

# SUBSTANCE ABUSE AT UCC DRAFTING SESSIONS

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A few substance abusers start down the road to addiction with a single reckless experiment. Such was the case of Professor "Doe", a consumer law specialist of my acquaintance.<sup>1</sup> The entanglement of Professor Doe in the UCC drafting process began when he accepted what seemed like the harmless invitation of a friend to attend a single National Conference of Commissioners on Uniform State Laws ("NCCUSL") drafting session in 1990.<sup>2</sup> Session after session followed. Soon he found himself in a descending spiral—attending study groups, legislative task forces, and conference programs being held in strange cities to debate a new or revised provision of some new or revised Article of the Uniform Commercial Code ("UCC").

In retrospect, it is apparent that Doe attended far more sessions than he ever thought he would—and far more than many Code experts and others in the legal profession now believe are prudent to maintain professional health and respectability.<sup>3</sup> Doe conceded that each and every moment of these meetings was not glamorous or stimulating, but the cumulative effect was

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1. Professor Doe requested that his actual identity remain concealed.

2. See Steven L. Schwarcz, *A Fundamental Inquiry into the Statutory Rulemaking Process of Private Legislatures*, 29 GA. L. REV. 909, 921 (1995). Schwarcz's article praises the UCC drafting process as a private legislative activity which

at least in the uniform state law arena . . . has important redeeming attributes. It brings together, in ways that an individual state legislature could not, experts from around the country to pool their knowledge and ideas in the development of nationally uniform statutes. It also provides—through organizations such as ALI and NCCUSL—a forum in which dedicated and talented lawyers, judges, and academics can provide a public service.

*Id.*

3. Although I assured Doe that there was nothing at all unsavory about paying attention to Code problems in moderation, some of Doe's friends warned him that colleagues do not consider prodigious efforts on bar committees or at drafting sessions to be much of an indication of professional accomplishment for the purposes of evaluating his qualifications for tenure or for merit pay increases. They also cautioned him that publications in this area were likely to be treated as narrow, no matter how broad their significance; and that in all probability, writings about the Code would be harder to place in the major journals; more likely to go unread; and in general, be more easily dismissed and misunderstood by those who do not teach in closely related fields.

intoxicating. He was drawn into the orbit of the private legislatures, where he felt as though he had the power of a senator, or, at least, a senator's aide.

Doe experienced sensory "highs" as a result of his attendance at these sessions, but these sensations diminished in intensity as time passed. He told friends that with each new Revision project it became necessary to go deeper and deeper into his subject matter in pursuit of satiation. This became physically exhausting: the circulation of one revised draft after another—often with new alternative comments to previously redrafted alternative provisions, followed by debate that could last for a great many minutes, took its numbing toll. Doe exhausted more and more of his resources in efforts to replicate his initial ecstasy.

Reading about the Uniform Commercial Code became something of a compulsion. In lonely moments with too much time on his hands he would reach in desperation for a UCC panel cassette tape. To untutored ears, these cassettes might sound dry and tedious, but to Doe, they were like cigarettes to a chain-smoker. Their effect was positively narcotic. Paradoxically, immersion in the Uniform Commercial Code had its soporific as well as its stimulating effects.

No matter how hard Doe tried to banish the actual session debates from his memory, the recollection of especially vigorous ones crept into his Unconscious. On many occasions Professor Doe replayed heated exchanges which had taken place during the UCC sessions on the interior proscenium of his mind. These tableaux remained there, tormenting him.

In his fantasies, Doe imagined that he had a large reputation for repartee which he had gained by tossing witty insults whenever his adversaries challenged him. He was a legend in his own mind. He would entertain friends endlessly with reinvented episodes involving arcane subjects such as the limitation of deficiency judgments,<sup>4</sup> the restriction of security interests in deposit accounts,<sup>5</sup> and the improvement of rules related to check truncation.<sup>6</sup> His memory of events, however, often altered them to come out the way he wanted them to come out.

At least initially, Doe understood that his imaginings were nothing more than exercises in wish-fulfillment; he would later come to his senses and speak about what had truly transpired. He would describe what had been

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4. See U.C.C. § 9-504 (1995).

5. *Id.* § 9-104(a).

6. *Id.* § 4-406.

decided by the Commissioners. In misery he would complain: "If only I had not kept silent;" or "if only I had mentioned the FTC study;"<sup>7</sup> or, "if only I had countered that argument about economic efficiency more skillfully;" or, "if only I had proposed a different wording than the one I did." All this second-guessing was futile and psychologically destructive, of course. It plagued and depressed him until he could no longer maintain the line between fact and fiction. Finally, Doe fell victim to recurring, protracted, and fantastic delusions about the UCC drafting process.

It is these sustained episodes of delusion that I would like to relate to you here. I am not entirely certain what they signify; perhaps those conversant in some of the newer psychoanalytic techniques will help locate what this significance is. From my perspective, however, a study of Professor Doe's dementia bears heavily on concerns that have been fashionably expressed of late by several UCC theorists.

The concerns I am speaking about are fears that consumer advocates have "hijacked"<sup>8</sup> or "captured"<sup>9</sup> the otherwise relatively pure and equitable process of promulgating state commercial law.<sup>10</sup> Exploring Doe's hallucinations may

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7. See FTC Credit Practice Rule, 16 C.F.R. § 444.2 (1996).

