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THE CHANGED (AND CHANGING?) UNIFORM COMMERCIAL CODE

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THE CHANGED (AND CHANGING?) UNIFORM COMMERCIAL CODE*

LARRY T. GARVIN**

* Adapted, with apologies, from the excellent ALI-ABA series. *See, e.g.*, THE EMERGED AND EMERGING NEW UNIFORM COMMERCIAL CODE 283 (ALI-ABA Course of Study, Dec. 9-11, 1993).

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I. INTRODUCTION

The Uniform Commercial Code of today is not the Uniform Commercial Code of our youth, or, in any event, of those halcyon days before law school. By now, almost every article has been revised at least once, and the last holdouts—Articles 1 and 2—are even now being changed, and will reach final form in a year or so.[1] Indeed, we even have two new articles, covering leases of personalty and electronic funds transfers, and a new article on licensing may come forth in 2000.[2]

The last decade has proven especially active. Since 1990, most of the Code has been revised or written anew, including those parts now under change. State legislatures have been busy keeping up with the onslaught of revised articles, new articles, and conforming amendments; law professors have come out with many profitable new editions of casebooks; practitioners have attended countless slumbrous CLE sessions in which the new rules were more or less explained. If only through revision, commercial law is a growth industry.

Florida has taken part in this rather narcotic revolution, enacting, sooner or later, the revisions that the indefatigable National Conference of Commissioners on Uniform State Laws (NCCUSL) fling forth.[3] Still, Florida, whether a leader or a laggard, has retained its taste for uniformity and eventually has always rejoined the parade, with only occasional dirty glances from states that have marched along earlier.

The Florida Legislature's most recent foray into the U.C.C. was last session's enactment of two revisions: those of Article 2A, governing leases of personal property, and 8, governing the transfer of investment securities.[4] This foray provides the excuse, such as it is, for this

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1. Article 7, on warehouse receipts and bills of lading, will not be revised in the short run. An ABA task force recently examined Article 7, concluding that no substantial overhaul was in order. In addition, the task force thought changes in the corresponding federal statutes perhaps desirable, but also perhaps infeasible. Finally, there were uncertainties as to the path electronic commerce might take and thus whether revision was yet appropriate. Accordingly, the Permanent Editorial Board of the U.C.C. decided not to recommend revision of Article 7 at present. *See* Fred H. Miller, *Et Sic Ulterius—V*, UCC BULL., Feb. 1998, at 1, 7.

2. *See infra* Part IV.C.

3. Usually later. For the most recent set of revisions, for instance, Florida was the next-to-last state to operate under the old version of Article 2A, and one of only six to operate under the old Article 8. *See* Miller, *supra* note 1, at 3-4.

4. *See* Act effective Oct. 1, 1999, ch. 98-11, 1998 Fla. Laws 105 (codified at FLA. STAT. chs. 678, 680 (Supp. 1998)). Governor Chiles, presumably preferring not to take a public stand on so fraught an issue, allowed the bill to become law without his signature. *See id.* at 161.

In the enactment of revised Articles 2A and 8, the Legislature put in place one nonuniform amendment to Article 9. Section 9-105(1)(e) of the Official Text, defining deposit account, had excluded "an account evidenced by a certificate of deposit." U.C.C. § 9-105(1)(e)

Article (such as *it* is). Part II discusses Article 2A, while Part III discusses Article 8. These two parts explain how each revision changes the law in its field, noting both the improvements and the possible pitfalls of the revisions and, in an exercise of the usual professorial prerogative, showing how much better each would have been if only someone had asked me first.

In addition, Parts II and III will discuss briefly how each revision came about. Each exemplifies a sort of statutory pathology, whether of NCCUSL, the several states, or some other force. One wonders, I suppose, about an Article that needed significant revision almost within minutes of its proposal to the states, or of another which boldly charted a course that the world blithely ignored. From these one may draw morals about future attempts at statutory development.

Finally, Part IV will canvass briefly the work ahead. Despite its recent spate of enactments, Florida still has not enacted revised Article 5, on letters of credit, which was proposed to the states in 1995 and which has been adopted in thirty-two.[5] In addition, three more articles are on the way: revised Article 9, governing secured transactions, which was approved by NCCUSL and the American Law Institute (ALI) in 1998 and which has just been put in final form; revised Article 2, on sales of goods, which should be ready for approval in 1999 and proposal in 2000; and new Article 2B on licenses, which may be ready in 2000 or 2001. This last part will contain a few general assessments

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(1995). The Florida amendment revised the definition to exclude "an account evidenced by a transferrable certificate of deposit that is an instrument within this article." FLA. STAT. § 679.105(1)(e) (Supp. 1998). The effect of this is to place nontransferable certificates of deposit potentially within the scope of deposit accounts, which are not governed by Article 9. *See* U.C.C. § 9-104(*l*) (1995). If a nontransferable certificate of deposit is not governed by Article 9, then a security interest in it can be perfected only under the common law rule of giving notice to the depository bank. *See, e.g.*, Bank of Winter Park v. Resolution Trust Corp., 633 So. 2d 53, 55 (Fla. 5th DCA 1994).

It is hard to see why this amendment was put in place. A certificate of deposit, even if nontransferable, may still be an instrument, a security interest in which can be perfected by possession under Article 9. *See* U.C.C. § 9-305 (1995). This conclusion was easier to reach until the recent revision of Article 3, adopted in Florida, which narrowed the definition of negotiable instrument to exclude nontransferable certificates of deposit. *See id.* § 3-102(a). Even under the revised version, though, a number of courts have held that nontransferable certificates of deposit are instruments under the broader definition in Article 9. *See, e.g.*, Craft Prods., Inc. v. Hartford Fire Ins. Co., 670 N.E.2d 959, 961 (Ind. Ct. App. 1996); Belke v. M&I First Nat'l Bank, 525 N.W.2d 737, 738 (Wis. Ct. App. 1994). Indeed, an earlier decision of the Florida Supreme Court, made when Florida still had old Article 3, held the very same thing. *See* Citizens Nat'l Bank v. Bornstein, 374 So. 2d 6, 9-10 (Fla. 1979). If the amendment was intended to remove nontransferable certificates of deposit from Article 9, then it fails at the job; a better way to have done so would have been to redefine "instrument" within Article 9 to exclude these as well. Still, the amendment seems harmless, especially because a new Article 9 is on the way and will likely be enacted in Florida in the next few years. *See infra* Part IV.B. If this amendment was the price of gaining the support of certain parts of the banking industry for these U.C.C. revisions, then it was well worth it.

5. *See, e.g.*, Miller, *supra* note 1, at 4. Thirty-two states had enacted Revised Article 5 as of early 1998; others will likely have enacted it by the time this Article goes to press.

and thoroughly unreliable predictions about the fate, deserved or not, of each. In addition, Part V will suggest some changes in both Florida's treatment of uniform legislation and the treatment of uniform legislation generally. Now on with the festivities.

II. ARTICLE 2A

A. Background

The U.C.C., and uniform law generally, has had rather a troubled relation with the law of personal property leasing. In the early days B.L. (Before Llewellyn), the field was left almost entirely to the common law of the several states (and, before *Erie*,[6] to the general federal common law as well). Llewellyn, generally something of an imperialist for his commercial code, left leasing alone. This is not to say that the U.C.C. had no effect on lease law; a good many courts chose to apply the principles of Article 2 by analogy.[7] Still, others did not, and few enough did that leasing law remained variant.[8]

This might not have been troubling if leasing of personalty had remained either inconsequential or fundamentally local. If the former, uniformity would hardly be worth the effort.[9] If the latter, then codification might be in order, but uniformity might not; a model statute, rather than a uniform statute, might be as far as one would want to go. Neither proved true. Personal property leasing has burgeoned over the last couple of decades. By 1987, when Article 2A was first proposed, almost 100 billion dollars in equipment was added through leasing.[10] The current estimates for 1998 are over 180 billion, in each case around thirty percent of total business investment in equip-

6. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

7. *See, e.g.*, W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98, 99-100 (Fla. 1970); Redfern Meats, Inc. v. Hertz Corp., 215 S.E.2d 10, 15-17 (Ga. Ct. App. 1975); Glenn Dick Equip. Co. v. Galey Constr., Inc., 541 P.2d 1184, 1188-89 (Idaho 1975); *see also, e.g.*, Amelia H. Boss, *Panacea or Nightmare? Leases in Article 2*, 64 B.U. L. REV. 39 (1984); William D. Hawkland, *The Impact of the Uniform Commercial Code on Equipment Leasing*, 1974 U. ILL. L.F. 446; Daniel E. Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971). This application was more or less authorized in the comments to the statute, though rather coyly. *See* U.C.C. § 1-102 cmt. 1 (1995) (stating that courts "have recognized the policies embodied in an act as applicable in reason to subject-matter which was not expressly included in the language of the act . . . . Nothing in this Act stands in the way of the continuance of such action by the courts.").

8. *See, e.g.*, DeKalb Agresearch, Inc. v. Abbott, 391 F. Supp. 152, 153-54 (N.D. Ala. 1974); Alpiser v. Eagle Pontiac-GMC-Isuzu, Inc., 389 S.E.2d 293, 294-95 (N.C. Ct. App. 1990); W.R. Weaver Co. v. Burroughs Corp., 580 S.W.2d 76, 81 (Tex. Civ. App. 1979).

9. This evidently is why leasing was not codified when the U.C.C. was first drafted. *See* WILLIAM H. LAWRENCE & JOHN H. MINAN, THE LAW OF PERSONAL PROPERTY LEASING ¶ 1.01 (1993).

10. *See* U.S. DEP'T OF COMMERCE, U.S. INDUSTRIAL OUTLOOK 1992, at 52-1 (1992).

ment.[11] In addition, leasing is very much a multi-state affair, as a visit to any airport will suggest. Codification was thus in order.

NCCUSL thus started drafting a Uniform Personal Property Leasing Act in 1981.[12] This model statute was approved by NCCUSL in 1985; immediately after, though, it was suggested that the Act be folded into the U.C.C, which took another two years.[13] We thus saw the first new article for the U.C.C. since its initial proposal: Article 2A on personal property leasing. At least one symposium, and a good many articles in a range of legal periodicals, heralded its advent.[14] A number of states quickly considered it, and a few adopted it posthaste.

Almost from the first, though, Article 2A proved troublesome, or perhaps the states did. A State Bar of California study recommended a good many nonuniform amendments to Article 2A.[15] The California Legislature passed Article 2A with quite a few of these and added some of its own.[16] Similarly, Massachusetts took many of the California changes, revised them, and added a few more.[17] Other jurisdictions, with or without encouragement from bar associations and law review commissions, followed along.[18] On the other hand, other jurisdictions, starting with Oklahoma, enacted the 1987 Official Text as is.[19] Florida adopted the original version of 2A in 1990, following California and Massachusetts in part and adding a few original variants.[20]

Even as Florida enacted the 1987 version, though, NCCUSL was hard at work amending the 1987 text to take account of these criticisms. NCCUSL was worried—and rightly so—that the California/Massachusetts approach would engulf the uniform version.[21] Ac-

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11. *See* U.S. DEP'T OF COMMERCE, U.S. INDUSTRY & TRADE OUTLOOK 1998, at 47-17 (1998). These totals exclude short-term equipment leases and consumer leases. *See id.*

12. *See, e.g.*, Amelia H. Boss, *The New [1990] Article 2A: Leases*, *in* THE EMERGED AND EMERGING NEW UNIFORM COMMERCIAL CODE 283, 283 (ALI-ABA Course of Study, Dec. 9-11, 1993).

13. *See id.*

14. The symposium is Symposium, *Article 2A of the Uniform Commercial Code*, 39 ALA. L. REV. 559 (1988). Many of the pieces in this symposium are cited to in this Article.

15. UNIFORM COMMERCIAL CODE COMMITTEE, STATE BAR OF CALIFORNIA, REPORT ON PROPOSED CALIFORNIA COMMERCIAL CODE DIVISION 10 (ARTICLE 2A) (1987), *reprinted in* Harry C. Sigman & Jeffrey S. Turner, *Preface to the California Report on Article 2A (With Some Thoughts About Participation in the Legislative Process)*, 39 ALA. L. REV. 975, 979-1049 (1988) [hereinafter *California Report*].

16. CAL. COM. CODE §§ 10101-10532 (West 1990).

17. *See, e.g.*, Daryl B. Robertson, *Report of the Commercial Code Committee of the Section of Business Law of the State Bar of Texas on UCC Article 2A*, 43 BAYLOR L. REV. 235, 237 (1991).

18. *See, e.g.*, Boss, *supra* note 12, at 283; Robertson, *supra* note 17, at 237-38.

19. *See* Act effective Nov. 1, 1988, ch. 86, 1988 Okla. Sess. Laws 1683 (current version at OKLA. STAT. ANN. tit. 12A, §§ 2A-101 to 2A-532 (West 1998)).

20. *See* Act effective Jan. 1, 1991, ch. 90-278, 1990 Fla. Laws 2114 (current version at FLA. STAT. ch. 680 (1997)).

21. *See, e.g.*, Fred H. Miller, *The Uniform Article 2A Amendments and the National Conference of Commissioners on Uniform State Laws After One Hundred Years*, 45 CONSUMER FIN. L.Q. REP. 193, 193 (1991).

cordingly, the Standby Committee on Article 2A consulted with those involved with the California and Massachusetts efforts, as well as others, with an eye toward preserving uniformity and accommodating the policy differences contained in the amendments.[22] As a result, NCCUSL put forth a set of amendments to some twenty-four sections of Article 2A, taking into account many of the changes proposed elsewhere and adding a few new ones. Had Florida waited one legislative session, it could have put in place the now-uniform version.[23] Still, here we are. Better late, etc.

What follows in this Part is a look at the principal changes to Florida's version of Article 2A made by the recent amendments. This is not the same as a comparison of the 1987 and 1990 versions of Article 2A. Florida's old version and the 1990 amendments have a common ancestor in the California/Massachusetts version, so many of the amendments did not change Florida law. Moreover, as will be discussed below, the recent amendments to Florida's Article 2A did not wipe out Florida's nonuniformity.[24] Rather, Florida moved from one nonuniform version to another, more uniform version. The comparison is the focus of what follows.[25]

B. New Article 2A

For the most part, the 1990 revisions to Article 2A left Article 2A intact. There were, however, some important revisions, particularly in the areas of finance leases, security interests in leasehold interests, and lease remedies. These will be dealt with in turn.

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22. *See id.* NCCUSL creates a Standby Committee whenever it sets forth a new statute. The Standby Committee watches over the statute and can recommend changes if the need arises. *See id.* at 193 & n.4.

23. To some extent, Florida already had. Insofar as the Florida adoption of the California/Massachusetts version merely anticipated the 1990 amendments, Florida's Article 2A has not changed in substance (though possibly in form). For example, the 1990 treatment of finance leases drew heavily on the California version and thus does not materially change Florida law. This Article will not discuss either unamended sections of Article 2A or, with a few exceptions, sections where Florida's nonuniform version agreed in substance with the 1990 amendments. For more on Florida's initial adoption of Article 2A, see James E. Foster & David G. Shields, *Personal Property Leasing in Florida: Moving 2A Uniform Treatment*, 18 FLA. ST. U. L. REV. 295 (1991).

24. *See infra* notes 151-159 and accompanying text.

25. This discussion has general application, though, because most of Florida's Article 2A is the same as the official 1990 version, just as most of its earlier version was the same as the official 1987 version.

One point of nomenclature and citation format. For ease in reference, this Article refers to the *Florida Statutes* only when looking at a nonuniform variant of Article 2A. Otherwise, references to the current version of Article 2A are to the 1995 Official Text, and references to the older version are to the 1987 Official Text (and are so designated in each footnote).

1. Finance Leases

Most leasing occurs when a lessor in possession of goods grants use of the goods to a lessee for consideration. At times, though, the lessor does not own the goods that the lessee wishes to rent. The lessee typically wishes to arrange for the goods directly with a supplier; the lessor essentially just finances the purchase of the goods, though it does take title plus a residuary interest in the goods themselves. This transaction is analogous to a purchase money security agreement: the lessor here is in the same position as the bank or other third-party creditor in the purchase money situation. Here, too, the lessor is usually a financial institution.

These transactions are finance leases. They involve three parties—the supplier, the finance lessor, and the finance lessee—and two contracts—the supply contract and the lease contract. Though Article 2A usually follows Article 2 closely, here there are strong Article 9 overlays. Perhaps in part for this reason, Article 2A has a number of special rules for finance leases that recognize the limited role of the finance lessor in the transaction. To be sure, as the Chief Reporter for Article 2A observed, special provisions really were not necessary; if the finance lessor wanted to limit its potential liability, it could do so using conventional disclaimers.[26] These consensual finance leases were common before Article 2A and were in no way impeded by its enactment.[27] Still, finance leases are important enough, and the finance leasing industry obdurate enough, that these provisions exist as safe harbors.[28]

The original finance lease provisions garnered some criticism, for the most part because their scope was, in the eyes of the finance leasing industry, unduly narrow. The original definition required that the finance lessee either receive a copy of the supply contract before signing the lease contract or approve the supply contract as a condition to the effectiveness of the lease contract.[29] Some finance lessors objected because they did not want to reveal the full supply contracts to their lessees. Accordingly, the definition was amended to allow more limited information to be transmitted.[30] Florida helped lead the way here; its

26. *See* Edwin E. Huddleson, III, *Old Wine in New Bottles: UCC Article 2A-Leases*, 39 ALA. L. REV. 615, 661 & n.151 (1988). Huddleson thus characterized the finance lease provisions of Article 2A as "a sop to industry." *Id.* at 661.

27. *See, e.g.*, 2 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 13-3(a) (4th ed. 1995).

28. As of 1995, leaving aside short-term rentals, finance leases governed 87% of the cost of equipment subject to commercial leases. *See* U.S. DEP'T OF COMMERCE, U.S. INDUSTRY AND TRADE OUTLOOK 1998, at 47-16 (1998).

29. *See* U.C.C. § 2A-103(g)(iii) (1987).

30. *See* U.C.C. § 2A-103(g)(iii) (1995); *see also* Miller, *supra* note 21, at 193-94.

version of Article 2A has had substantially similar language since its initial enactment.[31] The change is thus purely stylistic.

There are other changes to finance lease provisions in the 1990 version of Article 2A, most of which are either issues of style or, like the definition of finance lease, are present already in Florida's version of Article 2A.[32] Two fall into neither category, and merit brief attention. First, the 1990 amendments clarified the treatment of "hell or high water" clauses in finance leases. These picturesquely named clauses provide that the lessee is obliged to perform under the lease, regardless of the lessor's non-performance, once the lessee has accepted the goods. These are standard in finance leases because the quality of the leased goods is the responsibility of the supplier, whose warranties extend through the lessor to the finance lessee.[33] If the finance lessee is dissatisfied, it may go after the supplier; it must, however, continue to pay the finance lessor. Hell or high water clauses were statutorily put in place for nonconsumer finance lessees in the 1987 version of Article 2A.[34] The 1990 amendment was intended to clarify that hell or high water clauses in other sorts of lease agreements, most notably consumer leases, might be attacked under other law (mainly unconscionability).[35] By its terms, though, the amendment applies to all lease agreements, including contractual finance leases, which leaves open an attack on their validity.[36] Second, the finance lessee, if not also a consumer lessee, may revoke its acceptance of the leased goods if the lessor defaults under the lease contract and that default substantially impairs the value of the goods to the lessee.[37] Hitherto, the statute was silent on whether the finance lessor's failure to comply with its duties under the lease agreement would allow the finance lessee to revoke. As it stands, unless the lease agreement provides otherwise,[38] the finance lessee may revoke only if the goods are nonconforming, the nonconformity substantially impairs their value to the lessee, and the fi-

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31. *Compare* FLA. STAT. § 680.1031(1)(g)(3)(c)-(d) (1991) *with* FLA. STAT. § 680.1031(1)(g)(3)(c)-(d) (1997).

32. Another example of the latter is U.C.C. § 2A-209, the amendments to which made clearer the extent to which the finance lessee retained rights it may have had under agreements between it and the supplier. Florida already had in place a nonuniform amendment that did this, so Florida law is not changed by the advent of uniformity. *See* FLA. STAT. § 680.209 (1997).

33. *See* U.C.C. § 2A-209 (1995).

34. *See* U.C.C. § 2A-407(1) (1987). This reflected the main body of caselaw under the common law of leases. *See, e.g.*, West Virginia v. Hassett (*In re* O.P.M. Leasing Servs., Inc.), 21 B.R. 993, 1006 (Bankr. S.D.N.Y. 1982); U.S. Roofing, Inc. v. Credit Alliance Corp., 279 Cal. Rptr. 533, 544-46 (Cal. Ct. App. 1991).

35. *See* U.C.C. § 2A-407(3) & cmt. 6 (1995); *see also id.* § 2A-108 (1995).

36. The provision states, in pertinent part, that "[t]his section does not affect the validity under any other law of a [hell or high water clause] in any lease contract . . . ." *Id.* § 2A-407(3); *see also, e.g.*, 2 WHITE & SUMMERS, *supra* note 27, at 504.

37. *See* U.C.C. § 2A-517(2) (1995).

38. *See id.* § 2A-517(3).

nance lessee's failure to detect the nonconformity was induced by the lessor's assurances.[39]

Because the adoption of the 1990 amendments swept away a Florida nonuniform amendment, one other section should be mentioned. Under both the 1987 and 1990 texts, finance lessees could not revoke their acceptances of leased goods if they knew of a nonconformity in the goods at the time of acceptance.[40] In contrast, Florida did not apply this blanket prohibition to consumer finance lessees where the supplier helped prepare the lease contract or helped the finance lessor negotiate the terms with the lessee.[41] This twist was sensible, given the greater rights elsewhere afforded the consumer finance lessee and the limits placed on even the consumer finance lessee's ability to revoke for minor nonconformities. One can easily imagine that a finance lessee might choose not to reject because, say, of an immediate need for the goods, or because of a lack of time to go through the rejection machinery, or because the lessee acted through an agent with power to accept, but no power to reject (as, for example, a spouse or older child). In any event, the nonuniform amendment is gone; a victory for uniformity, if not for merit.

2. *Security Interests and Leaseholds*

One might expect a commercial lessor to acquire its leased goods using borrowed funds. If the funds were advanced in order to purchase the goods, then the lender would take a purchase money security interest in the goods. Alternatively, or in addition, the lessor might pledge its assets, including leased goods, to a bank or other creditor as security for a line of credit. In either case, one might envisage a conflict if the lessor defaults. The secured creditor doubtless will wish to assert its rights under its security agreement, presumably including repossession under Article 9. On the other hand, the lessee has a leasehold interest, perhaps prepaid, but in any event contractual. Who prevails?

Under both versions of Article 2A, large classes of lessees would prevail. Like buyers in the ordinary course of business, lessees in the ordinary course of business take their leasehold rights free of any prior security interest, whatever the state of perfection or knowledge.[42] Even lessees not in the ordinary course would usually prevail under either version. The general rule provides that "a creditor of a lessor takes subject to the lease contract."[43]

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39. *See id.* § 2A-517(1)(b).

40. *See id.* § 2A-516(2).

41. *See* FLA. STAT. § 680.516(2) (1997).

42. Of course, the lessor retains a residual interest in the leased goods, and can repossess them and dispose of them at the end of the lease term.

43. U.C.C. § 2A-307(2).

There are exceptions, though. The 1987 and 1990 texts share one: if the creditor's lien attached to the goods before the lease contract became enforceable, then the lien creditor will prevail.[44] This does not help secured creditors, as the definition of "lien" excludes them,[45] but will help involuntary lien creditors—materialmen, mechanics, and the like, as well as the garden-variety judgment lien creditor.[46] In contrast, the exceptions for secured creditors were revised significantly, and bear attention.

Originally, secured creditors prevailed over lessees not in the ordinary course only if the security interest would have priority over a properly perfected security interest taking effect when the lease contract was made.[47] The lessee thus resembled the hypothetical lien creditor of the Bankruptcy Code, which sets the trustee's power to avoid other claims on assets of the estate.[48] This created some odd results. For example, as Professor Harris has pointed out, the 1987 text did not state which type of hypothetical lien creditor the lessee would be. If, for example, the lessee hypothetically held a purchase money security interest, then it would have a superpriority over earlier secured creditors.[49] The Official Comment to section 2A-307 stated that the lessee ought not be considered a purchase money secured creditor, but its rationales were not wholly convincing.[50] Apart from this statutory omission, though, the rule was rather arbitrary. The lessee would, by its operation, prevail against the holder of an unperfected security interest, even though a buyer often would not.[51] On the other hand, if the secured creditor filed before the lease contract took effect, but cre-

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44. *See id.* § 2A-307(2)(a).

45. *See id.* § 2A-103(1)(r).

46. Statutory lien creditors also take solace from section 2A-306, which, like section 9-310 for secured creditors, gives priority to liens taken by those who furnish services or materials for goods covered by a lease contract unless the law giving rise to the lien provides otherwise. This section was not changed in the 1990 amendments.

47. *See* U.C.C. § 2A-307(2)(b) (1987). This leaves aside section 2A-308, which allows a creditor, secured or otherwise, to treat a lease contract as void if either the lessor's continued possession of the goods or the lease itself would be fraudulent under other law. An exception is carved out for sale-leaseback arrangements, under which the seller retains possession under a lease contract between the buyer as lessor and the seller as lessee. As long as the buyer gave value and bought in good faith, such a transaction is not fraudulent, notwithstanding section 2-402.

