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BUT THE PROPOSED UNIFORM [?] COMMERCIAL CODE WAS ADOPTED

Carl Felsenfeld *

The oldest living resident may recognize that the title above is derived from an article written by Professor Frederick K. Beutel of the Yale Law School, which appeared in the 1952 *Yale Law Journal*.¹ Professor Beutel began his article by stating that the UCC should not be adopted and concluded by advising that it would “mark the beginning of the end of fairness and uniformity in the commercial law.”² Beutel’s advice was not taken, and, with relatively modest modifications, the UCC has been adopted in all states. This Essay investigates whether Professor Beutel’s concerns were justified.

Beutel turns out to have been a vibrant and forceful writer. Upon reading his article, one is first tempted to scream “STOP” and ring a legislative fire bell. If the UCC were adopted, the world, or at least the economic world, would surely grind to a halt. And then one remembers that some forty years have elapsed, the UCC has been adopted, and somehow, we continue to exist and to trade. Perhaps even “fairness and uniformity” have not left us. How can this be?³

The major explanation of Beutel’s style is simple advocacy. How well some of us academics recall the lawyering days when every brief foretold doom if the other side’s misguided position were accepted. Those of us with lobbying experience equally remember the egregious misstatements we made to legislators and regulators—which they typically did not believe anyway—on the risks of not adopting our perspectives. Professor Beutel, whether a former litigator or lobbyist, unfortunately retained the battle spirit in academia. This Essay relates Beutel’s major points to actual experience under the UCC.⁴

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

2. *Id.* at 363.

3. Professor Beutel’s message is countered in the same volume of the *Yale Law Journal* by Professor Grant Gilmore, a primary draftsman of Article 9 and a leading advocate of the UCC. Grant Gilmore, *The Uniform Commercial Code: A Reply to Professor Beutel*, 61 *YALE L.J.* 364 (1952).

4. The roman numeral headings that follow are the same as those used by Beutel.

I. THE SCOPE OF THE CODE

Beutel began by noting that the UCC was designed to eliminate and replace seven uniform laws and a number of widely adopted non-uniform statutes. The uniform laws, whose names may jangle bells for our oldest resident, are the Negotiable Instruments Law,⁵ the Warehouse Receipts Act,⁶ the Stock Transfer Act,⁷ the Sales Act,⁸ the Bills of Lading Act,⁹ the Trust Receipt Act¹⁰ and the Conditional Sales Act.¹¹ Non-uniform statutes include the American Banker's Association Bank Collections Code,¹² various bulk transfer laws and "numerous statutes having to do with the rights of creditors and the relationships of banks to their depositors."¹³

Professor Beutel found that "ninety percent of the [UCC] involves re-codification of current statutes."¹⁴ It was, therefore, at best, a great waste of time. Lest one start testing this position by comparing prior statutes with the UCC, it should immediately be noted that Beutel had the effrontery to consider Article 9 largely a reformulation of the Uniform Conditional Sales Act.¹⁵ It is and was generally recognized in 1952 as being much more than that.¹⁶ In my judgment, Article 9 of the UCC is a beautiful exercise, which took the Uniform Conditional Sales Act plus many other statutes and created a logical and flowing treatment of what the UCC calls "a security interest."¹⁷

Even accepting Article 9 as new and creative, one can reasonably question whether an essential rewrite of existing law justified the creation of something as massive as the UCC. Would we do it today?

Before answering no, reflect that the UCC articles are regularly reviewed. Articles 3 and 4 have just been rewritten; Article 8, having been redone in 1977, is again going through the process; and Article 9 is

5. UNIF. NEGOTIABLE INSTRUMENTS LAW (1896) (superseded by U.C.C. art. 3).

6. UNIF. WAREHOUSE RECEIPTS ACT, 3 U.L.A. 1 (1906) (superseded by U.C.C. art. 7).

7. UNIF. STOCK TRANSFER ACT (1909) (superseded by U.C.C. art. 2).

8. UNIF. SALES ACT (1906) (superseded by U.C.C. art. 2).

9. UNIF. BILLS OF LADING ACT (1909) (act withdrawn 1951).

10. UNIF. TRUST RECEIPTS ACT (1933) (act withdrawn 1951).

11. UNIF. CONDITIONAL SALES ACT (1918) (act withdrawn 1943).

12. FREDERICK K. BEUTEL, BEUTEL'S BRANNAN NEGOTIABLE INSTRUMENTS LAW 133 (7th ed. 1948).

13. Beutel, *supra* note 1, at 336.

14. *Id.* at 337.

15. *Id.* at 354. Beutel did, however, discuss the changes Article 9 made to the existing law, but found the changes unnecessary. *Id.* at 354-57.

16. In his rebuttal, Professor Gilmore, the principal architect of Article 9, whether for reasons of modesty or whatever, did not give Article 9 nearly the defense it deserves. See Gilmore, *supra* note 3, at 364 n.1.