8. See A. Brooke Overby, *Modeling UCC Drafting*, 29 LOY. L.A. L. REV. 645, 663 (1996) (objecting to a supposed "consumer rights" political model for the drafting process, whereby "interest groups representing consumer interests would receive predominant consideration in the drafting process."). But see Yvonne W. Rosmarin, *Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process*, 35 WM. & MARY L. REV. 1593, 1594 (1994). Rosmarin observes:

Some would see consumers as a "special interest" group, like a manufacturers' association or purchasers' organization, but this view misses the point. Consumer transactions are not those of a special interest group, they are merely a subset of commercial transactions, which involve a commercial party on one side and an individual on the other. To characterize attempts to craft fair rules for those transactions as catering to "special interests" loses sight of the fact that every individual is a consumer and needs to purchase goods.

*Id.*

9. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 647 (1995) (predicting that "reformer-dominated study groups will attempt to enlist interest group support and diffuse interest group opposition. The only groups that were possibly cohesive enough for the reformers to consider in connection with the Article 2 revisions were those that represented consumers."). But see Schwarcz, *supra* note 2, at 919-20 (agreeing with Professor Scott that "the UCC rulemaking process is susceptible to pressure from cohesive interest groups," but identifying financial institutions as the most prevalent of such groups. Schwarcz contends that when capture occurs, private legislatures "will create 'bright-line' rules, and . . . the substance of those rules will favor the capturing industry."):

10. See Schwarcz, *supra* note 2, at 950. Schwarcz opposes a wholly representational model on grounds that other groups would capture the law:

Lawyers who have as their main goal to advance the cause of clarity, uniformity, and elegance . . . in commercial law and damn the special interest oxen which are gored in the process. . . are the keepers of the precious flame that is the UCC, and without their persistence, their vigilance, their almost religious dedication, the UCC would be nothing but a patchwork quilt of special interest

help to determine whether these worries have a basis in reality. This exploration also may indicate whether the proper model for the UCC drafting process is one in which various interests are formally represented—that is, it may indicate whether there is validity to qualms that have been expressed about adopting a “policy” or “interest group” model for the drafting process.<sup>11</sup>

For these purposes allow me to describe three of the detailed hallucinations Doe described in his sessions with me over the course of several months. I invite you to help me to grasp their meaning. I shall refer to these as Doe’s “collusion dream,”<sup>12</sup> his “collateral phantasm,”<sup>13</sup> and his “payment system fantasy.”<sup>14</sup>

### I. THE COLLUSION DREAM

It is 1992 in Professor Doe’s collusion dream, and he has been invited to a drafting session where Article 8 of the UCC (“Investment Securities Article”) is being revised. Instead of being held in Chicago in the winter, in his dream the session is being held at the Hilton Head Resort and it is the springtime. Back in the corner of the room, decanters of planter’s punch and plates of key lime pie sit on neatly pressed hotel table linen.

Doe believes that at the drafting session he is the star of the show. He manages to demonstrate with eloquence and passion and logic that however brilliantly conceived, key provisions of the Investment Securities Article such as Revised section 8-503,<sup>15</sup> are utterly misguided from the point of view of individual investors.<sup>16</sup> Doe puts forward the view that an unfortunate

provisions cobbled together by the guys in the blue suits making more for each and every hour of their participation than my mortgage payment.

*Id.* (quoting Corinne Cooper, *The Madonnas Play Tug of War with the Whores Or Who Is Saving the UCC?*, 26 *LOY. L.A. L. REV.* 563, 568-69 (1993)).

11. See Overby, *supra* note 8, at 689 (troubled by dangers that bubble up from an “emerging paradigm for the UCC drafting process [which] is the policy model . . . through [which] inclusion of all interested parties in the drafting process and the . . . UCC provisions . . . [is supposed to result in] a proposed uniform law that adequately balances, on policy grounds, the interests of all concerned”).

12. See *infra* notes 15-21 and accompanying text.

13. See *infra* notes 22-37 and accompanying text.

14. See *infra* notes 38-47 and accompanying text.

15. Revised section 8-503 states that “An action based on the entitlement holder’s property interest with respect to a particular financial asset . . . may not be asserted against any purchaser of a financial asset or interest therein who gives value, obtains control, and does not act in collusion with the securities intermediary in violating the securities intermediary’s obligations under Section 8-504.” U.C.C. § 8-503 (1995).

16. See Committee on Unif. State Laws & Banking Law Comm. of the Ass’n of the Bar of the City of New York, Report on Proposed Revisions to Article 8 of the New York Uniform Commercial Code, with

customer whose securities are unlawfully pledged by a defunct broker to a commercial lender should not need to prove that the two parties have “colluded” with each other, as defined by tort standards, in order for the customer to recover the shares the broker was supposed to hold.

