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I wrote some years ago that "[n]ot since Llewellyn's death . . . has the efficacy of *drafting* commercial law from the legal realists' frame of reference been examined."[1] With the current proliferation of projects to adjust, amend, rewrite and draft new, whole articles of the Uniform Commercial Code, Karl Llewellyn's jurisprudential perspective has been challenged.

Most importantly, Llewellyn knew what a statute could not do, and he knew what a judge could and could not do with a statute. Article 2 of the Uniform Commercial Code is a jurisprudential statement; it's Llewellyn's assertion that commercial sales law could be liberated from "the Law" by focusing on the natural forces inhibiting uncommercial behavior and providing a "Cardozoean" means to discern the immanent justice in recurring trouble cases.[2] Llewellyn's legal realism[3] does not just vindicate the status quo, but accommodates development along consistent lines that would not cross when the interests of powerful lobbies were brought to bear.

Llewellyn chose sales law as his laboratory, an area of the commercial law composed of a body of commercial principles and invigorated by transactors responsive to a commonality of interests. Codifying sales law would be easier than codifying many other areas of the commercial law if your design were to develop a framework that would enable the courts to reach not just predictable results, but the better or even the best results. So Llewellyn did, to an extent, start with a deck stacked in his favor.

The community of commercial sales transactors is substantially homogeneous. Buyers and sellers of goods share a common interest, realizing the mutual benefits of exchange, and, in more sophisticated transactions, those more likely to litigate will be represented by sophisti-

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1. Peter A. Alces, *Toward a Jurisprudence of Bank-Customer Relations*, 32 WAYNE L. REV. 1279, 1298 (1986).

2. Justice Cardozo's regard for fluid legal concepts, capable of adaptation to ongoing situations, impressed Llewellyn, who envisioned the Code as the source of law for commercial transactions now and in the future.

3. Llewellyn believed there was no unitary school of legal realism. Each realist subscribed to a legal philosophy that was not necessarily the same as that espoused by other realists. What distinguished the movement and provided the common ground among its adherents more than anything else was an impatience with formalism.

cated counsel. Now that would not distinguish sales from secured transactions. Article 9 deals are regularly negotiated by counsel, and both the creditor and debtor believe that the transaction will be mutually advantageous. Secured transactions, however, are distinguishable from sales transactions insofar as they are typically dominated by the secured party. The lender in one deal is generally the lender in the next. On the other hand, the seller in one Article 2 transaction is often the buyer in the next. Sears both buys and sells. Citicorp makes Article 9 loans; it does not (in its normal course) borrow money on Article 9 terms.

This distinction between Articles 2 and 9 explains why Article 2 achieves a better balance between the rights of buyers and sellers than Article 9 achieves between creditors and debtors. It also explains why there might be more litigation concerning Article 2 than there would Article 9. Buyers and sellers of relatively equal financial power would bring an Article 2 action, whereas most Article 9 debtors would not have the same wherewithal to sue an Article 9 creditor.[4]

Further, the fact that buyers and sellers are interchangeable from one deal to the next suggests that at the time Article 2 was drafted or revised, it would be easier to reach agreement on the formulation of a provision that favored neither buyer nor seller over the other. For example, Sears as buyer would not want to push too hard for fear of prejudicing the interests of Sears as seller.

The payments system law—governed by Articles 3 and 4—is distinct from both sales and secured transactions law because many commercial paper and bank collections transactions involve consumers, on whom the predictable business pressures do not necessarily operate in the way that and the extent to which they do in sales transactions. You could also be fairly certain that even if you were to defer to financial institution pressure and draft a rule that favored such interests at the expense of consumers, the provision would not generate an avalanche of litigation because consumers neither have the means nor the sophistication to bring actions premised on the loss of far less than a few hundred dollars.[5]

So Llewellyn reserved for himself the article of the UCC that provided the best setting for his, Cardozo's and Corbin's jurisprudential perspective.

Then Llewellyn set about drafting an article that would work in the way that he thought the statutory law should work. It has been ob-

4. Perhaps the proliferation of lender liability theories in the 1980s signaled borrowers' willingness to more aggressively confront their lenders in court.

5. *See* Alces, *supra* note 1.

served, derisively in commercial circles, that Article 9 provides the answer and that Article 2 merely restates the question. Therefore, Article 9 is superior to Article 2. It may be, however, that the genius of Article 2 is its restatement of the question in terms that invite the judge and jury to discern the justice that inheres in the recurring contexts. Mr. Donald Rapson, a member of the Permanent Editorial Board of the UCC, formulated for me the difference between the Article 2 and Article 9 drafting approaches in a 1986 letter:

> There is clearly an intended and recognized difference between 2 and 9. Coogan and Kripke purposefully did not adopt Llewellyn's drafting technique. It is almost axiomatic that the best thing a commercial lawyer can do for his client is to keep the client out of court. Article 9 takes that tack. Compared to Article 2 which looks to the courts and other forums to decide disputes by applying Article 2 principles, Article 9 endeavors to prevent the disputes by anticipating the issues and furnishing answers. By and large it has succeeded. In fact, it is primarily when Article 9 fails to provide answers in Part 5 and instead, simply uses the Article 2 technique of setting forth a "commercial unreasonableness" standard that it generates litigation.[6]

