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WAIVING GOODBYE TO THE UCC: A PROPOSAL TO RESTRICT THE CONTINUING EROSION OF RIGHTS UNDER AN IMPERFECT CODE

Daniel A. Gecker and Kevin R. Huennekens***

I. INTRODUCTION

The Uniform Commercial Code (UCC or Code) seeks to facilitate commercial transactions by promoting certainty, consistency, and uniformity across disparate jurisdictions.¹ Certainty of result should translate into lower-cost commercial transactions because it should reduce the cost of litigating over or insuring against ambiguities.

The concept of freedom of contract is an equally important goal of the UCC.² The Code generally allows parties to waive or vary its terms to achieve a customized contract.³ Freedom of contract, however, is not absolute. For example, parties may not waive the bedrock of commercial dealings—the obligation of good faith.⁴

Permitting parties to vary the UCC's terms by agreement allows for the flexibility necessary to structure complicated commercial transactions. This flexibility allows the parties to shift burdens to re-

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** Principle, Maloney, Yeatts & Barr, a Professional Corporation; A.B., 1975, College of William and Mary; J.D., 1978, Marshall-Wythe School of Law, College of William and Mary.

1. UCC § 1-102 provides:

- (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
- (2) Underlying purposes and policies of this Act are
 - (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;
 - (c) to make uniform the law among the various jurisdictions.

U.C.C. § 1-102 (1990).

2. *See id.* § 1-102(2)(b).
3. *See id.* § 1-102(3).
4. *Id.* § 1-203.

duce costs. The ability to waive warranties,⁵ for example, should reduce the cost to the sellers of goods by transferring those costs to the purchasers. The transfer should manifest itself by way of a reduced sales price; although it may merely result in the ability to generate greater profits. Similarly, the ability to waive enforcement-related provisions of the Code, such as the right to receive notice,⁶ should serve to strengthen a lender's collateral position, and thereby reduce the costs associated with repossession and a forced sale upon default. This should result in a lower interest rate, although arguably, it may merely result in circumvention of rights accorded by the Code by the party in the superior bargaining position.

Other than the inability to waive good faith, diligence, reasonableness, and care, there are very few sections of the UCC which cannot be waived or varied by agreement.⁷ Although the area of secured transactions protects the rights of debtors upon default, rights provided under other sections of the UCC can be and routinely are ignored. Far from meeting the goals set forth in section 1-102, the Code encourages extensive waivers of rights, complicating the most basic transactions. The courts are increasingly forced to determine the bona fides of waivers, without the benefit of bright-line tests.⁸ Consequently, the uniform enforcement of the Code's provisions has been eliminated. The Code has become a checklist for forms, rather than a statute for enforcement.⁹

5. See, e.g., *id.* § 2-315 (addressing warranty of fitness for particular purpose).

6. See, e.g., *id.* § 9-504(3) (providing for notice to debtor prior to sale of collateral).

7. In recognition of the inherent inequality of bargaining power found in most secured transactions, the remedial provisions of Article 9 are an exception. *Id.* §§ 9-501(3) to -507 (discussing rights of debtor after default).

8. *Bell v. Congress Mortgage Co.*, 24 Cal. App. 4th 1675, 1680, 30 Cal. Rptr. 2d 205, 208 (1994), *withdrawn*, No. S040252, 1994 Cal. LEXIS 4258 (July 28, 1994); see *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 489, 186 Cal. Rptr. 114, 123 (1982).

9. A modern bank-form guaranty is illustrative. The typical guaranty routinely waives:

- (a) The right to require the bank to bring any action against the maker;
- (b) The right to require that the bank resort to any security held by the bank or to any accounts maintained at the bank by the debtor;
- (c) Any and all rights available to the guarantor under state statutes;
- (d) Any claims against the bank for failure to perfect a security interest in any property securing the obligations of the maker;
- (e) Any claim for discharge based upon an extension of or change of the time of payment and/or the manner, place, or terms of payment;
- (f) Any claim for discharge based upon the exchange, release, and/or surrender of all or any collateral;
- (g) Any claim for discharge based upon settlement with the maker or discharge of the maker;

Two factors militate against allowing complete freedom of contract. First, parties seldom are of relatively equal bargaining power. In a commercial world where parties are of equal bargaining power, the potential for harm from allowing bargained-for waivers is minimal. But, in a commercial marketplace inhabited by large institutions, negotiated terms are the exception and not the norm. Thus, waivers represent a potential danger to the substantive rights of those without sufficient bargaining power to protect themselves by consensual contract. Consequently, the current business climate reflects this issue by the attention focused on "consumer transactions."

Second, at some point, the costs occasioned by disparity outweigh the benefits achieved by freedom of contract. It may become necessary to litigate the variations to which the parties agreed.

