

CONSUMERS AND THE CODE: THE SEARCH FOR THE PROPER FORMULA

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PROLOGUE

In the 1940s and early 1950s, the concept of discrete legal rules applicable in consumer transactions was only beginning to emerge.¹ Generally, one rule was the norm, applicable whether both parties to a transaction were merchants or one was a merchant and one was an individual acquiring the property or services for personal, family, or household use (a “consumer”).²

However, even at this early stage there was recognition that the same legal rule that works well for commercial parties might not work as well where a consumer is involved. Commercial “law,” for one matter, generally was determinable by the parties. That is, commercial law statutes or cases provided so-called “default” rules applicable for the most part only when the parties did not set their own standard by agreement. In a consumer context, such “freedom of contract” is a license for the unscrupulous to take unfair advantage of the consumer. Most consumers are not equal to merchants in knowledge or sophistication. Accordingly, consumers may not recognize the

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1. For example, *Commercial Credit Co. v. Childs*, 137 S.W.2d 260 (Ark. 1940) and *Mutual Finance Co. v. Martin*, 63 So. 2d 649 (Fla. 1953), were two of the earliest cases to erode the commercial holder-in-due-course doctrine in negotiable instruments law to protect consumers. One basis for the decisions was that the assignee financing agency was “in a far better position to protect [its] interests against unscrupulous and insolvent dealers,” presumably because it had more knowledge and bargaining power than did the consumer who signed the note. *Martin*, 63 So. 2d at 653. The perceived absence of adequate knowledge and the inability to bargain in the case of the average consumer is the force that prompts the view consumers need special provisions.

2. Perhaps the most significant exception to this observation at the time was in the case of usury statutes eroded by small loan and installment loan acts, retail installment sale acts, and the like. However, even here the approach was a usury statute of general applicability, with separate exceptions making special provisions for sales credit and for small consumer loans and perhaps other types of consumer credit. See, e.g., *Report of the National Commission on Consumer Finance, Consumer Credit in the United States* chs. 6, 7 (1972). Reflecting an approach later used in original UCC Article 2, there often was a special “merchant” rule as well, denying the defense of usury to corporations.

possible adverse consequences that could flow from contract provisions drafted by counsel for the merchant. Even more to the point, they might not be able to understand the meaning of many provisions drafted in legal language, even if the detrimental consequences that might flow from such provisions would be reasonably apparent.

For another matter, consumers are seldom familiar with the default law, or the usages and practices of the commercial world, that will apply to the transaction absent a contrary agreement. Thus uneducated, the consumer often may not take the appropriate steps necessary to protect against certain eventualities. In short, freedom of contract in the case of a consumer not only can be used abusively, but where it could be used by the consumer to his or her advantage, it usually will not be. The classic example is the average consumer's failure to understand that a check given for a purchase more likely than not will operate to shift the burden of obtaining recourse for a nondelivered or defective product to the consumer.³ Even if payment is stopped in time, the burden shifts because there will likely be a holder in due course somewhere in the collection chain. The legal aid remedy, of course, was to educate consumers to strike out the "words of negotiability," which is a "contractual" solution to the problem.⁴

Finally, even if the consumer might possess the knowledge to recognize the possible danger and devise a contractual provision to protect his or her interests, seldom does the consumer have the ability to bargain his or her way into an acceptable contract. Most consumer transactions are too inconsequential, taken one by one, to permit or accommodate individual dealmaking; the usual option is to take it or leave it.

When a lawsuit occurred over particularly egregious consequences that arose from time to time out of these circumstances,⁵ by and large the courts

3. See U.C.C. §§ 4-201, 4-210, 4-211, 3-302, 3-305 (1995).

4. This will no longer work, however. See U.C.C. § 3-104(c) (1995). Today the educational effort should be in favor of using a credit card. See Regulation Z, 12 C.F.R. §§ 226.12(c), .13(a)(3), (c) (1996) (claims and defenses against card issuers and consumer-friendly billing error resolution provisions).

5. Litigation to enforce consumer rights under the UCC is not unknown, but faces significant obstacles. One obstacle is that amounts involved often are relatively small, and thus economically it makes more sense to drop the matter, if the other side shows no inclination to settle, or declare bankruptcy. A second obstacle is that the legal resolution of the dispute often will be unclear: what constitutes a "reasonable time," a "commercially reasonable sale," and so on. Rubbery rules reduce bargaining power for consumers. They also raise legal costs, and, for the most part, even if the consumer wins the lawsuit, he or she will have to pay his or her attorney, considerably eroding or even exceeding the compensatory relief.

In these circumstances, courts often strive to compensate for the obstacles. Awards of punitive

fashioned some sort of relief.⁶ Aside from the lesser efficiency in adjusting these consequences after the fact, there are more costly results in this approach. When the courts have to develop relief for consumers on a case-by-case basis by slowly eroding a general rule, the ultimate result may be a new, more protective, and perhaps more efficient, rule. However, great uncertainty during the evolutionary period for the new rule will result, because it is not clear for this period whether a particular case or cases should be isolated to their facts, or whether they instead represent a new and evolving rule that qualifies the general rule in yet an unknown way. Generations of commercial law students have been told by their professors that whatever the commercial law rule is, no matter how bad, it is better than not knowing what the rule is.⁷ If that is true, the described circumstances represent the worst of all possible situations.⁸

I. THE CODE MEETS CONSUMERISM

A. *The Early Years*

By the time the Code was being drafted in the late 1940s, the observations described above were of considerable concern to the persons working on the new statute. We are told that Karl Llewellyn not only perceived the need for a release valve to allow courts to reach reasonable decisions in “hard” cases without doing violence to the certainty needed for commercial law rules,⁹ but

damages where the conduct is not really that bad, and fashioning rules like the “absolute bar” rule against deficiency judgments in UCC Article 9 cases, are examples that are common enough so as to permit consumer lawsuits to accomplish some control function. A more direct approach might be preferable, however. *See, e.g.*, U.C.C. § 2A-108(4) (1995) (the unconscionability provisions of Article 2A award “reasonable attorney fees” in a consumer lease).

6. *See, e.g., supra* note 1.

7. That is to say, commerce thrives on certainty as, after all, most bad rules can be changed by the agreement of the parties.

8. There was an additional price ultimately paid because of this approach. The approach largely excluded special consumer rules from the Code. Thus, consumer rules developed elsewhere in the law. In some cases the development elsewhere was useful because all the special rules could be considered together and their aggregate impact assessed, and then an appropriate balance could be reached. But the result in most cases was actual, although not always apparent, nonuniformity, except where the rule was based in federal law, or the concept was so limited that undue variance was simply unlikely, as in the case of state lemon laws. Nonuniformity in the consumer context is perhaps not as deleterious as commercial nonuniformity, but from the author’s experience in constructing multistate consumer credit programs in states where the law is nonuniform, as contrasted with, for example, states which have enacted the Uniform Consumer Credit Code, it extracts a significant and largely unnecessary cost.

9. The release valve chosen was explicit recognition of the doctrine of unconscionability. U.C.C. § 2-302 (1995). As Official Comment 1 observes:

that he also was of the opinion that the statute should differentiate between consumers and professionals.¹⁰ This differentiation was to be accomplished through the so-called "merchant rules," which created a different standard in appropriate circumstances "between merchants."¹¹ However, in the end, Llewellyn's grand scheme for the incorporation of inverse special consumer rules into Article 2 largely failed because the arguably limited vision of others forced necessary compromises that left only a patchwork of the merchant rules remaining in the final version of Article 2.

Similar experiences occurred with respect to Article 9. There the drafters' approach was more direct, and early versions of Article 9 extensively addressed the special problems involved in consumer finance. For example, an early draft included consumer provisions that have survived to today, which invalidated most after-acquired property interests,¹² allowed some good faith purchasers to take property free of a security interest,¹³ subjected assignees to contract defenses,¹⁴ and regulated rights upon default.¹⁵ Other provisions, which have not survived to today, included ones that provided for discharge due to insurance payments, regulated the form of the contract including various disclosures of credit terms and default rights, and regulated certain practices such as add-on contracts.¹⁶ These provisions met with far less than universal approval, and among other objections, charges of discrimination against certain types of creditors were asserted.¹⁷ At the end of

This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract.

Id. at cmt. 1. To lower the uncertainty this injected, unconscionability was made a matter for the court. *Id.* § 2-302(1). Ultimately, this approach would build a considerable body of precedent, as opposed to unpredictable fact finding, thus leading to a body of new "consumer type" rules.

10. Zipporah B. Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 492 (1987).

11. See U.C.C. § 2-104(1), (3) (1995) (defining "merchant" and "between merchants"); *id.* § 2-201(2) (statute of frauds exception for merchants); *id.* § 2-209(2) (special "private statute of frauds rule" for merchants); *id.* § 2-314(2) (implied warranty of merchantability only made by "a merchant with respect to goods of that kind").

12. U.C.C. § 9-204(2) (1995). For a discussion of the drafting history, see G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 9.2 (1965).

13. U.C.C. § 9-307(2) (1995).

14. *Id.* § 9-206(1).

15. *Id.* § 9-501(3).

16. 1 GILMORE, *supra* note 12, § 9.2 n.8.

17. *Id.* § 9.2, at 293.

the day, compromises necessary to build a consensus left out all but a handful of the special consumer provisions.¹⁸

B. All Quiet on the Consumer Front

There is no question that the original compromises described above with respect to Articles 2 and 9 allowed widespread enactment of the initial version of the Code with relatively few explicit nonuniform amendments.¹⁹ Accordingly, most of the special consumer rules were developed outside of the Code,²⁰ making appearances of uniformity deceiving and compounding complexity in the cases of the consumer rules. Further, imperfect coordination among the laws led to appropriate policy not always being systematically effectuated.