For Rapson, then, a commercial statute that does not discourage litigation is a bad commercial statute, or at least not as good as the statute that discourages litigation by "anticipating the issues and furnishing answers."[7]

There are several responses to that conclusion. First, it is not clear that Article 2 spawns more litigation than Article 9. While there may be more sales cases in the UCC digest than there are secured transactions cases, this does not establish the proposition that the drafting style of Article 2 is the reason for the greater volume of sales litigation. It may just be that there are many (hundreds of times) more sales than there are secured transactions. Every day virtually every commercial entity in the developed world is involved in a sales transaction. The same is not true of secured transactions. Before we could conclude that Article 2 generates more litigation than Article 9, we would have to know what percentage of sales and secured transactions results in litigation.

Further, is it fair to conclude that Part 5 of Article 9 is the most litigated portion of the secured transactions article simply because it

6. Letter from Donald J. Rapson, Member, Permanent Editorial Board of the UCC, to Peter A. Alces, Associate Professor of Law, University of Alabama 1-2 (Mar. 31, 1986) (on file with author).

7. *Id.* at 2.

incorporates Article 2 notions of "commercial unreasonableness"? Maybe Part 5 is heavily litigated because of the time at which it becomes relevant: The debtor has defaulted in its contract with the secured party and the secured party is foreclosing on the collateral. Debtors may be more litigious when they have little to lose and everything to gain.

Even if it were accurate that Article 2 generates more litigation than most of Article 9, one could argue that the measure of a commercial statute is not the volume of litigation it engenders or discourages, but the quality of the results that courts can reach when they correctly apply the statute's provisions. That is, wouldn't we prefer commercial law that accommodates our getting the right answer when we do litigate over law that discourages the very litigation that might guide us toward that answer? Certainly we could draft a statute that precluded litigation and denied transactors access to the courts, but that would not be desirable, even if efficacious. The answer lies in balance, a balance between rules that provide predictable results and those that guide us toward the best results. It would be inappropriate to conclude that commercial law that emphasizes "the sense of the situation"—essentially factual determinations—is deficient because it is less predictable before the fact.

Article 2, in its way, anticipates the issues and furnishes the means of obtaining the answers. Llewellyn recognized that it could not provide the answers. To an extent, the drafters of Article 2A recognized that the sales law model could support other commercial contexts and chose to draft as the uniform personal property lease law a new Article 2A rather than a new Article 9A. Certainly that choice was to an extent colored by the desire to avoid imposing a filing requirement in the lease setting.[8] But the fact that Article 2A tracks Article 2 so extensively supports the conclusion that the Article 2 model is viable and is not rendered less so by its imposition of a reasonableness analysis. In fact, the Article 2 provisions not imposed on the lease law were not discarded because of their incorporation of reasonableness tests. They were otherwise deficient.[9] In the one instance in which the drafters of Article 2A expressed an interest in departing from a reasonableness inquiry, the comment explaining their

8. For the terms of the filing requirement debate, see Douglas G. Baird & Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175 (1983), and Charles W. Mooney, Jr., *The Mystery and Myth of "Ostensible Ownership" and Article 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases*, 39 ALA. L. REV. 683 (1988).

9. For example, the drafters of Article 2A chose not to include a lease analogue of the sales article "battle of the forms" provision, U.C.C. § 2-207 (1990).

reasons for doing so establishes that they did not so much discard reasonableness as define it in terms of the lease context.[10]

Similarly probative is the expansion of the good faith inquiry in revised Articles 3, 4 and 6, as well as in new Article 4A, to expressly incorporate conceptions of reasonableness. If the complaint about Llewellyn's Article 2 were that it relies too much on conceptions of reasonableness, it would be curious that the sponsoring organizations have not backed off of the requirement but rather have multiplied the contexts in which it matters.

I suspect, however, that the cause of the uneasiness with Article 2, and Llewellyn's jurisprudential position, is not that it relies too much on reasonableness inquiries but that it restates the question rather than provides certain answers. From the perspective of some sophisticated commercial counsel, the method of Article 2 inhibits lawyering on behalf of clients uncomfortable with a judge's or jury's exercising judgment that might not vindicate the economic leverage such clients could utilize if Article 2 were not the law. It is not, then, the lack of certainty and predictability that they find most troubling.

That conclusion is supported daily by courts that construe the most ostensibly certain and formal aspects of the Commercial Code. There is probably no more clear example of such a mechanical Code concept than the Article 9 filing statement requirements.[11] If, in fact, Article 9 works because the drafters anticipated the issues and formulated the best answers, then it is difficult to explain the Article 9 filing system. The filing and search system is a morass,[12] and Article 9 debtors, trustees in bankruptcy and junior secured parties have little trouble finding a litigable issue that can survive summary judgment in order to frustrate, if not altogether defeat, the secured party.[13]

The state of Article 9 filing litigation, then, intimates that the solution to the litigation problem might not rest alone in the terms of the statutory formulation. Instead, the volume of litigation that a statute or

10. *See id.* § 2A-504.

