessors' behavior and about the remedy for abuses disadvantages these claimants more than lending institutions, which can and do create their own certainty through planning and insurance. In the absence of a public advisor, the few consumer advocates working as observers in the Revised Article 9 project have had to ration their limited political capital and focus on a handful of issues they view as key. They have not attempted comprehensive reform and thus have left unaddressed many issues of significance to consumers, including clarification of what constitutes a breach of the peace or a waiver of default.

The Symposium concludes with a comparative perspective provided by Andreas Reindl of the Vienna University of Economic and Business Administration, who details the slow progress of European Community ("EC") measures governing warranties and warranty-related consumer contract terms.[22] His analysis is that the EC is likely to continue to play only a limited role in strengthening consumer rights, leaving the major role to the member states. In the consideration of consumer law initiatives, the EC has not overcome the problem of variations in its member states' commitment to consumer protection, a problem similar to that experienced in UCC projects intended for enactment in the fifty U.S. states and several U.S. territories.

The UCC drafting process is of course a political one, and it has two forms of democratic oversight. Although the Institute's membership is self-perpetuating and not democratically accountable in any way, the members of the Conference are typically appointed by elected officials such as

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21. Jean Braucher, *The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law*, 75 WASH. U. L.Q. 549 (1997).

22. Andreas P. Reindl, *Consumer Contracts and European Community Law*, 75 WASH. U. L.Q. 627 (1997).

governors.[23] The much more significant democratic control on the two sponsoring "private legislatures" comes after the fact, in the enactment process. Thus, as members of the Institute and the Conference seek to draft legislation reflecting consensus views of sound policy, they also continuously evaluate the anticipated political acceptability of their work. In their political prognosticating, the sponsors have at-the-ready assistance from advocates for affected interests who participate as observers of the drafting process and who occasionally engage in histrionics or make bald threats. The process is not always pretty, but neither are the public legislative alternatives—federal or nonuniform state lawmaking, which also involve lobbying by affected interests.

Professor Rubin notes that federal lawmaking in the consumer area has been less one-sided than the UCC.[24] Would federal enactment of the UCC improve the picture for consumers and other interests underrepresented in the UCC process, such as unsecured creditors? Lately, I have heard this question raised even by leaders in the Conference and Institute. If an expert drafting consultancy could be established to produce proposed commercial law for enactment by Congress, legislation perhaps could be designed with more conceptual daring, with greater likelihood of being efficient, fair and effective, and with only one political review to anticipate, rather than more than fifty. On the other hand, in a season of cover stories and headlines about a "do-nothing Congress,"[25] I am not sure.

Carlyle Ring, a leader in the Conference,[26] has detailed the reasons Congress is not an ideal forum for drafting commercial law.[27] These include: its crisis atmosphere, the lack of involvement of members in actually drafting legislation, the lack of experience by its staff (which does the real drafting work) in commercial law and institutions, the way its process is shaped and "perhaps even corrupted by" special interests, the lack of genuine dialogue between knowledgeable participants, its slowness and propensity to stalemate, lobbying by power plays rather than open and extended debate,

23. Braucher, *supra* note 2, at 68.

24. Rubin, *supra* note 6, at 67.

25. *See, e.g., The Best Do-Nothing Congress Money Can Buy*, NEW REP., Apr. 7, 1997, cover.

26. He is a past president of the Conference, co-chaired the drafting committee for Article 4A and Amendments to Articles 3 and 4, chaired the Revised Article 5 drafting committee and currently chairs the Article 2B committee.

27. *See* Ring, *supra* note 4, at 1820-21.

and lack of opportunity for consensus-building.[28] However, most of these sound objections to congressional stewardship over commercial law would be answered by an open and expert, privately-sponsored drafting process that preceded introduction of proposed legislation to Congress. As a practical matter, of course, the necessary institutional reconfigurations[29] are unlikely to occur before the next great round of UCC revisions and additions.[30]

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28. *Id.*

29. The Conference is now funded largely by the states, NATIONAL CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, 1995-96 REFERENCE BOOK 4 (1995-96), and they would be unlikely to fund drafting of federal law. The American Bar Association and private foundations also provide financial support. *Id.* The Institute has historically focused on common law, for which it has been criticized. *See* Hon. Richard A. Posner, Annual Dinner Address, May 18, 1995, Remarks and Addresses at the 72nd Annual Meeting of the American Law Institute, 72 A.L.I. PROC. 321, 324 (1995) (discussing "the problem of creeping or incipient marginalization of the Institute" because it does not make use of delegation to administrative agencies).

30. Federal enactment of commercial law has been debated at least since the 1890s. *See* Robert Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 L. & CONTEMP. PROB. 100, 101-03 (1951) (relating the history of these debates and discussing the weaknesses of uniform state legislation, especially in achieving uniformity).