To provide merely one illustration of these consequences, consider the slow death of the holder-in-due-course doctrine in consumer transactions in negotiable instruments and related law. The story begins with a case-law doctrine denying holder-in-due-course status, which allows freedom from most defenses to payment, to assignee holders of consumer payment obligations who are in "close connection" with the person who dealt with the consumer and who provided the consumer with allegedly defective goods, or perhaps failed to deliver at all.²¹ The next chapter of the story involves a spate of state legislation more directly denying holder-in-due-course status to the purchasers of assigned credit sale paper.²² Inevitably, the practice of making a direct loan to the consumer (so-called "dragging the body") developed to avoid the restrictions relating to assigned paper.²³ This development spawned

18. *Id.*

19. To illustrate, a number of states restrict disclaimers or limits on remedies in consumer sales (Vermont, Rhode Island, New Hampshire, Massachusetts, Maryland, Maine, and Connecticut are examples), and some have added provisions for a minimum recovery and attorneys' fees or limiting a deficiency for secured-party misconduct or limiting the property that a security interest can be taken in (Oregon, Ohio, Connecticut, and California are examples). However, there also are separate statutes that modify the Code without explicitly amending it. State "lemon laws" are an example. *See* statutes cited *infra* note 20.

20. Examples are state "lemon laws," *e.g.* OKLA. STAT. ANN. tit.15, § 901 (West 1993); the so-called Magnuson-Moss Act, 15 U.S.C. §§ 2301-2310 (1994); state and federal holder-in-due-course limitations as in the UNIF. CONSUMER CREDIT CODE §§ 3.403-405 (1974) and the Federal Trade Commission so-called "Holder" rule, 16 C.F.R. pt. 433 (1996); the Federal Trade Commission Credit Practices Rule, 16 C.F.R. pt. 444 (1996); and the Expedited Funds Availability Act, 12 U.S.C. §§ 4001-4010 (1994).

21. *See supra* note 1. *See generally* FRED H. MILLER & ALVIN C. HARRELL, *THE LAW OF MODERN PAYMENT SYSTEMS AND NOTES* § 3.04 (2d ed. 1992).

22. *E.g.*, UNIF. CONSUMER CREDIT CODE § 3.404 (1974).

23. *See, e.g.*, Fred H. Miller, *An Alternative Response to the Supposed Direct Loan Loophole in*

yet additional state legislation to prevent that evasion of protection.²⁴ When enough consensus had been reached the Federal Trade Commission ("FTC") acted and promulgated its trade regulation rule on Preservation of Consumers' Claims and Defenses, which addressed both of the above circumstances.²⁵ This rule was added on top of the state regulation.²⁶ However, the FTC rule did not address the situation where a third-party credit card, like a bank credit card, was used; rather, that became the subject of a federal statute, which provided a similar, but different, result.²⁷ The FTC rule, and many state laws, also addressed clauses that sought to confer holder-in-due-course status by agreement rather than by negotiability, so-called "waiver of defenses clauses."²⁸ But the FTC rule does not extend to the first cousin of such clauses, the so-called "hell or high water" clause in a true lease of goods,²⁹ nor does it extend to letters of credit issued by consumers independent of the underlying consumer transaction.³⁰ Those variations had to be dealt with by state law, if at all.³¹ The one unitary effort to restore uniformity, to create consistency of policy and to minimize complexity in the payments area, was summarily murdered a number of years ago at the inception of the current Code revision effort.³²

the UCCC, 24 OKLA. L. REV. 427, 433-38 (1971).

24. *E.g.*, UNIF. CONSUMER CREDIT CODE § 3.405 (1974).

25. 16 C.F.R. pt. 433 (1996).

26. A joint federal-state presence in the same legal area inevitably generates a new level of problems of interrelationship, and this situation did not represent an exception. For example, did failure to comply with the FTC rule constitute notice of a defense or a lack of good faith so as to deprive a person, who otherwise would be a holder in due course under state law, of that status? *See, e.g.*, *Capital Bank & Trust Co. v. Lacey*, 393 So. 2d 668 (La. 1980). Even worse, did compliance with the FTC rule destroy negotiability, so as to have far greater consequences under state law than merely the loss of holder in due course status? *See* U.C.C. § 3-106(d) (1995).

27. 15 U.S.C. § 1666i (1994); 12 C.F.R. § 226.12(c) (1996); *see also* UNIF. CONSUMER CREDIT CODE § 3.403 (1974).

28. In such a clause, the consumer agrees not to assert against any assignee of the contract any claim or defense that might be asserted against the assignor. The consideration was the assignee's purchase of the contract in reliance.

29. *See* U.C.C. § 2A-407 (1995). This type of clause agrees the lessee's duty to pay is independent of the obligations of the lessor.

30. UCC section 5-102(a)(9) prevents an individual issuing a letter of credit for a consumer purpose because of the independence principle of section 5-103(d). *See id.* §§ 5-102 & cmt. 5, 5-103(d).

31. *See, e.g.*, UNIF. CONSUMER CREDIT CODE § 3.404 (1974); U.C.C. § 2A-407(3) (1995) (not impairing other law on a "hell or high water" clause); *id.* § 5-102(a)(9) (defining "issuer" of a "letter of credit").

32. *See* Fred H. Miller, *Report on the New Payments Code*, 41 BUS. LAW. 1007 (1986). Certain conclusions were drawn from this event that influenced the later Code revisions, as described *infra* Part I.C.

C. *The Gathering Storm*

The genesis of the current effort to revise the Code comes from changes in business practices and technology³³ and from perceived deficiencies and ambiguities in the statute.³⁴ This revision effort is widespread and not limited as were the completed 1970s revisions to Articles 9 and 8.³⁵ For that reason, the question of the role, if any, for special consumer provisions in the Code has arisen in this new effort for the first time since the late 1940s.

The first project in the current revision efforts was Article 2A on the leasing of goods.³⁶ This author, as a member of that drafting committee,³⁷

33. For example, before UCC Article 3 was revised, under most decisions variable rate notes were not construed to be within that Article. *See, e.g.*, *Farmers Prod. Credit Ass'n v. Arena*, 481 A.2d 1064 (Vt. 1984) (construing variable rate notes as not negotiable instruments under pre-Revised Article 3). *But see Goss v. Trinity Sav. & Loan Ass'n*, 813 P.2d 492 (Okla. 1991) (variable rate note falls within UCC and gives the parties rights described in the UCC). The whole modern system involving the indirect holding of investment securities was also largely missing from Article 8 before its revision. The leasing industry was struggling along under piece-meal rules developed by analogy from Article 2 before Article 2A was prepared. The same was true for commercial (electronic) funds transfers prior to Article 4A. Before revision of Article 4, the check collection system operated more under agreement than under Article 4 because the old Article 4 was written with paper in mind even though the era of automated check processing was dawning at the time of its drafting.

34. Article 5, being deliberately skeletal as the first codification of letter of credit law and because the operational rules were already well understood by experienced issuers, proved not up to the task when inexperienced issuers, applicants, and beneficiaries, unfamiliar with the extra-statutory practice, began to use credits. It also failed to withstand greater pressures brought on by the development of standby credits. Thus, Article 5 had to be revised. Ambiguities in the scheme of Article 3 for allocating losses from forgeries and alterations were an important consideration in the decision to rewrite those rules as well.

35. A second difference is that the prior revisions were accomplished by the Permanent Editorial Board ("PEB") for the Code and involved a much smaller participatory base than the current Code revision efforts do, as described in this article. This difference in degree of participation was perceived to have had a direct and substantial effect on the acceptance of the rules developed in those earlier efforts and was also thought to have contributed to their slow enactment. The failure to reach consensus because of less than adequate participation in the third and last effort of the PEB to update the Code represented by the New Payments Code also left an important legacy. *See generally* Miller, *supra* note 32. As a result, the PEB no longer prepares drafts, and instead that is done by a drafting committee composed of Conference and Institute members in open discussion with advisers and observers.

36. *See* U.C.C. §§ 2A-102, 2A-103(1)(h), (j) (1995) for a general introduction into what is covered by Article 2A.

37. Article 2A began as a uniform act outside the Code because the Institute schedule was described as too crowded to accommodate such a new project. Ultimately, after the Personal Property Leasing Act was largely developed, the Institute schedule became less congested and the act was reconsigned to a drafting committee with Institute representation to be reworked into new Article 2A of the Code. Subsequent revisions or additions to the Code then came along very rapidly, so much so that the Institute's schedule again experienced difficulty in accommodating all the projects. By the time of this writing, the schedule of the Conference is also burdened. As a result, while the Institute has scheduled its final consideration of Article 9 to occur before that of the Conference, each of Articles 2, 2A (which must be conformed to changes in Article 2) and new 2B, will be considered by the Conference before consideration

explored the possibility of obtaining consumer organization representation during drafting committee sessions from at least one nationally recognized consumer organization. The organization advised the author that no one had expertise in the subject of consumer leasing, except as related to the Federal Consumer Leasing Act.³⁸

Nonetheless, the author and Professor William E. Hogan, a Commissioner to the Conference from New York and a member of the drafting committee, both of whom had worked on the Uniform Consumer Credit Code, believed that a new Code Article could not be widely accepted in the 1980s without some additional attention being given to consumer issues. The author and Commissioner Hogan accordingly prepared a list of ten or so possible special consumer protection provisions, drawn from the 1974 Uniform Consumer Credit Code, for possible inclusion in Article 2A. The reception to this list on the part of some advisers and observers, and even by some members of the drafting committee, must have replicated, to a degree, the Article 9 experience of forty years before; there was less than full agreement about the need to include some provisions, as well as over details. Nevertheless, while the right to cure a default in payment and some other proposed rules did not survive, a considerable number did.³⁹ More might have survived were it not for remembrance of the strong, indeed vehement, opposition to the inclusion of special consumer provisions in the New Payments Code; that opposition came both from industry (there were too many provisions) and consumers (there were too few provisions).⁴⁰ As a consequence, the special consumer provisions added to Article 2A were designed only to "level the playing field"—that is, protect against the worst kind of abuse that might flow from unlimited freedom of contract. Therefore, the effort turned out to be a very modest initial excursus.

Even so, the Article 2A consumer provisions were not uniformly accepted in the enactment process: some were dropped,⁴¹ some were changed,⁴² and

in final form by the Institute. All Articles, including revisions to Article 1, are scheduled for completion in 1998. The matter of consistency in approach to issues, including consumer issues, is an important focal point of the entire revision effort.