48. *See* 11 U.S.C. § 544(a)(1) (1994); *see also* Steven L. Harris, *The Rights of Creditors Under Article 2A*, 39 ALA. L. REV. 803, 819 (1988).

49. *See* U.C.C. § 9-312(3) (1995).

50. *See* Harris, *supra* note 48, at 819-20 & n.62. Perhaps the best reason is analogy; the bankruptcy trustee is not considered a purchase money creditor either.

51. Holders of perfected security interests prevail over holders of unperfected security interests, even if the unperfected security interests arose before the perfected security interests. *See* U.C.C. §§ 9-301(1)(a), -312(5) (1995). On the other hand, buyers take free of unperfected security interests only if they are in ordinary course, *see id.* § 9-307(1), or if the buyer, though not in ordinary course, gave value and took delivery without knowledge of the security interest and before perfection. *See id.* § 9-301(1)(c). *See generally* Harris, *supra* note 48, at 820-21.

ated the security interest after, the secured creditor would prevail because perfected security interests in goods ordinarily derive priority from the time of filing or perfection, whichever is earlier.[52]

These results were, to a point, smoothed out by the 1990 amendments.[53] Now the lessor's secured creditor takes subject to the lease contract unless the lessee knew of the security interest when it gave value and took delivery (or, *a fortiori*, if it did not give value or did not take delivery), or if the creditor's security interest was perfected before the lease contract became enforceable.[54] The first situation is probably inconsequential, though it is analogous to the rights of the buyer not in ordinary course under Article 9.[55] Only the rare lessee will either give no value[56] or leave the leased goods with the lessor (apart from returns of goods for temporary storage or repair). It is possible that a lessee not in the ordinary course would know generally that the lessor's goods would probably be subject to a security interest, but the U.C.C. defines knowledge strictly. Knowledge includes actual knowledge only—not constructive knowledge, not possibility, and not standard practice.[57] Combining the relative infrequency of leases not in ordinary course and the stringency of the knowledge provision, very few leases should remain.

The second situation—perfection before the lease contract becomes enforceable—is more likely. Purchase money secured creditors ordinarily will either prefile (so perfection will occur when the debtor acquires rights in the goods) or file shortly after the debtor takes control of the goods.[58] The lessee would thus almost certainly enter into the lease contract after the secured creditor had perfected its security interest. This might not be true when an ordinary lender takes equipment as collateral, as the equipment may already be subject to a leasehold. It will, however, be true much of the time, given that commercial leasing firms probably have lines of credit secured by floating

52. *See* U.C.C. § 9-312(5)(a) (1995).

53. These amendments derive largely from California's nonuniform enactment. *Compare* U.C.C. § 2A-307 (1995) *with California Report*, *supra* note 15, at 1016-24. Unfortunately, Florida chose to leave this out when it enacted much of the California text. Florida's adoption of the 1990 amendments thus changes Florida leasing law substantially.

54. *See* U.C.C. § 2A-307(2)(b), (c) (1995).

55. *See id.* § 9-301(1)(c).

56. Value includes promises of payment. *See id.* § 1-201(44). An executory lease contract thus gives value. Presumably a gratuitous bailment would not, but one would not expect to see these very often, neighborly loans of lawnmowers aside.

57. *See id.* § 1-201(25) (1995); *see also, e.g.*, Southland Corp. v. Emerald Oil Co., 789 F.2d 1441, 1445-46 (9th Cir. 1986) (holding, in the analogous context of section 9-301(1)(c), that there was no duty to make inquiries); Clark Oil & Ref. Co. v. Liddicoat, 223 N.W.2d 530, 535-36 (Wis. 1974) (same).

58. Most states have amended U.C.C. section 9-301(2) to allow 20 days to perfect purchase money security interests, the perfection to take effect retroactively. *See* U.C.C. § 9-301, 3A U.L.A. 14-15 (1992 & Supp. 1998) (listing 41 states that have adopted the 20-day standard).

liens in equipment. Still, this narrows the old rule because prefiled financing statements will not by themselves yield priority; only if there is actual perfection, which includes the taking of the security interest, will the secured creditor win.

Another scenario in which the 1990 amendments might affect the result arises when the lease contract antedates the lessor's acquisition of the goods. Even a prefiled financing statement will not give rise to a perfected security interest until the secured creditor's rights attach, which may not occur until the debtor acquires rights in the goods.[59] If the lease contract took effect before then, the 1990 amendments would hold that the lessee would prevail. In contrast, under the 1987 version, the lessee was treated as a hypothetical lien creditor as of the date of the lease contract. Since the secured creditor's security interest would derive its priority from the time of filing, the secured creditor would have prevailed. To be sure, this fact pattern requires that the lease contract become enforceable before the leased goods are even in the hands of the lessor, much less delivered to the lessee. Still, one can anticipatorily breach any contract, including a lease contract, so this may not be chimerical.[60]

Which rule makes more sense? Probably the 1990 flavor. Lessees, like buyers, acquire at least partial rights in the goods. Both buyers and lessees might reasonably assume that their sellers or lessors maintain their inventory subject to loans of various types. Nevertheless, financers not just expect, but desire, that the collateral be alienated, in order that the debtor may pay off the loans. In order to ease these transactions, ordinary course lessors and buyers receive formidable rights.

Buyers and lessees who take out of the ordinary course, however, more properly suspect that the goods may carry encumbrances. Furthermore, the financers are less likely to want the debtors to dispose of the goods. By definition, a disposition not in the ordinary course of business is not part of the seller's or lessor's normal business.[61] Typically, a seller may sell off some fixtures or equipment, or may lease equipment that was purchased for the lessor's own use. If so, the proceeds of the disposition will likely not be as high as might be true of ordinary course transactions. This is not to say that secured parties would always object; better to dispose of unneeded equipment or the like at low prices if it would otherwise become valueless. Still, such transactions are often associated with failing businesses, and failing businesses often will take desperate steps in order to avoid bank-

59. *See* U.C.C. § 9-203(1)(c) (1995).

60. *See id.* § 2A-402 (anticipatory repudiation); *cf.* U.C.C. § 2-610 (1995) (same; sales of goods); RESTATEMENT (SECOND) OF CONTRACTS § 250 (1981) (same; common law).

61. *See* U.C.C. § 1-201(9) (1995) (buyers); *id.* § 2A-103(1)(o) (lessors).

ruptcy, even steps that their secured creditors would frown upon.[62] This may justify the harsher treatment of lessees and buyers out of the ordinary course.

But does this justify disparate treatment? The old rule subordinated lessees out of the ordinary course when the secured party had prefiled, presumably on the basis that the lessee had constructive notice of a security interest. Though a financing statement does not necessarily betoken a security agreement, it often does, and the lessee might thus be alerted of its need to search further. But why would a lessee, even out of the ordinary course, expect to search? The transience of leaseholds further undercuts the apparent need to search. Finally, the 1987 version's analogy to bankruptcy is peculiar, to say the least. Creditors may not, among other things, take or perfect security interests after the filing of a bankruptcy petition.[63] But no such rule prevents a creditor from taking a security interest in goods after a lease contract is signed.

Perhaps, in the end, the real virtue of the amendment is uniformity. Now buyers and lessees are treated in the same way. True, one can concoct odd hypotheticals in which a crafty creditor hoodwinks lessees into renting from the debtor/lessor, and then contrives to get superior rights. For the most part, these might best be left to professors in desperate search of exam questions. The 1990 amendments reject the false analogy to bankruptcy and adopt instead a truer analogy to Article 2. That should suffice.

3. *Lease Remedies*

Article 2A's remedial provisions were quite controversial when Article 2A was first put forth, drawing fire from, among others, the California Bar[64] and academic commentators.[65] They were thus redrafted extensively; though they remain imperfect, they have received at least the moderate endorsement of many.[66] Both the 1987 and 1990 versions

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62. After all, failing firms present a classic moral hazard problem. Secured creditors of failing firms logically wish to maximize the value of their collateral, which probably means avoiding desperate and risky maneuvers. Equity holders, on the other hand, will lose all in case of bankruptcy, so they have an incentive to take risks with the funds they have received through secured credit. *See, e.g.*, Larry T. Garvin, *Credit, Information, and Trust in the Law of Sales: The Credit Seller's Right of Reclamation*, 44 UCLA L. REV. 247, 285-86, 309-11 (1996).

63. *See* 11 U.S.C. § 362(a)(3)-(5) (1994).

64. *See California Report*, *supra* note 15, at 1030-46.

65. *See, e.g.*, Marion W. Benfield, Jr., *Lessor's Damages Under Article 2A After Default by the Lessee as to Accepted Goods*, 39 ALA. L. REV. 915 (1988); Michael J. Herbert, *A Draft Too Soon: Article 2A of the Uniform Commercial Code*, 93 COM. L.J. 413 (1988); Donald J. Rapson, *Deficiencies and Ambiguities in Lessors' Remedies Under Article 2A: Using Official Comments to Cure Problems in the Statute*, 39 ALA. L. REV. 875 (1988).

66. For example, Professor Herbert, who had excoriated the 1987 version. *Compare* Michael J. Herbert, *Getting Better All the Time: The Official (Revised) Remedy Provisions*

draw heavily on Article 2 concepts, and often language, which at times may yield obscure and odd results. But now for the changes.

(a) Entitlement to Remedies

An important area that underwent some change is default. This is dealt with in sections 2A-508 to 2A-517. One change reverses what looked like a departure from the Article 2 analogue. Section 2A-508(4), dealing with the lessee's remedies, states in both versions that the lessee may recover damages if the lessor breached a warranty. This hardly needed saying, given that section 2A-508(1) grants the lessee a right to a remedy if the lessor fails to comply with the lease agreement.

The comment, though, shifts interestingly. Originally, it provided that a lessor's breach of warranty might not result in default "unless the breach is material."[67] This appears to put in place the material breach rule familiar in the common law.[68] Article 2, in contrast, uses a perfect tender rule for rejection, though one subject to a good many exceptions.[69] The drafters stated no reason for this change. Perhaps they felt that an ongoing relation like a lease should not be subject to rescission for a minor defect, even if subject to a right of cure.[70] This may well be a valid point for long-term leases, but it deprives the lessee of a powerful bargaining tool in forcing the lessor to provide the promised goods. In any event, the 1990 comment states that a breach of warranty "may not rise to the level of a default by the lessor justifying revocation of acceptance."[71] This changes nothing; it merely adverts to the revocation rules of section 2A-517, based closely on Article 2, which limit the lessee's rights to revoke its acceptance of nonconforming goods unless, among other things, the value of the good is substantially impaired.[72]

Beyond this, the statute was amended to make clearer that the parties may define default as they like and may thus create their own rules about when they might claim remedies.[73]

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of the Uniform Commercial Code's Article 2A, 96 COM. L.J. 1 (1991) (favoring adoption), *with* Herbert, *supra* note 65 (favoring rejection or significant amendment before adoption).

67. U.C.C. § 2A-508 cmt. (1987).

68. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981); *see also, e.g.*, Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 890-91 (N.Y. 1921) (Cardozo, J.).

69. *See* U.C.C. § 2-601 (1995). For interesting discussions of the perfect tender and material breach rules, see William H. Lawrence, *The Prematurely Reported Demise of the Perfect Tender Rule*, 35 U. KAN. L. REV. 557 (1987); George L. Priest, *Breach and Remedy for the Tender of Nonconforming Goods Under the Uniform Commercial Code: An Economic Approach*, 91 HARV. L. REV. 960 (1978).

70. *See* U.C.C. § 2A-513 (1995).

71. *Id.* § 2A-508 cmt. 6.

72. *See id.* § 2A-517(1); *cf. id.* § 2-608(1) (sales of goods; analogous provision requiring substantial impairment for revocation).

73. *See id.* §§ 2A-508(1)(d), -523(1)(f), -523(3).

(b) Lessee's Damages

Assuming that the lessor has in some way defaulted on its obligations, then the lessee will likely be entitled to damages. How these are measured has proven vexing, whether under the 1987 version of Article 2A, Florida's old nonuniform version, or the recent amendments. Two sets of changes seem material: those to the lessee's restitutionary remedy, and those to the cover remedy.

i. Restitution

In the catalog of remedies available to the lessee, Article 2A once provided that the lessee could "recover so much of the rent and security as has been paid, but in the case of an installment lease contract the recovery is that which is just under the circumstances."[74] This apparently would allow the lessee to recover its full stream of payments, even if it had derived most of the value of the lease agreement. If, for example, the lessor under a five-year lease defaulted on its maintenance obligations under the lease in year three, the lessee probably could revoke its acceptance[75] and, under this section, recover its lease payments for the two or more years in which it had used the leased goods. Except for installment lease contracts,[76] the payments, if one takes the section literally, would not be offset by the value of the leased goods for the time of use. To be sure, the general rule of the U.C.C. limits damages to those necessary to put the breached-against party in the position it would have been in had the contract been performed in full.[77] Still, the narrow limitation of this principle to installment leases in this section might suggest that the lessee could gain through the lessor's breach.

This notion, though foreign to expectation, is not unknown at common law; restitution, as a good many famous cases have told us, is not limited by expectation.[78] The 1990 amendments, however, changed the text and comments to subordinate restitution more fully to expectation. The text now limits the lessee's recovery of its rent and security in all cases to that which is just.[79] Moreover, the comment clarifies the point by noting that the return of the lease payments may be reduced if the goods have been used while the lease payments were made.[80] As

74. U.C.C. § 2A-508(1)(b) (1987).

75. *See* U.C.C. § 2A-517(2) (1995).

76. Lease contracts under which separate lots of goods would be delivered and accepted separately. *See id*. § 2A-103(1)(i).

77. *See id*. § 1-106(1).

78. *See, e.g.*, United States v. Algernon Blair, Inc., 479 F.2d 638, 641 (4th Cir. 1973); Scaduto v. Orlando, 381 F.2d 587, 595-96 (2d Cir. 1967); *see also, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 373 cmt. d (1981).

79. *See* U.C.C. § 2A-508(1)(b) (1995).

80. *See id*. § 2A-508 cmt. 2.

has often been true over the last century: Expectation 1, Restitution 0.[81]

ii. Cover

Should the lessor breach, the lessee may wish to secure replacement goods and sue the lessor for the added cost, if any. Cover has long been a remedy available under Article 2, and Article 2A follows to some extent this statutory analogue.[82] This section was revised extensively in 1990, though, as we shall see, Florida had anticipated one of the amendments.

Cover is available when, on the lessor's breach, the lessee makes a substantially similar lease agreement for replacement goods in good faith and in a commercially reasonable manner.[83] Leaving aside for the moment just how one determines whether two leases are substantially similar,[84] what is the remedy? Besides the usual incidental and consequential damages, the lessee gets, put in the most general way, the difference between the cover price and the contract price, as in Article 2. How this difference is measured has changed with the drafts.

Originally, the lessee would receive the present value, as of the date of default, of the difference between the rent for the lease term of the new agreement and the total rent for the balance of the lease term under the old lease.[85] If a cover lease was longer than the original

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81. Restitution may be coming back, though. The ALI has started work on a *Restatement (Third) of Restitution* (though, oddly, there is no *Restatement (Second) of Restitution*). *See* Herbert P. Wilkins, *Foreward*, 26 HOFSTRA L. REV. 567, 570-71 (1998). The literature also shows a boom—well, a boomlet—of restitutionary scholarship. *See, e.g.*, HANOCH DAGAN, UNJUST ENRICHMENT (1997); LORD GOFF OF CHIEVELEY & GARETH JONES, THE LAW OF RESTITUTION (4th ed. 1993); Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191 (1995). Stay tuned for late-breaking developments.

82. *See* U.C.C. § 2A-518 (1995); *cf. id.* § 2-712.

83. *See id.* § 2A-518(2). If the lessee purchases goods as cover, it must proceed under the contract-market measure of § 2A-519. *See id.* § 2A-518 cmt. 2. This may be too narrow an approach. By definition, a lease may not encompass the whole economic life of the leased goods, so ordinarily purchase will give the lessee more than it had under the lease. *See id.* § 1-201(37)(1st a). If, however, the leased goods were new, and the lessee covered by buying used goods, the lessee might purchase goods with a useful life no greater than that under the breached lease agreement. The lessee might alternatively purchase new goods and then sell the goods as used at the end of the period of the breached lease. Finally, the lessee could simply retain the goods, with the remaining value deducted from the damages award. Under any of these scenarios, purchase would plausibly cover for a breached lease; Article 2A's failure to recognize this remains a problem, even after the 1990 amendments.

84. The term "substantially similar" goes largely undefined in the comments. *See* Herbert, *supra* note 65, at 445-48 (attacking comments as "verbose" and a "tautological mess"). In fairness, the comments were later revised, and now are somewhat clearer, though still a trifle vague.

85. *See* U.C.C. § 2A-518(2) (1987). This is not quite Florida's old text. Leaving aside differences of style, Florida measured present value from the commencement of the term of the cover lease, rather than from the date of default. *See* FLA. STAT. § 680.518(2) (1997). This change was adopted in the 1990 amendments—and a good thing, too, because using

lease, the whole of the cover period would be used to calculate damages.[86] The lessee might thus have received gratis the benefit of the goods for the additional period.[87] Now, however, damages are calculated using the rent under the cover lease for the period comparable to the unexpired term of the old lease.[88] This does not mean that the old and new leases must be identical; the new lease might begin and end earlier or later without thereby becoming incomparable.[89] It does, however, avoid giving the lessee a longer lease term than the lessee had originally bargained for.

Another change is a bit obscure, but helpful. The method of calculation has changed from the present value of the difference between the cover price and the contract price[90] to the difference between the present values of the cover price and the contract price.[91] This change makes no difference if the old and new leases have identical payment schedules. The 1990 amendments, however, opened up the possibility that the terms might not coincide exactly. If they did not, it is hard to see how one would calculate the present value of the difference. One cannot use simple subtraction, because the payments would occur at different times. One would, I suppose, have to discount the later payment to the earlier time, and then subtract—and then do another present value calculation. Rather than add this possibility for error, the test was sensibly reframed.[92]

One final question is whether section 2A-518 is mandatory for lessees who cover with an appropriate lease.[93] Florida originally enacted a nonuniform amendment that gave the lessee a choice of remedy; if it covered, it could choose either the cover remedy or the remedy for retained goods.[94] By adopting the 1990 amendments, Florida moved from freedom to constraint. Now, if the lessee covers with an appropriate lease, section 2A-518 provides the sole measure of damages.[95]

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the date of default left the lessee uncompensated for the value of money between the date of default and the date it had to pay for the leased goods.

86. If the cover lease term differed too greatly from the term of the breached lease, though, the two leases might not be substantially similar; the lessee would then resort to damages under section 2A-519 (a contract-market measure, which would take no account of cover prices or extended durations).

87. One assumes, though, that the usual duty to mitigate, as well as the general rule of section 1-106, would cause set-off to the extent that the lessee derived benefit from the extended lease term.

88. *See* U.C.C. § 2A-518(2) (1995).

89. *See id.* § 2A-518 cmt. 7. There is, however, a strong suggestion in the comment that the comparable periods, whenever they begin or end, must be the same length. *See id.*

90. *See* U.C.C. § 2A-518(2) (1987).

91. *See* U.C.C. § 2A-518(2) (1995).

92. The same change was made to all the other damages measures, whether for lessees or lessors. *See id.* §§ 2A-519(1), -527(2), -528(1).

93. A lessee may cover by purchase; if so, the cover falls outside section 2A-518, and the remedy must be set by section 2A-519. *See id.* § 2A-518(1), (3).

94. *See* FLA. STAT. §§ 680.518(3), .519(1) (1997).

95. *See* U.C.C. § 2A-518(3) & cmt. 2 (1995).

(c) Lessor's Damages

These sections may have drawn the most fire of any in old Article 2A. Two articles, often critical, in the leading symposium on Article 2A were devoted to these sections,[96] and other commentary was almost uniformly negative.[97] Moreover, these sections are among the most Janus-faced in Article 2A. The damages measures, and many of the procedures involved in declaring a default, look to Article 2. On the other hand (face?), the lessor's permitted actions in retaking its rights in the goods resemble those allowed under Article 9. The union of these different approaches is inherent in the law of leases, but can lead to some tensions—tensions not always resolved in the 1990 amendments. The major changes are discussed below.

i. Re-Lease

After the lessee breaches, the lessor may dispose of the goods. Assuming, for the moment, that the lessor is able to re-lease the goods, it may choose between this section and the next—or perhaps not, depending on how one reads the fruits of a careless legislative error. Free election between these remedies is not found in the official text of Article 2A under either the 1987 or 1990 versions. In these, if the lessor sells the goods, or leases them in a manner not substantially similar to the breached lease, then the lessor must use contract-market damages.[98] If, on the other hand, the lessor re-leases the goods under a lease agreement that is substantially similar to the one breached, then the lessor is entitled to damages based on the difference between the rent under the old contract and the rent under the new contract, as well as any unpaid rent under the old contract and any incidental damages.[99]

Florida, however, allowed election of remedies when it enacted its variation of the 1987 text.[100] When it amended Article 2A, the Legislature changed only those subsections of the statute that were altered from one official version to the other. Because the election of remedies language in section 2A-527, providing damages for re-lease, was not changed in the 1990 official amendments, it was left untouched here, so election of remedies appears to persist.[101] But the corresponding

96. *See* Benfield, *supra* note 65, at 915; Rapson, *supra* note 65, at 875.

97. *See, e.g.*, *California Report*, *supra* note 15, at 1036-46; Herbert, *supra* note 65, at 450-58; Homer Kripke, *Some Dissonant Notes About Article 2A*, 39 ALA. L. REV. 791, 795-97 (1988).

98. *See* U.C.C. § 2A-527(3) (1995). These damages must be reduced by the amount gained through the disposition. *See id.* § 2A-523 cmt. 11; LAWRENCE & MINAN, *supra* note 9, ¶ 15.03[6][b].

99. *See* U.C.C. § 2A-527(2) (1995).

100. *See* FLA. STAT. §§ 680.527(3), .528(1) (1997).

101. *See* Act effective Apr. 14, 1998, ch. 98-11, § 43, 1998 Fla. Laws 105, 158 (amending FLA STAT. § 680.527(1),(2) (1997)).

language in the section governing contract-market damages was deleted because it was placed in a section that the 1990 amendments changed.[102] There, it would seem that there is no election. So whether there is election of remedies depends on whether one starts one's analysis with section 2A-527 or section 2A-528. One hopes that this sloppiness will be mended shortly, perhaps when Florida comes back to the U.C.C.[103]

Three substantial changes were made here by the 1990 amendments, all of which mirror changes made elsewhere. First, the unpaid rent is now measured as of the date of the new lease agreement, rather than the date of default—a change from the 1987 official text, but not from Florida's formerly nonuniform variation of it.[104] Second, the measure no longer compares the total rent remaining under the old and new agreements, but looks only at the total rent for the comparable periods of the old and new leases.[105] Third, the measure is no longer based on the present value of the difference between the two rents, but the difference of the present value of the two rents, a change which makes easier the calculation of damages when the two lease terms do not match up perfectly.[106]

ii. Contract-Market Damages

This measure, perhaps applying when the conditions for re-lease damages are not met,[107] was changed in what are by now familiar ways. The unpaid rent is measured from the date of the new lease, rather than the date of default, and the measure is based on the difference of the present values of the contract rent and the market rent, rather than the present value of the difference between the contract rent and the market rent.[108] There is, however, one change of some modest interest. In the original Article 2A, the hypothetical market rent was measured at the place for tender.[109] The new version measures this rent at the place where the goods are located.[110]

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102. *See id.* § 44, 1998 Fla. Laws at 159 (amending FLA. STAT. § 680.525(2), (3) (1997)).

103. There are other nonuniform amendments that survived the recent legislation, many both substantive and regrettable. *See infra* notes 151-158 and accompanying text.

104. *See* U.C.C. § 2A-527(2) (1995); *see also supra* notes 85-88 and accompanying text.

105. *See id.*; *see also supra* notes 91-92 and accompanying text.

106. *See id.*; *see also supra* notes 91-92 and accompanying text.

107. Or, then again, perhaps not. *See supra* notes 98-99 and accompanying text.

108. *See* U.C.C. § 2A-528(1) (1995). The latter change seems immaterial, because the hypothetical lease period would appear to be identical to the actual lease period. One assumes it was put in place in case it is impossible to use the actual lease term to measure the hypothetical rent; in that case, the court may use a reasonable substitute, which might produce the sort of problem this change in formula addresses. *See id.* § 2A-507(2).

109. *See* U.C.C. § 2A-528(1)(b) (1987).

110. *See* U.C.C. § 2A-528(1)(ii) (1995).

iii. Lost-Volume Lessor

This remedy is the counterpart to that favorite from first-year Contracts, U.C.C. section 2-708(2). It gives the lessor the profit it would have made if the lessee had fully performed.[111] The one change in this section—rather an important one—changes the remedy from the full profit[112] to the profit reduced to present value.[113] Regrettably, the section was otherwise left as muddy as its Article 2 counterpart. For instance, the final clause of section 2-708(2), giving "due credit for payment or proceeds of resale," has almost universally been considered a drafting disaster.[114] Courts have come to realize that it applies only to components sellers—sellers whose buyers breach when the goods are incomplete, and who salvage something through sale or use of the incomplete goods.[115] Did the Article 2A drafters learn from this and craft a properly limited equivalent? No. It reads "due credit for payments or proceeds of disposition"—using the language of leases, but otherwise preserving the horrors of the old language.[116] This fidelity to Llewellyn is touching, but he can do without this sort of homage.[117]

Even more fundamentally, the section leaves entirely unclear just when it should be used. As in the original, we are told that the lost profit measure should be used when the contract-market measure will not put the lessor in as good a position as would performance.[118] The comment merely repeats the original, with some minor embellishment.[119] One imagines that the classic article by Professor Harris will be adapted for use here, but some statutory guidance would have been helpful.[120] And, as Professor Herbert has pointed out, the section is in

111. *See id.* § 2A-528(2).

