COMMENTS AT 1997 AALS ANNUAL MEETING: CONSUMER PROTECTION AND THE UNIFORM COMMERCIAL CODE

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As Jean [Braucher][1] said, I have served on several committees in connection with the revisions of Articles 2, 2A, and 5. I am now on a committee of uncertain obligation that is going to review the NCCUSL draft of Article 2 for the American Law Institute. I was the reporter—an awful task, if anybody ever asks you to do that, you should think about it once or twice—for Article 5. I think service as the reporter for Article 2 might kill Dick Speidel by the time he is done.

I want to talk about the revision process. My comments are based on my anecdotal observation; I focus on Articles 2 and 9. It is unclear to me whether the NCCUSL process is up to the task of revising Articles 2 and 9 right now.

Let me explain. First, there is no broad agreement, no consensus, among the interested parties about the fairness or the efficiency of the "consumer protection" rules. On the one hand, you have people, including a number of people at this table (everybody at this table except for me, I suspect), who honestly and truly believe in and who persuasively argue on behalf of various "consumer protection" provisions. At the base level, consumer advocates would say that the consumer proposals for Articles 2 and 9 are fair and that we are obliged to have law that is fair. Secondly, I suspect that they would argue that these consumer protection rules are efficient. Even if these rules cost consumers money in the form of higher fees, they are efficient because, given the choice, consumers would pay for those consumer rights as a form of insurance against unfair treatment on default. Therefore—according to the consumer advocates—the law will better fit what consumers would really want if they could bargain for it.

On the other hand are sellers and creditors—equally well-intentioned—who argue in good faith that these laws should not be enacted. The merchants

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and creditors make several arguments. First, they claim that the consumer protection rules are costly and not efficient. These rules, particularly those in Article 9, take money from the mass of consumers who never default and—so the argument goes—give it to those who do. These creditors will claim that Gail [Hillebrand][2] speaks only for the three percent who default; they will argue that there is no evidence that the great mass of consumers wish to buy insurance against an unlikely default. In sum the creditors will ask who is at the table speaking for the ninety-seven percent who never default, but whose money is taken because credit is more expensive to them. The creditors maintain that the cost of that credit buys rights for the unworthy, the dishonest, or at least for the small minority who are incapable or unwilling to pay.

My basic point—a point I believe to be indisputable—is that honest and principled persons are in deep disagreement about the justification for introducing consumer protection rules in Articles 2 and 9. I make no claim about which of these groups is correct; I claim only that there is an honest division about what is right for society and an almost equally deep division about what is right for consumers. It is my thesis that neither the Commissioners nor the American Law Institute is a very effective body for dealing with issues where there is such a deep and principled division of opinion about what is good law.

In my opinion, the Commissioners work best when they are dealing with intricate questions of law where there is wide agreement among all of the participants on the basic social policy and where the job of the Commissioners is merely to deal with second or third level social issues and mostly with the technical questions concerning the drafting and the technical operation of the law. Examples might be the commercial contract damage provisions in Article 2[3] and the provisions for priority among secured creditors in Article 9.[4] These are the kind of intricate and important questions that wise drafters can resolve. Neither of these touch on important social policies in a fundamental way; neither generates the kind of anger and frustration that consumer issues produce.

Let me explain why the system does not deal well with important issues of social policy. First of all, NCCUSL exists to promote uniformity. The

2. Litigation Counsel, West Coast Regional Office, Consumers Union.
3. *See* U.C.C. §§ 2-701 to 2-719 (1995).
4. *See id.* §§ 9-311 to 9-316.

Commissioners produce uniformity only by passage of law in fifty state legislatures. If you tell the Commissioners that a law is not going to go through fifteen of the state legislatures, or, for example, through New York or Illinois or Texas, they will say to you, "We don't want to propose that law because we don't want to produce nonuniformity."

The Commissioners have a much more difficult job than members of any legislature. Their vote does not make anything law anywhere. Rather, to accomplish their purpose they must make a guess about the probable response of the state legislatures when those bodies are presented with the arguments pro and con on the adoption of a uniform law. Unlike the Congress or state legislature, where even a close vote of 51-49 resolves things irrevocably, the Commissioners' vote resolves nothing. That vote must be taken with an eye to the state legislatures and long and harsh experience has taught the Commissioners that their power is limited.

In most cases the size and power of the constituency *for* the adoption of uniform law is hard to underestimate. Consider, for example, Articles 3 and 4 where revisions were proposed in 1990. The revisions made comparatively modest changes in the existing law, but, ultimately, they attracted the opposition of two persons at this table—Ed Rubin and Gail Hillebrand. Sweet Ed Rubin, a professor of law at Berkeley, was able to keep Article 3 from being adopted in several states for a couple of years merely by writing a letter to some of the legislators. By doing a little eleventh hour whining in the California legislature, Gail was able to keep Article 3 from being adopted for more than a year.