38. Consumer Leasing Act, 15 U.S.C. §§ 1667-1667e (1994).

39. See U.C.C. § 2A-104 cmt. 4 (1995).

40. See generally Fred H. Miller, *Report on the New Payments Code*, 39 BUS. LAW. 1215 (1984); Miller, *supra* note 32.

41. For example, Florida did not enact subsections (2) and (4) of UCC section 2A-108 on unconscionable inducement and collection in a consumer lease and providing for recovery of attorney's fees. Compare U.C.C. § 2A-108 (1995) with FLA. STAT. ANN. § 680.1081 (West Supp. 1996).

some additional ones were added.⁴³ Moreover, in several states Article 2A was stalled for a time or has not been enacted because its modest approach is viewed as too modest.⁴⁴ In some states, only when a separate consumer leasing act was also agreed upon or enacted was Article 2A passed into law.⁴⁵ The National Conference has now begun work on a separate consumer leasing act to foster a greater degree of uniformity on a subject for which there clearly is some demand in the states. It is also hoped that this effort will facilitate completion of the enactment of Article 2A, where the lack of special consumer protection provisions has been a stumbling block. Of course, this effort is occurring outside and not within the Code, but the end result will be the same if the demand for uniform legislation is sufficient. This approach will also provide comparison to the approach of inclusion of consumer provisions selected for Articles 2 and 9, but the timing and the circumstances are different enough that a comparison may be all that can be derived.

A second Code revision effort picked up where the New Payments Code faltered and focused on Articles 3 and 4 governing negotiable instruments and bank deposits and collections.⁴⁶ Again, at the very beginning of this new project, overtures were made to consumer organizations for representation at the drafting sessions. However, the invitations largely fell on deaf ears,⁴⁷ and Articles 3 and 4 emerged with virtually no special consumer protection rules. Some have argued that this demonstrates a flaw in the drafting process and that the uniform acts, developed when all interest groups do not participate, lack validity. The assumption is that when one or more groups are not represented, other special interest groups, in the case of Articles 3 and 4, the banking industry, may dominate the drafting process. That is a myopic

42. For example, California changed UCC section 2A-201 so all consumer leases must be written to be enforceable. *Compare* U.C.C. § 2A-201 (1995) *with* CAL. COM. CODE. § 10201(a) (West Supp. 1997).

43. For example, California added more explicit limitations on choice of forum in a consumer lease. *Compare* U.C.C. § 2A-106 (1995) *with* CAL. COM. CODE § 10106(b) (West Supp. 1997).

44. For example, Connecticut has yet to adopt Article 2A. 1B U.L.A. Supp. 148 (Supp. 1996).

45. This occurred in New York and New Jersey.

46. *See* Miller, *supra* note 32.

47. *See* Carlyle C. Ring, Jr., *The UCC Process—Consensus and Balance*, 28 LOY. L.A. L. REV. 287 (1994). Interestingly, there had been consumer representation during the New Payments Code project. This "second" effort included new Article 4A as well. However, Article 4A basically does not deal with consumer transactions; instead, it leaves that to federal law in the Electronic Fund Transfers Act, 15 U.S.C. §§ 1693-1693r (1994). *See* U.C.C. § 4A-108 (1995) (stating that Article 4A does not apply to transactions governed by federal law). The same absence of relevance to consumers is fundamentally true for UCC Article 5 on letters of credit; Article 6 on bulk sales; and Article 8 on investment securities (the consumers in Article 8, if they can be called that, hardly being people of small resources and sophistication).

view.⁴⁸ Clearly, widespread participation at the drafting stage tends to facilitate production of a fairer and more balanced statute. However, the Conference and the Institute process is designed to produce fair and balanced statutes and does so without the necessity of complete outside participation. Moreover, once a Code addition or revision is completed by the Conference and the Institute, it is not law. It must still be enacted on a state-by-state basis. If a group that did not previously participate for some reason in the drafting raises a persuasive objection at this point, the proposed statute or its Official Comments may well be changed. This is precisely what happened to Articles 3 and 4 in California and in several other jurisdictions.⁴⁹

To elaborate on the above discussion, the failure of an interest group to participate in the drafting is not fatal to obtaining provisions that it might otherwise advocate. To be specific, many Commissioners and members of the Institute have a consumer viewpoint or are sensitive to that point of view. For example, a variety of special consumer protection provisions came into Article 2A without any consumer organization representation in the drafting process, even though the leasing industry was present and quite vocal in opposition to those special provisions being included.⁵⁰ Consumer protection, unheralded, even slipped into Article 5⁵¹ without being especially advocated.

Special consumer protection provisions are sparse in revised Articles 3 and 4 for reasons other than lack of representation. First, to a significant degree, as has already been alluded to, a large body of consumer protection rules involving negotiable instruments already exists outside the Code. The FTC trade regulation rule on Preservation of Consumers' Claims and Defenses,⁵² the Expedited Funds Availability Act,⁵³ and various other state laws⁵⁴ are merely some examples. Second, for the most part, there was a

48. See, e.g., Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (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). The basic problem with these lessons is the teachers never actually attended the classes.

49. See Gail K. Hillebrand, *UCC Articles 3 and 4 in the California Legislature: A New Focus on Consumer Protection in Uniform Law Proposals*, 47 CONSUMER FIN. L.Q. REP. 123 (1993).

50. See text preceding *supra* note 40.

51. See U.C.C. § 5-102(a)(9) & cmt. 5 (1995) (prohibiting consumers from issuing letters of credit as violative of the policy underlying the FTC trade regulation rule on Preservation of Consumers' Claims and Defenses).

52. 16 C.F.R. pt. 433 (1996); see also U.C.C. § 3-302(g) (1995) (stating that section 3-302 is subject to any law which limits holder-in-due-course status in specific transactions).

53. 12 U.S.C. §§ 4001-4010 (1994) (implemented by Regulation CC, 12 C.F.R. pt. 229 (1996)).

54. For example, the Uniform Consumer Credit Code § 3.204 (1974), allowed payment to the

belief that a number of proposed special consumer protection provisions were not desirable because one rule best accommodated all system users, given considerations of system efficiency, and it was better to benefit all users and not just some, given the ability of all system users to protect themselves.⁵⁵

Finally, certain other proposed special consumer rules were rejected as inappropriate either in nature or in necessity. For example, an error resolution procedure⁵⁶ was rejected as imposing unnecessary costs⁵⁷ and requiring an enforcement system incompatible with the private law nature of the Code and freedom of contract, that freedom being one of the Code's major achievements in allowing accommodation of the statute to evolving commercial practices and technological change.⁵⁸ A proposal to adopt a bright-line system to allocate loss from forgery and alteration similar to that in federal law⁵⁹ was rejected as ill-advised for checks. It was asserted that the proposed system would have been more efficient and fairer than that of the Code,⁶⁰ which makes the loss allocation initially to the institution on the basis of noncompliance with the customer's order, but reallocates on the basis of fault.⁶¹ However, no clear evidence seemed to support the argument that

original obligee until notice of assignment, thus qualifying U.C.C. § 3-602(a) (1995).

55. Two examples are instructive. First, the cost of using post-dated checks was allocated only to persons desiring to employ that device, rather than to all users. *See* U.C.C. § 4-401(c) (1995) (mandating that a customer must notify a bank if using post-dated checks). Checks are payment devices; if a user desires credit, the user should protect himself or herself by obtaining credit through regulated channels.

Second, a requirement that more information be given about items on or with a customer's bank statement, which would hamper truncation efforts and thus impede cost reduction benefiting all users, was rejected in favor of allocating the risk from a lack of proper record keeping to those failing in that respect. *See* U.C.C. § 4-406(a) & cmt. 1 (1995); Fred H. Miller, *U.C.C. Articles 3, 4 and 4A: A Study in Process and Scope*, 42 ALA. L. REV. 405 (1991).

56. For an example, see 15 U.S.C. § 1693f (1994) (provision for electronic fund transfer error resolution).

57. Empirical data to support legal proposals is remarkably hard to come by and often inconclusive. Nonetheless, there are very few reported cases involving matters that an error resolution system would address. *See, e.g., Drier v. Chase Manhattan Bank*, 37 U.C.C. Rep. Serv. (CBC) 520 (N.Y. Civ. Ct. 1983). Thus, the cost of such a system seemed an unnecessary expense.

58. *See* U.C.C. § 1-102(2)(b) (1995) (stating that one of the purposes of the UCC is to promote "continued expansion of commercial practices through customs usage and agreement of the parties"); *see* Miller, *supra* note 55.

59. *See, e.g.,* 15 U.S.C. § 1693g (1994) (allocating up to the first \$50 of loss to the consumer from the unauthorized use of an electronic fund transfer device and the balance to the institution, except in two clear cases of consumer negligence).

60. *See* Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991).

61. *See* U.C.C. §§ 3-406, 4-401, 4-406 (1995). These are the basic provisions. It may be worth notice that in its Regulation E proposal for comment on stored-value cards, the Federal Reserve Board seems to agree with the Code system in citing as one reason for potentially not applying Regulation E's limits on

placing greater loss on the institution, by relieving some of the consumer's obligation to help guard the system against fraud, would reduce overall fraud losses and thus benefit all users, as opposed to some less careful ones.

That being said, it is clear from the enactment experience with revised Articles 3 and 4 that opinions can and do differ on some of these points. That observation is evidenced by the enactment experience with these Code Articles in several states. In California, Consumers Union, which had not substantially participated in the drafting process, effectively lobbied the legislature and won several statutory and comment changes as the price of enactment.⁶² Revised Articles 3 and 4 have yet to be enacted in New York because of a dispute over the report of the New York Law Revision Commission, which takes a contrary position on some of the above matters.⁶³

Both sides have learned from this experience. Consumer organizations now realize that a Code project, once begun, will proceed to widespread enactment and, while special consumer protection provisions certainly can be negotiated during the enactment process, greater progress is likely to be made the earlier their interests are represented in the overall process.⁶⁴ Accordingly, representatives from consumer organizations have been involved in the revisions of Articles 2 and 9 from their inception.⁶⁵ On the other hand, the Conference and the Institute are reinforced in their belief, which has existed from the beginning, that active consideration of consumer issues is necessary

liability for unauthorized use that it "may lead consumers to be more careful." Electronic Fund Transfers, 61 Fed. Reg. 19696, 19701 (1996) (to be codified at 12 C.F.R. pt. 205) (proposed May 2, 1996).