112. *See* U.C.C. § 2A-528(2) (1987).

113. *See* U.C.C. § 2A-528(2) (1995). The original comment, though not the statute itself, said that "the concept of present value should be given effect." U.C.C. § 2A-528 cmt. (1987). The diffident *should* is now a bossy *must*, and, in any case, is now statutory. *See* U.C.C. § 2A-528 cmt. 5 (1995). This change comes from the California version. *See* Herbert, *supra* note 65, at 455 n.231.

114. *See, e.g.*, Charles J. Goetz & Robert E. Scott, *Measuring Sellers' Damages: The Lost-Profits Puzzle*, 31 STAN. L. REV. 323, 326 (1979); Robert J. Harris, *A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared*, 18 STAN. L. REV. 66, 83-87 (1965).

115. This appears to have been the intent of the drafters. Section 2-708(2) was amended in 1954 to add the critical phrase. The drafting committee explained that the new phrase was "to clarify the privilege of the seller to realize junk value when it is manifestly useless to complete the operation of manufacture." EDITORIAL BOARD OF THE UNIFORM COMMERCIAL CODE, DECEMBER 1954 RECOMMENDATIONS 14 (1955).

116. *See* U.C.C. § 2A-528(2) (1995).

117. And no one can say that the drafters were not warned. Both Professor Herbert and the California Bar committee pointed out this problem. *See* Herbert, *supra* note 65, at 454-55; *California Report*, *supra* note 15, at 1040-41.

118. *See* U.C.C. § 2A-528(2) (1995); *cf. id.* § 2-708(2).

119. *See id.* § 2A-528 cmts. 4 & 5.

120. The Harris article outlined the classes of sellers that might take advantage of U.C.C. section 2-708(2): (1) lost volume sellers, who now have unsold units because of the

the wrong place. The lessor who will want to take advantage of it is one who has re-leased the goods; consequently, the lost-volume remedy should be in section 2A-527, not in section 2A-528.[121] Fortunately, courts construing Article 2 have managed to find section 2-708(2), which is similarly misplaced, so one assumes that they will find section 2A-528(2) as well.

iv. Action for the Rent

Section 2A-529, granting the lessor an action for unpaid rent, underwent a great deal of revision in the 1990 amendments. Fortunately for Florida, most of the major changes were already in its statute book, thanks to its adoption of California's nonuniform version. Perhaps the most important change in this section is one of these. The 1987 Urtext violated the usual rules of mitigation, because it did not provide that, if the lessor was able to dispose of the goods after a judgment, it could not keep both the full rent (as damages from the lessee) and the proceeds of the disposition.[122] This arose because the action for the rent was originally available whenever the lessee had accepted goods, at least according to the statute.[123] Presumably, a lessor that had repossessed the goods, but had not decided whether to dispose of them, would choose an action for the rent (with no apparent duty to mitigate) over a contract-market action (with a duty to mitigate).[124] The pre-Code cases suggested a need to mitigate before seeking an action for the rent, but these cases were not referred to in the comment, much less in the statute.[125] Quite a mess.

The 1990 amendments fixed the statute with two changes (and corresponding changes to the comments). First, the action for the rent

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breach and resulting resale; (2) jobbers, who maintain no inventory and thus have no opportunity for resale; and (3) components sellers, who do not complete the goods and consequently cannot resell them. *See* Harris, *supra* note 114, at 98. This leaves aside the large literature asking whether, in an efficient market, there is such a thing as a lost volume seller, or whether this measure of damages is appropriate if there is such a creature. *See, e.g.*, Goetz & Scott, *supra* note 114, at 326-27; Victor P. Goldberg, *An Economic Analysis of the Lost-Volume Retail Seller*, 57 S. CAL. L. REV. 283, 283-84 (1984).

121. *See* Herbert, *supra* note 65, at 454.

122. *See* U.C.C. § 2A-529(3) (1987). The original comment sought to prevent double recovery, by pointing out that, according to the statute, the lessor was obliged to hold the goods for the lessee. *See* U.C.C. § 2A-529 cmt. 3 (1995); *see also id.* § 2A-529(2) (providing this right). However, this obligation was subject to a critical limit: the lessor was entitled to dispose of the goods at any time until the damages were collected, though its damages would be limited to re-lease or contract-market if it did so during the remaining lease term. *See* U.C.C. § 2A-529(3) (1987). Thus, if the lessor did collect damages from the lessee, the lessor could not then re-lease the goods, but the lessor could, if it chose, do so after judgment (and the expiration of the lease term) and before the damages were collected and still claim the full damages.

123. *See* U.C.C. § 2A-529(1)(a) (1987).

124. *See* Rapson, *supra* note 65, at 902-04.

125. *See, e.g.*, United Chemicals, Inc. v. Welch, 460 So. 2d 540, 541-42 (Fla. 1st DCA 1984); *see generally* Benfield, *supra* note 65, at 940 & n.78.

under section 2A-529(1)(a) could be brought only when the lessee had accepted the goods and the lessor had not repossessed them or had them tendered back (or when the goods were damaged when the lessee bore the risk of loss).[126] This eliminated the free choice between the action for rent and the action for contract-market damages or re-lease damages. Second, the section permitting re-lease or other disposition now provided an express right of set-off to the extent that the damages available under section 2A-529 exceed those available under the other section.[127] Both of these helpful changes were found in the California version of the statute, and both were carried forward into Florida's original enactment.[128]

Similarly, the 1990 amendments codify another nonuniform change carried from California to Florida: the use of the date of entry of the judgment, rather than the date of default, to set the time until which unpaid rent could be recovered.[129] The remaining changes were mainly cosmetic.

v. Catch-All Damages

It is possible that none of these remedies would prove entirely satisfactory to the lessor. For the most part, they contemplate that the lessor will repossess all of the goods, which may be infeasible. Repossession might also be undesirable, should the dispute not go to the core of the lease agreement; the lessor may prefer to keep the lease alive and litigate the dispute. Furthermore, some of these remedies may compensate the lessor only in part. Finally, Article 2A does not make every default a basis for seeking remedies. The parties may, as has been noted, define default as they please, and may provide that the lessor is entitled to remedies for even trivial defaults.[130] If they do not, though, defaults not listed in the general section on the lessor's remedies, and not substantially impairing the value of the lease contract to the lessor, will not entitle the lessor to the remedies noted above.[131]

For each of these scenarios, the 1990 amendments to Article 2A provide a catch-all remedy. This entitles the lessor to "recover the loss resulting in the ordinary course of events from the lessee's default as determined in any reasonable manner, together with incidental damages, less expenses saved in consequence of the lessee's default."[132]

126. *See* U.C.C. § 2A-529(1)(a) & cmt. 1 (1995).
127. *See id.* § 2A-529(3).
128. *See* FLA. STAT. § 680.529(1)(a) (1997).
129. *See* U.C.C. §§ 2A-529(1)(a)(i), -529(1)(b)(i) (1995); *cf.* FLA. STAT. §§ 680.529(1)(a)(1), .529(1)(b)(1) (1997).
130. *See* U.C.C. § 2A-523(3) (1995).
131. *See id.* § 2A-523(3)(a), (b).
132. *Id.* § 2A-523(2).

This remedy is obviously rather fluid, giving great deference to the ability of the courts to frame a remedy consistent with expectation.[133]

This section adds usefully to Article 2A. It makes clear that the lessor need not elect remedies, an approach otherwise disfavored in the U.C.C.[134] The section also provides a clear remedy for minor defaults; though these would not ordinarily be litigated by themselves, they might be litigated as part of a larger action based on more fundamental breaches of the lease agreement. It should be noted that this section does not allow the lessor to drive up its damages. If, for example, the lessee tenders back the leased goods and the lessor refuses to accept them, the lessor may not then seek under this section any damages that could have been avoided had the lessor accepted the goods and re-leased them.[135] This is implicit in the general need to mitigate, but bears repetition all the same.[136]

4. *Other Changes*

Of the remaining amendments, a good many were purely stylistic or formal, and need not be discussed here. Two, however, though not fitting into the categories above, are sufficiently weighty to warrant brief attention.

(a) Subordination

The parties to a lease may have various types of priority created by Article 2A. For instance, mechanic's liens and materialman's liens generally have priority over the interests of the lessor and lessee, un-

133. Which is the general damages measure under the U.C.C. *See id.* § 1-106(1).

134. *See, e.g., id.* §§ 2-703 cmt. 1, 9-501(1); *see also id.* § 2A-523 cmt. 1 (rejecting election of remedies).

135. *See* U.C.C. § 2A-523 drafting note (1990). These damages would be precluded under section 2A-529(1)(a) of the U.C.C., assuming that the lessor would have been able to release the goods. *See* U.C.C. § 2A-529 cmt. 1 (1995).

136. The 1990 amendments added a section on the lessor's residual interest in goods, simply providing that the lessor might, in addition to the remedies mentioned above, recover damages if the lessee's default caused damage to the lessor's residual interest in the goods. *See* U.C.C. § 2A-532 (1995). This section merely codified what has long been understood: the lessor, by definition, has some lingering property right in the leased goods, which the lessee may not impair (beyond whatever wear and tear is contemplated under the lease agreement, and any damage consistent with the lessee's duty of ordinary care under the bailment for hire). *See, e.g.,* Davis v. M.L.G. Corp., 712 P.2d 985, 987-88 (Colo. 1986); Stephens v. Thompson, 339 S.E.2d 784, 785 (Ga. Ct. App. 1986). The section conforms almost exactly to a Florida nonuniform amendment, drawn from the California Bar report, and thus does not change Florida law. *See* FLA. STAT. § 680.532 (1997); *see also California Report*, *supra* note 15, at 1045-46. Professors White and Summers find this section mysterious, perhaps because they have assumed that this right was so obvious that it could be taken for granted. *See* 2 WHITE & SUMMERS, *supra* note 27, § 14-3, at 42. Two grizzled veterans of Code wars probably should know better than to assume that anything in the Code is so obvious that it cannot be mucked up by the naive, foolish, or willful. In any event, here it is.

less the law creating the lien provides otherwise.[137] On the other hand, creditors of the lessee always, and of the lessor usually, take subject to the lease contract.[138] And, as in Article 9, the rights of lessors and lessees in fixtures depend in large part on the presence of fixture filings.[139] In Article 9, rights of these types may be subordinated.[140] As the comment to section 9-316 hints, the section may not itself have been necessary.[141] Given the ready alienability of claims outside of the U.C.C., it is logical to suppose that one can agree to take junior status, whether gratuitously or for a consideration. Certainly pre-U.C.C. law held as much.[142]

The first try at Article 2A omitted this right. Possibly it was omitted out of simple economy, if all concerned thought subordination sufficiently obvious. Still, most of the rights in Article 2A subject to subordination derive from Article 9. A court with too much time on its hands might thus apply *expressio unius est exclusio alterius* and conclude, one assumes wrongly, that no such right of subordination existed under old Article 2A. Happily, the 1990 amendments contain a section copied word for word from Article 9, with almost exactly the same comment.[143] Parties to a lease, as well as other parties with rights in a lease, may thus blithely subordinate away, secure in the knowledge that their transactions will not be invalidated.

(b) Right of Revocation

Under both Article 2 and Article 2A, the right of revocation is narrower than the right of rejection, in large part to avoid the strategic behavior that could result were the recipient of the goods able to revoke its acceptance well after it took delivery.[144] Under the 1987 text, the lessee's right to revoke was rather narrow, stemming entirely from the nonconformity of the goods leased.[145] This left out the possibility that the lessor might default under the lease contract, even though it supplied conforming goods. For example, a lessor might have a continuing service obligation. Its failure to comply might render the goods valueless as they break down, though they might have performed per-

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137. *See* U.C.C. § 2A-306 (1995). In Florida, the statutes creating these liens are generally found in chapter 713 of the *Florida Statutes*.

138. *See id.* § 2A-307.

139. *See id.* § 2A-309; *cf. id.* § 9-313 (fixtures).

140. *See id.* § 9-316.

141. *See id.* § 9-316 cmt. ("This section is inserted to make it entirely clear that a person entitled to priority may effectively agree to subordinate his claim.").

142. *See, e.g.*, 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 37.1 (1965).

143. *See* U.C.C. § 2A-311 & cmt. (1995). The only change in the comment renders it gender-neutral.

144. *See, e.g.*, Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215 (1990).

145. *See* U.C.C. § 2A-517(1) (1987).

fectly when they were first delivered. The 1990 amendments corrected this oversight by providing that breach of the lease contract, like supplying non-conforming goods, can justify the lessee's revocation if the breach substantially impairs the value of the goods to the lessee.[146] Another, perhaps less necessary subsection was added, which provides that the lessee may revoke for other reasons if the lease contract so provides.[147] This may not have been necessary; default is left to the parties to define, so one would think, *a fortiori*, that they could define a lesser right than default. Still, the clarity does no harm, and may reduce lingering or contrived uncertainty.

C. Conclusion

Article 2A has improved. The 1990 amendments did much to remove the earlier uncertainties and perversities in remedies, in particular, and in other areas as well. Florida, of course, had taken a step toward the current version when it enacted its nonuniform version of Article 2A back in 1990. Now it has brought itself more or less into line with other states, and has at the same time gained the other improvements that the 1990 amendments brought. Uniformity and certainty are perhaps self-evident virtues in commercial law.[148] Unpredictable results and free-form standards can lead to risk-averse behavior and, as a result, inefficient operations.[149] Firms may decline opportunities to make money or take excessive precautions to reduce risk (or, in the case of damages, to prove the amount).[150] Uniformity promotes certainty, at least in the middle- to short-run, by promoting convergence on legal standards. Florida has, at little cost, bought its lessors and lessees certainty.

But not complete certainty. Yes, of course no statute can provide that. But there is a larger reason to make the comment about uncertainty: Florida still has a nonuniform version of Article 2A. The Legislature enacted NCCUSL's 1990 amendments, which covered about half of Article 2A's sections. For these, Florida has purely the uniform version. The other sections, though, remain as they were before this legislative session. In the main, Florida had enacted the uniform version here as well. In several sections, though, Florida had enacted

146. *See* U.C.C. § 2A-517(2) (1995).

147. *See id.* § 2A-517(3).

148. *Cf.* Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved . . . .") (citations omitted).

149. *See, e.g.*, Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 279-80 (1986); Louis Kaplow & Steven Shavell, *Accuracy in the Assessment of Damages*, 39 J.L. & ECON. 191, 194 (1996).

150. *See* Kaplow & Shavell, *supra* note 149, at 192.

nonuniform versions, untouched by the recent amendments. For these sections, then, Florida remains out of step with most of the nation.[151]

Many of these differences are immaterial. A few, though, are not. Almost all of these pertain to consumers, and often weaken the rights of consumers under Article 2A.[152] For example, the uniform provision on unconscionability provides in part that consumer leases induced by unconscionable conduct or as to which unconscionable collection prac-

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151. Florida's leasing law has one provision not contained within Article 2A, but affecting it greatly. When Article 2A was put in place, Florida added to its motor vehicle laws a provision stating that for motor vehicles and trailers, "a transaction does not create a security interest merely because it provides that the rental price is permitted or required to be adjusted under the agreement either upward or downward by reference to the amount realized upon sale or other disposition of the motor vehicle or trailer." FLA. STAT. § 319.271 (1997). This sort of statute has been enacted in a good many states, and a version of it appears in the Internal Revenue Code. *See* 26 U.S.C. § 7701(h) (1994); *see also, e.g.*, Corinne Cooper, *Identifying a True Lease Under UCC § 1-201(37), in* 1 EQUIPMENT LEASING § 4.08, at 4-81 n.89 (Jeffrey J. Wong ed., 1998) [hereinafter Cooper, *Lease*]. Its effect is to validate so-called terminal rent adjustment clauses (TRACs) as leases, thus excusing those who use them from complying with the filing requirements and procedural restrictions of Article 9.

TRACs are used when the parties anticipate that the lessor will sell the leased goods at the end of the lease term. The parties set a value for the residual interest in the goods. If the goods are sold or appraised for more than this value at the end of the lease, then the lessee gets the gain; if the goods are worth less, the lessee is liable for the difference. The question, then, is how much of the risk associated with this sale is retained by the lessor. At times, a clause of this sort merely protects the lessor against excessive mileage or wear and tear. It may be defensible as a true lease. Most of these clauses, though, effectively divest the lessors of any real residual interest in the leased goods. If the lessee insures the lessor against any downside market risk, and retains any upside gain, then the lessee effectively has taken the full risk of any market change. This sounds like a classic security interest, because the lessor has handed off its real residual right in the goods. It is guaranteed a certain amount—the lease payments, plus a lump-sum payment at sale. The lessee is thus, in essence, the economic owner of the goods. *See, e.g.*, Cooper, *Lease*, *supra*, § 4.08[1]; *see also, e.g.*, *In re* Zerkle Trucking Co., 132 B.R. 316 (Bankr. S.D. W. Va. 1991) (holding TRAC lease a disguised security interest).

Article 2A avoided this issue, in large part to prevent conflict with the TRAC leasing industry. *See* Corinne Cooper, *The Madonnas Play Tug of War with the Whores or Who is Saving the UCC?*, 26 LOY. L.A. L. REV. 563, 574-76 (1993) [hereinafter Cooper, *Madonnas*]. We thus see legislation, as in Florida, that validates them. It is hard to justify these statutes as a matter of principle, and especially hard to justify placing them apart from the rest of the relevant statutory scheme. *See* Cooper, *Madonnas*, *supra*, at 574-76 (noting that the location "despicably hides the ball"). One hopes that the legislature will clear out this anomaly, to use a polite term, when it next revises Article 2A.

152. One nonconsumer change is to the risk of loss section. The change shifts the risk of loss to the lessee when the loss resulted from the lessee's negligence. *See* FLA. STAT. § 680.219(1) (1997); *cf.* U.C.C. § 2A-219(1) (1995). This seems inconsequential. Though Article 2A does not say so in as many words, the Official Comment states that the parallel provisions in Article 2 that expressly allow the parties to allocate risk of loss contractually "are not incorporated as they are not necessary." *Id.* § 2A-219 cmt. One may infer from this that the parties are free to allocate risk by contract, the apparently firm rule of section 2A-219(1) notwithstanding. *See, e.g.*, LAWRENCE & MINAN, *supra* note 9, ¶ 13.02[5]; 2 WHITE & SUMMERS, *supra* note 27, at 462. If so, the lessor is likely to shift the risk to the lessee in its form contract. In any event, this provision may appropriately place the risk on the party better able to avoid it, which is not inconsistent with the conventional economic analysis of tort. *See, e.g.*, Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1057 (1972).

tices have been used may give rise to relief, and that a court finding unconscionability shall grant reasonable attorney's fees to the consumer lessee.[153] These provisions were, and are, omitted from Florida's Article 2A.[154] Similarly, the permissible choice of law provisions in leasing contracts have been expanded from those in the uniform version.[155] Another is section 2A-406(1)(b), which controls when delay or allocation by a lessor enables a lessee to modify the lease contract by accepting what is supplied, with an appropriate allowance for the deficiency. In the uniform version, this right extends to all lessees except nonconsumer finance lessees, who presumably look to the supplier for recourse.[156] Florida's version, as in a few other states,[157] bars all finance lessees from exercising the right to modify.[158]

If only in the interests of consistency, the Legislature should tidy up Article 2A to render it wholly uniform. Beyond the appeal of uniformity, though, most of the substantive amendments disrupt the care-

153. *See* U.C.C. § 2A-108(2), (4) (1995). Subsection 4 also provides that the party against whom a claim of unconscionability is made may collect its fees if the lessee's claim proves groundless. This has been attacked as creating excessive uncertainty for consumer lessees, thus perhaps chilling unconscionability litigation. *See* Donald B. King, *Major Problems with Article 2A: Unfairness, "Cutting Off" Consumer Defenses, Unfiled Interests, and Uneven Adoption*, 43 MERCER L. REV. 869, 873-77 (1992). One could solve this problem, if problem it be, by enacting only section 2A-108(4)(a) without the reverse fee shifting. *See also infra* notes 343-352 and accompanying text (fee shifting in revised Article 5).

154. *See* FLA. STAT. § 680.1081 (1997).

155. The uniform version of Article 2A allows the parties to a consumer lease to choose only the law of the jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within thirty days after, or that in which the leased goods are to be used. *See* U.C.C. § 2A-106(1) (1995). Florida's version also allows the parties to choose the law of the jurisdiction where the goods will be used. *See* FLA. STAT. § 680.1061(1) (1997). While this is convenient for the lessor, the lessee, often a tourist, may find the law unfamiliar and irksome (especially in light of the attenuated consumer protections granted by Florida's Article 2A).

156. *See* U.C.C. § 2A-406 cmt. (1995).

157. Seven, as of 1997. *See* U.C.C. § 2A-406(1)(b), 1B U.L.A. 227 (Supp. 1998).

158. *See* FLA. STAT. § 680.406(1) (1997). A similar change was made in the section dealing with casualty to leased goods. *See id.* § 680.221(b); *cf.* U.C.C. § 2A-221(b) (1995).

It should be noted that not all of the changes that affect consumers do so for the worse. One, to a provision on rejection and revocation, excepts most consumer finance lessees from a bar on revocation when the lessee knows of a nonconformity when it accepts the goods. *See* FLA. STAT. § 680.516(2) (1997); *cf.* U.C.C. § 2A-516(2) (1995) (barring all finance lessees from revocation under those circumstances). Florida did not, however, make a corresponding amendment to the parallel provision in section 2A-517(1)(a), which creates some internal inconsistency. One assumes that the nonuniform enactment trumps the uniform language, thus giving consumer finance lessors an expanded revocation right. In the same vein, Florida removed the requirement of timely notice of default in the case of revocation for all consumer leases, which clears away one procedural hurdle otherwise faced by consumers. *See* FLA. STAT. § 680.516(6) (1997); *cf.* U.C.C. § 2A-516(3)(a) (1995) (requiring timely notice). Other states have chosen this nonuniform path. *See* U.C.C. § 2A-516, 1B U.L.A. 243-44 (Supp. 1998) (Alabama, Maryland, South Dakota). Finally, the Article 2A Statute of Frauds has been amended in Florida to require all consumer leases to be in writing, subject to a limited list of exceptions; the uniform version excuses leases with total payments of less than $1,000. *Compare* FLA. STAT. § 680.201(1)(a) (1997) *with* U.C.C. § 2A-201(1)(a) (1995).

ful balance of consumer and lessor rights contained in Article 2A. NCCUSL is even now revising Article 2A yet again, this time to take account of changes in draft Article 2 and new Article 9, as well as other criticisms that have been made over time. When these changes come forward, the Legislature should take the opportunity to clear out the remaining idiosyncrasies in Florida's Article 2A.[159]

One might also ask whether Article 2A is a whole loaf. There is much to be said to the contrary. One critique of Article 2A has been its limited treatment of consumer leases.[160] This is not a surprise; much of the force behind Article 2A's drafting came from commercial lessors, and most of the leasing industry engages in commercial leases, Hertz, Avis, and the like notwithstanding. Article 2A does contain some consumer protection provisions, though not many of overpowering consequence.[161] True, there are other statutes, state and federal, that give consumers additional rights.[162] The statutes do not, however, provide a systematic and coherent body of consumer protection law governing leases.

To remedy this, a NCCUSL drafting committee is hard at work on a Uniform Consumer Leasing Act. The first draft appeared in 1996, and the sixth appeared in October of 1998.[163] It is too early to comment on this project, but at present it seems to be providing a sensible body of consumer leasing law. Whether it will be widely enacted is a trickier question. If consumer protections had been worked into a more general uniform act, the leasing industry might be relatively willing to take the bitter with the sweet and swallow the whole act. As it is, the industry has the benefits of uniformity, and, should the statute be oversolicitous to consumers, can snipe at this consumer statute. One may thus wonder whether it will be enacted generally. This may well depend on the extent to which leasing industry concerns can be addressed—and to this extent, consumer advocates may be less enchanted with the statute. Floridians, along with the rest of the nation, will just have to wait.

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159. It could do so earlier, of course, perhaps either in a glitch bill or as part of the next U.C.C. amendments (presumably Articles 5 and 9). *See infra* Parts IV.A.-B.

160. *See, e.g.*, King, *supra* note 153, at 877-80.

161. For a somewhat jaundiced view of these provisions, see 2 WHITE & SUMMERS, *supra* note 27, § 13-4; for a more optimistic view, see Fred H. Miller, *Consumer Leases Under Uniform Commercial Code Article 2A*, 39 ALA. L. REV. 957, 959-64 (1988).

162. Perhaps the most important is the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667e (1994), and the corresponding regulation, Regulation M, 12 C.F.R. § 213 (1998). The Uniform Consumer Credit Code also gives consumer lessees special rights, though it is not in force in most states.

163. The drafts are available at the NCCUSL Website, located at <http://www.law.upenn.edu/library/ulc/ulc.htm> (visited Jan. 28, 1999).