In Doe’s hallucination, dozens of consumer-oriented participants are seated around the table. Astonishingly, instead of arguing among themselves, they all agree with Doe, or at least they do not contradict him in public. So many individual consumer-investors speak so persuasively, in fact, and they have so much practical experience with the rules in question, that those who represent the lenders and securities clearinghouses are hushed into resentful acquiescence. In Doe’s dream the silence of the creditor’s group is in part attributable to the superior talent of the consumer representatives and in part to the fact that in the eyes of some of the more august participants, the securities industry representatives are unqualified to sit at the table. Doe himself imagines that these industry representatives are unseasoned novices at the UCC drafting business or else that they come from small law firms without a regular securities practice base.<sup>17</sup>

The commissioners around the table are called on to vote about whether to reform the collusion standard. They and the Reporter side with Doe, and enthusiastically embrace his drafting suggestions. Instead of producing the inevitable outcome that the secured lender with a control agreement always wins, they redraft the rule. The new rule calls for lenders (intermediaries) to

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Conforming and Miscellaneous Amendments to Articles 1, 5, 9 and 13 Thereof as Well as Conforming and Miscellaneous Amendments to Other Statutes 41-45 (Feb. 21, 1996) (on file with *Washington University Law Quarterly*).

17. The reality, of course, has more often been closer to the opposite situation. See, e.g., Amelia H. Boss, *Foreword: Is the UCC Dead, or Alive and Well? An Introduction to the Practitioners’ Perspective*, 28 LOY. L.A. L. REV. 89, 94 (1994) (“The cost and burden of participating in the drafting process may discourage or foreclose participation by consumer representatives, which may result in the failure of the Code to adequately address consumer issues in some areas.”); see also Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. REV. 349, 403 (1988); 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, 759-67 (1993) (noting numerical strength and resources of industry observers). Professor Braucher observes, in the context of FTC regulatory proceedings, that

[I]n the Credit Practices Rule proceedings institutional lenders and credit trade associations stood opposed to consumers. One side thus consisted of wealthy, well-organized groups able to speak the accepted language of net-benefit maximization. On the other side were less organized and less well-financed consumers and their representatives, whose arguments sometimes sounded less rigorous and more like emotional pleas for particular outcomes. This problem was exacerbated because the benefits of regulation often are harder to identify and quantify than the costs.

Braucher, *supra* at 403.

relinquish possession and pay draconian statutory damages to any consumer entitlement holder who can show that, within 60 days of the broker's insolvency, a securities intermediary "conceivably might have heard somehow about rumors of a business downturn, malaise or suspiciously low morale" at the broker's place of business.

This dream is of course improbable, bizarre, and inaccurate. Indeed, it is impossible. We know today that there were *not any* consumer representatives at all at the Article Eight drafting sessions<sup>18</sup> and that there was *not any* formal participation by any consumer organization.<sup>19</sup> Even if there had been a few representatives, they would hardly have been able to affect the overall results.<sup>20</sup> We know now that the collusion standard, in the interest of "super-negotiability"<sup>21</sup> survived the drafting process intact, impervious to criticism about its possible effects.

We also know that NCCUSL never arranges for planter's punch and key lime pie at drafting meetings. Coffee and pineapple cheese danish are generally preferred.

18. See Thomas C. Baxter, Jr., *The UCC Thrives in the Law of Commercial Payment*, 28 LOY. L.A. L. REV. 113, 129 (1996). Baxter observes:

what may be one of the few weaknesses of the NCCUSL process—the absence of consumer representation on drafting committees. To the extent that consumer groups can be more effectively incorporated into the process, and this probably requires some mechanism for funding their participation, then some of the problems of the past can be avoided. While this might be relatively unimportant in the Article 8 revision effort, given that consumers are not routinely involved in securities transfers and clearing, it could be very important to the success of the Article 9 and Article 2 revision projects.

*Id.*

19. See Norman I. Silber, *Consumer Participation in Lawmaking: Past Present and Future*, ADVANCING THE CONSUMER INTEREST (forthcoming Spring 1997).

20. See Clayton P. Gillette, *Rules, Standards, and Precautions in Payment Systems*, 82 VA. L. REV. 181, 198-99 (1996). The significance of a small representation of consumer advocates is minimized because

[i]f consumer representatives are consistently in the minority, they can enter into effective logrolls only if other groups are in disagreement with each other and consumer representatives can align themselves with one of those adverse groups. If the majority of a drafting group is already in agreement and that agreement stands in opposition to or is indifferent to consumer interests, participation by consumer representatives to create a majority coalition will be unnecessary. . . . Only if the majority seeks to obtain unanimity or to forestall vocal dissent will a group that consistently constitutes a minority have the capacity to enact part of its agenda.

*Id.*

21. See Jeanne L. Schroeder, *Is Article 8 Finally Ready This Time? The Radical Reform of Secured Lending on Wall Street*, 1994 COLUM. BUS. L. REV. 291, 298-99, 351-56.

## II. THE COLLATERAL PHANTASM

In Doe's collateral phantasm it is 1995. He is attending the drafting session for Revised Article 9 (secured transactions). In Doe's warped head the session is being held at the Super 8 Motel in Akron instead of the Washington Marriott. The tables in the banquet room, instead of being set up in their usual oblong configuration, are set up in a polka-dot pattern, wedding reception style, with a dance floor in the middle. The Reporters have taken care to place seating cards at each round table, with a sequined copy of *The Portable UCC*<sup>22</sup> as a centerpiece at each one.

According to Doe's version he is the lone consumer-oriented participant on this occasion; he arrives late and must find a seat at the table located farthest away, in the remote corner. In his dream he is an intellectual ninja warrior whose mission is to turn upside-down the instinctive creditor perspective of the other observers from the finance companies and private firms who are present, as well as the outlook of the voting participants. After lunch, Doe imagines, wine glasses are refilled with Sangria. Balloons, party favors, and worthless chattel paper are swept off the carpet. The drafters put aside their convivial banter and return to work.