62. See *supra* note 49.

63. NEW YORK LAW REVISION COMM'N, REPORT CONCERNING PROPOSED REVISED ARTICLES 3 AND 4 UNIFORM COMMERCIAL CODE (1996) (on file with author). For example, the report disagrees in part with the uniform proposal to allocate fraud losses and instead would allocate to the bank a portion of any loss from a forgery or alteration that might have been prevented by the bank had it actually examined the item. *Id.* at 12-17. The uniform proposal does not consider a payor's failure to examine an item necessarily as a failure to exercise ordinary care. The effect of the Law Revision Commission's nonuniform amendment would tend to impede truncation at everyone's expense if it prompts a bank to examine items. More likely, a bank will continue not to examine all items so the proposal will allocate risk to the payor institution that it cannot economically guard against while at the same time decreasing the consequences and thus possibly the incentive of the customer to take action to guard the system which is in the customer's power to take. However, some would argue that the Law Revision Commission proposal will encourage payors, who have the resources and knowledge, to develop technology to guard against fraud in other ways, which will lower overall loss, and that it is more advantageous economically to force payors to examine transactions than it is to force customers to do so. There also is a fairness argument where there is an easily detectable forgery or alteration as the uniform proposal even in that case might allocate the entire loss to a customer whose lack of exercise of ordinary care was comparatively slight.

64. See *supra* note 49 and accompanying text.

65. Organizations represented include Consumers Union, The National Consumer Law Center, and several legal services offices.

in the Code revision process to have the maximum opportunity to build consensus through the exchange of views, and thus the best possible chance for rapid, and widespread, enactment of the Code. An additional lesson learned, however, is that the search for the best balance or formula to gain uniformity in this respect is not over.

II. THE FUTURE FOR CONSUMERISM AND THE CODE

A. *The Articles 2 and 9 Process to Date*

Given this background and the drafting committee chair's deep involvement in the legislative experience with Articles 3 and 4 in California, it is not surprising that early in the revision process for UCC Article 9, Commissioner William Burke, the chair of the drafting committee, created a task force from the drafting committee and its advisers and observers to study what should be done concerning special consumer provisions in revised Article 9.⁶⁶ While that task force worked to identify issues and attempted to devise possible solutions to those issues, the reporters for the Article 9 project placed in the draft a number of special consumer provisions as proposals to begin discussion. For example, an absolute bar rule was discussed for secured creditor failure to properly repossess and dispose of collateral. Other draft proposals also were discussed, but still others never received discussion by the drafting committee because, before the drafting committee reached that point, a crescendo of often strident protest arose over the inclusion of any additional special consumer provisions. Indeed, protest arose over the failure to address whether special consumer provisions already in Article 9 should be adjusted, and the responses of those who desired preservation of the present provisions, as well as the inclusion of additional provisions, prompted an uneasy feeling that the process was getting out of control.⁶⁷ Much of the same

66. The Article 9 Study Committee, which preceded the drafting committee and which operated under the auspices of the PEB for the UCC, did not focus on this topic as its principal impetus, and was concerned with perceived problems relating to business credit transactions. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 9 REPORT 3 n.9 (1992). A discussion of the report appears in Fred H. Miller, *The Revision of UCC Article 9*, 47 CONSUMER FIN. L.Q. REP. 257 (1993).

67. See, e.g., Alvin C. Harrell, *1994 Meetings Refine Proposed Article 9 Revisions*, 48 CONSUMER FIN. L.Q. REP. 326, 336 (1994). Perhaps a number of observers, being unfamiliar with the process, assumed the provisions included at an early stage to prompt discussion were destined for ultimate enactment. Rather, such provisions are more akin to trial balloons; what is not raised cannot be considered. Response is definitely called for, but overreaction does not advance deliberate discussion or consensus.

heated discussion was occurring in the Article 2 revision process, and that group did not have a task force or other group in place working toward what perhaps could result ultimately in some sort of consensus.

These developments were of deep concern to the leadership of NCCUSL and the Institute for a number of reasons. First, the vehemence of the discussion threatened to undermine the viability of both projects.⁶⁸ Second, the Code is an integrated statute which should reflect, absent real differences, a unitary policy on common issues. The lack of focus in the debates on special consumer provisions in each Article gave no assurance that, were a consensus reached, it would represent a sound and unitary policy, as opposed to simply the view of one or another separate drafting committee. Finally, the debate seemed to be proceeding without an adequate study of various approaches to resolving problems, and even the problems needed better documentation to gain proper recognition and acceptance as real problems. Thus, a period for study and reflection seemed highly desirable.⁶⁹

Consequently, NCCUSL and Institute leadership determined that subcommittees of both the Article 2 and Article 9 drafting committees⁷⁰ should be formed. The subcommittees would meet over the following year with a task force of consumer and industry representatives to identify appropriate special consumer issues for each Article and attempt to reach consensus on how to approach them and, if possible, specifically resolve them.⁷¹

During the following year, each subcommittee worked diligently, and at the end of that period, reported back to the drafting committees on its

68. The New Payments Code experience was not forgotten in this respect. *See supra* note 40 and accompanying text. Indeed, at this date certain representatives of creditor groups have ceased participation in the discussion of consumer issues and have warned that, unless fewer consumer additions ultimately are adopted, the revised Articles will be legislatively opposed. It is submitted that this is an ill-advised strategy, as discussion may bring more progress than will a failure to participate, and the failure to bargain is unlikely to be favorably viewed in the enactment phase.

69. As previously noted, another, but different, approach to the issue concerning special consumer provisions and the Code was proceeding at this time. NCCUSL had determined to prepare a separate consumer leasing act to complement Article 2A, and it was thought desirable to give that project some time to develop to see whether it might represent an alternative approach to what was being discussed for Articles 2 and 9, if the discussion there ultimately did not work out. *See supra* text following note 42.

70. The drafting committee for the revision of Article 2A was not included due to its limited charge to conform the provisions of Article 2A to those of revised Article 2 unless differences existed that warranted different treatment, and due to its separate consumer leasing act endeavor. Article 2B on licensing also was excluded to the extent it was handling "consumer type" issues in a different manner through distinguishing between mass-market licenses and other types of transactions.

71. Minutes of NCCUSL Executive Committee (Aug. 3, 1995) (on file with author).

recommendations.⁷² The drafting committees, in turn, considered the reports and, after discussion and minor amendment, forwarded the resulting recommendations to NCCUSL's Scope and Program Committee, which met at the NCCUSL annual meeting in July 1996 to consider its own recommendation on the matter to the Executive Committee of NCCUSL.

The NCCUSL Executive Committee considered further the recommendations received, found the recommendations from the Article 9 drafting committee to be compatible in concept, albeit potentially different in detail, with those from the Article 2 drafting committee, and recommended the following to the Commissioners, meeting as a committee of the whole, at the 1996 NCCUSL annual meeting:⁷³

1. As to Article 2,

[t]he Executive Committee recommend[ed] to the Conference that it concur with the policy decisions of the Article 2 Drafting Committee that there be no lessening of the consumer protection provisions of Article 2 as originally promulgated by the Conference and as interpreted by the courts and that the draft integrate as part of Article 2 the specific consumer protection provisions described in the list below prepared by the Article 2 Drafting Committee . . .⁷⁴

and further recommended that such specific consumer protection provisions as are included should not be separately set forth in the text of the statute. The provisions described included:

- a. definitions of consumer, consumer contract, and consumer goods;
- b. a provision subjecting Article 2 transactions to consumer protection laws of the enacting state;
- c. a provision on standard form agreements that would provide that a consumer is not bound by terms not expressly agreed to if they would not reasonably be expected by a consumer to be included in the agreement;

72. Reports were due before the drafting committees ceased their work for the year and prior to the 1996 annual NCCUSL meeting.

73. Minutes of the Second Meeting of the Executive Committee of the National Conference of Commissioners on Uniform State Laws, San Antonio, Tex. (July 13, 1996) (on file with author and in NCCUSL Executive Office, Chicago, IL.).

74. *Id.* at 1.

- d. a provision rendering the no oral modification rule inapplicable to standard form consumer contracts;
- e. a provision requiring a disclaimer of implied warranties to be in a record, and the seller to carry a burden of proof that the buyer expressly agreed to it;
- f. a provision giving a consumer buyer greater protection where a limited remedy fails of its essential purpose;
- g. that a limitation on consequential damages be presumed to be unconscionable in a consumer contract where injury is to the person; and
- h. a provision making, in a consumer contract, unreasonably high or low liquidated damages agreements unenforceable.⁷⁵

2. As to Article 9, [t]he Executive Committee recommend[ed] to the Conference that it instruct the Article 9 Drafting Committee to continue the protection of consumers in secured transactions and integrate into Article 9 such additional consumer protection provisions as may be deemed appropriate by the drafting committee,⁷⁶ and not to separately set forth in the text of the statute the additional consumer protection provisions. The Executive Committee also expressed the instruction the provisions should be ready to be presented to NCCUSL at its 1997 Annual Meeting.

Discussion of the recommendations of the Executive Committee at the 1996 NCCUSL annual meeting was not particularly extensive. In the case of Article 2 the discussion was brief because much had been at least tentatively resolved by the recommendation unless the committee of the whole completely disagreed with the general approach recommended.⁷⁷ Moreover, as to the details of the recommendation, seldom does the floor of the Conference seek to limit the options of a drafting committee on its first consideration of the proposed statute. Rather, discussion is directed toward suggestions of problems with the provisions presented and possible alternative ways to deal with those issues or other resolutions of the issues. At most, general guidance through "sense of the house" resolutions is provided. It is during the final consideration of the statute by the Institute (projected for

75. *Id.*

76. *Id.* at 2.