III. ARTICLE 8

Article 8 of the U.C.C. deals with investment securities—not the more glamorous bits of securities regulation of the sort that have made certain shady operators guests of the federal government from time to time, but the bits that control how we own and transfer securities.[164] One can understand that a statute originally written in the 1940s and 1950s might need some revision, given the radical changes in financial markets since that time. Indeed, some of the revisions to Article 8 deal precisely with the advent of new technology, and will be dealt with below.[165] But Article 8 has already been revised since the Age of Llewellyn, as recently as 1977. Why the need for a new Article 8?

The reason requires a bit of history; but, as Holmes didn't quite say, a page of history is worth a volume of illogic. Once upon a time, when Karl Llewellyn bestrode the earth, stockbrokers moved stock certificates from place to place when they sold shares for their customers. This meant a good deal of paperwork and some careful record-keeping, but share volume was none too high. In 1964, at the height of enactment of the U.C.C., daily volume on the New York Stock Exchange averaged 4.89 million shares.[166] Then came a boom in stock trading, as conglomerates sprouted and the economy, stimulated by the guns-and-butter policies of the Johnson administration, took off. By 1968 share volume had almost tripled from that of only a few years before.[167] The increased trading volume might have gratified the brokers in the front office, but wrought havoc on the increasingly desperate clerks in the back office. Brokerage houses, unwilling to devote more resources to mundane tasks like processing trades, fell further and further behind—so much so that, despite midnight shifts of workers and seven-day workweeks, stock exchanges shortened trading days in late 1967 and early 1968, and even closed on Wednesdays in much of 1968.[168] Something had to be done.

Perhaps obviously, some firms bought the relatively newfangled computers to help out; others failed to keep up and shut their

164. Indeed, the new Article 8 no longer covers those bits of contract law on the sale of securities which old Article 8 had covered. Thus, for instance, the old provisions on performance and remedies have been deleted on the theory that a statute should either regulate contracts comprehensively or not at all. *See* U.C.C. art. 8 pref. note IV.B.8. (1995); *cf.* U.C.C. § 8-107 (1977) (remedies); *id.* § 8-314 (breach).

165. *See infra* Part III.A.

166. *See* VI LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 2899 (1989).

167. *See id.*

168. *See id.* at 2899-900.

doors.[169] More systematic solutions took shape, prodded by legislative and regulatory action that promoted such things as uncertificated or book-entry stocks and centralized clearing corporations.[170] As these took shape, NCCUSL started work on a revision of Article 8 that would, it was hoped, provide a legal structure for a more efficient system of transferring securities.

The process begat the 1977 version of Article 8. After surveying the changing world of securities transfers, the drafting committee concluded that uncertificated stocks would shortly predominate.[171] Issuers would no longer send out nicely engraved certificates; rather, they would simply record ownership and transfer electronically or otherwise, as they were told to do so by their shareholders or the shareholders' agents. The committee, however, was aware that actual stock certificates would continue to exist and even continue to be created. Accordingly, the 1977 version of Article 8 provided parallel rules for both certificated and uncertificated securities.[172] All told, it was a sensible resolution of a knotty and potentially disastrous problem, and one much heralded in the literature.[173] Except for one little detail—it didn't work.

The problem with the 1977 version of Article 8 became obvious quickly, and, using the perfect hindsight vouchsafed law professors, was evident even as that version came forth and was enacted. That problem? Uncertificated securities never really arose, save for mutual funds and United States Government securities.[174] Why is hard

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169. *See id.* at 2902-07; *see also* Emily I. Osiecki, Comment, Alabama By-Products Corp. v. Cede & Co.: *Shareholder Protection Through Strict Statutory Construction*, 22 DEL. J. CORP. L. 221, 225 (1997).

170. *See* Osiecki, *supra* note 169, at 224-25.

171. The literature of the time was rife with calls for uncertificated securities. *See, e.g.*, Egon Guttman, *Toward the Uncertificated Security: A Congressional Lead for the States to Follow*, 37 WASH. & LEE L. REV. 717 (1980); Thomas H. Jolls, *Can We Do Without Stock Certificates? A Look at the Future*, 23 BUS. LAW. 909 (1968); Richard B. Smith, *A Piece of Paper*, 25 BUS. LAW. 923 (1970); Richard B. Smith, "*A Piece of Paper Revisited*," 26 BUS. LAW. 1769 (1971).

172. For proper analyses of this version of Article 8, see, EGON GUTTMAN, MODERN SECURITIES TRANSFERS (3d ed. 1987); 7 WILLIAM D. HAWKLAND ET AL., UNIFORM COMMERCIAL CODE SERIES, ARTICLE 8: INVESTMENT SECURITIES (1986).

173. Including in this esteemed periodical. *See* Paul B. Rasor, *A Critical Look at Secured Transactions Under Revised UCC Article 8*, 14 FLA. ST. U. L. REV. 859, 865-67 (1987); *see also, e.g.*, Martin J. Aronstein et al., *Article 8 Is Ready*, 93 HARV. L. REV. 889 (1980).

174. *See* James Steven Rogers, *Policy Perspectives on Revised U.C.C. Article 8*, 43 UCLA L. REV. 1431, 1443 (1996). Indeed, a good many states continued to require that share certificates be issued by their corporations, including New Jersey and, for quite a while, Pennsylvania, both corporate havens. *See* GUTTMAN, *supra* note 172, ¶ 1.04[2]. Even many of the states that allowed their corporations to issue uncertificated securities still allowed shareholders to demand stock certificates. *See id.*

The principal exception for publicly-held corporations is the dividend reinvestment plan, under which the issuer automatically uses dividends to purchase more shares, often fractional, of the issuer's stock. If a broker holds the shares in street name—that is, the broto explain. Possibly the issuers decided that they would not want to invalidate existing stock certificates or convert the old records into new. Possibly all concerned were a little uneasy about a brand-new set of rules, preferring to adhere as closely as possible to rules familiar from certificated days. Possibly the immediate solution to the paperwork crunch of the late 1960s was successful enough that brokers and issuers alike decided to stay with it, whether because of inertia or because of the preference for certainty.[175] In any event, the world of securities developed a very different model, one in which certificates were still issued but never moved.[176]

The key to this system is the use of a common depository for shares. The Depository Trust Company (DTC), a New York company, holds about three-quarters of shares in publicly traded companies, with its nominee, Cede & Co., as the nominal shareholder of record. Brokerages and banks created DTC to allow them to deposit certificates centrally (so-called "jumbo certificates," often representing tens or hundreds of thousands of shares) and leave them at rest. When a customer of one of DTC's participants buys or sells shares, appropriate changes are made on the books of the participants.[177] At the end of each day, the transactions are netted out,[178] so that only the net changes for each participant need be recorded by DTC. Each broker makes similar book entries. Thus, if one customer of a broker buys one hundred shares of a certain stock, and another sells one hundred shares, the brokerage need not report anything to NSCC. The clear-

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ker's name—this is no different from any other indirect system of holding. If, however, the shares are held in the customer's name, but the issuer has its own reinvestment plan, then the issuer will usually reinvest the dividends and hold the shares as a book entry rather than issue new certificates with each reinvestment. *See* Martin J. Aronstein, *Security Interests in Securities: How Code Revision Reflects Modern Security-Holding Practices*, 10 UCC L.J. 289, 292-93 (1978).

175. In contrast, mutual funds, though dating back a good many years (at least as closed-end funds), did not become very important until the 1960s. Accordingly, there was less accumulated practice to dislodge, and the industry could adopt more readily a new method of dealing with securities. The government's move toward uncertificated securities may be explained, at least in part, by its unitary structure. Though a single corporation might choose not to rely on uncertificated securities, given dominant industry practice to the contrary, the federal government need not worry about losing out to rival governments or to any resulting reluctance on the part of investors to purchase its securities. For more on federal uncertificated securities, see Guttman, *supra* note 171.

176. The description that follows is drawn from a number of sources. *See, e.g.*, U.C.C. art. 8 intro. (1995); JOHN F. DOLAN, COMMERCIAL LAW: ESSENTIAL TERMS AND TRANSACTIONS § 14.4 (2d ed. 1997); Charles W. Mooney, Jr., *Property, Credit, and Regulation Meet Information Technology: Clearance and Settlement in the Securities Markets*, LAW & CONTEMP. PROBS., Summer 1992, at 131, 136-38.

177. Some small brokerages and financial intermediaries may not be members of DTC. In that case, they generally contract with members to handle their clearance tasks. *See* Jeanne L. Schroeder, *Is Article 8 Really Ready This Time? The Radical Reform of Secured Lending on Wall Street*, 1994 COLUM. BUS. L. REV. 291, 327-28.

178. The transactions are netted out by the National Securities Clearing Corporation (NSCC), another creation of brokerages and banks.

ing agent and DTC's books will show no change. Only the brokerage's own books will reflect the sale and purchase.

Revised Article 8 made some acknowledgment of this indirect holding system, but very little.[179] For the most part, it treated all dealings in certificated securities alike, which proved increasingly troublesome as this method of share disposition took hold. The greatest problems, at least conceptually, arose because of the 1977 revision's use of property models when dealing with securities held by an intermediary. Much has been written about the confusion this yielded, particularly in such areas as tracing rules and the creation of security interests.[180] Moreover, the 1977 revision of Article 8 made no great changes in the substance or scope of the statute. For the most part, it merely accommodated the new and, it was hoped, soon predominant method of share transfer. New tools of trafficking in securities arose, which fit imperfectly within the old rules. Finally, the stock market difficulties of October 1987 brought about studies that suggested that legal uncertainties about clearance and settlement might contribute to fears that institutions might not be able to meet their obligations, and thus to increased market volatility.[181]

By 1988, an American Bar Association committee was hard at work proposing alterations to Article 8 and encouraging NCCUSL to form a drafting committee.[182] NCCUSL responded by assembling a drafting committee in 1991; this committee—one of NCCUSL's stronger assemblages, with Professor James Steven Rogers as reporter and Professor Curtis R. Reitz as chair—completed its work in 1994. Its fruits are now the law of almost every state, including, at last, Florida.

To do justice to new Article 8 would exceed the patience of even those few readers who have made it this far, not to mention the page budget that this periodical could allow.[183] A few issues, though, bear

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179. *See* U.C.C. § 8-313 (1995).

180. *See, e.g.*, Charles W. Mooney, Jr., *Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled by Intermediaries*, 12 CARDOZO L. REV. 305 (1990); James Steven Rogers, *Negotiability, Property, and Identity*, 12 CARDOZO L. REV. 471 (1990); Schroeder, *supra* note 177.

181. *See, e.g.*, Rogers, *supra* note 174, at 1437-38, 1445-46.

182. *See* Charles W. Mooney, Jr., et al., *An Introduction to the Revised U.C.C. Article 8 and Review of Other Recent Developments with Investment Securities*, 49 BUS. LAW. 1891, 1892 & n.3 (1994).

183. I take solace that two leading scholarly commentators on Article 8 have recently made similar laments—and then gone on to write very lengthy articles that did not cover the whole terrain. *See* Rogers, *supra* note 174, at 1433 n.2 (disclaiming comprehensive coverage in an article of 113 pages); Schroeder, *supra* note 177, at 301 (same disclaimer in an article of 212 pages). The best overviews of new Article 8 are EGON GUTTMAN, MODERN SECURITIES TRANSFERS (3d ed. Supp. 1998), 7A WILLIAM D. HAWKLAND & JAMES S. ROGERS, UNIFORM COMMERCIAL CODE SERIES, REVISED ARTICLE 8: INVESTMENT SECURITIES (1996), and Bryn R. Vaaler, *Revised Article 8 of the Mississippi UCC: Dealing Directly with Indirect Holding*, 66 MISS. L.J. 249 (1996).

attention, whether because they are potentially important to a wide range of practitioners or because they are at the core of the new statute. This Article will thus touch on virtual commerce, risks of wrongdoing by intermediaries, and security interests in investment securities.[184]

A. The Virtual Stock Certificate

Electronic commerce has become ever more important, as everything from funds transfers to airline tickets and antiques are handled over the wires. The U.C.C. adjusted to this to some degree when Article 4A, on electronic funds transfers, was added in 1989.[185] The current U.C.C. revisions also take electronic commerce into account, at least to some extent.[186] Indeed, there is a larger NCCUSL project to draft a Uniform Electronic Transactions Act, which would regulate the manner in which electronic contracts might be formed.[187]

Revised Article 8 takes these developments into account in a range of sections. One of obvious interest is its deletion of the Statute of Frauds, on the theory that electronic transactions rendered the

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184. This is not to say that new Article 8 makes no other significant changes. For example, until these revisions, the issuer would have been liable to a former owner of securities for wrongful registration if the issuer had received written notice of an adverse claim far enough ahead of the presentation of the security for registration that it could act appropriately. *See* U.C.C. § 8-403(1) (1977). Once the issuer had received notice, it would have been under a duty to inquire about the merits of the claim, an inquiry potentially satisfied by notice to the adverse claimant that registration would proceed in 30 days unless the issuer received either an appropriate court order or a bond. *See id.* § 8-403(2). This honored a long line of American cases but imposed significant burdens on transfers by fiduciaries. *See, e.g.*, Lowry v. Commercial & Farmers' Bank, 15 F. Cas. 1040 (C.C.D. Md. 1848) (No. 8581). Various fiduciary statutes, consistent with this principle, excused issuers from liability, save in the presence of notice. *See, e.g.*, Vaaler, *supra* note 183, at 292-93. Revised Article 8, following in its tendency to increase the negotiability of interests in securities, entirely eliminated issuer liability, whether or not notice had been given of adverse claims, unless the issuer had been served with an injunction or similar order or the issuer colluded with the wrongdoer. *See* U.C.C. § 8-404(a) (1995).

185. Federal law had adjusted somewhat earlier, with the enactment of the Electronic Funds Transfer Act (EFTA), covering consumer transactions, in 1978. *See* 15 U.S.C. §§ 1693, 1693a-1693r (1994). Transactions governed in part by the EFTA do not fall within Article 4A. *See* U.C.C. § 4A-108 (1995). In addition, a number of Federal Reserve regulations and operating circulars of Federal Reserve Banks regulate electronic funds transfers; perhaps obviously, these prevail over Article 4A. *See id.* § 4A-107. Article 4A has been part of Florida law since 1991. *See* Act effective Jan. 1, 1992, ch. 91-70, 1991 Fla. Laws 515 (current version at FLA. STAT. §§ 670.101-.507 (1997)).

186. Thus, for example, the current draft of Article 2 no longer refers to "writings," but, rather, uses "records," a term that includes both traditional writings and information stored in an electronic medium. *See* U.C.C. § 2-102(26) (Draft Mar. 1, 1999) (defining "record"); *see also* U.C.C. § 2-201 (Draft Mar. 1, 1999) (Statute of Frauds; refers to "record," rather than "writing").

187. *See* UNIF. ELEC. TRANSACTIONS ACT (Draft Jan. 29, 1999). At least at present, the statute would defer to other bodies of law, including the U.C.C., should they have their own rules about electronic contracting. *See id.* § 103(c).

provision dated and even obstructionist.[188] A good deal of litigation had arisen under the old Statute of Frauds—more, perhaps, than under any other section of Article 8. This litigation typically involved informal transactions in securities of small firms, and often also involved an alleged promise that an employee would receive shares in the firm.[189] It may be too much to think, though, as one optimistic author did, that this heralded the virtual demise of the Statute of Frauds.[190] Article 2's revisers, after flirting with the deletion of the Statute of Frauds, have since restored it, albeit in weakened form.[191] The Statute is, perhaps, on a life support system, but its heart beats (feebly) on.[192]

More fundamentally, revised Article 8 recognizes—at last!—the indirect holding system and allows it to flourish without resort to general and variant principles of agency law. Until the 1994 revisions, only one section of Article 8 dealt with the depositary system described above, and that section was messy and complex.[193] Under the new rules, we have a new vocabulary—not merely the old and general use of "financial intermediary."[194] Consider the following scenario. Suppose that Moe has a brokerage account with Dewey, Cheatham & Howe, a securities firm that is a member of DTC and NSCC. Moe places an order to buy one hundred shares of Stooge Pictures with Shemp, his broker. Once the order is executed and the shares paid for, what do we have? To begin, Moe is not a purchaser; Moe does not own any specific shares, and Moe's name appears nowhere on the books of Stooge. Moe is, instead, an "entitlement

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188. *See* U.C.C. § 8-113 & cmt. (1995); *see also* U.C.C. art. 8 pref. note IV.B.7. (1995) (explaining reasons further); *cf*. U.C.C. § 8-319 (1977) (old Statute of Frauds).

189. *See* U.C.C. art. 8 pref. note B.7. (1995); *see also, e.g.*, Goldfinger v. Brown, 564 N.Y.S.2d 459, 460-61 (App. Div. 1991); Davenport v. Island Ford, Lincoln, Mercury, Inc., 465 S.E.2d 737, 738-39 (S.C. Ct. App. 1995); Beta Drilling, Inc. v. Durkee, 821 S.W.2d 739, 740 (Tex. Ct. App. 1992); GUTTMAN, *supra* note 172, ¶ 5.03[1][b].

190. *See* Douglas R. Heidenreich, *Article 8—Article 8?*, 22 WM. MITCHELL L. REV. 985, 991-92 (1996).

191. *See* U.C.C. § 2-201 (Draft Mar. 1, 1999).

192. Perhaps appropriately. With no Statute of Frauds, it is true that, say, a buyer could bring in oral evidence of a sales agreement that the seller sought to deny. It is just as true, though, that a seller could do the same with a buyer, which might reopen the door to the sort of fraud which the Statute of Frauds was designed to discourage. For the sale of goods, then, there might be something to be said for an asymmetric Statute of Frauds, which would bar only the seller to a consumer from asserting the existence of an oral contract over a certain amount. In contrast, many of the Statute of Frauds cases under Article 8 may well have involved statute-induced fraud, if, say, an employer sought to avoid an oral contract to sell stock to an employee. In the reverse set of circumstances—an employee either making up an offer to sell, or, more charitably, misinterpreting vague suggestions as firm contracts—presumably the plaintiff's burden of proof, along with the threat of suits in tort (and even criminal sanctions) will sufficiently prevent fraud. Hence Professor Guttman's comment that "[t]he continuation of such a formalistic anachronism is difficult to justify." GUTTMAN, *supra* note 172, ¶ 5.03[1][b], at 5-22.

193. *See* U.C.C. § 8-313 (1977).

194. *Id*. § 8-313(4).

holder."[195] Moe's agreement with Dewey is a "securities account,"[196] and the rights created under that account in the Stooge stock is a "security entitlement." Dewey, which maintains the securities account, is a "securities intermediary."[197] NSCC is a "clearing corporation."[198] The Stooge stock held by DTC in the name of Cede & Co. is a "security" (and, for that matter, a "financial asset," which includes the definition of "security"). The jumbo certificate held by DTC on behalf of Dewey and others is a "security certificate."

The vocabulary recognizes, as the 1977 flavor of Article 8 did not, that Moe does not own stock in Stooge Pictures. He instead has contractual rights created under his securities account. These give him a security entitlement that corresponds to one hundred shares of Stooge Pictures, because Dewey has indicated in its books that the one hundred shares—a financial asset—have been credited to Moe's account.[199] This security entitlement carries with it a good many rights and duties. For instance, Dewey must collect dividends or the like made by Stooge and must pay anything received to Moe (or hold it for him, as their securities account may provide).[200] If Moe wants to vote in shareholders' meetings, then Dewey must vote as Moe wishes, though Moe can allow Dewey to cast ballots for him.[201] Should Moe wish to sell his shares or place some other sort of order (for instance, a stop-loss order), then Dewey must comply.[202] Possibly Moe will decide that he prefers direct holding to indirect; if so, Dewey must, should the agreement creating the securities account provide as much, procure a stock certificate for Moe and have one hundred shares of Stooge placed directly in Moe's name, or in any other name that Moe may direct.[203]

Perhaps the most important rights go directly to what rests behind the security entitlement. Dewey must obtain and maintain financial assets that correspond to the aggregate claims of its entitlement holders.[204] Dewey, the securities intermediary, does not have a property interest in the financial assets held for its entitlement holders; rather, the entitlement holders have pro rata shares in the fi-

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195. U.C.C. § 8-102 (1995) contains this definition and the others in this illustration, except where noted.

196. *Id.* § 8-501(a).

197. If Dewey were not a member of DTC, but instead contracted with a DTC member to handle its dealings, both firms would be securities intermediaries. *See id.* § 8-102(a)(14)(ii) & cmt. 14. In addition, NSCC, which clears accounts for all DTC members, is itself a securities intermediary. *See id.*

198. But not DTC, which is merely a depositary. *See id.* § 8-102(a)(5) & cmt. 14.

199. *See id.* § 8-501(b)(1).

200. *See id.* § 8-505.

201. *See id.* § 8-506.

202. *See id.* § 8-507.

203. *See id.* § 8-508.

204. *See id.* § 8-504(a).

nancial assets held for them.[205] So far, so good for Moe; though Moe lacks the security of clutching the stock certificate to his bosom as he slumbers, or of knowing that his name is emblazoned upon the records of Stooge Pictures, he does have a property interest of some sort.[206] The question that Moe might think about, but probably does not, is just how far these rights will get him in case of a dispute. In particular, what if the shares underlying Moe's security entitlement are sold or given away without Moe's consent? This is the subject of the next Part.

B. The Rise of Negotiability

Before exploring the modest rights of the entitlement holder, we should look at the changed analogies that animated the change. Until the recent revision of Article 8, the law looked at rights in securities essentially as tangible property. Sitting behind each share, after all, is a collection of assets, usually tangible. The stock certificate, though itself only evidence of an ownership share in the underlying business, is also tangible. One may entertain a picture of certificates changing hands for money on the floor of the New York Stock Exchange, much in the way that goods change hands for money at the local five-and-dime.

If this is our image, then all sorts of rules spring forth. One in particular is of interest: the old property rule of *nemo dat*.[207] One may transfer all the rights one has, but no more. This shelter principle appears all over the U.C.C.[208] Thus, for instance, under Article 2 "[a] purchaser of goods acquires all title which his transferor had or had power to transfer."[209] As a corollary, a buyer of goods from a thief may never take good title, however honest the purchase may have seemed, and no purchaser down the chain of title may do any better.[210]

This principle seems to have influenced the drafters and initial revisers of Article 8. Consider the case of Moe. Let us say that Shemp, in desperate need of cash, forges Moe's name, sells the shares

205. *See id.* § 8-503(a), (b).

206. This property interest becomes important if Dewey becomes insolvent, and Dewey's general creditors seek to seize the financial assets Dewey holds for its entitlement holders. Ordinarily, entitlement holders prevail over any creditors of the securities intermediary. *See id.* § 8-503(a). Ordinarily? Yes, but there is an important exception. One hates to hold the reader in suspense, but . . . . *See infra* notes 283-309 and accompanying text.

207. More fully, *nemo dat quod non habet* (one cannot give what one does not have).

208. *See* John F. Dolan, *The U.C.C. Framework: Conveyancing Principles and Property Interests*, 59 B.U. L. REV. 811, 812-13 (1979).

209. U.C.C. § 2-403(1) (1995).

210. *See, e.g.*, Alamo Rent-a-Car, Inc. v. Williamson Cadillac Co., 613 So. 2d 517, 518-19 (Fla. 3d DCA 1993); Candela v. Port Motors Inc., 617 N.Y.S.2d 49, 50 (App. Div. 1994); Butler v. Buick Motor Co., 813 S.W.2d 454, 458 (Tenn. Ct. App. 1991).

credited to his account, and pockets the proceeds. Moe obviously has a claim against Shemp in tort, though this may not mean much if Shemp is insolvent. Can Moe get his stock back? Here we run into another concept familiar from personal property—tracing. Pursuing the analogy further, Moe's shares have disappeared into a blizzard of exchanges. It would be very difficult indeed to figure out where Moe's shares went. Under the 1977 version of Article 8, Moe would have owned a share in a "fungible bulk," the term of art applied to jumbo certificates and the like.[211] This recognizes, to a degree, that Moe has no certificate with his name on it nestled in some large vault. It also creates potential claims if Dewey has not been forthright. If, for instance, Dewey has not purchased all the shares that its customers have paid for, then Dewey's customers share pro rata in whatever bulk Dewey did acquire.[212]

Moe's immediate difficulty, then, may stem from an inability to trace the sale of the shares. Let us say, though, that he *did* own shares, and that we can trace them—improbable, true, but perhaps not impossible for thinly-traded shares. Under *nemo dat*, one would expect that Moe would win; after all, if Shemp acquired the shares through theft, then he could not pass good title to anyone.[213] Indeed, the hapless buyer—Larry—may well lose to Moe. The old rule started regrettably; Moe will lose to any bona fide purchaser.[214] If Larry bought through an indirect holding system, however, he would not be a bona fide purchaser unless the fungible bulk were held by a clearing corporation.[215] The distinction between fungible bulks held by clearing corporations and those held by other financial intermedi-

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211. *See* U.C.C. § 8-313(1)(d)(iii) (1977). The term is rooted in commodities. *See, e.g.*, U.C.C. § 2-501 cmt. 5 (1995).

212. *See id.* § 8-313(2). This avoids the use of especially messy tracing rules, which might depend on coordinating the actual and ostensible balances of shares. For more on tracing, see LIONEL D. SMITH, THE LAW OF TRACING (1997); LAUNDERING AND TRACING (Peter Birks ed., 1995).