The goals of the Code would be served better by eliminating those provisions which are no longer useful in the marketplace and are routinely waived,¹⁰ and having the balance of the Code mean what it says. A stripped-down, modernized Code would allow the parties to agree to new terms, rather than contracting around the statute, and would eliminate the costly litigation overlay.

II. THE ORIGIN OF THE DOCTRINE OF WAIVER

Waiver as a legal concept began to appear in reported decisions and treatises in the late 1700s. Prior to that time, when movable prop-

(h) Any defense based upon impairment of collateral;

(i) The right to challenge jurisdiction of the court in the state in which the bank is located;

(j) The right to have service of process in accordance with the statutes of the state in which the bank is located (regular mail substituted for the formal service requirements);

(k) Notice of acceptance;

(l) Notice of further extensions of credit to the maker;

(m) Presentment and/or demand for payment of any of the obligations of the maker;

(n) Protest or notice of dishonor or default;

(o) Any demand for payment under the guaranty;

(p) The benefit of any homestead rights or exemptions from seizure otherwise provided by applicable law;

(q) Any defenses which the maker might have against the bank;

(r) All claims against the maker, direct or indirect, arising from or relating to the guaranty, including the right of reimbursement, exoneration, indemnification, and/or contribution and all right of subrogation to the claims of the bank;

(s) The right to trial by jury; and

(t) The right to court process (arbitration or confession of judgment provision).

A similar list of formbook waivers in sales contracts would be equally illustrative.

10. For example, presentment and notice of dishonor are so routinely waived that the default rule should be that they are automatically waived absent an agreement requiring them.

erty consisted for all practical purposes of cattle,¹¹ actual delivery of goods appears to have been the only mode of transfer. The acceptance of earnest money and the giving of faith and pledges customarily sealed the bargain. Written contracts were not used.¹² Influenced by Roman and ecclesiastical law and custom in all realms, the law of contract in England developed by degrees.¹³ In most commercial transactions, credit became currency in law as well as in fact.¹⁴ Because of the prospects for national and international trade and the potential for abuse in the system, the law set out to make credit uniform and to ensure that debt truly had freely exchangeable value. About the second quarter of the fourteenth century, Mediterranean traders established the main features of bills of exchange, out of which grew the whole system of modern credit in England.¹⁵ Bills of exchange and promissory notes were a part of that branch of the common law known as the "law merchant."¹⁶ The law merchant consisted of the usages of merchants in the various "departments" of trade as ratified by decisions of courts. Upon usages being proved, courts adopted them as settled law with a view to the interests of trade and public convenience.¹⁷

Against this backdrop, waiver was broadly identified as the "passing by of a Thing, or a Refusal to accept it."¹⁸ One commentator noted that "[s]ometimes [waiver] is applied to an Estate, or something conveyed to a Man, and sometimes to a Plea."¹⁹ From the beginning, English jurists had problems moving beyond a general conceptualiza-

11. 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 57 (2d ed. 1959).

12. *Id.*

13. At common law, the most usual types of contracts for the acquisition of personal property were (1) sales or exchange (barter) contracts, (2) bailments, (3) hirings (leases) and borrowings, and (4) contracts of debt. Contracts of debt included debts by record, deeds, and debts by simple contracts, such as bills of exchange and promissory notes. 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 446 (RI. Burn ed., 9th ed. London 1783).

14. 1 FREDERICK POLLOCK, *A FIRST BOOK OF JURISPRUDENCE* 217-22 (6th ed. 1929).

15. *Id.* at 219-20.

16. 4(1) HALSBURY'S LAWS OF ENGLAND ¶ 508 (Lord Hailsham of St. Marylebone ed., 4th ed. reissue 1989) [hereinafter HALSBURY'S LAWS].

17. See 12 *id.* ¶ 458 (citing *Goodwin v. Robarts*, 10 L.R.-Ex. 337, 346 (Ex. Ch. 1875); *Brandao v. Barnett*, 8 Eng. Rep. 1622, 1624 (H.L. 1864)); see also 8 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 161-76 (1926) (discussing evolution of bills of exchange under common law in 17th century).

18. GILES JACOB, *NEW LAW-DICTIONARY* (8th ed. London, H. Woodfall & W. Strahan, Law-Printers to the King's Most Excellent Majesty 1762) (found, in alphabetical listing, under word "Waiver").