77. The issues tentatively resolved were whether Article 2 should continue its present special consumer provisions, whether some additional ones might be added, and in the latter case, whether the additions would be integrated into the statute or segregated in one manner or another.

May 1998) and by the Conference (projected for July 1997) where differences of opinion, if they have not been resolved, are hammered into a consensus by debate.

A withholding of discussion in the case of Article 9 was recommended because many provisions in the statute had not been discussed by the drafting committee and other provisions recommended by the consumer issues subcommittee had not yet been introduced into the statute. The provisions developed by the drafting committee pursuant to the recommendations will be addressed by the Conference and the Institute at subsequent annual meetings.

Thus, the future details of special consumer provisions in the Code are still open, and even their existence is not settled.

B. Discussion of the Special Consumer Provisions Now to Be Considered

The Article 9 consumer subcommittee made fourteen recommendations concerning special consumer provisions in relation to revised Article 9. The most important, according to the consumer issues subcommittee, is a procedural recommendation that the statute provide for an award of attorneys' fees to a consumer who prevails in litigation if a prevailing creditor could recover its attorneys' fees by reason of the contract. There is substantial agreement that Article 9 now contains many provisions that furnish an adequate remedy for secured-party misconduct, if a means to enforce those provisions exists. The recommendation would be the step toward providing that means, and a step that has proven successful in other consumer-protection legislation.⁷⁸ Of course, the narrow line to be walked in this context is one of leveling the playing field on the one hand and of being careful not to prompt unproductive litigation on the other. Accordingly, the recommendation is that the statute only allow the award of attorneys' fees if, by contract, the secured party is able to recover its attorneys' fees, should it prevail.

A common device employed in consumer protection statutes is a minimum statutory recovery or statutory penalty to be awarded to a prevailing consumer. Such a provision not only provides an incentive to

78. See, e.g., Truth in Lending Act, 15 U.S.C. §§ 1601-1667e (1994). For a discussion of why taking the step probably would not produce replication of the unfortunate consequences of the extensive litigation under the original version of the Truth in Lending Act, see Fred H. Miller, *Consumer Issues and the Revision of U.C.C. Article 2*, 35 WM. & MARY L. REV. 1565, 1577 (1994).

enforce legal rights where the amounts involved are often small, but it also acts to deter creditor misconduct. Article 9 already has such a provision in consumer transactions.⁷⁹ Nonetheless, a further recommendation for a codified absolute bar rule as an option for a legislature to consider in consumer transactions,⁸⁰ which clearly is a form of statutory penalty, was approved. The rationale is that this is the law by decision in ten states⁸¹ and because there is unlikely to be a movement to overturn the rule in these states, the legislatures should at least be able to consider the matter in the statute.⁸²

Having dealt with the problem of secured-party misconduct, the next recommendation turns to a perceived problem of reasonable value not being received for collateral that is said to exist even where all the proper steps are taken. Present Article 9 tried to address this issue years ago when it eliminated elaborate statutory safeguards in favor of a flexible standard, designed to give the parties freedom to realize the best possible price for collateral upon default.⁸³ That scheme has been less than entirely successful in that it has spawned much litigation over the general standard of "commercial reasonableness." Secured parties have been penalized for minor missteps in many cases,⁸⁴ but at the same time, according to consumer representatives and others, they have failed to provide for commercially reasonable values being received for collateral. Proposals to measure a deficiency by the difference between the debt and the greater of either the actual disposition proceeds or

79. See U.C.C. § 9-507(1) (1995) (awarding the amount of the finance charge and 10% of the loan principal or cash price to a prevailing consumer). The drafting committee approved, when it considered the recommendations of the consumer subcommittee, the addition of a bona fide error defense to this provision. While that would be an inroad on the current special consumer provisions in Article 9, it is consistent with other consumer protection legislation and may be a desirable qualification given the shift in balance that would occur if the attorneys' fee recommendation is ultimately incorporated into the revised statute.

80. For a discussion of the absolute bar rule versus the rebuttable presumption rule, see *Emmons v. Burkett*, 353 S.E.2d 908, 909-11 (Ga. 1987).

81. *E.g.*, *Skeels v. Universal C.I.T. Credit Corp.*, 222 F. Supp. 696 (W.D. Pa. 1963), *modified on other grounds*, 335 F.2d 846 (3d Cir. 1964); *Hallmark Cards, Inc. v. Peevy*, 739 S.W. 2d 691 (Ark. 1987).

82. The recommendation would present the issue to the legislature rather than leave the matter up to the courts, who are the source of the absolute bar rule in those states that have it. While this may result in less flexibility in application, it will make the decision occur in a forum where the overall balance of the statute can be considered, which the courts are presently unable to do.

83. See U.C.C. § 9-504 cmt. 1 (1995) (allowing parties to dispose of goods in a "commercially reasonable" manner).

84. See, *e.g.*, *Spillers v. First Nat'l Bank*, 400 N.E.2d 1057 (Ill. App. Ct. 1980). On the other hand, the flexibility does allow a court to refuse to accept a process that would be allowable in a technical statute but which produces egregious results. See, *e.g.*, *United States v. Willis*, 593 F.2d 247 (6th Cir. 1979).

the reasonable value of the collateral have been debated by the drafting committee. However, the recommendation, upon which further discussion will center, is limited to subjecting the price received and other aspects of the disposition to particular scrutiny only if requested by the debtor and if the purchaser of the collateral upon disposition is the secured party, a recourse party, or a party related to them, because this is where the greatest chance for an unwarranted loss exists.⁸⁵

Other recommendations, like the one better assuring reasonable value is received for collateral, also look at making appropriate adjustments within the overall policy objectives or current structure of present Article 9. One such recommendation would add information about the right to redeem the collateral, a contact point for information concerning that right, and information about the possibility of a deficiency to the required notice of intended disposition.⁸⁶ A second recommendation would provide a safe harbor for the timing of the notice of disposition (ten days), but would exclude consumer transactions.⁸⁷ A third recommendation would support clarification of whether a purchase money security interest loses that status under certain subsequent circumstances, like a refinancing or cross-collateralization,⁸⁸ but would add, in consumer transactions, a statutory allocation formula for the application of payments to determine the extent of the purchase money security interest if no allocation of payment by agreement is provided. A final recommendation would make very broad descriptions of the collateral in financing statements where filed in consumer transactions, such as "all assets," ineffective.⁸⁹ Such descriptions make it

85. The details of this recommendation remain to be fleshed out. Issues such as what will satisfy the heightened scrutiny (perhaps a showing that several better bona fide offers from unrelated parties were received) and what constitutes a related party (related by ownership as in *Luxrest Furniture Mfg. Co. v. Furniture Warehouse Sales, Inc.*, 209 S.E.2d 63 (Ga. Ct. App. 1974), or beyond that to include a pattern of business relationships) remain to be resolved.

86. See U.C.C. § 9-504(3) (1995) (describing what constitutes present notice).

87. A safe harbor for both commercial and consumer transactions is a consensus concept, but no agreement has been reached as to the description of that harbor, except in commercial transactions.

88. There is agreement that purchase money status should not be lost in either commercial and consumer transactions under Article 9. Thus while this point is extremely important in consumer cases, it is not a special consumer provision as it is applicable in all contexts. Whether the so-called "dual status" characterization should apply for other purposes, such as Bankruptcy Code section 522(f), however, is expressly left to the other law. See 11 U.S.C. § 522(f) (1994).

89. *But see* Draft, Uniform Commercial Code Revised Article 9, Secured Transactions; Sales of Accounts and Chattel Paper § 9-504 (Nat'l Conference of Comm'rs on Unif. State Laws, Oct. 1996) [hereinafter Oct. 1996 Draft, Art. 9], available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Mar. 28, 1997) (generally allowing such descriptions to be effective).

unduly difficult to obtain subsequent financing and are seldom, if ever, accurate.

The final group of Article 9 special consumer provisions recommended, with one exception, are consistent with the foregoing pattern, in that they involve no recommended adjustments at all or, at most, aim only at clarification.⁹⁰ The one significant exception is a proposal to add to Article 9 a type of substantive special consumer provision normally found in separate legislation.⁹¹ This proposal recommends a one-time statutory right to reinstate the transaction if, at the time of default, the debtor has paid sixty percent or more of the principal amount of the debt.⁹²

The eight recommendations⁹³ concerning special consumer provisions for Article 2 likewise look only to adjustments within the overall policy objectives or current structure of present Article 2, or only aim at clarification. The approved Article 2 report does list nine further provisions that do or might benefit consumers, but in that all of them are recommendations for both consumer and commercial transactions, they should not be viewed as additional special consumer provisions.⁹⁴ For example, the once proposed repeal of the statute of frauds hardly is a consumer driven proposition; indeed, it may not even be viewed favorably from the consumer perspective.

Turning to the eight explicit consumer provisions, there is a recommendation for consumer contracts⁹⁵ that if a valid and exclusive agreed

90. Thus, one recommendation would add in the Official Comments clarification of the parties' ability to agree upon standards, unless the standards are manifestly unreasonable. Although this ability does not allow contracting for commercially unreasonable conduct, the Official Comments would further point out the relevance of bargaining power and knowledge in determining the reasonableness of what is agreed upon. Another recommended change in the Official Comments would clarify that taking easily valued collateral far in excess of the debt owed under now section 9-505 may violate new Article 9's good faith standard. A third recommendation would not extend Article 9 to include certain consumer collateral, like a deposit account not represented by a certificate of deposit, even though like-collateral may be included within Article 9 in a commercial context. A final group of recommendations would deny adding special consumer provisions that commonly are found in separate legislation or regulations to Article 9, such as the principle of the Federal Trade Regulation on Preservation of Consumer Defenses, 16 C.F.R. pt. 433 (1996), to section 9-206, and an antideficiency rule such as in UNIF. CONSUMER CREDIT CODE § 5.103 (1974).

91. This right is similar to, but not the same as, the right to cure found in the Uniform Consumer Credit Code, §§ 5.109-.111 (1974).