The problem with stockbrokers (or, to use the new term for indirect holding, securities intermediaries) who might hold too little for their entitlement holders is not as great as it may have been. Federal statutes and regulations, most notably the Securities Investor Protection Act (SIPA), 15 U.S.C. §§ 78aaa to lll (1994), now protect customers against most shortfalls. *See* Michael E. Don & Josephine Wang, *Stockbroker Liquidations Under the Securities Investor Protection Act and Their Impact on Securities Transfers*, 12 CARDOZO L. REV. 509 (1990). This system of protection is not infallible, though, and might be strained or broken in a market crash; in addition, the changes in Article 8 may require some strengthening of this backup system. *See, e.g.*, David A. Kessler, Note, *Investor Casualties in the War for Market Efficiency*, 9 ADMIN. L. REV. 1307 (1996).

213. Shemp probably committed fraud, which nowadays is not thought to yield void title. The Article will deal with this shortly.

214. *See* U.C.C. § 8-302(1) (1977).

215. Section 8-302(1)(c) allows for bona fide purchase only when the purchaser's rights come through section 8-313(1)(c), -313 (d)(i), or -313(g). Section 8-313(1)(g), in turn, refers to entries made to the account of the purchaser or its designee on the books of a clearing corporation. We may assume that Larry's broker would serve as his designee.

aries probably was not deliberate, but remains puzzling and even mischievous.[216] Still, there it is; Moe may prevail over a downstream purchaser.

But *nemo dat* is not our only conveyancing principle, and this is not our only model. Indeed, this sort of property rule has long been hemmed in by another, more potent rule, even for tangible property: the good faith purchase rule. In brief, this rule provides that a good faith purchaser, typically for value, receives greater rights than the seller had.[217] Thus, for example, one who acquires goods by fraud has voidable title, rather than the void title acquired by a thief; though the defrauded party may replevy the goods from the defrauder, a good faith purchaser for value from the defrauder will take clear title, free from any claims of the victim of fraud.[218] This rule has a long and somewhat bumpy history. In general, though, with a few dips in the late nineteenth and early twentieth centuries, the trend, for better or worse, has been toward increasing the rights of the good faith purchaser for value.[219] This is also true outside of voidable title issues. Most of Article 3, governing negotiable instruments, is based on the premise that instruments of this sort must flow freely, giving their takers little reason to question the bona fides of each check; accordingly, we see that a holder in due course of a negotiable instrument is immune to almost every form of attack.[220] Coming a little closer to home, Article 2 allows a merchant to whom goods are entrusted to give clear title to a buyer in the ordinary course of business, as long as the merchant deals in goods of that kind.[221] If one thinks of the brokerage house as the entrustee and the customer as the entruster, then one can see rather a stern rule in the offing.[222]

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216. *See* Mooney, *supra* note 180, at 333-34 & n.95.

217. *See* Dolan, *supra* note 208, at 813-16.

218. *See* U.C.C § 2-403(1) (1995); *see also, e.g.*, Interstate Cigar Co. v. United States, 928 F.2d 221, 224 (7th Cir. 1991); Southeast Foods, Inc. v. Penguin Frozen Foods, 203 So. 2d 39, 43 (Fla. 3d DCA 1967); Jernigan v. Ham, 691 S.W.2d 553, 556 (Tenn. Ct. App. 1984).

219. *See, e.g.*, Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954). Professor Gilmore later regretted somewhat his enthusiasm for negotiability and the rights of the good faith purchaser, enthusiasm rendered tangible not merely in his article but in Article 9 of the U.C.C., for which he was the main drafter. *See generally* Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605 (1981) [hereinafter Gilmore, *Good Faith*].

220. *See* U.C.C. § 3-305(a)(1) (1995).

221. *See id.* § 2-403(2); *see also, e.g.*, Touch of Class Leasing v. Mercedes-Benz Credit of Canada, Inc., 591 A.2d 661, 667-71 (N.J. Super. Ct. App. Div. 1991); Thorn v. Adams, 865 P.2d 417, 420 (Or. App. Ct. 1993).

222. The entrustment analogy has been made by Schroeder, *supra* note 177, at 496.

Indeed, one can go further. Perhaps, as Professor Rogers has suggested, negotiability is not a very good analogy because it is based on the assumption that one owns a thing that is then negotiated. Investment securities are abstract rights—rights that may be represented by stock certificates, but rights all the same—and thus may not really be said to exist in

That is what we have in new Article 8. As before, the entitlement holder takes a pro rata share in all interests in that financial asset.[223] What if that asset is sold to one who acquires a security entitlement for value and without notice of any adverse claim? Then Moe would lose, even if he could somehow manage the job of tracing.[224] The rule applies no matter who the securities intermediary might be; whether clearing corporation or brokerage house no longer matters.[225] Nor is there any distinction between transfers of actual stock certificates or transfers through an indirect holding system.[226]

But we should go a little further. Suppose that the sale occurred, not because of fraud or theft by Shemp or by some outsider, but because of defalcation by Dewey itself. What then? Though at first blush it seems harsh, new Article 8 yields the same result; however the security or security entitlement was placed on the market, a purchaser with no notice of an adverse claim takes free of the entitlement holder's rights. This may cause the securities intermediary's entitlement holders to bump into each other. Another illustration may help. Let us say that Moe has a security entitlement for one hundred shares of Stooge Pictures, and that Dewey has faithfully entered this entitlement on its books and holds one hundred shares on the NSCC records. Now Curly comes along and enters an order for fifty shares of Stooge Pictures. Dewey takes his money and credits Curly's account with the position but purchases no more shares of Stooge. Then Dewey fails. One could use some tracing rule or other to figure out who owns what.[227] Rather than that, new Article 8 continues the policies of the old and allows the entitlement holders to share pro rata—here, giving Moe rights in just under sixty-seven shares and Curly rights in just over thirty-three.[228] Of course, there remains a claim against Dewey, for all the good that does.[229]

New Article 8 has thus embraced negotiability, giving purchasers of securities or securities entitlements even broader rights than they had under old Article 8. We have, however, one more class of transac-

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any sense that makes analogies drawn from the transfer of goods directly helpful. *See* Rogers, *supra* note 180, at 507-08.

223. *See* U.C.C. § 8-503(b) (1995).

224. *See id.* § 8-502 & cmt. 2.

225. *See id.*; *see also, e.g.*, Rogers, *supra* note 174, at 1469.

226. *See* U.C.C. § 8-303 (1995).

227. Such as first-in-time, last-in-time, or the like. *See supra* note 212.

228. *See* U.C.C. §§ 8-502 cmt. 4, 8-503(b) (1995).

229. Incidentally, what if Dewey *never* buys any shares? Technically, Moe may well have a security entitlement; though no financial asset actually existed, the presence of a financial asset is not essential if the other steps required to create a security entitlement took place. *See id.* § 8-501(c) & cmt. 3. Moe would then have a claim against Dewey for the value of this entitlement, as well as possible actions under state and federal law. This may, as before, be a hollow claim if Dewey lacks unencumbered assets, though some resources may be available under SIPA. *See* Schroeder, *supra* note 177, at 472-73.

tions to consider: security interests in securities or security entitlements. These transactions push negotiability to its edges—and beyond? We shall see.

C. Security Interests in . . . What?

Securities and security entitlements are potentially just the sort of assets in which a lender would want to stake a claim. Unlike, say, machine tools or kumquats, they do not wear out or decay; though they do fluctuate in value, whatever value they have may be readily realized. Two questions arise. First, how does revised Article 8 change the rules governing how one takes and perfects a security interest in securities or security entitlements? Second, what priority rules govern these security interests? In particular, do the claims of a security intermediary's secured creditors trump the securities entitlements of the intermediary's customers?

1. Securing Securities

Under the first iteration of Article 8, one went to Article 9 to determine whether a security interest in stock[230] existed and whether it was perfected. In general, just as with other security interests, the secured party would either have to take possession of the collateral or have the debtor sign a security agreement and give value in order to have a security interest in the stock.[231] Either filing or possession could perfect this security interest.[232] This was simple enough, but did not clearly deal with the indirect holding problem. The 1977 revision of Article 8 sought to solve the problem by pulling security interests in certificated securities back within Article 8, mainly in section 8-313—a section not unjustly called "the most opaque provision in the entire UCC."[233] To parse this closely would be both tedious and pointless.[234] In brief, a secured party could take a security interest in stock held in bulk by an intermediary only if the security were transferred to the secured party or its designee.[235] This security interest simultaneously attached and perfected the security interest; no addi-

230. Though stock is a narrower term than securities, I shall use it here to avoid overrepetition of the word security.

231. *See* U.C.C. § 9-203(1) (1972).

232. *See id.* §§ 9-302(1), -305. Though certificated securities are not named in section 9-305, the definition of instrument includes them. *See* U.C.C. § 9-105(1)(i) (1995).

233. BARKLEY CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 7.17[4] (rev. ed. 1993).

234. Particularly because it has been parsed lucidly by others. *See, e.g.*, CLARK, *supra* note 233, ¶ 7.17[2][a]; Peter F. Coogan, *Security Interests in Investment Securities Under Revised Article 8 of the Uniform Commercial Code*, 92 HARV. L. REV. 1013 (1979); Mooney, *supra* note 180; Jeanne L. Schroeder & David Gray Carlson, *Security Interests Under Article 8 of the Uniform Commercial Code*, 12 CARDOZO L. REV. 557 (1990).

235. *See* U.C.C. § 8-321(1) (1977).

tional filing was needed.[236] In turn, transfer of an indirectly held security could be effected through any of four ways.[237] First, the financial intermediary could send the secured party a confirmation that the security interest existed and make a book entry to that effect.[238] Second, if the shares were held by a clearing corporation, the transfer would be effected if the clearing corporation made appropriate book entries.[239] Third, if the debtor had signed a security agreement describing the stock, transfer occurred when the intermediary received a notice of the security agreement signed by the debtor.[240] Fourth, and last, if the secured party was itself a financial intermediary in possession of the stock, the security interest was transferred when the debtor signed a security agreement.[241]

These rules—the third, in particular—have allowed secured parties to claim rights in stocks. Yet there were many difficulties. The use of transfer as the key concept was a bit odd, continuing as it did the idea of a thing to be transferred.[242] It may, however, have been inevitable, if one bears in mind that 1977's section 8-313 was intended to cover not just the taking of security interests, but also the means by which purchasers would take clear title, whether to certificated or uncertificated securities.[243] Still, it makes for an unwieldy bit of drafting—and one that has yielded error in a range of contexts.[244] Moreover, infelicitous drafting meant that a broker with rights in more than one fungible bulk might make no transfer at all to any secured parties of her customers, meaning that there would be no security interests extant in a very common set of circumstances.[245]

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236. *See id.* § 8-321(3)(a).

237. The intermediary could perfect as the secured party's intermediary, as long as the certificate was either indorsed to the secured party or had been issued to it. *See id.* § 8-313(1)(c). This is not holding in bulk, though, and more properly falls under the general head of agency law.

In addition, the security interest would be perfected for 21 days if the security interest were taken under a security agreement and transfer had not yet been effected. *See id.* § 8-321(2). This is analogous to the rights under Article 9 for the holder of a security interest in instruments, certificated securities, or negotiable documents. *See* U.C.C. § 9-304(4) (1995).

238. *See* U.C.C. § 8-313(1)(d)(ii) (1977).

239. *See id.* § 8-313(1)(g).

240. *See id.* § 8-313(1)(h).

241. *See id.* § 8-313(1)(i).

242. On the other hand, it beats "delivery," for there is no delivery in the indirect holding system. *See* Aronstein, *supra* note 174, at 301-02.

243. *See* U.C.C. art. 8 pref. note IV.B.2. (1995).

244. *See, e.g.*, Schroeder & Carlson, *supra* note 234, at 588-98.

245. *See* Mooney, *supra* note 180, at 334-36; Schroeder & Carlson, *supra* note 234, at 602-04. Happily, the matter seems never to have been litigated to a reported judgment, though one cannot be sure whether this provision might have had some subterranean effect.

New Article 8 has come to the rescue, in part by selflessly returning security interests in investment securities to Article 9.[246] The new key is not transfer, but control. A secured party with control has both attached[247] and perfected[248] its security interest in the investment property, and thus has exalted rights. Indeed, control can even prevail over the Article 9 equivalent of the Statute of Frauds; one need not have a written security agreement to have a security interest if one has control of the investment property.[249] How one gains control, and what rights one acquires, are thus at the core of what follows.

Put generally, control entails taking whatever steps are necessary for the secured party to have the investment property sold without any further action by the owner.[250] The relevant actions will vary with the type of investment property. For example, taking control of certificated securities requires taking delivery of the certificates, either properly indorsed or registered in the secured party's name.[251] In turn, delivery is either to the secured party itself or to its agent, or to a securities intermediary who acts on behalf of the secured party (if the certificate is properly indorsed to the secured party).[252] The secured party thus need not have physical possession of the certificate, as long as the secured party is the registered holder of the security on the issuer's books and the holder is not a securities intermediary. Revised Article 8 thus includes the classic forms of pledges available even before the U.C.C., as well as a means involving a shift in registration.

More significant are the control provisions for securities entitlements. Here a secured party gains control either if it becomes the entitlement holder or if the securities intermediary agrees that it will obey entitlement orders from the secured party without gaining the assent of the entitlement holder.[253] The first system is straightforward, if perhaps not usual; if the secured party becomes the "owner," bearing in mind the difficulties with using conventional language of ownership, then it will have control.[254] More consistent with physical analogies to securities entitlements is the other method, which envi-

246. *See* U.C.C. art. 8 pref. note IV.B.2. (1995).

247. *See id.* § 9-203(1)(a).

248. *See id.* § 9-115(4).

249. *See id.* § 9-203(1).

250. *See id.* § 8-106 cmt. 1; *see also id.* § 9-115(1)(e) & cmt. 2 (showing relation of control to taking of security interest).

251. *See id.* § 8-106(b).

252. *See id.* § 8-301(a).

253. *See id.* § 8-106(d). Much the same system applies for security interests in uncertificated securities. *See id.* § 8-106(c) & cmt. 4.

254. These rules cover all forms of control, including purchase, so the scenario is not very *outré*, except perhaps for secured credit. Even then, one may see sales, as the common "repo" transaction suggests. *See infra* notes 265-269 and accompanying text.

sions a contract among the entitlement holder, the securities intermediary, and the secured party. The entitlement holder need not give up its own right to dispose of the entitlement; as long as the secured party is able to do so, the definition is satisfied.[255] For that matter, granting control rights to one secured party is perfectly consistent with granting control rights to other secured parties.[256] Finally, for the sake of completeness, one may grant and take a security interest in a securities account by taking control over all securities entitlements in that account or by taking control under a three-party agreement.[257]

One or two more rules on attachment and perfection under revised Article 8 may be helpful before we turn to priorities. One may, as noted, perfect a security interest in investment property by taking control. One may also do so in the more conventional manner of filing a financing statement in the appropriate office; conventional, that is, for most other types of security, but remarkable for investment securities.[258] How one perfects, however, may affect one's priority against other secured creditors.[259] The new rules also codify the old common law broker's lien. If a customer of a financial intermediary buys a financial asset, but has not yet paid for it when the asset is credited to the customer's account, the securities intermediary retains an automatically perfected security interest in the resulting securities entitlement securing the customer's obligation to pay.[260]

Finally, two special methods of securities transactions are handled specially under revised Article 8. First, those who lend to stockbrokers and the like secure their loans principally by taking security interests in the security entitlements of their debtors. These can be handled through a so-called "hard pledge," under which the securities are actually transferred on the clearing corporation's books; these can be disposed of only with the lender's approval.[261] Less radically, the secured lender may be willing to leave the securities or security entitlements in the name of the debtor, subject to an agreement that the securities or entitlements will be transferred to the se-

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255. *See* U.C.C. § 8-106(f) & cmts. 4 & 7 (1995). Indeed, example 3 to comment 4 does exactly that.

256. *See id.* Creating junior security interests or disposing of the entitlement may cause a default under the security agreement, but that is not the concern of the law that allows the security interests to be created and perfected.

257. *See id.* § 9-115(1)(e) & cmt. 4. To be truly complete, I should mention that commodities contracts and accounts are also covered by these sections, even though they are not securities for the purposes of Article 8. *See, e.g.*, Vaaler, *supra* note 183, at 314-15.

258. *See* U.C.C. § 9-115(4)(b) (1995). If, however, the debtor is a securities intermediary, the financing statement is irrelevant; the security interest is perfected when it attaches. *See id.* § 9-115(4)(c).

259. *See infra* notes 290-294 and accompanying text.

260. *See* U.C.C. § 9-116(1) & cmt. 2 (1995).

261. *Id.* § 9-115 cmt. 6.

cured creditor on demand—an "agreement to pledge."[262] The hard pledge gives the lender control, and thus a perfected security interest, with no need to file. The agreement to pledge, on the other hand, gives a security interest, but no control; the lender may not sell the securities or security entitlements without the broker/debtor's approval. Under the 1977 version of Article 8, the lender under an agreement to pledge could gain only temporary perfection and thus had to roll over the loans every twenty-one days (not a real problem, because the loans seldom last that long).[263] Revised Article 8 is kinder to this sort of lender; it falls under the automatic perfection rule, and thus does not have to roll over the loan.[264]

One more type of lending before we go on to the new priorities rules: repo lending. This type of transaction became notorious in 1994 when Orange County, California, was forced into bankruptcy by incautious trading in repos, and many major corporations showed great and surprising losses.[265] What is this financing method? Briefly, a firm simultaneously sells securities and agrees to buy equivalent securities back at some specified time and price.[266] The price difference is, in effect, the interest rate charged by the repo lender for the use of the purchase price.

Repo agreements caused a great deal of dispute during the drafting of revised Article 8, in part because it was far from clear whether they were security interests or simple sales. The characterization is complicated in part by the different types of repos. Some allow the repo seller to retain the underlying securities ("hold-in-custody" repos), while others require that the repo seller give control of the securities to the repo buyer ("delivered-out" repos).[267] These correspond roughly to agreements to pledge and hard-pledge loans, discussed above, and very possibly would receive the same overall treatment.[268] For our purposes, it is enough to note the problem and point out that

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262. *Id.*; *see also* Howard M. Darmstadter, *Revised Article 8 and the Agreement to Pledge*, 28 UCC L.J. 202, 205-06 (1995).

263. *See* Darmstadter, *supra* note 262, at 203-04.

264. *See* U.C.C. § 9-115(4)(c) & cmt. 6 (1995); *see also* Darmstadter, *supra* note 262, at 206-07. This kindness may be more apparent than real, though, because the lender under an agreement to pledge has lost some of its old priority. *See infra* notes 290-294 and accompanying text.

265. *See* Jeanne L. Schroeder, *Repo Madness: The Characterization of Repurchase Agreements Under the Bankruptcy Code and the U.C.C.*, 46 SYRACUSE L. REV. 999, 1000 (1996).

266. *See* Jeanne L. Schroeder, *Repo Redux: Repurchase Agreements Under the 1994 Revisions to the UCC*, 29 UCC L.J. 3, 4 (1996); *see also generally* MARCIA STIGUM, THE REPO AND REVERSE MARKETS (1989).

267. *See* U.C.C. art. 8 pref. note III.C.10 (1995).

268. The courts and commentators seem divided on the issue. *See, e.g.*, Schroeder, *supra* note 265; Schroeder, *supra* note 266; William F. Hegarty, IV, Note, *Lifting the Cloud of Uncertainty Over the Repo Market: Characterization of Repos as Separate Purchases and Sales of Securities*, 37 VAND. L. REV. 401 (1984).

revised Article 8 generally does not require that one characterize a transaction as one or the other.[269]

In sum, revised Article 8 cleans up the baroque world of attachment and perfection for all classes of security interests in investment securities, and particularly for security interests in security entitlements. As others have suggested, this removes earlier impediments to secured lending and very likely improves the availability of credit to a wide range of potential borrowers.[270] Before one can opine boldly about the benefits to credit markets and the like, though, one must look closely at the priority rules under revised Article 8, for changes in priorities will affect greatly the willingness of a lender to lend and the ability of a borrower to borrow.

2. The Insecurity of Securities Accounts; Priorities Under the New Article 8

Security interests have value because they can give priority to their holders over other creditors, should the debtor default, and because, relatedly, the creditors typically have easier, faster, and cheaper means of getting to their collateral as a result. We need not enter the murky debate about the efficiency of secured credit here, or this Article would never end.[271] For the moment, it is sufficient to suggest that there are at least some cases where secured credit may be efficient, even if they are at times overrated. The real question then becomes who takes priority over whom.

Under the 1977 version of Article 8, these questions were left to conventional Article 9 law.[272] Then and now, the general rule under Article 9 resolves disputes among holders of perfected security inter-

269. This is unlike, say, the distinction between a sale and a lease, which has potentially huge consequences in a wide range of instances. *See* U.C.C. § 1-201(37) (1995); 4 WHITE & SUMMERS, *supra* note 27, § 30-3.

270. *See* George T. Morrison & John J. Donlon, *Pending Revisions to Articles 8 and 9 of the Florida UCC: An Opportunity for Florida to Merge onto the Information Superhighway*, FLA. B.J., Jan. 1998, at 45, 46.

271. For those inclined to take the plunge, here are some of the leading sources pro and contra: Symposium, *The Priority of Secured Debt*, 82 CORNELL L. REV. 1279 (1997); Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857 (1996); Garvin, *supra* note 62; Steven L. Harris & Charles W. Mooney, Jr., *A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously*, 80 VA. L. REV. 2021 (1994); Lynn LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887 (1994); Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625 (1997); Steven L. Schwarcz, *The Easy Case for the Priority of Secured Claims in Bankruptcy*, 47 DUKE L.J. 425 (1997); Alan Schwartz, *Security Interests and Bankruptcy Priorities: A Review of Current Theories*, 10 J. LEGAL STUD. 1 (1981); Paul M. Shupack, *Solving the Puzzle of Secured Transactions*, 41 RUTGERS L. REV. 1067 (1989); Elizabeth Warren, *An Article 9 Set-Aside for Unsecured Creditors*, 51 CONSUMER FIN. L. Q. REP. 323 (1997); James J. White, *Efficiency Justifications for Personal Property Security*, 37 VAND. L. REV. 473 (1984).

272. *See* U.C.C. § 8-321(3) & cmt. 3 (1977).

ests by giving priority to the first to file or perfect.[273] There are a good many twists on this rule, particularly for holders of purchase money security interests—security interests that exist to enable the debtor to purchase the collateral—who generally receive superpriority over earlier holders of liens in after-acquired property ("floating liens").[274] In any event, security interests continue in the proceeds of the collateral, to the extent the proceeds were traceable.[275] Secured parties, however, did lose to buyers in the ordinary course of business,[276] and even to many non-ordinary-course buyers.[277] These rules had uncertain application under the 1977 version of Article 8, in large part because the methods of transfer under section 8-313 fit poorly with the main Article 9 approaches to the creation of security interests, even for conventionally certificated securities.[278]

(a) Priority Battles with a Customer as Debtor

The attendant uncertainty did little to encourage the use of investment securities as collateral, whether held directly or indirectly. Revised Article 8 sought to reduce confusion here, in part by setting up some special priority rules in Article 9. To get at these, it may be useful to go back to hypotheticals. We shall retain the Dewey firm, but this time use as our entitlement holder Laverne, who holds a security entitlement in one hundred shares of Shotz Brewing. Laverne's security entitlement is, as noted earlier, a property interest in the underlying financial assets.[279] A few uncontroversial results may be dealt with first, starting with priorities involving only one secured creditor. If Laverne seeks to borrow, using her security entitlement as collateral, the lender's perfected security interest will have all the attributes of an ordinary security interest. Thus, it will be safe against the claims of the trustee in bankruptcy as hypothetical lien creditor.[280] It will also give the secured creditor rights over all unsecured creditors who may wish to levy Laverne's assets.[281] None of this changed prior law.

If we add another secured creditor, we start to see changes. If two secured creditors, perhaps Lenny and Squiggy, take control of

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273. *See* U.C.C. § 9-312(5) (1995).

274. *See id.* §§ 9-109, -312(3), (4).

275. *See id.* § 9-306. This statement, like most of the others in this synopsis, is oversimplified, but may be useful to set up the new provisions on security interests in investment securities.

276. *See id.* § 9-307(1).

277. *See id.* § 9-307(2), (3).

278. *See, e.g.*, Coogan, *supra* note 234; Schroeder & Carlson, *supra* note 234, at 618-40.

279. *See supra* notes 196-206 and accompanying text.

280. *See* 11 U.S.C. § 544(a) (1994).

281. *See* U.C.C. § 9-301 cmt. 2 (1995).

Laverne's security entitlement,[282] then we would ordinarily expect the first to take control to prevail, following the general Article 9 analogy. Under the revised rule, however, Lenny and Squiggy will usually rank equally, presumably sharing the collateral pro rata.[283] This result seems odd, in that it undercuts the apparent primacy of the initial security interest. Furthermore, if both Lenny and Squiggy had filed financing statements to perfect their security interests, then the first to file would prevail.[284] One assumes that the first to take control will define default in the security agreement to include the granting of control to any other secured party, though this may do little good if Laverne becomes insolvent. But what if Lenny perfects by filing, and Squiggy then perfects by taking control? Under a first-to-file-or-perfect rule, Lenny would prevail (if we analogize taking control of a security entitlement to taking possession of goods). But under the new rule Squiggy would win: one who perfects by taking control prevails over one who perfects by filing.[285]

This needs some explanation, given that we ordinarily assume that later creditors with notice of a security interest can protect themselves. What about a later creditor here? The control agreement will not be found in the public records, so an untruthful borrower can do some mischief. The rationale rests on the fact only in the revision was filing made a proper means of perfecting a security interest in securities.[286] Accordingly, lenders may not yet have grown accustomed to searching the public records. As standard practice had been to perfect by other means, it seemed appropriate to the framers of revised Article 8 to give precedence to established practice. Furthermore, this approach is consistent both with practice and law for negotiable instruments and even for certain transactions within Article 9 for which there is a preferred means of perfection.[287] One may still ask whether this approach may prove a trap for the unwary. An inexperienced lender may be seduced by the general Article 9 method and assume that filing first will grant priority. Still, perhaps these battles among secured creditors—probably relatively sophisticated examples of this breed, given the type of security they are taking—should not evoke our sympathy; if they can't learn the rules of their trade, they should pick a new line of work.