19. *Id.*

tion of waiver and applying the doctrine in commercial cases at a more specific level. In *Stackhouse v. Barnston*,²⁰ for instance, the court observed that “[a]s to waiver, it is difficult to say precisely, what is meant by that term, with reference to the legal effect.”²¹ Regardless of these nascent analytical questions, courts clearly believed by 1762 that a waiver as to goods and chattels “will be effectual.”²²

The parameters of the doctrine of waiver were firmly established at common law in the nineteenth century. Waiver was defined to be the renunciation or abandonment of a right or interest, whereby the right was lost or extinguished.²³ Waiver could be express or implied.²⁴ A person who was entitled to the benefit of a contractual stipulation, or a statutory provision, could expressly waive it and allow the contract or transaction to proceed as though the term or provision did not exist.²⁵ In some cases, however, courts ruled that a statutory provision enacted for general public purposes, and not for the benefit of a particular person only, could not be waived.²⁶ The policy behind this rule was that a person could not renounce a right which was his or her duty to the public and of which the claims of society forbade the renunciation.²⁷

At common law the renunciation or abandonment of the right had to be supported by valuable consideration²⁸ or by matter of rec-

20. 32 Eng. Rep. 921 (M.R. 1805).

21. *Id.* at 925; *see also* *Ross T. Smyth & Co. v. T.D. Bailey, Son & Co.*, 3 All E.R. 60, 70 (H.L. 1940) (“The word ‘waiver’ is a vague term used in many senses.”).

22. JACOB, *supra* note 18 (citation omitted).

23. 16 HALSBURY’S LAWS, *supra* note 16, ¶ 922.

24. 16 *id.*

25. 16 *id.* ¶ 922 & nn.9-10 (“Delay is not necessarily waiver, although it may be evidence of waiver.”) (citing *Selwyn v. Garfit*, 38 Ch. D. 273, 284 (Eng. C.A. 1888); *Ex parte Moore*, *In re Stokoe*, 2 Ch. D. 802 (Eng. C.A. 1876) (holding that statutory requirement as to time for disclaimer by trustee in bankruptcy may be waived)).

26. *See, e.g.*, *Habergham v. Vincent*, 30 Eng. Rep. 595, 607 (Ch. 1793).

27. *See id.* (quoting Latin maxim “*quisquis renunciare potest juri pro se introducto*”).

28. *Williams v. Stern*, 5 Q.B.D. 409, 412 (Eng. C.A. 1879) (holding promise not to enforce accrued right is not binding unless supported by consideration or debtor has altered position). Reliance was generally sufficient consideration at common law to support a waiver. 16 HALSBURY’S LAWS, *supra* note 16, ¶ 922. In *Williams*, the court addressed whether a party to a secured interest under an indenture had waived the contractual right to take immediate possession of the goods upon the debtor’s default. *See* 5 Q.B.D. at 410-12. The debtor paid 13 consecutive weekly installments under the contract. *Id.* On the day the 14th payment became due, he had to appear as a juror. He called upon the creditor and requested additional time in which to pay the installment. *Id.* The creditor told the debtor that he would “not look to a week.” *Id.* at 411. Relying on this statement, the debtor served on the jury for three days—but on the third day the creditor seized the debtor’s goods and sold them. The court phrased the question as whether the defendant had “so acted as to induce the plaintiff to believe that the defendant would hold his hand.”

ord or deed.²⁹ A right could be waived impliedly by conduct indicating an intention to abandon the right, or in some cases by neglect to enforce the right.³⁰ No person was deemed to have waived a right, unless he or she was fully aware of the right and the facts of the case.³¹ In addition, no waiver would be found unless the person acted under such circumstances that a court might reasonably presume that the right was intended to be waived.³² Common-law courts also apparently believed that waiver could be effectual upon principles analogous to that of estoppel³³ or release.³⁴

The principles of waiver articulated at common law were adopted without change in the United States.³⁵ In cases involving bills and notes, waiver could be express, as where it was stated in direct and positive terms in the instrument.³⁶ It also could be implied, as where it resulted from the conduct or an understanding between creditor and debtor and from which it could be reasonably inferred that the parties intended a waiver.³⁷ As a general rule, waiver could also be shown by custom.³⁸

Id. The court decided that there was no evidence of waiver because no benefit had accrued to the creditor from his promise. *Id.* at 411-12.

29. See 9 HALSBURY'S LAWS, *supra* note 16, ¶ 573.

30. The acts relied upon had to be inconsistent with the continuance of the right alleged to be waived. See *Keene v. Biscoe*, 8 Ch. D. 201, 203 (Eng. 1878).

31. 16 HALSBURY'S LAWS, *supra* note 16, ¶ 922.

32. *Vyvyan v. Vyvyan*, 54 Eng. Rep. 813, 817 (M.R. 1861) ("Waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and that being so, he neglects to enforce them, or chooses one benefit instead of another.").