I do not use this example to exaggerate the power of a law professor to keep something from being adopted, but the reverse. I take it as a given that law professors have little or no influence on any legislation in most circumstances. That Ed—a law professor from infamous Berkeley—was capable of slowing Article 3 shows not that he is powerful, but that the pressure for its adoption is weak. Because she speaks for the Consumers Union, Gail, of course, has more influence than any law professor, but as I understand it, even her push against Article 3 was modest and undertaken at the eleventh hour. It is a bitter truth that the push for adoption of any revision of any of the Articles of the Uniform Commercial Code is so modest that it is possible for even weak and disorganized opposition to hold up or even stalemate their adoption in many of the state legislatures.

Ask yourself who wants a revision of Article 2 or Article 9. Who is dying for this? The answer, I think, is nobody. As a member of the Study Committee (to recommend whether Article 2 be revised or not) I saw

considerable feeling that Article 2 should not be revised. To my knowledge no industry association, bar group, or other association is clamoring for the modification of Article 2 or Article 9.

If one accepts my hypothesis, no one is willing to spend a substantial amount of legislative capital to get Article 2 or Article 9 adopted, yet any significant consumer additions to or subtractions from either Article will produce at least moderately determined opposition. So what are the probable results when this confrontation between the consumer advocates and the merchants and creditors comes to a head in the next year?

One possibility is that the Commissioners successfully broker a deal between the creditors and debtors and successfully engineer a fifty state adoption that is more or less uniform. As I suggested above, I do not think this will happen unless the revisions hew quite closely to the existing law. The omission of existing consumer protection or the addition of significant new consumer protection is likely to stand in the way of adoption because of the opposition of one of the opposing groups.

The second possibility is that the whole process aborts. The abortion model is the "3, 4, 8" project, a proposal for a large—some would say radical—change that would have taken the place of Articles 3, 4, and 8. When after several drafts the Commissioners concluded that the bankers' opposition would keep the 3, 4, 8 proposal from being adopted, they canceled the proposal.

I suppose the worst of all possible outcomes is "high centering"; high centering occurs when you are driving a truck or a car on a deeply rutted road and the car gets hung up on its frame. High centering is to get revised Articles 2 and 9 through twenty legislatures and then to get stuck. If that happens, we have Article 9 in one version in twenty states and a different Article 9 in thirty other states—for the rest of our lives. That too is possible.

The Uniform Consumer Credit Code high centered. It was passed in about a dozen states and then got stuck. If the truth were known, high centering is probably the most common historical outcome of uniform laws. In fact, the very first law proposed by the Commissioners, having to do with marriage and divorce, passed in only one or two states. You would be surprised to hear the list of uniform laws that have been proposed for uniform adoption but have been adopted only in a handful of states. The Commissioners, of course, are more keenly aware of this possibility than you or I, and we can expect them to labor mightily to keep this result from happening.

What are the most likely results? In Article 2 the most likely outcome is something that hews to the status quo in existing Article 2. Whether that is

satisfactory to Gail and her consumer colleagues remains to be seen. My guess is that Gail does not have the political power to get much more than that from the Article 2 people. The car manufacturers and the car dealers have just sent out a letter that challenges the current draft of Article 2. It explicitly threatens a campaign in the state legislatures against Article 2. I would guess that one car dealer in the state of Illinois has more power than all the law professors in this room combined, so the manufacturers and dealers make a plausible threat and the Commissioners will understand that.

With Article 9 I think the odds are pretty fair either that we will get a stalemate between the consumer creditors and Gail's people or that we will have a series of alternatives. I do not know how Gail or the consumer creditors will respond to the alternatives. In other words, the draft might have Alternative A which will say "in case of failure to sell in a commercially reasonable manner, no deficiency" . . . and Alternative B "in case of failure to sell in a commercially reasonable manner, only damages proved by the debtor." You will have a series of creditor and debtor alternatives. Alternatives shift the fight to the state legislatures. Right? It means that Gail has to travel all over the country (something she does not want to do) and the consumer creditors have to mount an attack in every state. So it is conceivable that either side at that point would say to the Commissioners that if that is what you are going to do, we do not want anything. And "we do not want anything" of course is a plausible outcome here because there is nothing too badly wrong with Articles 9 or 2.

Whether we eventually get consensus on a revision, no revision, or a flawed revision that high centers, this is an interesting political process—one you should follow as closely as you can. There is a reasonable possibility that we have come upon two parts of the law that will defeat this process. We will see.