In due course important questions about whether to strengthen or weaken the self-help repossession and coercive collection powers of creditors come up for discussion. In Doe's vision, the academic exponents of the Public Choice<sup>23</sup> and Law and Economics school, backed by a score of representatives of the secured lending community, expound on the true motives of consumer advocates<sup>24</sup> and the nature of law's influence on commercial behavior. They present five theoretical proofs, all of which tend to prove that consumer representatives are, frankly, deluded or duped into believing that limitations on secured creditors benefit most of those consumers they represent.<sup>25</sup>

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22. See THE PORTABLE UCC: 1995 OFFICIAL TEXT (Corinne Cooper ed. 1996).

23. See Overby, *supra* note 8, at 661 (describing public choice theory, in this context, as seeking to "assess the effects that interest-group influences and voting behavior might have on the revision process and on the final content of the Code").

24. See, e.g., Peter V. Letsou, *The Political Economy of Consumer Credit Regulation*, 44 EMORY L.J. 587, 628 (1995) (claiming that groups benefit from legal restrictions on coercive collection out of self-interest, including "consumers who default on their loans, legal aid organizations, banks and other non-finance company lenders," and that "groups that benefit from restrictions on creditor remedies have relatively small memberships and relatively large per capita stakes").

25. See *id.* at 643 (theorizing that "while consumers who repay their loans are harmed by restrictions on coercive collection practices, they are unlikely to be an effective lobbying force against those legal

The lender syllogisms advanced by these forces tend to disprove that it even helps most poor consumers to place controls on the ability of lenders to take all of their property as collateral.<sup>26</sup> Poor consumers are much better off when legal rules encourage creditors to securitize all of a debtor's possessions, the secured creditor proponents claim. This is, they say, because additional assets that are securitizable will make millions of dollars of additional credit available and lead hundreds of thousands of consumers to become newly eligible for credit.<sup>27</sup>

The creditors argue in a similar vein that all waivers of rights and exculpatory provisions in standard form security agreements should be enforced against debtors. Debt collection, they assert, would be much more efficient if the rules only would permit creditors to enforce "all assets" securitization agreements, and wholesale bankruptcy waiver provisions. In what Doe concedes is a minority view, some among these creditors also favor impounding small children whenever a parent debtor acts uncivilly toward a secured party. Other secured creditors suggest that those who propose further protections for consumers in Article 9 are no better than sociopathic killers out to subvert and ultimately destroy the existing Article—an exquisite and perfectly designed UCC jewel.<sup>28</sup>

restrictions"); *see also* Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 131-32 (1993). Professor Patchel suggests that

[i]f the uniform laws process were more open, adequate consumer representatives might appear through a process of natural selection. Because it is not, the Conference runs the risk in selecting consumer representatives of finding that the representatives it has chosen do not represent the views of a sufficient number of consumers.

*Id.*

26. Letsou asserts that

[c]onsumer group support for legal restrictions on contract terms defining lender remedies can be explained on at least two other bases, neither of which involves pressure from consumers who default: First, those in charge of consumer groups may be subject to . . . economic illusions . . . and, second, those in charge of consumer groups may simply be staking out a position—opposition to banks and other moneyed interests—that has enjoyed considerable popular appeal in the past. . . .

Letsou, *supra* note 25, at 629 n.139.

27. *See id.* at 591 (arguing that "the market for contract terms may well be marked by imperfections, but . . . in many cases the cost to consumers of the regulatory efforts undertaken to remedy those imperfections exceeds the benefits"); *see also* Memorandum from the Representatives of Consumer Creditors to Article 9 Drafting Committee, Proposed Amendments to the October 15, 1996 Draft of Proposed Revisions to Article 9, at 2 (Jan. 1997) (on file with *Washington University Law Quarterly*) (enclosure to Letter from Edward J. Heiser, Jr., Whyte Hirschboeck Dudek S.C., to William M. Burke, Shearman & Sterling (Jan. 15, 1997) ("Even though the cost associated with each particular [lender restriction] may be small, the total costs are large.").

28. *See infra* Appendix A.



Doe imagines that on this occasion he is fully prepared for their intellectual onslaught. Doe has anticipated all these efficient market arguments in advance. He has done his homework. He has obtained a grant of several hundred thousand dollars from a well-known, consumer-oriented screen actress. Using that money he has commissioned studies and hired consultants to investigate the appropriate arguments which might appeal to the drafters.<sup>29</sup> In his dream Doe makes his case with a degree of skill, equanimity and brilliance that might please a commercial lawyer from the Davis Polk firm.

Doe draws the group's attention to a statistically significant, mathematically sophisticated, and yet accessible empirical study prepared by the Rand Foundation, which concludes that it is the nature of consumer credit evaluation that creditors seldom give greater value for taking blanket liens than they give for taking partial ones.

Doe next calls in a researcher from the University of Pennsylvania, who authoritatively reports that 99.999% of all creditors do not give debtors an opportunity to read, much less understand or modify the security agreements they sign. He shows that consumer representatives, as well as debtors, are correct to treat the protections for those who have defaulted as valuable to all consumers because it is uncertain whether any particular debtor might default in the face of job loss, sickness, and fraudulent or incompetent or dishonest conduct by sellers and creditors.<sup>30</sup> He confirms that consumer security agreements in the same retail market rarely vary from one lender to the next.