33. See *Williams*, 5 Q.B.D. at 412; *Price v. Dyer*, 34 Eng. Rep. 137, 140 (Ch. 1810). In the case of written contracts, although the terms could not be varied by parol evidence, there was nothing to prevent the parties from agreeing verbally to waive any stipulation of the contract as to the mode or time of performance. If the contract was performed in accordance with such verbal agreement, courts would find that the terms, which had been waived, were discharged. See 9 HALSBURY'S LAWS, *supra* note 16, ¶ 572 (citing *Stead v. Dawber*, 113 Eng. Rep. 22 (K.B. 1839)).

34. *Stackhouse v. Barnston*, 32 Eng. Rep. 921, 925-26 (1805) ("A mere waiver signifies nothing more than an expression of intention not to insist upon the right; which in equity will not without consideration bar the right any more than at law accord without satisfaction would be a plea.").

35. See generally RENZO D. BOWERS, A TREATISE ON THE LAW OF WAIVER 19 (1914) (providing excellent discussion of doctrine of waiver in United States and source for early cases).

36. See *id.* at 19-21 (discussing requirements for effective waiver of terms in contract).

37. See *id.* at 20.

38. *Id.* at 80-81 (citation omitted).

III. DEVELOPMENT OF THE DOCTRINE OF WAIVER

Increasingly, the principle of freedom of contract predominates the development of the doctrine. Waivers are routinely enforced in almost all areas, criminal and civil. However, the courts have yet to adopt a general theory that unifies the concept of waiver across all areas of law.³⁹ Although the most familiar definition of waiver, "an intentional relinquishment . . . of a known right or privilege,"⁴⁰ is often cited, this definition is used infrequently in waiver analysis. Instead, waivers of the most fundamental rights are routinely enforced, and conduct is often held to waive rights whether known or unknown.⁴¹

Modern limitations on the ability to waive rights stem from two sources. The restriction can be predicated on either the status of the protected person or the importance of the right. In the first category, minors are not entitled to waive rights.⁴² In addition, guardians generally are not entitled to waive rights for their wards, nor are committees entitled to waive rights for incompetents. In the latter category, the inability to waive the right in question is usually based upon the primacy given to that right. This restriction on waiver is often framed in terms of public policy. Where a statutory right involves a strong public policy, a waiver of the right is ineffectual.⁴³

The protection afforded consumers in commercial transactions has been an outgrowth of both of these sources. The judicial proscription on waiver has developed from the concept of unconscionability

39. See Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 479-80 (1981).

40. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

41. See *Brewer v. Williams*, 430 U.S. 387, 404-05 (1977) (stating that incriminating statement made subsequent to indictment can constitute waiver of Sixth Amendment right to counsel); *Davis v. United States*, 411 U.S. 233 (1973) (addressing failure to object to grand jury selection); *United States v. Robinson*, 361 U.S. 220 (1960) (addressing failure to file appeal); *United States v. Scott*, 464 F.2d 832 (D.C. Cir. 1972) (discussing failure to raise defense of double jeopardy); *United States v. Semel*, 347 F.2d 228, 229 (4th Cir.) (stating that defendant waived objection to venue by pleading guilty), *cert. denied*, 382 U.S. 840 (1965). See generally Rubin, *supra* note 39, at 491-528 (summarizing present law of waivers).

42. See BOWERS, *supra* note 35, at 22-23.

43. See, e.g., *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945) (holding written waiver of employee's right to liquidated damages under wage laws ineffectual); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987) (noting that waiver of right to file charge with Equal Employment Opportunity Commission is void as against public policy); *Boyd v. Adams*, 513 F.2d 83, 88 (7th Cir. 1975) (holding 42 U.S.C. § 1983 waiver void as matter of law and against public policy); *Haas v. Madison County Bd. of Educ.*, 380 So. 2d 873, 875 (Ala. Civ. App.) (holding that waiver of protection afforded by teacher tenure laws is ineffectual on public policy grounds), *cert. denied*, 380 So. 2d 877 (Ala. 1980).

which has become the judicial hook upon which the fundamental rights of consumers have been hung. Although not expressly prohibiting waiver of fundamental rights when confronted with adhesion contracts,⁴⁴ courts recently have been reluctant to enforce waiver provisions absent a showing that the waiver was informed.⁴⁵ Because the courts have not been able to develop a uniform doctrine of waiver or to apply the doctrine consistently, legislatures have sought to fill the void. Increasingly, consumers as a class have been the beneficiaries of statutes enacted for their protection. The UCC's waiver provision has been preempted in an increasing number of areas, restricting the freedom of consumers to contract by eliminating their right as a class to waive certain substantive rights.⁴⁶ Both legislative and judicial responses have resulted in the application of an increasing number of exceptions to the Code. The exceptions have eroded the consistency that the Code sought to achieve and have destroyed uniformity of commercial transactions for a broad class of persons in society.