11. *See id.* art. 9.

12. *See generally* Peter A. Alces & Robert M. Lloyd, *An Agenda for Reform of the Article 9 Filing System*, 44 OKLA. L. REV. 99 (1991) (suggesting need for changes to assure that substance prevails over form).

13. *See* Letter from James J. White to Charles W. Mooney & Steven L. Harris, Co-Reporters, Permanent Editorial Board Article 9 Study 1-3 (Sept. 3, 1992) (on file with author) (urging that revised Article 9 should make unperfected security interest superior to judicial lien—claim asserted by trustee in bankruptcy—in order to avoid financing statement litigation in bankruptcy setting). Professor White wrote: "This litigation is waste. It is wonderful for us lawyers, but adds little or nothing of social value." *Id.* at 2.

provision generates may be more a function of the transactional contexts in which the litigable issues arise. If a particular provision comes into play when a party to the transaction is in bankruptcy, then that provision might be the source of more litigation than would an even more flexible, ostensibly uncertain, formulation that is pertinent at a point in the transaction at which the parties are not necessarily any closer to bankruptcy.

It may also be that there is a greater likelihood of litigation if the parties to a transaction are more likely to be represented by counsel and the value in dispute is sufficient to justify the litigation expense for both transactors. This is not to say that the sophistication and means of the litigants bear a relation to the volume of litigation more directly than the relationship between flexibility ("reasonableness" tests) and litigation volume, but it does suggest that the case against Article 2, based on the idea that the Article's focus on fact-sensitive determinations generate litigation, has not been made.

Because Article 2's preoccupation with factual determinations may not, as some would assert, actually cripple the legislation, that still does not provide any argument in favor of Llewellyn's style. It would barely constitute faint praise. But Llewellyn's style in drafting Article 2 is otherwise defensible, even laudable. The argument in its favor may proceed from Lon Fuller's description of one perspective toward adjudication:

> We are all familiar with the process by which the judicial reform of disfavored legislative enactments is accomplished. . . .
>
> The process . . . requires three steps. The first of these is to divine some single "purpose" which the statute serves. This is done although not one statute in a hundred has any such single purpose, and although the objectives of nearly every statute are differently interpreted by the different classes of its sponsors. The second step is to discover that a mythical being called "the legislator," in pursuit of this imagined "purpose," overlooked something or left some gap or imperfection in his work. Then comes the final and most refreshing part of the task, which is, of course, to fill in the blank thus created. *Quod erat faciendum*.
>
> My [fellow justice]'s penchant for finding holes in statutes reminds one of the story told by an ancient author about the man who ate a pair of shoes. Asked how he liked them, he replied that the part he liked best was the holes. That is the way my [fellow justice] feels about statutes; the more holes they

> have in them the better he likes them. In short, he doesn't like statutes.[14]

The jurisprudential perspective Fuller describes is Cardozo's perspective as described by Llewellyn.[15] But does it make sense to say that Llewellyn would build a statute around the jurisprudential perspective of a jurist who did not like statutes? Yes. In fact, I wonder whether Llewellyn liked statutes very much.

Article 2 has been recognized as a common-law code. The sales article represents the tortification of contract law in commercial sales contexts. The focus is on factual analyses in terms of fundamental principles. Llewellyn concluded that it was better to define the parameters of acceptable commercial behavior and practices and empower judges and juries, than to fix ostensibly determinate and certain rules and then allow the courts and lawyers to contort the spirit of the law while being true to its letter.

The focus on result in terms of the sense of the situation, something more than common sense, would provide more predictable results than would the provision of certain statutory terms. The irony is that the more flexible the drafting, the more "open-ended" the statutory inquiry, the *more* predictable the results that would flow from the courts' application of the statute. The provisions of Article 2 betray a coherent and comprehensive method. It is that method that provides all the predictability that can be expected of the law.

It would be a mistake for the drafters of commercial law to give up on Llewellyn's jurisprudential approach, to look for ways to distinguish one commercial context from the next—such as software licensing from sales and leases of goods and services—to disintegrate the commercial law with new Articles 2B, 2C, *ad nauseum*, rather than to look for ways to integrate commercial legislation. The challenge for the drafters of a revised Article 2 is to identify the strategic strong points Llewellyn knew would reveal themselves to the careful lawyer-scholar. Article 2 should certainly be revised, if for no other reason than to bring more commercial contracts within its scope.

But maybe we will find looking back on 1993, in twenty-five or so years, that in their desire to follow in the footsteps of the drafters of the original Uniform Commercial Code, the commercial lawyer-scholars of the late twentieth century divided the Code into more and more special-

14. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 634 (1949).

15. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 430-37 (1960).

ized and discrete articles, each bearing the imprint of the particular predisposition of its drafter(s). Then, in around the year 2020, the task will be to discern and recapture the common ground, to emphasize fundamental affinities rather than superficial bases for distinction. Maybe only then we will see the beginning of the "neo-realist" movement.