Doe then tows into the room an ex-employee of the General Motors Acceptance Corporation who speaks—from behind a screen with a voice-altering device—about 237 improper auction sales he orchestrated before his sense of guilt compelled him to repent.<sup>31</sup>

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29. See Peter Winship, *As the World Turns: Revisiting Rudolf Schlesinger's Study of the Uniform Commercial Code "In the Light of Comparative Law"*, 29 LOY. L.A. L. REV. 1143, 1151 (1996) (observing that with respect to empirical studies, "[l]ittle has changed since Professor Schlesinger wrote. The UCC sponsors have not commissioned preparatory comparative research before beginning work on revision of specific articles.").

30. See Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489 (1991) (theoretical and empirical analysis which argues, in the context of real property mortgagor protection laws, that compulsory mortgagor protection rules should be viewed as mandatory insurance which is essential to counter inherent risk perception difficulties).

31. See Luize E. Zubrow, *Rethinking Article 9 Remedies: Economic and Fiduciary Perspectives*, 42 UCLA L. REV. 445, 449 (1994) (proposing "stringent constraints be placed on . . . creditor profit-taking in self-dealing transactions not approved by informed debtors"); see also *Ford Motor Co. v. Federal Trade Commission*, 673 F.2d 1008 (9th Cir. 1982) (discussing abusive foreclosure sale practices).

He invites a hardworking single parent and her two-year-old child onto the floor. In his vision, the mother brings tears to the eyes of all the commissioners when she describes how, with great difficulty,<sup>32</sup> she borrowed a sum of money to pay her grandfather's medical bills; how she lost her job because the defense plant closed; how the auto credit company repossessed her car \$20 short of the debt retirement; how the company represented to her that there was not any surplus available from the foreclosure sale; and how the repossession prevented her from visiting her terminally ill grandfather at the hospital. Even the most hardened lending attorneys are visibly moved. Kleenex dispensers dart around the room.

As the *coup-de-grace*, Doe marches state legislative judiciary committee chairs from ten of the leading industrial states into the hall. The politicians announce in unison to the UCC commissioners that the consumer debtors in their states are so knowledgeable about the problems of secured credit, so organized, and so incensed about the deficiencies in Part 5 of Article 9 (dealing with default) that they have organized in key districts to topple unsympathetic and industry-oriented legislators. As a result, the judiciary chairs of those states have vowed to bottle-up the UCC for the better part of a decade unless self-help repossession and coercive collection remedies are modified.

Doe's dream almost turns into a nightmare at this point. His last maneuver has almost gone too far. The Commissioners are shocked and infuriated by the political threat made by the legislators. In a backlash against intimidation, the drafters nearly refuse to consider any mitigation of the effect of coercive collection techniques on consumers. At the last moment Doe convinces them that no real intimidation was intended and that the model draft should at least take a middle road.

Doe's tale reveals the degree to which his mind had succumbed to the worst sort of distortion of reality. It is clear that the reporters, commissioners, and most others in the UCC drafting process reject Doe's basic perspectives about debtors and their problems. They are further persuaded—largely by the classical theory of exchange and legal tradition—that coercive collection devices, including garnishment and self-help repossession, have great virtue in signaling a debtor's commitment to performance; that creditors rarely

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32. See Peter P. Swire, *Equality of Opportunity and Investment in Creditworthiness*, 143 U. PA. L. REV. 1533, 1535 (1995); Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787, 862 (1995) (concluding that economic analysis supports a belief that discrimination exists and without regulatory intervention of some kind will persist in lending markets).

abuse their rights to disposition upon foreclosure; and that standard form agreements, although adhesive in nature, seldom produce seriously inequitable results.<sup>33</sup> Notwithstanding their commitment to defending the institution of secured credit<sup>34</sup> and to reinforcing coercive foreclosure and collection practices, the drafters also want to improve the fairness, effectiveness and legitimacy of the drafting process. Toward that end they have, among other things, markedly increased consumer representation at the drafting sessions, especially in the Article 9 drafting process.<sup>35</sup>

Doe's dream has gone far off-base in other ways as well. The drafters and Code specialists of today consider consumer constituencies to be far less influential with the state legislatures than are many commercial interest groups.<sup>36</sup> And of course, far from being disturbed by arguments about the

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33. *But see* Gail Hillebrand, *The Redrafting of U.C.C. Articles 2 and 9: Model Codes or Model Dinosaurs?*, 28 LOY. L.A. L. REV. 191, 192 (1994) (modern model codes must reexamine and modify rules that were created for the individually negotiated contract between commercial parties); Michael M. Greenfield, *Article 9 and Consumer Transactions: The Need for Revision*, 48 CONSUMER FIN. L.Q. REP. 483 (1994) (discussing the inequitable impact of standard form security agreements on consumers).

34. *But see* Lucian A. Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857 (1996) (contesting the importance of secured credit in light of social and economic costs to unsecured and undersecured parties); Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1947-1958 (1994) (contesting theories which justify subordination of unsecured to secured creditors); *see also* Susan Block-Lieb, *The Unsecured Creditor's Bargain: A Reply*, 80 VA. L. REV. 1989 (1994) (denying the workability of LoPucki's proposals).

35. *See* 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. 249, 259-60 (1996) (describing as adequate the consumer representation in recent drafting processes).