IV. THE DOCTRINE OF WAIVER AND SPONSORS OF THE UCC

The UCC sponsors initially rejected the application of the doctrine of waiver *carte blanche* to all commercial contracts. Except in certain instances, parties were not to be free to vary the provisions of the Code in all matters related to their commercial dealings.⁴⁷ Section 1-108 of the 1949 draft of the UCC provided that "[t]he rules enunciated in this Act are mandatory and may not be waived or modified by agreement unless the rule is qualified by the words 'unless otherwise

44. A contract of adhesion is a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.

45. *Bell v. Congress Mortgage Co.*, 24 Cal. App. 4th 1675, 1681, 30 Cal. Rptr. 2d 205, 209 (1994), *withdrawn*, No. S040252, 1994 Cal. LEXIS 4258 (July 28, 1994); see *Obstetrics & Gynecologists v. Pepper*, 693 P.2d 1259, 1261 (Nev. 1985).

46. For example, the right to assert underlying defenses against a seller's assignee can be waived. U.C.C. § 9-206 (1990). Consumers, however, can no longer waive this right in consumer credit contracts because of federal preemption of this area. See 16 C.F.R. § 433.2 (1975).

47. See, e.g., U.C.C. § 1-108 (1949), reprinted in 6 UNIFORM COMMERCIAL CODE DRAFTS 31 (Elizabeth Slusser Kelly compiler, 1984). There were many sources from which the sponsors of the UCC could have, but did not, adopt a general principle of waiver. Section 62 of the draft of the Federal Sales Act, for instance, stated that

[w]here any right, duty, or liability would arise under a contract to sell or a sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

H.R. 1619, 75th Cong., 1st Sess. 46-47 (1937), reprinted in 1 UNIFORM COMMERCIAL CODE DRAFTS, *supra* at 46-47.

agreed' or their equivalent."⁴⁸ "Great care" was taken to specify those provisions of the Code that could be modified or waived.⁴⁹ In all other cases, the rules set forth in the UCC were intended to be mandatory. The rules were intended to govern the contract.⁵⁰

The inflexibility initially prescribed by the Code grew out of the concern that the courts would not be capable of knowing, without clear direction from the drafters, which sections of the Code should be susceptible to variation by agreement and which sections were definitional and therefore mandatory.⁵¹ It was feared that the courts would destroy the goal of predictability and uniformity in commercial transactions.

The conflict between competing interest groups for favorable treatment in the Code⁵² is not a new one. The banking lobby in 1950 had difficulty with the strong statement of nonwaivability of the Code's provisions. Initially, the controversy focused on Article 4, Bank Deposits and Collections, and it resulted in Article 4 being exempted in its entirety from the nonwaivability mandate. The conflict-

48. U.C.C. § 1-108 (1949), *reprinted in* 6 UNIFORM COMMERCIAL CODE DRAFTS, *supra* note 47, at 31. The 1950 Draft of the UCC contained a similar provision. U.C.C. § 1-107 (Proposed Final Draft 1950), *reprinted in* 10 UNIFORM COMMERCIAL CODE DRAFTS, *supra* note 47, at 55-56. The official comment to the 1950 Draft defined the term "agreement" as including usage of trade, course of dealing, and course of performance. *Id.* at 56 (citing official comment to § 1-107).

49. U.C.C. § 1-107 cmt. (Proposed Final Draft 1950), *reprinted in* 10 UNIFORM COMMERCIAL CODE DRAFTS, *supra* note 47, at 56. As the official comment to subsection (4) of § 1-102 illustrates, the language "unless otherwise agreed" was used "to avoid controversy as to whether the subject matter of a particular section does or does not fall within the exceptions to subsection (3)." U.C.C. § 1-102 cmt. 3 (1990).

50. U.C.C. § 1-107 cmt. (Proposed Final Draft 1950), *reprinted in* 10 UNIFORM COMMERCIAL CODE DRAFTS, *supra* note 47, at 56.

51. The official comment to § 1-108 of the 1949 draft stated:

This Act contains two types of rules: (1) Rules which are mandatory that is, intended to govern the contract; (2) Rules which are intended to merely substitute for matters not expressed by the parties to the contract.

The former may not be modified or waived by agreement. The latter may be waived or modified at will. The failure of the courts to distinguish between these two types of rules in interpreting prior Acts has led to complete lack of uniformity. Accordingly, great care has been used in specifying those rules which may be modified or waived by agreement. In all other cases, it is intended that the rules shall be mandatory.

U.C.C. § 1-108 cmt. (1949), *reprinted in* 6 UNIFORM COMMERCIAL CODE DRAFTS, *supra* note 47, at 31.