282. Recall that control need not be limited to one secured party. *See supra* note 256 and accompanying text.

283. *See* U.C.C. § 9-115(5)(b) (1995).

284. *See id.* §§ 9-115(5)(f), -312(5)(a). The purchase money superpriority rule does not apply here. *See id.* § 9-115(5)(f).

285. *See id.* § 9-115(5)(a) & cmt. 5. Examples one through three in the comment contain variations on this theme.

286. *See id.* § 9-115 cmt. 5.

287. *See* Rogers, *supra* note 174, at 1477-83.

These battles among secured creditors produce different results when one secured creditor is the debtor's financial intermediary. In these cases, the financial intermediary will always prevail, even if the other secured creditor takes control.[288] Once again, the first-in-time approach is not followed, though perhaps this result is not so odd. After all, the security entitlement exists on the broker's books, which might be analogized to perfection by possession.

(b) Priority Battles with the Securities Intermediary as Debtor

If the debtor is, say, a brokerage house, most of the rules discussed above will apply. This is true both for the routine rules about control and for other rules that apply to the debtor's financial intermediary, for a financial intermediary may itself have a financial intermediary. For example, a stockbroker not itself a member of DTC may contract with another broker to handle its accounts; that broker, in turn, has DTC as its intermediary. It should be noted, though, that if the debtor is a financial intermediary, filing a financing statement will neither perfect a security interest in its investment property nor affect the priority of the security interest, because such a security interest perfects automatically on attachment.[289]

These rules change the priorities for some of the specialized transactions discussed above. Consider, for starters, the hard pledge and the agreement to pledge.[290] The former is unexceptionable because the lender has control and thus has a perfected security interest with priority over a noncontrol security interest.[291] The trickier case is the agreement to pledge. Here there is no control; the lender under such an agreement thus will take equally with other noncontrol lenders with perfected security interests, but will lose to all holders of control security interests.[292] The advantages of lasting perfection for the lender under an agreement to pledge are thus countered by this somewhat pale priority.[293] Repo lenders have very similar problems under revised Article 8. If they actually require that the security entitlements be transferred, then they have control with all the resulting advantages; if not, then not.[294]

These rules may not be too surprising, given that we have recovered from whatever shock the basic rules induced when we went through them with Laverne as debtor. Nor should we worry much, if

288. *See* U.C.C. § 9-115(5)(c) (1995).
289. *See id.* § 9-115(4)(c).
290. *See supra* notes 261-264 and accompanying text.
291. *See* U.C.C. § 9-115 cmt. 6 (1995).
292. *See id.*
293. But the real problem is up ahead. *See infra* notes 301-09 and accompanying text.
294. There is much more to this analysis, but not for present purposes. *See, e.g.*, Schroeder, *supra* note 177.

at all, about any of the assumptions made about standard practice or appropriate analogies; these rules seem to comport with what sophisticated parties, who are pretty much the only ones who will care, will want, and so they are probably efficient. But what if one of the parties to a priority battle probably is not sophisticated? This may happen—indeed, probably will—if the battle is between an entitlement holder and a secured creditor of the securities intermediary, and it is here that we will end up.

(c) "WARNING: YOUR SECURITIES INTERMEDIARY MAY BE DANGEROUS TO YOUR WEALTH"[295]

Under the 1977 version of Article 8, the priority rules appeared to give the entitlement holder, as we would now put it, the rights of a purchaser, but perhaps not a bona fide purchaser.[296] This posed problems when the broker's secured creditor held rights in the broker's assets. Though the cases were unsettled, a parsing of the statute leads one to conclude that a secured creditor could prevail over a customer with an interest in a fungible bulk, depending on the timing of the secured loan and the transfer to the customer.[297] This emphasis on timing was thought peculiar; the customer would have no way to know about any transactions with a secured lender (who at that time could not perfect by filing) or another intermediary, whether before the customer acquired its interest or after.[298] A clearer rule would, if nothing else, give the customer certainty and allow her to plan.

Revised Article 8 does provide certainty—but, for the most part, the certainty of the grave. We can, however, start with some good news for the entitlement holder. If Shirley, the holder of a security interest in Dewey's securities and security entitlements, challenges Laverne, our entitlement holder, and Shirley's security interest is an agreement to pledge, then Laverne will win. Under section 8-511, an entitlement holder will prevail over a creditor of the securities intermediary when the creditor does not have control over the financial asset.[299] This changed then-current law in the entitlement holder's favor.[300] Otherwise, though, the news is not very good. If Shirley instead took control of the securities and security entitlements, then

295. Mooney et al., *supra* note 182, at 1895 (quoting Martin J. Aronstein).

296. *See supra* notes 272-278 and accompanying text.

297. *See, e.g.*, Mooney, *supra* note 180, at 366-79.

298. *See id.* at 377.

299. *See* U.C.C. § 8-511(a), (b) (1995); *see also* Darmstadter, *supra* note 262, at 207-08.

300. *See* Darmstadter, *supra* note 262, at 208; Rogers, *supra* note 174, at 1523-26. Whether there will be any lasting benefit is less clear. If lenders under agreements to pledge respond by taking control, then the entitlement holder will lose anyway, and will have succeeded only in forcing the securities intermediary to pay more for its loan. *See* Mooney et al., *supra* note 182, at 1901.

she would prevail over Laverne, the customer.[301] Hence the title of this section: allowing a securities intermediary to act on one's behalf exposes one to the risk that the intermediary will become insolvent.

As Professor Rogers has observed, this provision has engendered a good deal of comment, much at least initially adverse.[302] Indeed, Professor Rogers, the Reporter for revised Article 8, was among those inclined at first to favor the rights of the customers.[303] His conversion, and perhaps that of others, stemmed in part from the apparent conservatism of the provision; though the customers would lose, they would very likely have lost under old Article 8. Perhaps more to the point, the rule is consistent with other provisions, such as section 8-503, which favors the transferee over the entitlement-holder wrongfully deprived of her entitlement.[304] Nor may the securities intermediary routinely grant these security interests. Indeed, revised Article 8 makes clear the implicit idea that one cannot pledge what one does not own.[305] In addition, a rule which protected entitlement holders over secured creditors or, for that matter, transferees, would greatly complicate repo financing, for it is far from clear even now whether repos are true sales or security interests.[306] One last point of the many that could be made: very often customers are perfectly willing to allow their brokers to borrow on their security entitlements. If, for instance, a customer buys on margin, the broker in effect lends the customer the added money needed to establish the entitlement, money that the broker will have to get somewhere. The broker is likely to borrow it, using its assets, including the security entitlement, as collateral. To draw a distinction between these transactions, which presumably are acceptable, and others would increase the cost of lending, and very possibly discourage the use of margin accounts.[307] The arguments are many and can only be touched on here.[308] It should be borne in mind that the major threat to an entitlement holder—that its security intermediary may wrongfully pledge its entitlement and then become insolvent—is dealt with by other law. SIPA should often provide the customer with the remedy she cannot get under revised Article 8.[309]

301. *See* U.C.C. § 8-511(b) & cmt. 1 (1995).

302. *See* Rogers, *supra* note 174, at 1511-12.

303. *See id.*

304. *See supra* notes 223-226 and accompanying text.

305. *See* U.C.C. § 8-504(b) (1995).

306. *See* Rogers, *supra* note 174, at 1527-28.

307. *See* Rogers, *supra* note 174, at 1533-34. Much the same result may obtain when a customer sells short. *See id.* at 1528-29.

308. The curious may wish to consult U.C.C. § 8-511 cmts. 1 & 2 (1995); *see also* Rogers, *supra* note 174, at 1511-40; Schroeder, *supra* note 177, at 486-502.

309. Rights under SIPA are, however, limited, and could in extreme cases run out entirely. *See, e.g.,* Egon Guttman, *Mediating Industry and Investor Needs in the Redrafting of UCC Article 8*, 28 UCC L.J. 3, 13-18 (1996); Kessler, *supra* note 212.

D. Conclusion

Revised Article 8 is certainly a success, if adoptions and scholarly commentary are any guide. The commentary, strewn throughout the preceding footnotes, has almost all been laudatory, and the adoptions have been rapid and plentiful. Indeed, revised Article 8 has even been adopted as the federal law governing the perfection and priority of security interests in Treasury securities.[310] Even if the statute were at best an indifferent success, Florida would have been justified in adopting it for the sake of uniformity and the commercial advantages that attach to it. As it is, the statute clarifies much that was murky, especially with respect to the indirect holding system.

One may still ask whether the rules that place a good deal of the risk of intermediary failure on the customer had to be structured thus. Granting the considerable force of Professor Rogers' arguments in their favor, the rules could still have had, in essence, a consumer exception. It would not have to protect repo financers, margin customers, or the like, and it would not have to affect the rules that protect buyers of entitlements. Rather, revised Article 8 could have given individual entitlement holders priority over secured creditors of their intermediaries as to any entitlements pledged to the secured creditors. After all, the intermediary is not supposed to borrow on the basis of the entitlements held by others, and one may fairly assume that most of an intermediary's financial assets are held on behalf of its customers. Under these circumstances, why should a lender, presumably knowing these facts, be given priority in assets which it should know the intermediary may not pledge?[311] This problem is especially acute in light of the tendency of most people to undervalue remote risk and thus the probability that an intermediary might default.[312] Properly crafted, it would have been possible to avoid the

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310. *See* 31 C.F.R. § 357.10(c) (1997). For a vigorous critique of the earlier proposals and the earlier law, see Charles W. Mooney, Jr., *Good Faith Transferees of U.S. Treasury Securities and Other Weird Ideas: Making Federal Commercial Law*, 26 LOY. L.A. L. REV. 715 (1993). On the appropriate means of complying with revised Article 8, see CLARK, *supra* note 233, ¶ 7.17[3] (Supp. 1998).

311. The lender could, of course, lend on the basis of any securities held by the intermediary on its own account, and separate arrangements could be effected to deal with margin accounts—which, in any case, have proved problematic enough in our history that very modest discouragement may not be amiss.

312. This may be caused by a good many factors, including excessive discounting of future events, over-optimism, cognitive dissonance, and the infrequency, and resulting underassessment, of this sort of risk. In the securities context, see Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 CAL. L. REV. 627 (1996); Robert B. Thompson, *Securities Regulation in an Electronic Age: The Impact of Cognitive Psychology*, 75 WASH. U.L.Q. 779 (1997). On cognitive error more generally, see Larry T. Garvin, *Disproportionality and the Law of Consequential Damages: Default Theory and Cognitive Reality*, 59 OHIO ST. L.J. 339 (1998); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

harms to which Professor Rogers and others allude, and give some added protection to those against whom the intermediary acted wrongfully.[313]

But here we are, and Article 8 will not be revised again any time soon. Perhaps, as has been observed, the great clarity of revised Article 8 will bring home to investors their relative vulnerability and lead to strengthening of consumer protections in other legislation.[314] Even as it is, though, revised Article 8 vastly improves the law of investment securities; any regrets are about missed opportunities, of which there are very few, rather than errors made. Taken as a whole, the statute is a great success; NCCUSL should be proud of fostering it, and Florida should be proud to have enacted it.

IV. THE GHOST OF U.C.C. YET TO COME

Thanks to the last legislative session, Florida's U.C.C. is almost current. The Legislature has adopted revisions that, though not perfect, both improve the law and increase uniformity. It is thus time to blow the dust off of the crystal ball and look at impending U.C.C. revisions, both for already-approved changes to the Code and for changes that are in the works. These follow, in the likely order of submission.

A. Article 5

This section of the U.C.C. governs letters of credit. It had gone unrevised since its initial enactment, a few conforming amendments occasioned by changes in other articles aside. Since the 1950s and 1960s, though, letter of credit practice has changed greatly. This is due in large part to shifts in international letter of credit law. To illustrate, the International Chamber of Commerce has adopted the Uniform Customs and Practice for Documentary Credits (UCP), a codification of trade practice that, by contract, governs most international letters of credit. The UCP has changed over the years, with the most recent iteration in 1993.[315] In addition, the United Nations Commission on International Trade Law (UNCITRAL) has prepared the United Nations Convention on International Guarantees and Stand-by Letters of Credit, which has been adopted by the General Assembly of the United Nations and which awaits ratification.[316] Given the large percentage of letters of credit that occur internation-

313. As others have suggested. *See, e.g.*, Francis J. Facciolo, *Proposed Article 8: Why it Should Not Be Adopted in Its Current Form*, UCC BULL., Apr. 1997, at 1, 5.

314. *See* Mooney et al., *supra* note 182, at 1895.

315. *See* INTERNATIONAL CHAMBER OF COMMERCE, ICC PUBLICATION NO. 500 (1993).

316. *See* JOHN F. DOLAN, THE LAW OF LETTERS OF CREDIT ¶ 4.01[4] (rev. ed. 1996 & Supp. 1998).

ally, banks issuing letters of credit would much prefer international and domestic law to coincide. To an extent, they did before; the area has evolved over many centuries, and modern changes have tended not to depart far from this historic base. Furthermore, several states, most notably New York, put in place a nonuniform amendment to Article 5 that expressly allowed parties to contract out of Article 5 and into the UCP, or to apply the UCP through trade usage or the like.[317] Still, divergence in practice could create traps for the unwary or incautious, and thus might be avoided.

Ordinary domestic practice has also changed. One significant change is the increasing use of electronic payment systems, including letters of credit, which were not even contemplated some forty years ago when Article 5 was first drafted. Some specialized types of letters of credit, most notably standby letters of credit, have been developed as well, and fit imperfectly in the old statutory regime.[318] Finally, Article 5 was the first attempt to codify this old and often idiosyncratic field. Excellent as the original project was, some drafting anomalies and oversights cropped up over the years, and were dealt with in varying ways and with varying degrees of success by courts and legislatures.

Accordingly, an American Bar Association Task Force on Article 5 studied the matter and recommended substantial revision.[319] A Drafting Committee, with Professor James White (of the classic White and Summers treatise) as reporter, began work in 1990, and a final draft was approved in 1995. This has been adopted, with very few nonuniform amendments, by thirty-two states.[320]

It would be hard to do justice to the revision in the limited space one can justify, especially in light of the technical challenges of the field.[321] In brief, the revision seeks both to align letter of credit law more closely with good commercial practice and modernize letter of

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317. The states were Alabama, Arizona, Missouri, and New York. *See id.* ¶ 4.05. Since then, all save New York have enacted revised Article 5. *See* U.C.C. art. 5, 2B U.L.A. 127-29 (Supp. 1998).

318. In part to bring order to this important area, the International Chamber of Commerce recently codified international standby practices. *See* Robert S. Rendell, *Stand By for New Set of Rules on Letters of Credit*, NAT'L L.J., Nov. 2, 1998, at B8. These obviously are not referred to in new Article 5, but presumably will be treated in much the same manner as the UCP. *See infra* notes 322-323 and accompanying text.

319. *See generally An Examination of U.C.C. Article 5*, 45 BUS. LAW. 1521 (1990).

320. *See* U.C.C. art. 5, 2B U.L.A. 127-29 (Supp. 1998).

321. For more thorough summaries of the Article 5 revisions, see James G. Barnes & James E. Byrne, *Revision of U.C.C. Article 5*, 50 BUS. LAW. 1449 (1995); Dellas W. Lee, *Letters of Credit: What Does Revised Article 5 Have to Offer to Issuers, Applicants, and Beneficiaries?*, 30 UCC L.J. 234 (1996); Milton R. Schroeder, *The 1995 Revisions to UCC Article 5, Letters of Credit*, 29 UCC L.J. 331 (1997); B. Lynn Kremers, Note, *Letters of Credit: Should Revised Article 5 of the Uniform Commercial Code be Adopted in Missouri*, 65 UMKC L. REV. 567 (1997); James J. White, *Trade Without Tears, or Around Letters of Credit in 17 Sections*, UCC BULL., Dec. 1995, at 1.

credit law. The former is accomplished in part by section 5-116(c), which provides that the parties may incorporate the UCP or other rules of custom or practice by reference, save where Article 5 declares itself nonvariable.[322] Parties to letter of credit transactions, generally a sophisticated lot, can thus use whatever rules are common to a contracting community, without fear that Article 5 will interfere.[323] To bring about modernity, revised Article 5 makes a good many changes. Some resolve splits in the cases; some bring U.S. law into line with general commercial norms; some change law, typically in a manner that increases commercial efficiency.[324] Perhaps an example of each is in order.

One important split resolved by revised Article 5 deals with the burden placed on beneficiaries to comply with the terms of the credit when they present the letter of credit to the issuer for honor. Problems here arise when a beneficiary provides documents that do not quite comply. For example, a beneficiary might be obliged to submit a draft that, among other things, gave the number of the credit and stated that it was drawn under the credit. What if the draft did not do so? If the issuer could refuse payment, then the beneficiary would be unpaid. This might not be a problem if the applicant were still solvent, but it might leave the beneficiary without recourse if the applicant were no longer solvent. On the other hand, one may ask whether it is appropriate to require issuers to decide whether to honor a letter in other than a relatively clear, mechanical way. To do so would likely drive up the cost of letters of credit and impair their primary use as an efficient means of ensuring prompt and certain payment.[325] Old Article 5 was vague on this issue, leading to a meas-

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322. *See* U.C.C. § 5-116(c) (1995). The nonvariable provisions, listed in section 5-103(c), go to the expiration of letters of credit, the assignability of proceeds of letters of credit, and certain definitions. In addition, the ability of the parties to vary the subrogation right is somewhat limited under section 5-117(d), and Article 5 is generally subject to section 1-102(3), which provides a good-faith limit on variation. On variability, see, e.g., Clark A. Remington, *Llewellyn, Antiformalism and the Fear of Transcendental Nonsense: Codifying the Variability Rule in the Law of Sales*, 44 WAYNE L. REV. 29, 60-100 (1998).

323. Article 5 thus recognizes the importance of extralegal norms in commercial behavior and gives legal force to these norms generated outside of law. Put positively, Article 5 thereby gives effect to relational contract; though the rules that govern actual behavior may have developed outside of commercial law, the law will nevertheless recognize these rules. *See* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996). Less positively, perhaps, Article 5 provides little basis for attacking standard commercial practice as unfair, inefficient, or misguided. This may not matter much in the law of letters of credit, though the same cannot be said of, say, the law of sales.

324. Some also codify nonuniform Florida law. For example, at present Article 5 is silent about whether letters of credit are irrevocable. Florida's version of Article 5 contains a nonuniform amendment that creates a default rule of irrevocability. *See* FLA. STAT. § 675.103(a) (1997). This concept is found in revised Article 5. *See* U.C.C. § 5-106(a) (1995).

325. On the functions of letters of credit, see, e.g., DOLAN, *supra* note 316, ¶ 3.07 (rev. ed. 1996).

ure of disagreement in the cases.[326] Most courts, including Florida's, have chosen the latter virtue over the former and employed a rule of strict compliance.[327] Though immaterial variations would not allow an issuer to refuse payment, anything else—even substantial compliance—would. A few jurisdictions, including that faced with the facts above, have instead chosen a substantial compliance rule, which deals more loosely with inaccuracies at the cost of certainty.[328]

Revised Article 5 has chosen the strict compliance rule, putting it squarely in the blackletter.[329] This does not, as the comments make clear, require "slavish conformity to the terms of the letter of credit."[330] Beyond typographical errors and the like, more substantial mistakes may also be excused under something very much like estoppel, though waiver seems no longer a valid basis for a claim.[331] The rule, though firm, is thus not quite as harsh as it could be. It also should be remembered that the parties involved are typically rather sophisticated, so the ameliorations more appropriate in other contexts may not be needed, or wanted, here.

A modest example of a change that conforms American law to general commercial practice is section 5-108(i)(1) on the issuer's right to reimbursement.[332] Under old Article 5, the issuer was entitled to immediate reimbursement in "effectively available funds" not later than the day before the acceptance under the letter matured.[333] As the ABA Study Committee pointed out, this contradicted normal business practice, which is to reimburse immediately as of the day the acceptance matured.[334] Indeed, it would be odd for the agreement giving rise to the letter of credit to provide otherwise.[335] Accordingly, revised Article 5 provides that reimbursement must be in "immediately available funds not later than the date of its payment of

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326. The relevant provision says merely that "[a]n issuer must honor a draft . . . which complies with the terms of the relevant credit . . . ." U.C.C. § 5-114(1) (1968).

327. *See, e.g.*, American Nat'l Bank v. Cashman Bros. Marine Contracting, 550 So. 2d 98, 100-02 (Fla. 1st DCA 1989); Fidelity Nat'l Bank v. Dade County, 371 So. 2d 545, 546-47 (Fla. 3d DCA 1979). On the general rule, see DOLAN, *supra* note 316, ¶ 6.04.

328. *See* First Nat'l Bank v. Wynne, 256 S.E.2d 383, 385-86 (Ga. Ct. App. 1979); *see also, e.g.*, Banco Espanol de Credito v. State St. Bank & Trust Co., 385 F.2d 230, 234-37 (1st Cir. 1967).

329. *See* U.C.C. § 5-108(a) (1995).

330. *Id.* § 5-108 cmt. 1.

331. *See id.* § 5-108(c) & cmt. 3. Waiver is addressed most clearly in section 5-108 cmt. 7.

332. *See id.* § 5-108(i). As noted earlier, the revision's general deference to commercial practice, especially as found within the UCP, is an important move toward uniformity. *See supra* notes 322-323 and accompanying text.

333. U.C.C. § 5-114(3) (1968).

334. *See An Examination of U.C.C. Article 5*, *supra* note 319, at 1625.

335. *See* 3 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 26-7, at 160 (4th ed. 1995).

funds."[336] The U.C.C. thus has put in place a majoritarian default rule, obviating the need to contract around its predecessor.[337]

The final example, demonstrating a change that furthers freedom of contract, is the changed treatment of the duty of care owed by an issuer to an applicant. Old Article 5 provides that an issuer has a duty to an applicant to examine documents with care.[338] This duty may be defined by the parties, but may not be waived.[339] In revised Article 5, the duty of care is gone.[340] Though this section requires nonpayment if the documents do not comply, this requirement is subject to the agreement of the parties.[341] The only limit to the elimination of this potential liability is procedural: section 5-103(c) does not allow sweeping disclaimers in boilerplate, but rather requires more narrowly tailored, explicit disclaimers.[342]

In general, the revision has been accepted. However, new Article 5 has been criticized on the grounds that its fee-shifting provision may dissuade small firms from bringing suit against large banks.[343] Indeed, Alabama and New Jersey have enacted nonuniform versions of the relevant section to avoid mandatory fee-shifting.[344] This section, 5-111(e), in essence adopts the English approach to attorney's fees by granting reasonable fees and costs to the prevailing party.[345] Perhaps ironically, the provision was intended to improve the position of beneficiaries of letters of credit, who might otherwise be unable to bring suits alleging wrongful dishonor.[346] The New Jersey Law Revi-

336. U.C.C. § 5-108(i)(1) (1995).

337. A majoritarian default rule is a rule that supplies what most contracting parties would choose if they could negotiate costlessly and with perfect information. Such a rule can be efficient because it lowers transaction costs: fewer contracts will have to provide alternative terms. In addition, a majoritarian default rule can provide a sensible result where the costs of contracting around the default would exceed the benefit derived from the departure. In those cases, the parties will not depart from the default rule; making the default rule anything other than their preferred result would thus yield an unwanted contract term. *See* Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L.J. 1, 12 (1993); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 93 (1989); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 613-17 (1998).

338. *See* U.C.C. § 5-109(2) (1962).

339. *See* U.C.C. § 1-102(3) (1995).

340. *See id.* § 5-108.

341. *See id.*

342. *See id.* § 5-103(c) & cmt. 2.

343. *See* Margaret L. Moses, *The Impact of Revised Article 5 on Small and Mid-Sized Exporters*, 29 UCC L.J. 390, 407 (1997). The provision, U.C.C. § 5-111(e) (1995), states that "[r]easonable attorney's fees and other expenses of litigation *must* be awarded to the prevailing party in an action in which a remedy is sought under this article." (emphasis added).

344. *See* ALA. CODE § 7-5-111(e) (1997) (making fee-shifting discretionary); N.J. STAT. ANN. § 12A:5-111(e) (Supp. 1998) (same).

345. *See* U.C.C. § 5-111(e) (1995).