[I]t is fair to say that in the effort to build a consensus, the drafting committees have come increasingly to look and sound like "mini-legislatures" or "mini-legislative committees." . . . Since most of those attending represent "interest groups" and understandably believe that they have a responsibility to air the views of their constituencies, [free-wheeling] discussion is hardly surprising. Professor Rubin's wish has been fulfilled—consumer representatives play as active a role in the process as do the various creditor groups.

*Id.*; *see also* 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) (notes & text discussing Art. 9 representatives).

36. *See* Fred H. Miller, *Consumer Issues and the Revision of UCC Article 2*, 35 WM. & MARY L. REV. 1565, 1567 (1994) (discussing failure of consumer oriented Code revisions); Winship, *supra* note 30, at 1158-59. Miller observes:

Except for environmental legislation, there have been few consumer initiatives since 1980 and the present political climate does not bode well for further federal legislation. In these developments the uniform law commissioners have had relatively little influence. The original UCC had few provisions specifically addressing consumer transactions. Even after a 1974 revision of the 1968 Uniform Consumer Credit Code, few states have enacted this uniform consumer legislation.

*Id.* *But see* Hiroshi Sarumida, *Comparative Institutional Analysis of Product Safety Systems in the United States and Japan: Alternative Approaches to Create Incentives for Product Safety*, 29 CORNELL INT'L L.J. 79, 92 (1996) (maintaining, in the context of product safety rules, that "[p]olitical

enactability of their statutes, the Commissioners listen to practical arguments about the prospect of legislative success with avid interest. In reality, the composition of the drafting committees, the self-selection of the interested persons who attend the sessions, and the legislative goals of the Conference, all combine to lead the Committee to discount arguments such as those Doe imagined himself making.<sup>37</sup>

Apart from the above, the plane schedule from Chicago to Akron, Ohio is too inconvenient for the drafters ever to hold a conference there.

### III. THE PAYMENT SYSTEM FANTASY

Doe's third, "payment system" fantasy occurs a couple years in the future. Surprisingly, ALI-NCCUSL already has convened a new project to revise the current Revised Articles 3 and 4 (negotiable instruments and bank collections). These Articles are being rewritten just a few years after they were subjected to their last revision, which happened just a few years after a previous effort to create a modern payment code.<sup>38</sup> According to Doe's vision, the return to the drawing board once more has come to pass chiefly because millions of consumers have abandoned their checking accounts after discovering a wide disparity between their rights and expenses as check drawers (predominantly under state laws) and their rights and expenses as credit card, cybercash and bank card users (predominantly under federal

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institutions . . . do not always compromise the interests of consumers on behalf of manufacturers [in some situations, such as] . . . when consumers are aware of product risks and desire protection enough to spend the resources necessary to support advocacy groups").

37. See Patchel, *supra* note 26, at 88 (examining the drafting process in the context of Articles 3 and 4 and concluding that the drafting process "is almost custom-made for the drafting and enactment of pro-business legislation."). Patchel also refers to Homer Kripke's description of difficulties establishing the legitimacy of consumer representation during the enactment of the Uniform Consumer Credit Code:

I was right [that consumer provisions would hinder enactment of the Code] because when (years later) we drafted the Uniform Consumer Credit Code (UCCC), even then it proved too soon to reach a consensus on consumer credit issues, and that Code bogged down in legislature after legislature. Even our efforts during the drafting period of the UCCC to bring consumer representatives into the drafting process proved to have been a failure, because the representatives Allison [Dunham] and others carefully selected were later repudiated by some more radical consumer spokesmen.

*Id.* at 132 n.210 (quoting Homer Kripke, *Reflections of a Drafter: Homer Kripke*, 43 OHIO ST. L.J. 577, 583 (1982)).

38. See Fred H. Miller, *U.C.C. Articles 3, 4 and 4A: A Study in Process and Scope*, 42 ALA. L. REV. 405 (1991) [hereinafter Miller, *UCC Articles 3, 4 & 4A*]; Fred H. Miller, *Report on the New Payments Code*, 41 BUS. LAW. 1007 (1986).

law.)<sup>39</sup> In his dream the Reporters who produced the previous versions of Articles 3 and 4 have conceded in a devastating *George Mason Law Review* article that they were wrong to give up on the New Payment Code, and wrong to perpetuate the bank-oriented, fault-based scheme embodied in the already archaic Revision.<sup>40</sup>

In Doe's peculiar forecast of the future, Professor Edward Rubin has been called in at the behest of the commercial banking community, in an atmosphere of crisis and urgency, to serve as the Reporter on a "Rapid Response Team" designed to develop and promulgate the Revised Revision in record time.<sup>41</sup> The Permanent Editorial Board of the UCC, NCCUSL and American Law Institute ("ALI") now have formally accepted what others have called a "hot tub" theory of drafting.<sup>42</sup> The hope behind this theory is

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39. See Gillette, *supra* note 20, at 196 (explaining the greater success of consumer protective credit legislation at the federal level by interest group theory). Gillette suggests that

[t]he traditional difficulties in monitoring or in forming effective selective incentives that have historically plagued diffuse groups whose members have individually small interests suggest that consumer groups will be underrepresented unless strong entrepreneurial leadership arises. If entrepreneurial leadership could arise in some states, but not others, consumer advocates might prefer organization at the national level in order to ensure that all consumers receive protection, and, not coincidentally, that consumer advocates could draw on the largest possible base for support.