52. See Corinne Cooper, *The Madonnas Play Tug of War with the Whores or Who Is Saving the UCC?*, 26 LOY. L.A. L. REV. 563 (1993); Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743 (1993).

ing policy issues between freedom of contract versus a strong code were hotly debated.⁵³

At the 1950 Annual Meeting of the American Law Institute, Karl Llewellyn advocated a general rule against waiver unless it was specifically authorized in the Code.⁵⁴ He argued that there were two different kinds of rules that exist throughout the law.

The first type is where the rule "controls [the transaction] regardless of the desire of the parties."⁵⁵ The rule governing the negotiability of an instrument is an example of this kind of mandatory rule. Parties simply should not be free to create their own customized terms rendering instruments negotiable.

Second, there are those that Llewellyn referred to as rules of construction. These "attempt to set out what one may call a standardized contract for the parties, to fill in all the points that they have neglected to talk about."⁵⁶ This type of rule should be subject to variation by the parties.

Llewellyn wanted the proposed Code to clearly distinguish between the mandatory rules and the rules of construction.⁵⁷ He was concerned that the courts often failed to distinguish adequately between the two types, leading to a "queer unpredictability in the actual case law."⁵⁸

The 1949 version of the Code provided a bright-line distinction between the rules of construction and the mandatory rules, by beginning rules of construction with the preface "unless otherwise agreed," or words of similar import.⁵⁹ All other rules in the Code were mandatory.

Llewellyn thought that the bright-line test included in the 1949 draft of the Code would enhance freedom of contract because each party would have a clear understanding of where it stood. Complete, unbridled freedom of contract was Llewellyn's equivalent of commercial chaos.⁶⁰ Only within the structure of an order imposed by a

53. See *Annual Meeting of the American Law Institute in Joint Session with National Conference of Commissioners on Uniform State Laws, Consideration of Proposed Final Draft of the Uniform Commercial Code*, 27 A.L.I. PROC. 1 (1950) [hereinafter ALI Proceedings].

54. *Id.* at 174-77.

55. *Id.* at 174.

56. *Id.* at 175.

57. *Id.*

58. *Id.*

59. See *id.* at 176.

60. *Id.*

meaningful and consistent set of rules are parties really free to engage in commercial transactions.⁶¹

Frederick Beutel, a frequent critic of the proposed Code,⁶² argued against the mandatory rules. He claimed that there was no precedent for them in commercial transactions:

All the other Code provisions that I have ever encountered, including the NIL [Negotiable Instruments Law], are rules of law which apply unless the parties agree otherwise. It is a fundamentally established principle of law in all free nations, that the rules of the civil law can be waived by contract unless the law specifically provides otherwise.

All our Codes in the past have been drafted that way. All our thoughts toward law, civil law rules, operate that way. We are operating in a commercial field in which the law is extremely complicated, and in which the desires of the parties can be infinite.⁶³

The underpinnings of the policy debate were purely political. If the position of Beutel were adopted, which was strongly supported by the banking lobby, the chances for the Code's acceptance would be enhanced.⁶⁴ When the vote was finally taken, the section prohibiting waiver was retained.

The clarity of the 1949 draft of the UCC was short-lived. The matter was referred to the Permanent Editorial Board (PEB) where it once again took center stage. The PEB held numerous discussions with representatives of banking groups, who expressed repeated concern about the impact of a Code which would not allow them to vary its terms for different customers.⁶⁵ The result of these negotiations was reported at the 1951 meeting of the National Conference of Commissioners on Uniform State Laws.⁶⁶ While the debate addressed, in

61. *Id.* Llewellyn also explains:

I should have thought that to show clearly which rules are which, would make contract easier and more certain. It seems to me that the question on freedom of contract must come in regard to particular rules which are thought undesirable and which are thought to be properly subject to contract when they are said in the Code not to be subject to contract, and that the problem, therefore, should be one of spotting those rules and thereby eliminating them by curing them.

Id. at 176-77.

62. Frederick K. Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 *YALE L.J.* 334 (1952).

63. ALI Proceedings, *supra* note 53, at 178.

64. *Id.* at 181 (reporting remarks of Walter Malcolm).

65. See Proceedings in Committee of the Whole on UCC, NCCUSL, in N.Y., N.Y. (Sept. 10-15, 1951) [hereinafter NCCUSL Proceedings].