92. The 60% figure is based on the same analysis that lies behind that figure in present U.C.C. § 9-505 (1995).

93. *See supra* text accompanying notes 73-76.

94. Subcomm. on Consumer Interests, UCC Article 2 Drafting Committee, Thoughts on the Treatment of Consumer Issues in a Revised UCC Article 2 app. at 2 (1996) [hereinafter Art. 2 Subcomm. Report] (on file with author).

95. One of the eight recommendations is merely definitional. Thus, a consumer contract is a contract

remedy fails substantially to achieve its intended purpose, the aggrieved party may reject the goods or revoke acceptance and, to the extent of the failure have other remedies as permitted in the statute, such as cover and damages.⁹⁶ Proposed section 2-104(a)(2) and (b) in the NCCUSL 1996 Annual Meeting Draft, and one of the recommendations, would subject the provisions of Article 2 to the consumer protection laws of the enacting state.⁹⁷ These proposals essentially represent merely a more explicit statement of the same rule in the current Article 2.⁹⁸

Proposed section 2-316(e) in the NCCUSL 1996 Annual Meeting Draft, and the recommendation it represents, would require any disclaimer of an implied warranty in a consumer contract to be in record form⁹⁹ and conspicuous, and the seller must establish by clear and affirmative evidence that the buyer expressly agreed to the disclaimer to enforce it.¹⁰⁰ While there are some additional requirements in this proposal beyond those in present section 2-316(2) or (3), they seem to be a matter of degree and to better achieve the policy behind the provisions.¹⁰¹ These requirements will be irrelevant in sales where there is a written warranty under the Magnuson-

for the sale of goods that when delivered are intended by the buyer primarily for personal, family, or household use where the seller is regularly engaged in the business of selling and the buyer is an individual. Draft, Uniform Commercial Code Article 2-Sales (199_) § 2-102(a)(10)-(12) (Nat'l Conference of Comm'rs on Unif. State Laws, July 12-19, 1996) [hereinafter July 1996 Annual Meeting Draft, Art. 2], available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Jan. 10, 1997). There have been subsequent drafts but no material changes except as noted. For subsequent drafts see <<http://www.law.upenn.edu/library/ulc/ulc.htm>>.

96. July 1996 Annual Meeting Draft, Art. 2, *supra* note 95, § 2-709(b)(2). This resolution is one adopted by a number of cases. It admittedly is more favorable to the buyer than another alternative, which preserves agreed limits not dependent upon the failed remedy, but the recommendation is more one for clarity than substantive change. See Yvonne W. Rosmarin, *Consumers R-Us: A Reality in the U.C.C. Article 2 Revision Process*, 35 WM. & MARY L. REV. 1593, 1620 (1994).

97. July 1996 Annual Meeting Draft, Art. 2, *supra* note 95, § 2-104(a)(2).

98. See U.C.C. § 2-719(2) (1995) (where remedy fails of its essential purpose); *id.* § 2-102 (1995) (setting forth the scope of Article 2); see also *supra* note 96.

99. A "record" is information that is inscribed on a tangible medium, such as a writing, or that is stored in an electronic or other medium and is retrievable in perceivable form. July 1996 Annual Meeting Draft, Art. 2, *supra* note 95, § 2-102(a)(33).

100. *Id.* § 2-316(e). A clear way to accomplish this would be to price the goods with and without an implied warranty and let the buyer select. Another way to deal with the matter is not to disclaim the warranty, but rather to limit the remedy for any breach of warranty.

101. The latest draft of revised Article 2 drops the evidentiary part of the proposal and does not require a conspicuous record. See Draft, Uniform Commercial Code Revised Article 2 Sales § 2-407(c) (Nat'l Conference of Comm'rs on Unif. State Laws, Jan. 24, 1997) [hereinafter Jan. 1997 Draft, Art. 2], available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Mar. 10, 1997). As to the requirement of "express agreement," Official Comment 1 to present UCC section 2-316 states the policy is to protect buyers from surprise. U.C.C. § 2-316, cmt. 1 (1995).

Moss Act¹⁰² and are far less restrictive than the complete prohibition of disclaimers now embodied in nonuniform amendments to Article 2 in a number of states.¹⁰³

Two recommendations¹⁰⁴ that were approved earlier by the drafting committee were later subsumed into the NCCUSL 1996 Article 2 Annual Meeting Draft when these special consumer provisions in essence became the general rules for all transactions.¹⁰⁵ A third recommendation, evidenced in proposed section 2-210(b) of the NCCUSL 1996 Annual Meeting Draft, renders a term in a consumer contract prohibiting modification or rescission, except by a signed record, ineffective.¹⁰⁶ As a practical matter, it does not actually extend present law. While present section 2-209(2) has no such limitation, it does require a separately signed form when the form is supplied by the merchant to a person who is not a merchant,¹⁰⁷ and fulfillment of this requirement in consumer sales is virtually never accomplished.

That leaves only one recommendation in the context of Article 2 that may be viewed arguably as going beyond present law in any significant way—the provisions of proposed section 2-206 of the NCCUSL 1996 Annual Meeting Draft relating to so-called contracts of adhesion.¹⁰⁸ A term in a record which

102. 15 U.S.C. § 2308(a) (1994). This provision eliminates the ability to disclaim an implied warranty in a sale which includes a written warranty.

103. *See supra* note 19.

104. *See supra* note 94.

105. The recommendation that unreasonably high or low liquidations of damages are unenforceable in consumer contracts made no real change in the law, unless it suggested that such agreements might be enforceable in commercial sales. *See* U.C.C. § 2-718(1) & cmt. 1 (1995). Thus, the reformation as a unitary rule actually kept present Article 2 without change.

Present section 2-719(3) makes the limitation of consequential damages for injury to a person in the case of consumer goods *prima facie* unconscionable. U.C.C. § 2-719(3) (1995). Section 2-709(d)(2) of the October 1, 1995 draft was in accord, and thus, the recommendation was only to keep the present rule. However, section 2-709(c) in the 1996 NCCUSL Annual Meeting Draft employs no presumption or *prima facie* language, and simply negates the ability to limit or exclude personal injury damages. July 1996 Annual Meeting Draft, Art. 2, *supra* note 95, § 2-709(c). This was the practical result under the prior rules, *see, e.g.*, *Collins v. Uniroyal, Inc.*, 315 A.2d 16 (N.J. 1974), and, given the availability of strict liability in tort in most jurisdictions under which contractual limitations were not enforceable, it was in essence the universal rule in both consumer and commercial sales. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965). However, in late drafts the presumption is back, and so, again, there is no change from present law. *See* Jan. 1997 Draft, Art. 2, *supra* note 101, § 2-810(c).

106. *See* July 1996 Annual Meeting Draft, Art. 2, *supra* note 95, § 2-210(b). Late drafts reach the same position by excluding consumer contracts from the rule. *See* Jan. 1997 Draft, Art. 2, *supra* note 101, § 2-210(c).

107. U.C.C. § 2-209(2) (1995).

108. This term is equated in the NCCUSL 1996 Annual Meeting Draft of revised Article 2 with a “standard form” or a form containing “standard terms.” July 1996 Annual Meeting Draft, Art. 2, *supra*

is a standard form, or which contains standard terms to which a person has apparently manifested assent¹⁰⁹ by a signature or other conduct, is nonetheless not part of a consumer contract if the consumer could not reasonably have expected it, unless the consumer expressly agrees to the term.¹¹⁰ On the other hand, an argument can be made that even this provision does little more than reflect an explicit application of the concept of procedural unconscionability.¹¹¹

C. Analysis of Recommended Special Consumer Provisions.

The work on fashioning a workable formula for special consumer provisions in relation to revised UCC Articles 2 and 9 is not complete. Several drafting committee meetings remain, as well as debate at the annual meetings of the Conference and the Institute. What has been accomplished to date, however, has greatly assisted in focusing the effort. As a result of this work, there now appears to be strong although not universal agreement for three fundamental propositions.

First, the special consumer provisions now in the Articles should, subject to minor adjustments that may be necessary due to other revision, be retained.¹¹² The reports of both consumer subcommittees, which were

note 95, § 2-206. A standard form is defined as a record prepared by one party in advance for general and repeated use that substantially contains standard terms and is used in the transaction without negotiation of, or changes in, the substantial majority of the standard terms. However, negotiation of price, quantity, time of delivery, or method of payment does not preclude such status. Standard terms are terms prepared in advance for general and repeated use by one party and used without negotiation with the other party. *Id.* § 2-102(a)(37), (38). Thus, a printed form where blanks are filled in for price, quantity, and delivery, even if used in a commercial sale, is a standard form. *See, e.g., Insurance Co. of N. Am. v. Automatic Sprinkler Corp.*, 423 N.E.2d 151 (Ohio 1981). In later drafts the commercial employment of this concept has been dropped, leaving the matter to the doctrine of unconscionability. *See* Jan. 1997 Draft, Art. 2, *supra* note 101, § 2-206 (limited to consumers).

109. To manifest assent, there must be an opportunity to review the terms, and to decline, followed by conduct that under the circumstances, constitutes acceptance of the terms, such as a signature. July 1996 Annual Meeting Draft, Art. 2, *supra* note 95, § 2-102(a)(28).

110. *Id.* § 2-206(b). In later drafts, the concept that a consumer must reasonably expect the term in a standard form in the type of transaction involved, still remains, but the provision provides a number of factors to assist the court in determining that issue, and provides for an expedited hearing in a manner similar to the case where unconscionability is raised. *See* Jan. 1997 Draft, Art. 2, *supra* note 101, § 2-206.

111. *See generally* 1 JAMES WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 4-3 (4th ed. 1995) (discussing the concept of procedural unconscionability).