*Id.*

40. Gillette observes that the regulations most favorable to consumers—capping card liability and making customer negligence irrelevant—appear at the federal level because consumers have better access to lawmaking processes in that forum. . . . [T]o the extent that checks and cards are functional equivalents, the result of advocacy by competing interest groups is that either federal law inefficiently imposes costs on card issuers or that state law inefficiently imposes costs on customers.

*Id.* at 194.

41. Doe was aware that Professor Rubin had demonstrated considerable skill in analyzing the structure of payment systems. See, e.g., EDWARD L. RUBIN & ROBERT COOTER, *THE PAYMENT SYSTEM* (1994); Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991); Edward L. Rubin, *Uniformity, Regulation, and the Federalization of State Law: Some Lessons from the Payment System*, 49 OHIO ST. L.J. 1251 (1989).

42. See Overby, *supra* note 8, at 683 (rejecting the "hot tub" theory, "even assuming that a rogue band of bank lawyers has held hostage the proper development of payment law for the last century"). On the other hand, Patchel maintains that

although some political analysts are quite skeptical that representative government actually provides an effective check on special interests, it certainly is true that the theory of representative government, whether it works in practice or not, provides a type of legitimacy to the decisions made by politically accountable bodies that the Conference's decisions lack. . . . Perhaps most importantly, the Conference has a particular duty to consider the effect of interest group politics on the uniform laws process because of the unique position that process occupies within the scheme of U.S. federalism. The uniform laws process has always existed within the interstices of federalism.

Patchel, *supra* note 25, at 146-47, 148.

that different interest group constituencies can all meet and “bang things out” in a harmonious environment, and quickly produce an Article that works in the “public interest.”<sup>43</sup>

The meeting therefore takes place over dinner in an upstairs room at a crabhouse in Alexandria, Virginia. Newspapers have been spread out over all of the tables. Dress is distinctly casual. The Reporter is using his gavel to crack crabshells. Many of the less relaxed participants are complaining because low-cholesterol buttersauce is dripping from sauceboats and chins onto computer keyboards.

Rubin proposes a consolidated model Uniform Code Article which adopts the same approach as the federal rule for allocating loss in the case of unauthorized use of credit cards. Negligence and fault rules for loss allocation are to be subordinated to other incentives for efficient behavior. Consumers under the Revised Revision will pay a small deductible in the event of an unauthorized debit to a checking account. All bank statements will have to include the name of the payee and the date an instrument was written. Bank fees will be limited and disclosure rules will be strengthened and simplified. New scope, conflict of laws, and “relation to federal law” provisions will encourage states to be more protective of consumer interests than the model whenever uniformity concerns do not mandate a different result.<sup>44</sup>

In Doe’s hallucination, the Revised Revision, even with all of these ostensibly wild, radical, unorthodox, and impractical provisions, succeeds dramatically. It flies through the revision process without objections. At the Annual Meeting of the Conference, one of the delegates remarks that she never believed she would live to see the day that such a consumer-oriented Article would be adopted, let alone by acclamation.<sup>45</sup> In his illness, Doe

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43. See Rapson, *supra* note 35, at 261. Rapson points out that [t]he “public interest,” . . . means different things to different people. . . . [S]tatutory rules must be clear, concise, and efficient. In order to be “efficient,” the rule must also be “fair” and encourage “fair dealing.” Not everyone agrees with the latter point. Indeed, there is some reluctance to accept this view in the drafting committees.

*Id.*

44. See Julianna J. Zekan, *Comparative Negligence Under the Code: Protecting Negligent Banks Against Negligent Customers*, 26 U. MICH. J.L. REFORM 125 (1992); Edward A. Purcell, Jr., *Geography As a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423 (1992); Norman Silber, *Why the UCC Should Not Subordinate Itself to Federal Authority: Imperfect Uniformity, Improper Delegation and Revised Section 3-102(c)*, 55 U. PITT. L. REV. 441 (1994).

45. See Gillette, *supra* note 20, at 197 (observing that “there is some evidence that the interests of financial institutions have been able to dominate those of consumers in the drafting and enactment of the Uniform Commercial Code.”). Gillette also theorizes that they would concentrate attention on federal reforms because

imagines that every one of the states eventually adopts the Revised Revision.

This is in many ways the most preposterous of the three fantasies, is it not? Today, bank representatives assure us that the adoption of the current version of Articles 3 and 4 allows for great technological adaptation of the check collection system and that consumers will never abandon checking accounts because fees are so reasonable and consumers depend upon them so heavily. And it is argued in Code circles that advancing consumer interests is no more justifiable than entrenching bank interests.<sup>46</sup> Nor has Doe considered the likelihood that the negligence and loss allocation principles contained in Revised Articles 3 and 4 might work out just fine.<sup>47</sup>

In any event, Doe was mistaken about the existence of dietetic cuisine in Alexandria crabhouses: they don't and probably never will serve low-cholesterol buttersauce.

#### IV. CONCLUDING THOUGHTS

How does Doe's pattern of self-delusion affect our understanding of the current state of the law-making process? As I did at the beginning of this story, I ask you to draw your own conclusions, for the most part.