66. *Id.*

lofty airs, the competing policies, the reality facing Code adoption in the legislatures of fifty states necessitated compromise. The UCC was just another piece of legislation; and perfection had to be sacrificed to garner support.⁶⁷

To facilitate passage and eliminate the opposition of the banking lobby, drafters removed the section prohibiting waiver.⁶⁸ The compromise reached in 1951 led to the adoption of the "imperfect" Code, and created the situation Llewellyn tried to prevent in the initial drafts. All reference to "mandatory" rules was eliminated. The idea that commercial practices could and should be regulated by a stipulated body of law, which could not be bargained away, was replaced by the principle of near total "freedom of contract." Contrary to the earlier provisions of the Code, the rules were allowed to be waived or modified even though the provision was not qualified by the words "unless otherwise agreed." The 1952 redraft added a new section 1-102(3)(c), which stated that certain "general obligations" prescribed by the UCC, "such as good faith, due diligence, commercial reasonableness and reasonable care" could not be disclaimed by agreement.⁶⁹ However, the parties were free to determine the standards by which

67. One participant spoke frankly of the situation:

There have been those who say that two groups have been working on this Commercial Code, those who dwelt in an ivory tower and those who were in the marketplace.

....

... There are two great forces which move for improvement, and one of them is a leader, and we have had a leader here who has led well and far in this Commercial Code. The other force is the force of necessity. If this thing which we are seeking to do now is enacted, although imperfect, the day is going to come when necessity will require that it be perfected. I think we must not try for complete perfection now. Perfection can be postponed.

....

I am not claiming that these two bodies should descend into the market place and pay no attention to our desire to produce a good Code. We must produce a good Code. But if we seek perfection and get no Code, that is considerably worse than having a Code which may be imperfect and which someday may be perfected. It seems to me that we must cut somewhere in the middle, that we must not lose the support, and certainly must not incur real opposition of a very powerful group; the banks in New York and the banks elsewhere can hurt very much our ability to get this Code on the statute books, and that is where we want it.

Id. at 18-19 (reporting remarks of Harrison Tweed).

68. *See id.* at 19.

69. U.C.C. § 1-102(3) (Official Draft 1952), reprinted in 14 UNIFORM COMMERCIAL CODE DRAFTS, *supra* note 47, at 43-44. The provision which allows the parties to determine standards of good faith, due diligence, reasonableness, and care has puzzled many commentators. *See, e.g., Commercial Law and Practice Guide* ¶ 1.04[2] (Barry L. Zaretsky et al. eds., 1994) ("We have never been too sure of what this language means.").

the performance of "such obligations" were to be measured, if the chosen standards were not "manifestly unreasonable."⁷⁰

Between 1952 and 1958, changes were recommended to UCC section 1-102(3)(c) that would make it clear that good faith, due diligence, reasonableness, and care were the *only* general obligations that could not be waived.⁷¹ These recommendations were adopted. Section 1-102(3) now provides:

The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that 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.⁷²

V. RECENT DEVELOPMENTS

The erosion of predictability, certainty, and uniformity of result continues. The revisors of Article 3 recently replaced several bright-line rules with invitations for litigation. For example, section 3-605 changed the prior rule that an accommodation party is discharged as a result of a material modification of the underlying obligation. Now an accommodation party is discharged to the extent that the modification causes loss to the accommodation party. The revision also allocates burdens of proof, thus transforming the provision from a conventional standard into something more akin to an evidentiary rule. Because of its recent passage, the courts have not yet become saturated with litigation caused by the amendment to this section. If the best thing that a commercial lawyer can do for his or her client is to keep the client out of court,⁷³ it must follow that the best thing that the drafters of the

70. U.C.C. § 1-102(3) (Official Draft 1952), reprinted in 14 UNIFORM COMMERCIAL CODE DRAFTS, *supra* note 47, at 43-44.

71. U.C.C. § 1-102 (Official Draft 1952) (including changes and modifications approved by Enlarged Editorial Board at meetings held on Dec. 29, 1952, Feb. 16, 1953, May 21, 1953, and Dec. 11, 1953), reprinted in 16 UNIFORM COMMERCIAL CODE DRAFTS, *supra* note 47, at 43-44.

72. U.C.C. § 1-102(3) (1990). Course of dealing and usage of trade continue to be important in determining whether agreed-upon "standards" by which good faith, diligence, reasonableness, and care are measured are "manifestly unreasonable." *Id.* cmt. 2.

73. Letter from Donald J. Rapson, Member, Permanent Editorial Board of the UCC, to Peter A. Alces, Associate Professor of Law, University of Alabama 1-2 (Mar. 31, 1986) (on file with the *Loyola of Los Angeles Law Review*), cited in Peter A. Alces, *Roll Over, Llewellyn?*, 26 *LOY. L.A. L. REV.* 543, 545 (1993).

commercial code can do is to eliminate provisions which, by their very nature, require judicial intervention.