112. The report of the Article 9 subcommittee in relation to what some believe is a statutory penalty in present section 9-507(1) states, "It seems politically difficult to cut back on a consumer remedy which has been in the Code without serious complaint for 30 years or more." Memorandum from Article 9 Drafting Committee, Consumer Issues Subcommittee (Marion Benfield et al.) to Article 9 Drafting Committee,

approved by the drafting committees, agree on this proposition. The Article 9 subcommittee, for example, recommended the absolute bar rule as an option, not because it was believed to be necessarily a sound rule, but because from their experience with state legislatures, they believed more would be lost than gained in trying to eliminate it. Clearly, retention is the bottom line for consumer representatives. While secured creditor and seller groups have spoken against the policy of retention because they then argue that they receive nothing in return for agreement to any additional provisions, their view is too narrow given that it is inevitable in any revision effort that they will have to accept some addition considering the minimal consumer protection in the present Code. Continuing to accept what one already has learned to live with can be traded for more limited additional provisions than otherwise might be the case, and ones that perhaps are more acceptable in form. It is clear this in fact has happened.

The second area of general agreement is that Articles 2 and 9 should not add a significant number of additional special consumer provisions.¹¹³ There are a number of reasons for this proposition. First, as a matter of principle, a special consumer provision should not be fashioned unless there is good reason to believe that a unitary rule for consumer and commercial transactions alike will not be satisfactory, either as subject to a high risk of abuse given freedom of contract or as inappropriate given less knowledge and bargaining power in consumers. Another reason is that the process in revising the Code does not easily accommodate the desirable research that should be a basis for the formulation of any new and untried provision.¹¹⁴ To formulate provisions in a factual vacuum may do more harm than good to the intended beneficiaries.¹¹⁵ A third reason for not adopting a large number of special

Advisors, and Observers 3 (May 29, 1996) (on file with author) [hereinafter Consumer Issues Memorandum]. The report of the Article 2 subcommittee makes the same point, "the Article 2 revision should, at a minimum, 'do no harm' to consumer interests. This, too, relates to enactability." Art. 2 Subcomm. Report, *supra* note 94, at 2.

113. The Article 2 subcommittee report for example states, "It seems preferable to state principles that apply to all transactions," and cites present section 2-302 on unconscionability as an example. Art. 2 Subcomm. Report, *supra* note 94, at 4.

114. See Consumer Issues Memorandum, *supra* note 112, at 4 (indicating certain suggested provisions were rejected by the subcommittee because of their uncertain economic effect).

115. This point has been consistently made by representatives of secured parties and sellers. While their attempt to shift the burden of proof to consumer representatives to establish by empirical evidence a need for any new provisions has not been embraced, it is clear that the reports of the consumer subcommittees reflect that this argument has not gone unnoticed. Indeed, the Article 2 subcommittee report states, "consideration should be given to some rewriting where there is convincing empirical evidence that the Official Text creates serious practical potential for unfair surprise or prejudice to

consumer provisions is that there has been little success with widespread and uniform enactment in arguably similar cases. For example, the Uniform (now Model) Consumer Sales Practices Act was enacted in only a handful of jurisdictions,¹¹⁶ and the experience with the Uniform (now Model) Consumer Credit Code, while somewhat better, was hardly an outstanding success.¹¹⁷ The lesson perhaps is that it is very difficult to reach a national consensus on a significant package of consumer issues due to differences in the social, economic, and political conditions in the states.¹¹⁸ A further reason not to include a large number of special consumer provisions in Articles 2 and 9 is that in many states considerable legislation already exists to supplement these

consumers." Art. 2 Subcomm. Report, *supra* note 94, at 4 (the drafting committee deleted the word "empirical" which appeared in the draft report).

While this practical approach is clearly correct (empirical evidence is not always available and appropriate anecdotal evidence can be entitled to weight; legislation is a political process driven by many considerations in addition to logic), the Article 9 subcommittee may have gone astray in the recommendation for a right to reinstate. Empirical evidence developed by consumer creditors and presented to the subcommittee demonstrates this is a right that could cost all consumers significant money and is of little or no ultimate benefit (other than in the short run) to defaulting debtors. However, the Article 9 subcommittee report, even with this research, seems to find "modest" benefit, and then justifies it by asserting the proposal is likely to have so little economic impact that there is no good argument not to implement it. *See* Consumer Issues Memorandum, *supra* note 112, at 12. This seems a contradictory analysis coupled with an untested assumption. Consumer representatives have presented a different perspective. Perhaps the answer lies in the observation that the creditor representatives derive their statistics from a higher end of the market, and the consumer representatives see a lower end of the market. Indeed, it appears at least some of the failure to reach agreement on these issues may derive from the different perceptions about consumers and their needs that the different sides have because their experience stems from different segments of the market. Hopefully, recognition of this possible variance will assist in reaching an accommodation in views.

116. 7A U.L.A. 231 (1985 & Supp. 1996) (Kansas, Ohio, and Utah are the only jurisdictions that have enacted the Uniform Consumer Sales Practices Act.).

117. 7 U.L.A. (1985 & Supp. 1996) (Colorado, Indiana, Oklahoma, South Carolina, Utah, Wisconsin, and Wyoming have enacted the 1968 version of the Uniform Consumer Credit Code); 7A U.L.A. (1985 & Supp. 1996) (Colorado, Idaho, Iowa, Kansas, and Maine are the only jurisdictions that have enacted the 1974 version of the Uniform Consumer Credit Code). Colorado has a hybrid of the 1968 and 1974 versions of the Uniform Consumer Credit Code in force. 7A U.L.A. Supp. 1 (Supp. 1996).

118. *See* Consumer Issues Memorandum, *supra* note 112, at 3. Circumstances on the federal level are somewhat different and often may simply ignore these differences, which state legislatures cannot. *See, e.g.,* William D. Warren, *UCC Drafting: Method and Message*, 26 LOY. L.A. L. REV. 811 (1993) (describing the process of revising the UCC). NCCUSL is retesting the water on the state level in its project to prepare a consumer leasing act. However, this project is not far enough along to determine whether there is now a greater promise of success. Moreover, the conditions in this endeavor are somewhat different from those involving Articles 2 and 9. Article 2A is enacted in most states, and the consumer leasing act will be offered as an after-the-fact companion piece to states where there is a demand for it. Revised Articles 2 and 9 still need to be enacted, and consumer representatives have signaled clearly that their bottom line for enactment of these Code Articles is the inclusion, in an integrated fashion, of adequate special consumer provisions in those Articles.

Articles. When legislation has been worked out for a particular jurisdiction, it is unrealistic to assume that conflicting provisions in Articles 2 and 9 will be substituted for it.¹¹⁹ Accordingly, a very activist approach can be expected to only engender controversy and ultimately nonuniformity.¹²⁰

The inclusion of a broad range of special consumer provisions also may conflict with the nature of the Code. As discussed, the Code, for the most part, is a series of default rules subject to freedom of contract, with deliberate flexibility built into the statutory rules. This point is often made in connection with Article 2, with the drafters trusting the courts to properly apply the flexible rules. Article 9 is sometimes seen as much more rigid and focused on bright-line rules. But it all depends; for example, the “commercial reasonableness” test in present section 9-504(3) is as flexible as anything in Article 2.¹²¹ Whether the courts in either instance have earned the trust given them is another issue.

But the point is, the nature of consumer provisions is different. To be protective, the provision must be nonvariable and there must be adequate provision for enforcement. Nonvariability is antagonistic to freedom of contract, and if enforcement is to be accomplished by means other than an administrative agency (a concept that itself is foreign to the Uniform Commercial Code), provisions that do not discourage private actions are required, such as minimum statutory recoveries (statutory penalties) and the ability to recover attorneys’ fees. The inevitable reaction, if this formula coupled with other factors produces significant litigation, is a demand for greater certainty from the statute, which is antagonistic to the Code principle of flexibility. While it is clear Articles 2 and 9 now contain nonvariable rules,¹²² and some incentives for enforcement,¹²³ ultimately it is a question of

119. As an illustration, consider UNIF. CONSUMER CREDIT CODE §§ 5.109-.111 (1974) (establishing a right to cure a default in payment) enacted in some states (Colorado for one). If one recommendation of the Article 9 subcommittee is followed, Article 9 will include a right to reinstate. On the whole, the latter right would seem to be more acceptable to secured parties as they can control the collateral before reinstatement. For the same reason, a right to cure should be more desirable for consumers as it prevents loss of the collateral until the end of the cure period. But what benefit is there in re-debating this issue?

120. See *supra* note 119.

121. See U.C.C. § 9-504(3) (1995).

122. See, e.g., U.C.C. § 9-501(3) (1995) (cannot waive rules which give rights to a debtor and impose a duty on a secured party). The statute of frauds is said to be such a provision in Article 2. See *id.* § 1-102 cmt. 2.

123. See, e.g., *id.* § 9-404(1) (\$100 penalty plus recovery of all additional loss if secured party in a consumer transaction fails to file an appropriate termination statement); *id.* § 9-507(1) (if secured party fails to comply with disposition rules, consumer can recover finance charge incurred plus 10% of principal). Perhaps section 2-717 and other self-help remedies like rejection, *id.* § 2-601, can be viewed as

degree. At some point, it is highly likely that irreparable damage to the nature of the Code occurs if too much by way of special consumer provisions is added.

Finally, scattering a significant number of special consumer provisions in the Code and others in separate legislation may produce unsound results. In short, integrating enough provisions into commercial law, while leaving others to other law, as opposed to considering all such provisions as a whole, can lead to an unintended result. To illustrate, a right to reinstate¹²⁴ clearly will cause some increase in the cost of credit transactions. That cost may be passed on to all consumers, who may be willing to pay it as a form of insurance against loss of property from unanticipated circumstances. But what if the cost cannot be passed on, perhaps because restrictions on finance charge rates or on the amounts of default charges are severely regulated by other law?¹²⁵ In that case, it is unlikely the creditor will absorb the cost as a profit reduction; it is more likely that credit standards will be tightened to eliminate the source of the cost. In that event, the very consumers intended to be benefited may instead be excluded, and the provision, like a usury law, will help no one because it neither helps those who need it nor those who do not. Inclusion of a more modest amount of special consumer provisions in the Code minimizes this type of risk.