346. *See id.* § 5-111 cmt. 1; *see also* Fred H. Miller, *Realism Not Idealism in Uniform Laws: Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 723 (1998).

sion Commission, despite the entreaties of Professor Fred Miller, NCCUSL's Executive Director, and Carlyle Ring, Chair of the Article 5 Drafting Committee, concluded instead that attorney's fees should be made available, but not required, necessitating a change from "must" to "may" in the statute.[347]

The point is a good one, though not perhaps this amendment. Symmetric two-way fee-shifting statutes are very rare in American law, and with good reason; though they reduce the number of frivolous suits, they also reduce the number of meritorious suits. The latter effect is probably greater than the former, given the relative risk-aversion of plaintiffs and defendants.[348] In any event, genuinely frivolous litigation can be dealt with by existing powers of the courts. True, under the fee-shifting rule rejected by New Jersey, beneficiaries of letters of credit may more easily sue issuers for wrongful dishonor—a claim especially important given the unavailability of consequential damages.[349] The problem of unavoidable consequential damages is attenuated, though, by the lack of duty to mitigate on the part of the beneficiary.[350] Little harm to uniformity would be done were section 5-111(e) either omitted, made optional (as in New Jersey), or, preferably, remodeled in the manner of Article 2A.[351] Much, however, would be done to bring revised Article 5 within the broader scope of American commercial law.[352]

With that exception—altering the fee-shifting provision to model that in Article 2A—Florida should enact revised Article 5.[353] Most let-

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347. NEW JERSEY LAW REVISION COMMISSION, FINAL REPORT: UNIFORM COMMERCIAL CODE REVISED ARTICLE 5—LETTERS OF CREDIT 7-8, 10 (1996) [hereinafter NEW JERSEY REPORT], *available at* <http://www.lawrev.state.nj.us> (visited Jan. 9, 1999).

348. *See, e.g.*, Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 368-73, 379 (1991).

349. *See* U.C.C. § 5-111(a) (1995).

350. *See id.* § 5-111 cmt. 1. One imagines that the beneficiary will still tend to mitigate. First, its action against the issuer may be combined with other actions for breach, for which a duty to mitigate would still apply. Second, it may seek to limit its (unrecoverable) consequential damages and, in so doing, may also mitigate its direct damages. By implication, the applicant still has a duty to mitigate.

351. Article 2A's unconscionability provision grants consumer lessees reasonable attorney's fees if the court finds unconscionability but gives the lessor reasonable attorney's fees only if the lessee knew the action to be groundless. *See id.* § 2A-108(4). This provision is modeled on the corresponding provision in the Uniform Consumer Credit Code. *See* UNIF. CONS. CRED. CODE § 5.108(6) (1974). It also resembles greatly the asymmetric fee-shifting system used under some federal civil rights statutes, including 42 U.S.C. § 1988. *See, e.g.*, Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978); *see generally* 1 ROBERT L. ROSSI, ATTORNEYS' FEES §§ 10:17 to 10:22 (1995) (collecting authority).

352. It should be added that Professor Miller, though understandably against this nonuniform amendment, does not see it as a major threat to uniformity. *See* Miller, *supra* note 346, at 723.

353. New Jersey has enacted another nonuniform amendment to revised Article 5, which specifies that whether the issuer observes the standard practice of financial institutions regularly issuing letters of credit is a question for the court, rather than the jury.

ters of credit that Florida firms receive domestically are now issued under revised Article 5; so Florida lawyers must of necessity become at least noddingly familiar with it. This is not a statute with massive consumer effects, in which one properly looks at the costs that change will have on various classes of those affected. Letters of credit exist to facilitate commerce; the more uniform the rules governing them, the lower the cost of commerce, and the greater the ease with which commerce can occur. Revised Article 5, in its deference to UCP and other sources of letter of credit practice, is sufficiently flexible to effect the efficient use of letters of credit for quite a long time.

B. Article 9

In 1998 both the ALI and NCCUSL approved the final text of revised Article 9, governing secured transactions. The reporters have just completed the comments, and the whole package has already been introduced in some legislatures. This will be the third version of Article 9. After the original enactment, Article 9 was revised in 1978. Since then, a few relatively minor changes have come about. In essence, though, Article 9 has remained static for some twenty years, and largely so since the framing of the U.C.C.

New Article 9 has not yet been enacted—not surprising, given its recency. Its recency and scope also preclude any thorough treatment of its many nuances. Analysis of these will cause the death of many trees—no, forests—for years to come. Still, a few comments and predictions may be appropriate. I predict that in relatively short order it will replace the current version of Article 9 everywhere. The growth of interstate banking and multistate firms has made all the more important a uniform law on the taking of security interests. Once a handful of states adopt the new Article 9, there will be a strong push for all the others to do so.

But will the first handful enact the new statute? Will Florida? If history repeats itself, Florida will not pioneer in the enactment of Ar-

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Compare U.C.C. § 5-108(e) (1995) *with* N.J. STAT. ANN. § 12A:5-108(e) (Supp. 1998). The problem raised here is whether the provision leaves an issue of fact for the judge, which might limit unconstitutionally the right to a jury trial. *See* Moses, *supra* note 343, at 391-407. *But see generally* James E. Byrne, *Revised UCC Section 5-108(e): A Constitutional Nudge to Courts*, 29 UCC L.J. 419 (1997) (suggesting that section 5-108(e) is constitutional). The difficulty here is the sweeping language of the statute. As Professor Miller has noted, the intent was merely to leave to the court the determination of what standard practice is, not to take from the finder of fact any disputed fact questions as to whether the issuer complied with that standard. *See* NEW JERSEY REPORT, *supra* note 347, at 6. New Jersey's amendment clarifies this meaning, though at some cost to uniformity. This amendment may not be too consequential; presumably a constitutional challenge would result at most in a limiting interpretation of this section, and the amendment seems only to carry out what Professor Miller has suggested was the drafters' intent. It is hard to say, as has been suggested, that this is a fundamental departure from nonuniformity. *See* Miller, *supra* note 346, at 723.

ticle 9, but will happily follow others. One may confidently expect other states to lead the way. Naturally, there is some pressure placed on legislatures to enact revised versions of uniform statutes. Those states with law reform commissions have a built-in lobby, and very often the organized bar will act vigorously to push for uniform legislation. In addition, the commissioners themselves often lead the way in the legislatures. Though NCCUSL puts out more uniform legislation than a commissioner can handle at one time, a statute as important as the U.C.C. will naturally tend to take priority. These suggest a certain tendency to move revised Article 9 ahead, though perhaps not enough to overcome legislative inertia.

The critical force probably will come from the interest groups most favored by the revision. As with revised Article 5, larger banks are likely to push for the enactment of new Article 9. In part, this stems from the added clarity that the revision provides (though at times at the cost of pithiness; the text and the comments of proposed Article 9 are much longer than its predecessor).[354] Certainty, like uniformity, has great value to repeat actors in a market. The costs of moving to a new statute are not, however, borne equally by those who use it. This problem stems both from the fact of change and from the increased detail and precision of the new statute—in many ways, a move from rules to standards. As Louis Kaplow has observed, rules impose costs ex ante, while standards impose costs ex post.[355] Most of the costs ex ante ordinarily stem from the promulgation of the rules. Sometimes, however, the costs ex ante may be of the sort here—the costs of reworking one's way of doing business. Large banks and frequent credit users may find the added certainty of the new Article 9 attractive, as their transition costs can be spread over a good many transactions. Small banks and relatively infrequent credit users may, however, find the changes less pleasing. Just like their more active competitors, they will have to change their forms and, in a good many instances, their methods of doing business, but they will have fewer transactions over which to spread their costs.[356] At least in the short run, the change to new Article 9 may thus make smaller creditors less competitive.

354. To illustrate, compare the provisions on the priorities of purchase money security interests. *Compare* U.C.C. § 9-324 (1998) *with* U.C.C. § 9-312(3), (4) (1995).

355. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 585-86 (1992).

356. Alternatively, they may choose a sort of rational ignorance; if they conclude that the costs of revising their business practices exceed the likely value of the revisions, they may choose to remain ignorant. *See id.* at 571-77, 596-99. Apart from the direct costs of legal nonconformity, though, knowing that one may be afoul of the law may lead to excessive risk-aversion and thus a loss of potential gain. *See* Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 299 (1986).

Even more important, though, is the tendency of revised Article 9 to favor secured lenders over trade creditors and other unsecured creditors. The original U.C.C. moved far in that direction, in part by unifying a messy and complex field of law, in part by abrogating the pre-Code rights of unsecured creditors, and in part by making possible the ready use of floating liens and blanket liens.[357] The new Article 9 pushes further that way. It expands the possible scope of security interests to include, among other things, deposit accounts, payment intangibles, commercial tort claims, health care receivables, and most consignments.[358] It eases perfection rules.[359] It lowers filing costs by doing away with most occasions for multiple filings.[360] It clarifies the rules about filing locations, thus reducing the number of multistate filings.[361]

Just as important are the things it does not do. It makes only modest improvements in the lot of the consumer-debtor, rolling back some helpful changes in earlier drafts.[362] Though a good many commentators of a wide range of political stances have urged that involuntary tort claimants be given enhanced priority, this was not done.[363] The Article 9 committee also lobbied for the reversal of a

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357. The main drafter of Article 9, Grant Gilmore, later regretted that change. *See* Gilmore, *Good Faith*, *supra* note 219, at 627. For an example of the loss in standing of unsecured creditors, see, e.g., Garvin, *supra* note 62.

358. *See* U.C.C. § 9-109 (1998).

359. For instance, by allowing perfection by filing for instruments. *Compare id.* § 9-312(a) (perfection may be by filing) *with* U.C.C. § 9-304(1) (1995) (perfection only by taking possession). Perfection by possession will still give greater security to the creditor, though. *See* U.C.C. § 9-330(d) (1998) (perfection by possession has priority over other forms of perfection).

360. *Compare* U.C.C. § 9-501 (1998) *with* U.C.C. § 9-401(1) (1995). This is likely to yield a measure of nonuniformity as states that have elected a dual filing system choose to retain part or all of it beyond the remnant left in the revision. Local filing officers, typically the clerks of the county courts, may well bemoan the lost revenue and urge such a change.

361. This may well be the greatest advance in clarity in the new Article 9. *Compare* U.C.C. §§ 9-301, -306 (1998) *with* U.C.C. § 9-103 (1995). Here, too, a state filing officer, usually the Secretary of State, may worry about the resulting shifts in filing patterns and agitate for nonuniform amendments, most likely consisting of the old rules.

362. *See* U.C.C. art. 9 pref. note at 29-33 (Annual Meeting Draft July 1998); *see also, e.g.*, Memorandum from the UCC Article 9 Drafting Committee to Commissioners (Apr. 1998) (outlining changes and rationales) (copy on file with *Florida State University Law Review*).

363. *See, e.g.*, Kenneth N. Klee, *Barbarians at the Trough: Riposte in Defense of the Warren Carve-Out Proposal*, 82 CORNELL L. REV. 1466 (1997); David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565 (1991); LoPucki, *supra* note 271; Robert K. Rasmussen, *An Essay on Optimal Bankruptcy Rules and Social Justice*, 1994 U. ILL. L. REV. 1. *Cf.* Alan Schwartz, *A Theory of Loan Priorities*, 18 J. LEGAL STUD. 209 (1989) (granting many tort claimants some priority, but not complete). The coreporters of Article 9, not surprisingly, hold quite different views. *See* Steven L. Harris & Charles W. Mooney, Jr., *Measuring the Social Costs and Benefits and Identifying the Victims of Subordinating Security Interests in Bankruptcy*, 82 CORNELL L. REV. 1349 (1997).

proposed change in Article 2, which would have improved the status of a reclaiming seller; the Article 2 committee acceded.[364]

All this is to say that most financers of goods are quite likely to work hard for the enactment of revised Article 9. Though there are more debtors in the world than there are creditors, and though we are all potential tort claimants, the very diffuseness of these classes, coupled with the unlikelihood that any individual will care much about the result, makes it improbable that there will be much sustained opposition.[365] Perhaps more importantly, the statute, though, like all works of mortals, imperfect,[366] clarifies a good many areas left uncertain either by current Article 9 or by capricious judicial glosses. There are some risks of nonuniform amendments, particularly in the place of filing and remedies sections, but the statute will probably be adopted universally and all but uniformly.[367]

C. Articles 2 and 2B

Article 2, governing sales of goods, has not been revised since the initial wave of enactments, a few conforming amendments aside. Llewellyn's loose framework gave Article 2 a good deal of play in its joints; nevertheless, a study committee charged with evaluating the

364. *See* U.C.C. § 2-816 cmt. (Draft May 16, 1997).

365. Consumer advocates did take part in the drafting of new Article 9 and had a role in the truncation of consumer provisions near the end of the drafting process. More to the point, consumer groups could choose to lobby for nonuniform amendments, or, if sufficiently peeved, for nonadoption. This is unlikely to happen. Despite the late rollbacks, there remain some advances for consumers in new Article 9. Many consumer advocates may well take their half-loaf. In addition, as part of the late compromise, consumer advocates agreed not to oppose new Article 9 in the legislatures. *See* U.C.C. art. 9 pref. note at 30 (Annual Meeting Draft July 1998). Though not all consumer groups were represented in the late bargaining, the most active generally were, which will blunt any sustained attack on that front.

366. Excepting, of course, Gilbert and Sullivan's *Iolanthe*.

367. There is one nonuniform enactment that Florida should consider, whatever the outcome of these other issues. The Florida version of section 9-312(4), which gives the holder of a purchase money security interest a superpriority if it perfects its security interest within a limited time after the debtor takes possession, contains an extra sentence: "Failure to so perfect shall cause the priority of the purchase money security interest to be determined under subsection (5)." FLA. STAT. § 679.312(4) (1997). This added sentence is surplusage if one reads the following section: "In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section) . . ." U.C.C. § 9-312(5) (1995). Florida enacted this to reverse *International Harvester Credit Corp. v. American National Bank*, 296 So. 2d 32 (Fla. 1974), which did violence to Article 9 by giving the holder of the purchase money security interest its superpriority even though it did not comply with section 9-312(4). The leading treatise on Article 9 has termed this "The World's Worst UCC Decision" and "probably the low point in judicial construction of Article 9." CLARK, *supra* note 233, ¶ 3.09[4][d]. Florida's nonuniform amendment was designed to overturn *International Harvester Credit*, restoring the statute to its otherwise universal meaning. As *International Harvester Credit* remains in the Southern Reporter, it may be prudent to carry forward the nonuniform language in order to remind future generations of that decision's fatuity.

state of sales law concluded that there were enough difficulties to warrant review.[368] A drafting committee was thus empanelled in 1991 and, with occasional intervals for rest and refreshment, has been at work ever since.

In the course of the revisions, it was proposed that software and other licensing transactions be brought within Article 2. The law here had not been codified; some courts applied Article 2 by analogy, others applied Article 2 directly, and still others used the common law.[369] Article 2, however, fits licensing imperfectly. After an attempt to use a hub-and-spoke method to bring together the laws of sales, leases, and licensing, it was decided to split licensing off on its own.[370] A new drafting committee was thus put in place, and Article 2B began to take life.

Both Articles are still works in progress. At present, it is anticipated that Article Two will go to the states in early 2000, while Article 2B should be ready a year later. Commenting on either in any detail would thus court instant obsolescence. One can, however, predict safely that both will prove controversial; it is even possible that one or both will be interred in a uniform graveyard. Interestingly, the nature of the opposition to each is quite different. The present opposition to Article 2 is led by various industry groups, most of which decry the slightly expanded warranty coverage in draft Article 2. They also worry about other consumer provisions, most notably the shifting provisions about assent and contract formation generally.[371] This is not, however, to say that consumer advocates are delighted with the progress of Article 2. In fact, most of the changes are fairly mod-

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368. *See generally* PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP, UNIFORM COMMERCIAL CODE ARTICLE 2: PRELIMINARY REPORT (1990).

369. *See* PETER A. ALCES & HAROLD F. SEE, THE COMMERCIAL LAW OF INTELLECTUAL PROPERTY ch. 9 (1994).

370. *See* UNIFORM COMMERCIAL CODE REVISED ARTICLE 2B—PREFACE 3-4 (Draft Dec. 1, 1995), *available at* <http://www.law.uh.edu/ucc2b/1201/pref1201.html> (visited Dec. 22, 1998).

371. *See, e.g.*, Letter from R. Bruce Josten, Executive Vice President, Government Affairs, Chamber of Commerce of the United States of America, to Members of the Uniform Commercial Code Article 2 Drafting Committee (Mar. 6, 1998) [hereinafter Josten Letter] (complaining about formation and warranties sections); Memorandum from Jeffrey S. Edelstein & Debra Freeman, Attorneys, Hall Dickler Kent Friedman & Wood, to Members of the Uniform Commercial Code Article 2 Drafting Committee (Mar. 2, 1998) [hereinafter Edelstein & Freeman Letter] (letter from advertising trade associations, complaining about treatment of warranties created by advertising); Letter from Andrew D. Koblenz, Senior Attorney, American Automobile Manufacturers Association, to Members of the Uniform Commercial Code Article 2 Drafting Committee (Jan. 26, 1998) (complaining mainly about formation and warranties sections) (copies on file with *Florida State University Law Review*).

est, and a good many, if they favor any side, favor industry.[372] An outsider might have trouble understanding the fuss; none of the changes proposed in the present draft of Article 2 could be called revolutionary, and most simply recognize existing cases or extend slightly principles that have long been present in contract and commercial law. Furthermore, as is often entirely justifiable, the Article 2 drafting committee has often revised the draft to take account of industry objections, whether on substantive grounds or out of real concerns about the prospects for enactment. On the merits, then, industry has little cause for complaint and should have still less by the end of the process.[373]

Two illustrations may be in order, one on contract formation and the other on warranties. A number of critics of draft Article 2 have pointed to what they term "significant changes" to the parol evidence rule.[374] When one actually compares the parol evidence rule in draft Article 2 with that in the current version, though, one finds precious little change. The main changes in the draft are (1) elevating language about whether terms "would certainly have been included" in the record from comment to blackletter[375] and (2) clarifying that terms in a record may be explained from the surrounding circumstances.[376] The latter may appear to expand the parol evidence rule; in fact, though, it merely brings it more formally in line with the more modern approach espoused by Arthur Corbin and found, among other places, in the *Restatement (Second) of Contracts.*[377] Indeed, as a number of courts and commentators have observed, the Article 2 parol evidence rule was itself substantially a rejection of the old four-corners approach to parol evidence.[378] The change in the draft=s pa-

372. *See, e.g.*, Letter from Gail Hillebrand, Senior Attorney, Consumers Union of U.S., Inc., to Uniform Law Commissioners (July 1997) (applauding balance in draft and noting the provisions that favor sellers and that favor buyers).

373. Enactability is an obvious and important issue for any uniform statute because there is always the concern that nonuniform amendments may degrade the uniformity of a statute, or that incomplete enactment will lead to divergent rules. *See, e.g.*, Fred H. Miller, *Consumers and the Code: The Search for the Proper Formula*, 75 WASH. U. L.Q. 187, 214-15 (1997).

374. Letter From Charles R. Keeton, Counsel, General Electric Company, to Members of the Uniform Commercial Code Article 2 Drafting Committee 2 (Feb. 5, 1998); *see also, e.g.* Letter From American Gas Association to Members of the Article 2 Drafting Committee, National Conference of Commissioners on Uniform State Laws 3 (Mar. 6-8, 1998); Josten Letter, *supra* note 371, at 2.

375. *Compare* U.C.C. ' 2-202(a)(1)(B) (Draft Mar. 1, 1999) *with* U.C.C. ' 2-202 cmt. 3 (1995).

376. *See* U.C.C. ' 2-202(b) (Draft Mar. 1, 1999).

377. *See* RESTATEMENT (SECOND) OF CONTRACTS ' 212 & cmt. b (1979); Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 189-90 (1965).

378. *See, e.g.*, Barbara Oil Co. v. Kansas Gas Supply Corp., 827 P.2d 24, 35 (Kan. 1992); Herman Oil, Inc. v. Peterman, 518 N.W.2d 184, 188 (N.D. 1994); Sundlun v. Shoe-

rol evidence rule is thus quite modest, and perfectly consistent with modern legal doctrine.[379]

The other illustration is the draft=s treatment of advertising warranties. Article 2 has hitherto been silent about whether a manufacturer could, through its mass-market advertising, create an express warranty enforceable by remote buyers. The draft expressly states that a manufacturer may, in essentially the same way that it creates any other express warranty.[380] This move has been attacked by many in industry.[381] One wonders why. Though it is true that current Article 2 does not specifically validate this sort of express warranty, in comments it clearly holds open the possibility that courts may wish to recognize that such a warranty exists.[382] Almost without exception, courts that have reached this issue have done so.[383] In fact, only one part of the draft treatment of advertising warranties diverges from the path of current law B its elimination of consequential damages for lost profits, even for those who make it past the usual foreseeability test.[384] Manufacturers may resist this codification of current case law, but the real long-term effect of this draft provision is in their favor. Again, the objections from industry seem ill-founded.

Article 2 has drawn some fire, but its life has been placid when compared with that of Article 2B. Almost from the start, Article 2B has drawn formidable opposition from a wide range of entities. Consumer groups have consistently opposed it, often calling of late for the abandonment of the project.[385] So, too, have many groups of soft-

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maker, 617 A.2d 1330, 1334 (Pa. Super. Ct. 1992); II E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS ' 7.3, at 216 (2d ed. 1998).

379. Though it should be noted that some jurisdictions still use something like the four-corners approach to parol evidence under the common law. *See, e.g.*, Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1148-59 (1995).

380. *See* U.C.C. ' 2-408(c) (Draft Mar. 1, 1999).

381. *See, e.g.*, Edelstein & Freeman Letter, *supra* note 371, at 2; Josten Letter, *supra* note 371, at 4.

382. *See* U.C.C. ' ' 2-313 cmt. 2, -318 cmt. 3 (1995).

383. *See, e.g.*, Ferguson v. Sturm, Ruger & Co., 524 F. Supp. 1042, 1046-47 (D. Conn. 1981); Prairie Prod., Inc. v. Agchem Div.-Pennwalt Corp., 514 N.E.2d 1299, 1302-04 (Ind. Ct. App. 1987); Spring Motors Distribs., Inc. v. Ford Motor Co., 489 A.2d 660, 674-77 (N.J. 1985); Inglis v. American Motors Corp., 209 N.E.2d 583, 586-88 (Ohio 1965).

384. *See* U.C.C. ' 2-408(f)(3) (Draft Mar. 1, 1999).

385. *See, e.g.*, Letter from Steve Brobeck et al., Consumer Federation of America, to Charles Alan Wright & Gene N. Lebrun, Presidents, ALI (Nov. 10, 1998) (letter from Consumer Federation of America, Consumer Project on Technology, National Consumers League, and U.S. Public Interest Research Group); Letter from Gail Hillebrand to Uniform Law Commissioners (June 24, 1998) (letter from Consumers Union). The letters and other items referred to in this note and those that follow may be found on *The 2BGuide*, the preeminent website on proposed Article 2B, at <http://www.2Bguide.com> (visited Nov. 18, 1998).

ware customers, including a good many industry groups.[386] Many groups of computing professionals have also opposed the statute,[387] as have certain industries affected at its edges.[388] Libraries and other custodians and providers of information have expressed dismay.[389] Finally, the Federal Trade Commission (FTC) recently wrote comments that call into question many important provisions in Article 2B.[390]

With all these opponents, they must be doing something right. Certainly that has been the view of the software industry, which has consistently supported Article 2B.[391] This, again, is understandable. The law governing licenses of computer software is far from determined, and major splits exist among courts on a great many important issues.[392] At some point, uniformity is highly desirable. One might ask whether it would be better to let common law courts build

386. *See, e.g.*, Letter from Gordon Pence to UCC Article 2B Drafting Committee (Oct. 12, 1998) (letter from Caterpillar, Inc.); Letter from John Stevenson to Carlyle C. Ring, Jr., Chair, NCCUSL Article 2B Drafting Committee (Oct. 8, 1998) (letter from SIM).

387. *See, e.g.*, Letter from John R. Reinert, President, IEEE-USA, to Carlyle C. Ring, Jr., Chair, & Raymond T. Nimmer, Reporter, NCCUSL Article 2B Drafting Committee (Oct. 9, 1998).

388. *See, e.g.*, Letter from Jack Valenti, Director, Motion Picture Association of America, et al., to Carlyle C. Ring, Jr. Chair, NCCUSL Article 2B Drafting Committee & Geoffrey Hazard, Jr., Director, ALI (Sept. 10, 1998) (letter from Motion Picture Association of America, Recording Industry Association of America, Newspaper Association of America, National Association of Broadcasters, National Cable Television Association, and Magazine Publishers of America).

389. *See, e.g.*, Letter from National Writers Union (UAW Local 1981) to Carlyle C. Ring, Jr., Chair, NCCUSL Article 2B Drafting Committee, et al. (Oct. 9, 1998); Letter from Robert Oakley, Washington Affairs Representative, American Association of Law Libraries, et al. to Charles Alan Wright, President, ALI (Oct. 8, 1998) (letter from American Association of Law Libraries, American Library Association, Association of Research Libraries, and Special Libraries Association).

390. *See* Letter from Joan Z. Bernstein, Director, Division of Financial Practices, Bureau of Consumer Protection, et al. to Carlyle C. Ring, Jr., Chair, NCCUSL Article 2B Drafting Committee, & Geoffrey Hazard, Jr., Director, ALI (Oct. 30, 1998) (letter from Bureau of Consumer Protection, Bureau of Competition, and Federal Trade Commission).

391. *See, e.g.*, Memorandum from Business Software Alliance to Article 2B Drafting Committee (Oct. 10, 1998); Memorandum from Information Industry Association to Article 2B Drafting Committee (Oct. 8, 1998).