It seems obvious that Professor Doe's substance abuse led him to concoct some rather absurd propositions: among them, that consumer advocates captured and conquered the Code drafting process; that they had made deep inroads in securing effective representation; and that they had become an integral part of private commercial lawmaking and changed its historical dynamic. Clearly Professor Doe was gravely mistaken: the idea of consumer "capture" of the code-making process is in almost every sense a figment of

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[o]ne would, in fact, predict that consumer representatives would have comparatively few opportunities to participate in private lawmaking groups. Participation in private lawmaking, for instance, typically provides rewards in terms of reputational benefits within the profession rather than direct compensation. One would expect, therefore, that participants would more likely be from academic environments or larger law firms where commitment to a long-term, nonprofit enterprise might not adversely affect the operation of the business. . . . [I]f private legislators are drawn primarily from the ranks of corporate attorneys or the professoriate, and if consumer groups can do little to offer a client base to the former or publicity (in the form of outlets for scholarship or the venting of policy positions) to the latter, then rent-seeking explanations of legislation suggest that consumers will have relatively little influence on organizations such as the ALI.

*Id.* at 197-98 (footnote omitted).

46. See Overby, *supra* note 8, at 688-89 (1996) (arguing that "[t]he consumer rights model is subject to the same charges as those levied against the bank rights model because it seeks merely to protect a different class. . . .").

47. See Miller, *UCC Articles 3, 4 & 4A*, *supra* note 38.

imagination.

There is also a cautionary note that I'm sure many of us recognise. The sustained abuse of a powerful substance, for example the substance of the drafting authority of the UCC, can bring ruin to an otherwise healthy and productive body.



## APPENDIX A

## The Creditor's Tale

At the 1996 meeting of the American Bar Association, William Solomon, Counsel to General Motors and an official observer at the Article 9 revision sessions, expressed dissatisfaction with what he believed to be the pro-consumer-debtor orientation of the Article 9 drafting process. He argued that consumer representatives harbor malicious and destructive designs upon Article 9, and more fundamentally upon the institution of Secured Credit. Drawing upon the movie *Babe*<sup>48</sup> for inspiration, Mr. Solomon maligned the efforts of consumer organizations and certain consumer law academics to obtain more favorable treatment for consumer debtors through participation in the Article 9 revision project. In particular he described the efforts of consumer participants to restrain certain practices of the automobile finance industry as less honorable than certain misguided efforts to slaughter the magnificent pig named "Babe" in the popular children's movie by that name.

Mr. Solomon's assault concluded with a stemwinding allegorical tale. The role of consumer representatives in the Article 9 revision process, he declared, reminded him of a story about a different pig, and a farmer, and a motorist:

The motorist . . . was driving down the road and saw a pig out in a pig pen with a wooden prosthesis where one of its back legs would be. The motorist stopped and knocked on the farmhouse door and asked the farmer about the pig because his curiosity was piqued. And the farmer said to the motorist, "Son, that is one fine pig you're talking about. Well just last year we were incurring a drought, and that pig went out into the back forty and dug up an unknown spring and saved the crop. And just last month that pig came into the house when there was a fire in the kitchen when the family was asleep and dragged each one of the children to safety and nudged my wife and I to safety. And just last week that pig found a chest of gold and now I am a rich man."

Well the motorist heard all that, but was still confused and said "Well farmer, I still don't understand. Why is the pig missing a leg?"

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48. *BABE* (Universal 1995).

And the farmer said, "SON, A PIG THAT FINE, YOU DON'T EAT ALL AT ONCE."<sup>49</sup>

Mr. Solomon argued that the proposals of the consumer debtor group were "as insidious as they are illogical," and that members of the group were "clever enough not to kill the goose that kills the golden egg."<sup>50</sup> Consumer participants, he claimed, "would rather devour our friend Article 9, BABE THE PIG, AS IT WERE, limb from limb."<sup>51</sup>

It should be observed that Mr. Solomon was especially incensed about the ostensible recklessness of rules proposed by consumer participants which in some circumstances would modify existing section 9-504<sup>52</sup> to strengthen the requirements for the notification of consumer debtors before the disposition of collateral and to require that auto dealers who buy from themselves the very same cars they have repossessed must credit debtors with an objectively discernible fair market price prior to seeking an additional deficiency recovery from the debtors.<sup>53</sup> Mr. Solomon's high regard for the balance contained in existing rules about consumer repossessions and deficiency actions is not universally or even widely shared by academics or secured lenders.<sup>54</sup>

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49. William Solomon, Panelist, Consumer Issues in the Uniform Commercial Code Article 9 Revisions, Presentation at ABA Section of Business Law Meeting (Summer 1996) (Cassette Tape No. 6215, side 3, available from Teach'em, 160 E. Illinois, Chicago, Ill. 60611).

50. *Id.*

51. *Id.*

52. See U.C.C. § 9-504 (1996).

53. See Draft, Uniform Commercial Code Revised Article 9, Secured Transactions; Sales of Accounts and Chattel Paper §§ 9-910, 9-911 (Nat'l Conference of Comm'rs on Unif. State Laws, Oct. 1996), available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Jan. 10, 1997).

54. See, e.g., Donald J. Rapson, *Deficiency Treatment of Deficiency Claims: Gilmore Would Have Repented*, 75 WASH. U. L.Q. 491, 512-36 (1997) (tracing deliberations of the Article 9 Drafting Committee); see also Jean Braucher, *The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law*, 75 WASH. U. L.Q. 549 (1997) (discussing possible revisions to Article 9 to address wrongful repossessions).