There also seems to be significant agreement about the final fundamental proposition. This proposition is that an appropriate formula for both Articles is to add additional special consumer provisions only when there is substantial agreement and a significant basis exists for their addition, they do not unduly alter the nature of the Code, and they adjust unitary rules in the Articles that are suitable for commercial transactions only to the extent that there is a significant risk the unadjusted rules will cause adverse impact if applied to consumer transactions.¹²⁶

such in Article 2.

124. See *supra* note 91 and accompanying text.

125. See, e.g., UNIF. CONSUMER CREDIT CODE §§ 2.401, 2.502 (1974). The allowable charges under this statute may be more than in many states.

126. The Article 9 subcommittee report states in its Introduction, "the question of coverage of consumer issues in Article 9 involves . . . a judgment regarding whether there is sufficient consensus on the appropriate substantive rule outside the Conference and the American Law Institute," and "the revision process should do no harm to consumer interests." See Consumer Issues Memorandum, *supra* note 112, at 3.

The Article 2 subcommittee report is even more explicit in these regards, stating, for example, "The most compelling cases [for new language to address consumer interests] will be those in which it is clear there will be some substantial improvement realized from codifying an emerging consensus in

However, within these basic propositions which have substantial support, the devil certainly lies in the details. If agreement is not achieved here, agreement at the conceptual level may be irrelevant. Clearly, the discussed recommendations generated by the consumer subcommittees and approved and modified by the Article 2 and Article 9 drafting committees are not considered to be final. On some, such as protection of the collateral value from an unreasonably low disposition price even in a commercially reasonable disposition, the details remain to be fleshed out. On other recommendations, details may be changed.¹²⁷ Indeed, on further consideration some recommendations may ultimately be eliminated and, while the second proposition previously discussed suggests that further recommendations beyond those now tentatively approved should be slow to be adopted,¹²⁸ it is conceivable that some additional recommendations could be incorporated into the final product.

The question arises as to what standard should guide the completion of this work and whether this standard suggests that the recommendations to date are basically sound. The first question is easily answered; there is consensus among the participants in the revision process that the standard should be the ultimate enactability of the statute in fundamentally uniform form. The Uniform Commercial Code is simply too important to the economy of the country and to the perpetuation of the federal system to permit significant nonuniformity through amendments, or through the failure to enact the revisions.¹²⁹ The discussed recommendations, and perhaps other

the courts [or adopting experience reflected in the enactment of statutes]." *See id.*

127. *See supra* note 110 (discussing the change that has occurred in proposed section 2-206, *see* July 1996 Annual Meeting Draft, Art. 2, *supra* note 95, § 2-206).

128. Some additional suggestions in the case of Article 2 that are consistent with the discussion in this article are listed in Miller, *supra* note 78, at 1574-91. A fairly obvious candidate might be a limitation on choice of law as in section 2A-106, unless that sort of limitation is built into section 1-105 in the revision of Article 1, which has now begun. Another addition providing for reciprocal attorneys' fees for Article 2 enforcement is strongly suggested. *See infra* note 132 and accompanying text.

The Consumer Subcommittee of the UCC Article 9 drafting committee has considered some additional proposals and the drafting committee agreed with a number of them. Some of these "merely" refine prior proposals, such as determining what is a consumer secured transaction; for example, should there be a dollar cap on the size of the transaction covered, or not? Others are aimed at more substantive matters, such as should Article 9 adopt a so-called "one-action rule." These proposals have not been considered beyond the drafting committee. To the extent that they progress, they should be measured against the same standard as the proposals to date.

129. The Article 9 report in its Introduction states, "the final decision regarding the extent of special consumer provisions in Article 9 must take into account enactability of the statute." Consumer Issues Memorandum, *supra* note 112, at 3. The Article 2 report states equally flatly, "A matter of primary concern must be the enactability of the proposed revised Article 2." Art. 2 Subcomm. Report, *supra* note

limited provisions with appropriate fine tuning, should be enactable. There are several reasons to believe so. First, developing limited, special consumer provisions within the UCC while integrating other desirable provisions into the more general provisions of the law maximizes the chances of ultimately reaching consensus among all interested groups.¹³⁰ Consensus will promote uniformity and avoid delays in enactment.¹³¹ Certain benefits obviously flow from uniform enactment, including lower transactional costs and fewer traps for secured parties and sellers doing business across state lines due to overlooking nonuniform amendments. For consumers, the benefits include uniformity of rights and obligations that foster greater knowledge and understanding of their legal position in a transaction. The opportunity to achieve these benefits further reinforces the incentive to participate, and ultimately should lead to promotion of, or at least not opposition to, enactment.

Second, the recommendations to date for the most part fit well within the overall policy objectives or structure of the present Code, or operate to clarify its operation. To that extent, they should not be seriously objectionable, and thus enactment should not pose significant difficulty. One possible exception is the right of reinstatement proposed for Article 9. This recommendation can be viewed as offending two aspects of the three fundamental propositions

94, at 1.

Pleas have been made for a broader view, but with explicit recognition that enactability would suffer. See, e.g., Richard A. Elbrecht, *The NCCUSL Should Abandon Its Search for Consensus and Address More Difficult and Controversial Issues Applying "Process" Concepts*, 28 LOY. L.A. L. REV. 147 (1994). But to erode the universal and fundamentally uniform enactment of the Code is simply too great a price; any revision with that effect should instead be avoided. Commentators agree on the desirability of uniform laws in the commercial law area. See, e.g., Larry E. Ribstein & Bruce H. Kiobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131 (1996).

130. The provisions outside the Code can be targeted with local considerations which may vary among jurisdictions. As to the limited Code provisions, if a particular interest group does not stay the course in their development, the risk is that their point of view may be lost and they will face a statute worse than if they had continued negotiating during the drafting process. Of course, opposition can be mounted state by state during enactment, but that is expensive and that opposition may be further weakened by the argument that the group had its chance during the formulation process and did not take advantage of it.

131. It must be recognized that consumer provisions already in place in a jurisdiction when the revised Code is introduced are unlikely to be disturbed. Thus in a given jurisdiction, some nonuniformity in the Code consumer provisions may result. But, this very fact gives an interest group that has stayed the course in the development of the Code consumer provisions an opportunity to argue for some adjustment of the Code consumer provisions toward their point of view. While a degree of nonuniformity thus may result, certainly overall, more uniformity will result than if no effort to reach consensus ever was made or if the problem was made more difficult by the adoption of extensive consumer provisions in the Code.

arrived at by consensus. First, it goes beyond present Code policy, which only allows redemption, and the provision does not represent a consensus position as evidenced by present state laws. To the extent other state law contains a right to reinstate, or alternatively a right to cure, there also is potential conflict with revised Article 9 if this recommendation is included. Second, the proposed rule may impose costs upon all consumers, or impede cost reductions for all consumers, for the benefit of a few who, in most cases with better management, should largely be able to avoid the difficulty in the first place. Rules that cater to undesirable conduct are productive of more of the same. Alternatively, this proposal may increase costs for secured parties who, even if they can pass them on, may be reluctant to do so for competitive reasons, and the provision intrudes upon the ability of a secured party to work with its debtor, which there is every incentive to do without legislative prompting or regulation. For the above reasons, this recommendation is likely to cause, at the very least, delay in enactability. Finally, to the extent this recommendation is not adequately supported by available evidence as to possible benefits, its adoption can be cited as evidence that the process for deciding which special consumer provisions are selected is arbitrary rather than principled. That perception could undermine the necessary support for other recommendations. Thus, very careful consideration should occur before this recommendation is adopted.

On the other hand, the Article 2 recommendations for special consumer provisions at present do not include a provision for reciprocal attorneys' fees for a prevailing consumer, unlike in the case of Article 9.¹³² Such an additional provision would be consistent with the standard of enactability. Consumers would be supportive,¹³³ but so should creditors for several reasons. For one reason, such a remedy will prompt better policing of the occasional bad actor to the competitive benefit of creditors who do business

132. The Article 2 subcommittee report states, "One possibility offered is to establish a remedial structure, including attorneys' fees for successful consumer litigants. While this type of fresh thinking has considerable merit, the subcommittee believes that the approach of the drafting committee, which observes the structure and history of Article 2, is preferable." Art. 2 Subcomm. Report, *supra* note 94, at 3. The discussion in this Article suggests that this conclusion is ill-advised. Particularly with respect to the approach of Article 2 in relying on general rules to be sensibly applied by courts, an effective means of achieving that goal is in keeping with the structure and history of Article 2.

133. Consumer groups believe the rights and remedies now available in Article 2 are important. They believe, at a minimum, attorneys' fees and costs should be included as consumers' remedies under Article 2. Coupled with provisions recommended for Article 2 to keep other remedies free of waivers and limitations, and limited protective provisions like proposed section 2-206 and further safeguards against surprising disclaimers, consumer support is better assured. *See* Rosmarin, *supra* note 96.

on fair and decent terms. Second, if there is a viable means for enforcing the considerable rights afforded by Article 2, it will reduce the pressure for additional special consumer provisions of a prophylactic nature that will inevitably carry the detrimental effects of nonvariability and inflexibility inherent in such provisions and possibly reduce the additional burden of uncertainty of contract. Finally, stronger enforcement measures will tend to focus the resultant additional costs on the creditors who generate them, rather than on all creditors through additional compliance burdens imposed upon them.

III. CONCLUSION

In the final analysis, the current recommendations concerning special consumer provisions in relation to revised UCC Articles 2 and 9 appear to hold considerable promise for the future of these two important statutes. The recommendations, with the possible exception of the right to reinstate in Article 9, and with the addition of a reciprocal attorneys' fee provision in Article 2, basically are consistent with the policy objectives and the structure of the present Code, or clarify areas that have proven troublesome in ways that are defensible. Overall, the recommendations have the potential to reduce litigation and transaction costs. The recommendations also are modest in scope and detail, and thus should be eminently enactable. Moreover, what is apparent is that the failure of interested parties to embrace these recommendations, or a set of special consumer provisions very much like them, will be fatal to the uniformity, the enactability, and thus, the continued viability of what has been termed, with perhaps only slight overstatement, "the grandest achievement of all time in the history of private statute lawmaking."¹³⁴

134. 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 7 (student ed. 3d ed. 1988).