392. One illustration comes in contract formation. Many software manufacturers use shrink-wrap licenses—licenses, the terms of which are located within the packages and that provide that assent occurs on the use of the software. If the buyer does not learn the terms of the license until she has paid for the software, are the license terms part of the sales contract? Federal circuit courts have split on the issue. *Compare* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 102 (3d Cir. 1991) (not enforceable), *with* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996) (Easterbrook, J.) (enforceable). Parenthetically, draft Article 2B generally validates shrink-wrap licenses even though they appear somewhat inconsistent with traditional rules of contract formation and, for that matter, the principles of federal warranty law. *See* U.C.C. §§ 2B-207, -208 (Draft Feb. 1, 1999); *see also, e.g.*, Magnuson-Moss Warranty Act § 102(b)(1)(A), 15 U.S.C. § 2302(b)(1)(A) (1994) (presale availability of warranty terms); Zachary M. Harrison, Note, *Just Click Here: Article 2B's Failure to Guarantee Adequate Manifestation of Assent in Click-Wrap Contracts*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 907 (1998).

up a body of case law before presuming to codify, but the need is present. Where there is need, though, there is danger; if the law is frozen incorrectly, it may alter greatly the continued development of an important industry.[393]

Article 2B continues to shift in order to address objections. At the November 1998 meeting of the drafting committee, for example, the scope of Article 2B was limited to computer information transactions, thus addressing in part the objections of many in print and other media who do not want to fall under Article 2B.[394] The drafting committee also endorsed a provision allowing public policy to override contractual terms. Thus, for example, it would be possible for contractual restrictions on fair use, reverse engineering, and the like to be rendered unenforceable.[395] More changes may be in store.[396]

It remains too early to tell whether Article 2B will even be proposed by NCCUSL and ALI, much less whether it will be enacted anywhere. Three comments can safely be made, though. First, if the

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393. This cuts both ways. A statute that placed excessive restrictions on software licensors might well stunt the growth of that industry. On the other hand, a statute that tilts too far in their favor might dissuade customers from licensing software from American firms, thus providing an obstacle to growth.

394. *See* Carlyle C. Ring, Jr., Summary of Actions at Article 2B Meeting, Nov. 13-15, 1998 at 1 (n.d.), *available at* <http://www. 2Bguide.com/docs/cr1198sum.html> (visited Jan. 9, 1999); *cf.* Letter from Jack Valenti et al., *supra* note 388. This change has not mollified those groups. Though they have escaped coverage as licensors, they are still covered as licensees. Furthermore, just as happened with Article 2, courts might apply Article 2B by analogy to other licensing transactions. They have thus renewed their objections. *See* Letter from Jack Valenti, President and CEO, Motion Picture Association of America et al. to Gene N. LeBrun, President, NCCUSL et al. (Dec. 7, 1998)).

395. *See* Ring, *supra* note 394, at 1; *see also, e.g.*, Charles R. McManis, *The Privatization (or "Shrink-Wrapping") of American Copyright Law*, 87 CAL. L. REV. 173 (1999) (assailing the use of such terms).

396. One may, however, doubt that enough changes will occur to palliate the objectors, or that the remainder of the process will be at all smooth. Even before the ALI decided to delay considering Article 2B, acrimony plagued the drafting. A random selection of the comments in *The 2B Guide* illustrates this. More disturbingly, the acrimony appears in official statements made by the drafters. *See, e.g.*, U.C.C. art. 2B pref. 20 (Draft Aug. 1, 1998) ("In the political process that surrounds any new law, many public statements have been made about the effect of Article 2B on consumer protection. Most are political efforts to mislead."). There have even been more or less polite intimations that some on the drafting committee have improperly communicated the views of others. *See* Letter from Gail Hillebrand, Senior Attorney, Consumers Union, to Gene Lebrun, President, NCCUSL, & Carlyle C. Ring, Jr., Chair, NCCUSL Article 2B Drafting Committee (May 11, 1998) (protesting use of Consumers Union's name with an implicit endorsement of Article 2B), *available at* <http://forums.infoworld.com/threads/get.cgi?56678> (visited Jan. 28, 1999). The amount of criticism itself would make bridging the gaps difficult; the tone suggests that it may be impossible. Moreover, it is hard to explain NCCUSL's decision not to change its schedule, even in light of the ALI's decision to delay consideration of Article 2B by a year. *See* Press Release from National Conference of Commissioners on Uniform State Laws (Jan. 9, 1999), *available at* <http://www.2bguide.com/docs/199prel.html> (visited Jan. 28, 1999). Possibly NCCUSL thinks the remaining problems can be dealt with by with a bit of polish on the current draft. *See id.* It may also be that NCCUSL has in mind proceeding ahead, even if ALI ultimately tables the draft or gives firm objections after NCCUSL has approved it. In any event, the prospects are uninviting.

FTC is not satisfied with the progress of Article 2B, it may render large parts of the project moot. As it has in other contexts, the FTC can issue regulations that preempt state law. The drafting committee, ALI, and NCCUSL would thus do well to ensure that the FTC's comments are heeded, at least in substantial part, if they want a real statute to emerge. Second, if Article 2B is proposed, then it may well become the law that governs a great many of our licensing transactions. It is not unlikely that 2B would be enacted in a few states with a heavy concentration of software licensors—Washington comes to mind. Article 2B's choice of law provision is quite broad, allowing the parties—really, the licensor—to designate the law of any jurisdiction, though the choice is limited somewhat in consumer transactions.[397] Accordingly, subject only to the limits imposed by the Full Faith and Credit Clause or similar policies regarding the recognition of one state's laws by another (in particular, looking to the enforceability of choice-of-law rules), it would then be possible for software manufacturers to operate under Article 2B, or some nonuniform variant, much as certain states of incorporation have become popular because, in part, of their relaxed corporation laws. What Florida, or any other state, does might thus largely be moot.[398] Third, if Article 2B is killed off, its spectre may haunt the killers. Now that a complete text is at hand, the software industry could seek its enactment state by state (perhaps first removing some of the consumer provisions).[399] In any event, the issue is not yet ripe, though the next several months should be critical.

V. A FEW WORDS ON UNIFORM LAW-MAKING

As one surveys the somewhat leisurely maelstrom that is commercial law today, and surveys as well the problems that attend enactment, one may sympathize with the politico who, responding to

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397. *See* U.C.C. § 2B-107 (Draft Feb. 1, 1999).

398. Furthermore, should one state in a region adopt Article 2B, other states will be under pressure to do so, lest they lose software publishers to the neighboring state. Thus, if Washington adopts 2B, California may follow. This, in turn, might lead competitive states to act similarly. If Article 2B is approved, then, its opponents may need to fight hard in the states in which it is first proposed, and its friends may want to pick early states with care and concentrate on them.

399. Something along these lines has already started. Though NCCUSL has not yet finished with Article 2B, and though the drafts have undergone, and are likely to undergo, significant changes, legislators in Connecticut and Virginia filed bills to put in place the then-current version of Article 2B. Interview with Gail Hillebrand, Senior Attorney, Consumers Union, in Los Angeles, Cal. (Feb. 6, 1999). Remarkably, when NCCUSL was informed of these premature attempts to enact Article 2B, it did not attempt to stop, or at least slow, legislative action. *Id*. Though it appears that these attempts have been abortive, they do presage similar attempts, especially if NCCUSL, as expected, approves a draft in July 1999 (though before ALI has reviewed it in May 2000). Should this happen, and should NCCUSL not act vigorously to hold back the legislatures, one may ask about the future of ALI-NCCUSL collaboration.

the advent of the *Erie* doctrine and the growth of the commerce powers, filed a bill to put sales law under the federal wing—and thus inspired NCCUSL to take steps toward a Uniform Commercial Code.[400] Life might well be easier, if not necessarily better, had commercial law become a federal creature. Still, here we are, with a uniform law that must be made uniform by the actions of some fifty jurisdictions. The survey above may suggest that not everything runs smoothly. Sometimes, as with Article 2A, a statute is launched, only to be recalled quickly as problems are pointed out. Sometimes, as with Article 8, a statute, though carefully devised, mispredicts the future and thus leaves ungoverned many of the transactions it was designed to govern. Sometimes, as with Article 2B, a well-intentioned project draws a barrage of criticism that may imperil the result. And the U.C.C. is a success story; many uniform statutes issued by NCCUSL are adopted by few states, and some by none.[401]

Furthermore, even if a good product is offered to the states, they may well put in place nonuniform amendments, whether to placate this or that interest group or to deal with some cherished idiosyncrasy in local law.[402] Nor is the process of enactment always a model of legislative deliberation, unless one's model is drawn from Bismarck's famous dictum. Busy legislatures generally give little attention to routine uniform statutes, save when an affected group takes an interest, and may have to rely heavily on advocacy, rather than dispassionate counsel, when deciding what to do. In closing, then, I offer a few diffident suggestions on the law reform process, from drafting through enactment.

1. Use New Forms of Communication to Improve Deliberation

This requires a bit of background for those unfamiliar with the drafting process. At present, drafting committees meet infrequently—say, no more than four or five times a year for somewhere between three and . . . well, however many years Article 2 ultimately takes. Attending these meetings can be costly, which limits the ability of some potentially interested parties to take an active role. Though interested parties can submit proposals to the reporters or committee between meetings, proposals are discussed and voted on only at meetings. As a result, a good deal of a typical meeting is spent hearing people recite relatively familiar arguments and devise ways to formulate proposals for voting. Even when proposals are

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400. *See* Garvin, *supra* note 62, at 264-66.

401. *See, e.g.*, Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State* Laws, 25 J. LEGAL STUD. 131 (1996).

402. *See supra* note 151. For that matter, these amendments may prove ineffective, thus doing nothing more than sowing confusion in the minds of future readers. *See supra* note 4 (nonuniform amendment to deposit account definition).

made in principle, to avoid drafting on the floor, the ultimate product will be voted on only later, after the reporters have framed the statute.

At least in my experience, the result is not always satisfactory. Written submissions unaccompanied by the physical presence of their authors are frequently left aside, and a good deal of wheel reinvention goes on. These meetings are held when the people involved are away from their files and offices and thus cannot easily check whether statements made are perfectly accurate or whether one person's rendition of an earlier compromise is entirely correct. The press of time often prevents one from tabling matters until the full truth can come out. In principle, one can go back to correct errors, but inertia and other business sometimes preclude this.

One can only speculate, but it is likely that some past problems have come about because of this method of drafting. Potentially affected parties are often silent or at least muted; on the other hand, parties that can afford to be present throughout may have undue sway. Much time is also lost in devising language on the spot, or in debating recollections, time that could better be spent on the merits.

The present drafting method may have made sense in earlier days, when gathering around a table was the only way to hash out statutory language. Nowadays, though, one could use computer bulletin boards and e-mail lists to carry out much of the work between meetings. Members of the drafting committee and other interested parties could post and debate proposals at leisure, with full reference materials at hand and no limits, save one's own endurance, on crafting one's views. Ideally, proposals could thus be framed and, to a large extent, completed between meetings, leaving actual meetings to settle on policy issues and pass on work completed between meetings.

How might this avoid past difficulties? First, it would open up the process to more participants, especially the relatively impecunious. This might head off some nonuniform amendments inserted when those unable to take an active role in drafting nationally take an active role locally. Second, it could shorten the drafting process by leaving less to do at meetings (and thus requiring fewer of them). Though errors are found and corrected over time, complex statutes may also become Byzantine with endless layers of redrafting and patching. It is hard to remember why one took a decision three or five years ago, so one may reverse it without regard to the sound principles it had captured. Third, it should improve the quality of the participation. This is not to say that drafting committee meetings are intellectual slums. To the contrary: those I have attended have been marvelously educative and have featured discussion at as high a level as one can contemplate. But a good deal of what is said is frank advocacy and thus may not present the truth fully or, at times, fairly. A less concentrated process of deliberation makes it harder to slide dubious assertions past a committee, many, if not most, members of which are generalists. Others can more plausibly rebut assertions or do the research rebuttal may require. Fourth, it should save money; if fewer meetings are required, then NCCUSL has lower costs. It thus could take on more drafting projects, or devote more resources to those it has.[403]

NCCUSL has already taken steps in this direction by placing drafts of its works in progress at a website.[404] It might be worth trying this with a new project to see whether the cost and bother would be worth it.[405]

2. Make Complete Drafts Available Before the Blackletter Is Approved

Ordinarily, draft articles of the U.C.C. are approved before the comments are complete, or even before they are written. The version passed on by ALI/NCCUSL contains the proposed statutory text, perhaps with introductory comments and some reporter's notes tucked within. This contrasts with the usual ALI process for approving Restatements of the Law, in which both the blackletter and the comments are made available in draft form when the members of the ALI review the Restatement.

One can see why the U.C.C. drafts over the last decade or more have proceeded in this way. It is time-consuming to prepare comments, and reporters have plenty on their hands without the need to write and rewrite comments as the statute changes. Furthermore, the drafting process tends to run on longer than expected. By the time the statutory text is more or less final, no one wants to wait until the comments can also be made ready. As ALI and NCCUSL meet only once a year (in May and July, respectively), delay caused by drafting comments can put back a statute by up to nine months.

Still, the experiment might be tried. First, it is common to resolve disputes among drafting committee members by assuring one side or

403. Most importantly, by commissioning empirical work or by hiring outside experts to prepare background papers in unfamiliar or relatively unstudied areas. Others have pointed to the lack of empirical work in so fact-driven an area as a deficiency in the drafting process. *See, e.g.*, 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, 770-73 (1993).

404. The URL is <http://www.law.upenn.edu/library/ulc> (visited Jan. 9, 1999).

405. A modest reform along these lines would be to hold drafting committee meetings in law schools. The committee members and observers would then have ready access to law libraries, and thus could check the accuracy of statements made during meetings and do research on matters otherwise unanticipated. Law students might also be available to assist. I am indebted to David Frisch for this observation.

the other, or perhaps both, that the problem will be dealt with in the comments. This is also a way to handle principles which are difficult to draft precisely and briefly, but that should go somewhere. It is thus difficult to assess the success with which the reporters have handled this delegation until the comments are out. Leaving aside the potential fallibility of reporters who are asked to put things into comments over many years, it is possible that problems with conflicting comments, or conflicting memories of what the comments should have said, may emerge only after the draft has been approved and the comments written—and then it is too late to open up the process.[406] This may lead to nonuniform amendments in the states as frustrated commissioners and observers seek to get their ideas recognized somewhere.

Second, it is hard for those not active in the drafting of a statute to get a clear sense of what is behind shifts in statutory language without comments. True, the drafts typically contain redlined text, and often the reporters will note why a change was made. If, however, something was dropped from the statute because it would be dealt with in the comments, an outside observer will not realize why. Making the comments available earlier might thus lead to more informed submissions to ALI and NCCUSL in the later stages of approving a draft.

Third, preparing the comments before, rather than after, the statute is approved should help reduce the sort of problem that plagued Article 2A. When objections came in after the blackletter was approved, the reporter responded by rewriting the comments. This at times left the text and comments at odds, as others have observed.[407] Better to have the two fit together, and have both text and comments approved at once.

Fourth, having a more complete version available may forestall some of the late interventions found, for instance, in Article 2A. It has been pointed out that state law revision commissions tend not to get involved with a draft statute until very late in the process. If a full version were available for a reasonable time before approval, state law revision commissions and bar committees might be more inclined to review the product and make suggestions before the statute is approved. This would probably cut down the number of nonuniform enactments, and perhaps remove the need to recall an article (as happened recently with Article 2A, and happened with the whole U.C.C. in the 1950s).[408]

406. The comments are made available for inspection before they are made final, but there is no opportunity for discussion.

407. *See, e.g.*, Rapson, *supra* note 65.

408. After Pennsylvania enacted the U.C.C., the New York Law Revision Commission issued a report that, though generally favorable, found a good many spots where the

Fifth, and perhaps most important, the comments are quite important. They do not control the text, though there are plenty of spots in the Code where the text is ambiguous or at least very difficult to understand without the comments. Still, they are at least the second resort, and often (alas?) the first, when one is faced with difficult or unfamiliar statutory language. And, as has been noted, they are often used to fill in the gaps, where the drafting committee either felt that the statute could not efficiently deal with the welter of cases that could arise or where what is called for is either a general principle or a series of illustrations. The comments can also be used to suggest answers to interstitial problems or to problems deliberately left outside the scope of the statute.

Given this, why are the comments not passed upon by the people who approve the statute proper? The lack of approval, beyond the reporters and the chair of the drafting committee, has been pointed to as a reason against the overuse of comments.[409] It does seem odd to allow a very small and perhaps unrepresentative group the chance to shift significantly the meaning of a statute. For purely instrumental reasons, this may not be a bad thing if one likes the reporter's views more than the views of the drafting committee.[410] But these instrumental reasons lack a certain legitimacy and may ultimately lower the value of the comments to potential users.[411]

It is hard to see why NCCUSL and ALI should promulgate the U.C.C.'s comments in a method so different from that used for the Restatements. Were the text and comments put together for deliberation and passage, the comments would carry even greater weight and might also benefit from more give-and-take. In any event, the process might be considered for one or another of the projects up-

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U.C.C. needed improvement. *See* WALTER P. ARMSTRONG, JR. A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 77 (1991). To avoid having nonuniform versions throughout the states, NCCUSL revised the U.C.C. significantly, bringing it closer to the New York approach. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1, at 4 (3d student ed. 1988).

It is true that the whole Code was available by then, which would seem to undercut the point made above. Having the whole Code, text and comments alike, does not guarantee that the states will pass on it in advance. It makes early comment more likely, though, which would be a help.

409. *See* Peter A. Alces & David Frisch, *Commenting on "Purpose" in the Uniform Commercial Code*, 58 OHIO ST. L.J. 419, 447-58 (1997).

410. Mistrust of the reporter, on the other hand, may lead those worried about the comments either to fight harder for changes in the text, or to oppose the statute altogether. Some of those involved in the drafting of Article 2B have said as much to me, and one suspects that Article 2B, though extreme, is not unique.

411. *See* Alces & Frisch, *supra* note 409, at 447-58; *see also, e.g.*, Laurens Walker, *Writings on the Margin of American Law: Committee Notes, Comments, and Commentary*, 29 GA. L. REV. 993 (1995).

coming—perhaps revised Article 1, which should be finished in 2000 or so.[412]

3. *Use Law Revision Commissions to Study and Propose Legislation*

Most states have law revision commissions that evaluate and report on proposed uniform statutes, survey the state's statutes for anomalies and excrescencies, and propose new statutes to supersede those now obsolete or address new problems. Their work often improves the state's own laws and can guide legislators as they make sense of newly proposed enactments. Because these are nonpartisan, they can also help sift through the comments of the interest groups that praise or denounce proposed legislation. Finally, state law revision commissions have figured prominently in reshaping uniform statutes. The U.C.C. itself was overhauled as a result of the New York Law Revision Commission's thorough report on the first version; not until the new version was it enacted generally.[413] More recently, Article 2A's hasty recall was occasioned by reports from the California Bar and the Massachusetts Law Revision Commission.

State bars can do much in this vein, as Florida's has. Still, they can do only so much, given that bar study committees work with volunteer staffs. In addition, it is possible that the bar committees could become dominated by one or another faction, thus providing less than dispassionate analysis of a proposed statute.[414] There is much to be said for the relative independence of a freestanding group.

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412. It should be noted that the argument for may also be an argument against. The drafting process is already prone to manipulation by groups of those affected by the statutes. Threats of opposition are common currency and can yield some great changes in the draft statutes. In contrast, the comments are not always run by members of these groups and thus may be more nearly pristine. Because they generally are not voted on by the legislatures, they also are not amended by them and so will remain impervious to attack.

One may thus prefer the comments to be drafted after approval so that they may moderate some of the influences brought to bear on the statute. The potential opponents will still be watching, though, and the comments will be out before virtually every legislature passes on the proposed statute. If the comments move greatly away from the understanding of an affected group, it may push for a nonuniform amendment to the statute or seek to bring the statute down.

Furthermore, the notion that the comments might be better, or at least more neutral, if drafted after approval requires that one have great faith in the reporter and committee chair. While I can think of no reporter or chair who is less than superbly able, it is fair to say that some may tilt one way or another on issues and that all, though able, are mortal. From time to time, there have been disputes over whether a reporter has faithfully captured the sense of NCCUSL or ALI in revising the statute after a request, or order, to do so. Leaving aside the details of these disputes, the fact that they arise suggests that a good many affected parties might be uneasy about approving a commentless statute.

413. *See, e.g.*, *supra* note 412.

414. I should add that I know of no such domination in any such committee with which I have worked. I raise the issue as at least a theoretical problem (and perhaps an actual problem, if anecdotal evidence from outside of Florida is to be believed).

For whatever reason, Florida lacks a law revision commission. This may well have led to the present problems with Article 2A as to which Florida, despite its recent actions, *still* lacks uniformity for no apparent reason.[415] These commissions need not be costly. For example, New Jersey's, with a relatively small staff and budget, has done impressive work over the last decade or so.[416] Putting one in place would be well worth the cost, given the increased clarity and modernity that Florida's law would have.

VI. CONCLUSION

Commercial law in the United States has had waves of development. The first may have been early in the nineteenth century, when Joseph Story, among others, sought to provide a degree of consistency and logic to an often-confused field.[417] Much the same may be said of the latter part of the nineteenth century, during which American law adapted to some degree to the requirements of an industrial economy. The third wave was the advance of statutes promulgated by NCCUSL, most of which appeared in the early twentieth century.[418] After this came the drafting and adoption of the U.C.C., which occupied the 1940s through the mid-1960s. And now we have the last decade, in which almost every Article of the U.C.C. has been revised, and a new one written. A golden age for commercial law?

Perhaps not. It is easy to idealize the works of our seniors, especially because we have not been around to see the messy compromises that they made. Certainly the U.C.C. was no exception; indeed, it was attacked at its outset partly because it was thought to be a craven capitulation to the banking lobby.[419] More recently, a promising attempt to render payments law coherent was scuttled after a mass of objections, primarily from the banking industry.[420] Commercial law's history is rife with these difficulties.

Still, there is some reason for doubt. All of the periods above brought forth an efflorescence of secondary literature—all save our own, in which commercial law occupies an ever-decreasing part of the law reviews and the curriculum, to look at but one part of our profession. This may in part stem from the tendency of modern statutes to draft for all contingencies, rather than rely on the statement of general principles as guides to courts. The latter, not the former, was

415. *See supra* notes 151-159 and accompanying text.

416. For more on the New Jersey Law Revision Commission, see its website at <http://www.lawrev.state.nj.us> (visited Jan. 9, 1999).

417. *See, e.g.*, Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (Story, J.) (creating general federal common law for negotiable instruments).

418. *See, e.g.*, ARMSTRONG, *supra* note 408.

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

420. *See* Rubin, *supra* note 403, at 745-46.

Llewellyn's idea of a proper commercial code, and one leaves Llewellyn's framework at some peril.

This move may in part have arisen because of those most vigorous in pushing for change in commercial law—the relevant groups regulated. As noted earlier, large firms, and trade associations that give large firms great weight, tend to favor legal certainty, even in light of greater transition costs and, perhaps, some lack of flexibility.[421] The latter is a legitimate worry for all, but the use of form contracts and default, rather than mandatory, rules allows large firms to contract around rules they find inconvenient. Smaller groups affected may not share these views, but they will likely have less of a voice when critical decisions are made. Nor do consumers always share them; though often consumers would prefer clear, simple rules, they also want some measure of protection against over-reaching and market imperfections. In general, though, we have seen something of a move from standards to rules—or, to a point, from what Llewellyn called in another context the Grand Style to the Formal Style.[422]

All this is to say that this generation of commercial statutes does a great deal to clarify current problems in the cases and give effect to good modern business practice, but does rather less to mold general principles of law in a completely balanced way. This difficulty may be the latest iteration of what Professor Cooper has called the "struggle for control of the UCC" between, as she puts it, the madonnas and the whores—advocates for clarity, consistency, and elegance and interest-group representatives, respectively.[423] The problem is all the more acute because of the relatively great resources available to those who represent larger industry groups.[424] However conscientious and competent the members of the drafting committees are—and their standards are very high indeed—there is some effect to a steady barrage of criticism from one side or another on any significant issue. Moreover, a good deal of any drafting process is made with enactability in mind. Neither ALI nor NCCUSL wants to draft a pristine and unenacted statute. This is all the more dangerous for the U.C.C., which is already on the books; uniformity would be imperiled were some states to adopt a revised article and others not. Furthermore, there is very little innate pressure for the adoption of revised uniform laws. Bar associations and commissioners may push a bit, but determined opposition by an important group will often overcome their force. This leads to a strong desire to avoid annoying any group

421. *See supra* notes 354-56 and accompanying text.

422. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION 36-39 (1960).

423. *See* Cooper, *Madonnas*, *supra* note 151, at 564.

424. *See, e.g.*, Rubin, *supra* note 403. Interestingly, much of the present strife over Article 2B may be caused by the relative balance of power between the software manufacturers, on the one hand, and the array of software licensees, information providers, and consumers on the other.

that can credibly threaten to oppose a statute energetically and effectively. While neither ALI nor NCCUSL would sell their good names to this or that piece of special-interest legislation, there are often areas for good-faith debate over important principles, and in those areas the pressure, and usually the result, is for the larger, more tenacious groups to prevail.[425]

One should not yield too readily to despair. The recent revisions that have been made have been useful, though, at times, somewhat inclined to favor the large groups that press their cases persistently, vigorously, and, it must be said, not implausibly. Elegance and consistency are by no means out the window; indeed, the recent revisions often show clean, lucid, and sensible resolutions of important problems. Perhaps some process reforms of the sort noted above will help rectify some of the imbalance that from time to time affects codification. In any case, we near the end of this generation of commercial law reform. Whether it is a model or a warning for the future remains to be seen.

425. On the problems posed by capture and enactability, see Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569 (1998).