The impact of the 1951 compromise on the waiver position has been the Code's failure to provide meaningful rules of the road for practitioners. Allowing virtually complete freedom of contract means that the "bargains" negotiated can be determined only in the courts. A court will consider a wide variety of circumstances to provide a commercial context for the contract's execution, including the relative bargaining strengths of the parties, the nature and extent of the negotiations, and specific representations made or withheld during those negotiations.⁷⁴

The Code should be revised so that it means what it says and so that what it says is enforceable regardless of the positions of the parties. The Code should eliminate those provisions which are so routinely waived that inclusion of them no longer makes sense. For example, almost all commercial notes waive presentment. Thus, the requirement for presentment has lost virtually all commercial meaning. The term, like many, should be deleted in order to eliminate the need of constantly having to contract around the provision.

The remainder of the Code should be made meaningful. Afforded rights should not be subject to elimination simply by the forms of the party with the superior bargaining power. The value of the right should not be dependent upon the party's status or classification. A uniform doctrine of waiver must be developed, and it should be applied consistently throughout the entire Code. If a right is important enough to be included in the Code and if it is not merely a "rule of construction," then a provision should be made in the Code to insure its availability. If the complexity of a transaction dictates waiver of a fundamental right or if the parties truly desire elimination of a right after deliberate negotiation for enhanced consideration, then the waiver should be knowing and intended as its definition suggests. Accepting that commercial dealings require an ability to contract freely, the ability to waive provisions of the Code should not be completely eliminated. However, to provide real freedom, availability of options should be prescribed. Bright-line tests can be incorporated into the Code to provide the standard by which meaningful waiver can be determined without having to turn constantly to a judicial forum. A re-

74. See *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 489, 186 Cal. Rptr. 114, 124 (1982).

vision of the Code to make its provisions mandatory absent a showing of separate value for an extracted waiver can achieve this goal.

In the context of the warranties of merchantability and fitness, for example, separate value for waiver could take the form of two price structures: (1) for the sale of goods with warranties, and (2) for the sale of goods without warranties. Litigation over the classification of the purchaser as a consumer would be eliminated. Providing the option to choose between waiver and nonwaiver should become mandatory. The warranty must be available if the purchaser chooses not to waive it. No artificial or disguised shifting of costs or burdens will occur. The market will determine the value of the waiver when it does occur.

In finance contracts, enhanced remedies for the lender could be priced through interest rates or points. A choice not to waive the provisions in question would have to be provided. The differentiation in price would clearly establish the negotiated meaningful consideration. In the event a market is not sufficiently developed or is unable to offer a meaningful dual-pricing structure, the provisions of the Code should not be subject to waiver.

Parties of "equal bargaining power," where the contracts are traditionally negotiated by professionals, will have full freedom of contract retained. Parties not of unequal bargaining power who voluntarily and with full awareness enter into agreements, should expect the courts to enforce those agreements as written.⁷⁵

This proposal goes beyond what the courts have fashioned in determining whether a party to a contract of adhesion has effectively waived a right. The judicial response has been to tie the effectiveness of the waiver to whether it was conspicuous in the contract or whether the provision was within the "reasonable expectations" of the adherent. The courts have suggested that this can be shown by a separate box to check indicating assent.⁷⁶ But this remedy has proven insufficient in other contexts. It requires only a change in the forms used. Similar to the requirement that the waiver of warranties be placed in bold or larger typeface, it will not lead to a substantive change in

75. *Overmyer Co. v. Frick*, 405 U.S. 174, 187 (1972) (ruling that waiver of prejudgment notice and hearing will be enforced where parties are of equal bargaining power and waived rights with full awareness of legal consequences).

76. See *Broemmer v. Abortion Serv.*, 840 P.2d 1013 (Ariz. 1992); *Bell v. Congress Mortgage Co.*, 24 Cal. App. 4th 1675, 300 Cal. Rptr. 2d 205 (1994), *withdrawn*, No. S040252, 1994 Cal. LEXIS 4258 (July 28, 1994); *Obstetrics & Gynecologists v. Pepper*, 693 P.2d 1259 (Nev. 1985).

rights among parties of unequal bargaining power. It will not unify the concept of waiver throughout the Code.

VI. CONCLUSION

Current commercial reality is that a large number of transactions occur between parties of unequal bargaining power. Substantive rights believed to be important by the drafters of the UCC are routinely waived, with or without the understanding and meaningful consent of the waiving party. In order to provide protection to all parties and to restore uniformity to the Code, the current policy of complete freedom of contract should be changed. Specifically, section 1-102(3) should be amended to read as follows:

(3) The effect of provisions of this Act may be varied by agreement, except

(i) as otherwise provided in this Act;

(ii) that provisions enacted for the benefit of a party may not be disclaimed by agreement unless the disclaimer is supported by separate and stated value and unless the option not to disclaim is clearly provided on the same terms and conditions absent the separate and stated value or the agreement is between parties of equal bargaining power; and

(iii) 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.