17. U.C.C. § 9-102(1)(a) (1990).

poised for a rewrite. In other words, the UCC drafting process was not necessarily a wasted effort, even if what came out was essentially what went in. Regular revision is an important part of good statutory drafting.¹⁸ Transforming the various predecessor statutes into the UCC may have yielded the unexpected benefit of putting into place a mechanism that assured future reconsiderations.¹⁹

Casey has, however, had the drink. Wasted effort (if it was) in the 1940s and 1950s has little effect on us today. If it ever was a reason not to enact the UCC, there is no life in it anymore.

II. THE LANGUAGE USED BY THE CODE IS UNNECESSARILY TECHNICAL, NEW AND ERRATIC

Whether language is “unnecessarily technical, new and erratic”²⁰ is largely a matter of taste. Beutel did, however, make some excellent points about the nature of a “code.” Comparing the UCC to the codes of Europe, he stated that codes should be phrased generally in terms of principle rather than in the technical detail favored by typical American statutes—which the UCC joins in this sense.²¹ He noted that the European codes “have practically no definitions.”²² The UCC is, of course, filled with them.

Beutel considered the United States Constitution “probably the most successful codification in history.”²³ He did not, however, address the question of whether the Due Process Clause, for example, represents a desirable standard for business practice. He did not consider the Article I power to establish “uniform Laws on the subject of Bankruptcies”²⁴ and see how that had to be expanded into a complex Bankruptcy Code, which is not code-like at all, even though its title defines itself as a

18. An absence of regular review is a criticism that may fairly be made of federal law. The banking industry, for example, is impeded by statutes enacted as long ago as 1863. *See* National Bank Act, ch. 106, 13 Stat. 99 (1864) (codified as amended at 12 U.S.C. §§ 21-215 (1988)).

19. The National Conference of Commissioners on Uniform State Laws and the American Law Institute have established the Permanent Editorial Board to keep an eye on the UCC. *See* Charles W. Mooney, Jr., *Introduction to the Uniform Commercial Code Annual Survey: Some Observations on the Past, Present, and Future of the U.C.C.*, 41 BUS. LAW. 1343, 1346 (1986).

20. Beutel, *supra* note 1, at 337.

21. *Id.* at 348.

22. *Id.* at 337-38; *see also* John Spanogle, *The Arrival of Private International Law*, 25 GEO. WASH. J. INT'L L. & ECON. 477, 507 (1991) (“[T]he civil law product will be shorter and contain fewer definitions.”).

23. Beutel, *supra* note 1, at 338 n.20.

24. U.S. CONST. art. I, § 8, cl. 4.

"code."²⁵ Neither did Beutel compare the success of the European codes as a guide to the behavior of laws such as the UCC.

The UCC, while bearing the label "code," follows the model of much American statutory law in its precision and detail.²⁶ What Beutel did not point out, however, in his description of foreign codes is the degree to which the umbrella codes, written in essential simplicity, are implemented by supporting legislation that contains all the detail of an American statute—including definitions. This satisfies American businesses' needs for guidance. We seem to arrive at a point where what is a code in the United States is really more like a European statute, not what civil lawyers would consider a code.

Beutel's argument is essentially based upon his perception of what a "code" is supposed to be, as contrasted with the function of a "statute." Whatever validity the argument may have had in favor of rejecting the UCC in 1952, it has little force today.

III. THE TERMINOLOGY IS NOT AS UNIFIED AS IN CURRENT UNIFORM LAWS

Professor Beutel observed that terms like "value, good faith, the concept of holder in due course, bona fide purchaser, notice, customer, accounts, goods, issue and many more" are basic to commercial law and "have a whole series of multifarious and conflicting meanings" in the UCC.²⁷ Those terms do have diverse meanings. Whether the meanings are conflicting or even confusing can, however, be disputed.

Good faith, for example, was defined one way in the section 1-201 definitional section, another way when applied to merchants in section 2-103 and yet a third way for negotiable instruments in section 3-103.²⁸ Value also had its basic meaning in section 1-201 and other sections of the UCC—including an elaborate construct for negotiable instruments at

25. See 11 U.S.C. §§ 101-1330 (1988).

26. American law is clearly a mixed bag in this regard. While we have "codes" written with endless detail like the Internal Revenue Code, we also have statutes in code-like simplicity, like the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1988 & Supp. II 1990).

27. Beutel, *supra* note 1, at 339.

28. The Article 3 definition indicates how views on this standard can change. In 1952, when Beutel wrote his piece, Article 3 defined good faith as "including observance of the reasonable commercial standards of any business in which the holder may be engaged." U.C.C. § 3-302(b) (1952) (superseded by U.C.C. § 3-103(4) (1990)). Prior to the 1990 amendments, the Article 3 definition of the term did not include the quoted language. The 1990 amendments redefine the definition to include "the observance of reasonable commercial standards of fair dealing." U.C.C. § 3-103(4) (1990). The author finds this type of revision more unfortunate and confusing than the general state of UCC drafting. One is not sure, however, whether, even if multiplied several times, it represents a fundamental objection to a law.

section 3-303—and is related to a concept of “new value” in section 9-108.

Variations such as these—and more—might have been perceived by Professor Beutel forty years ago as objectionable. However, they are all justified in terms of business need and desired result. The variations represent increased complexity over the prior law because of the greater complexity developing in mercantile transactions. They reflect subtleties of thought theretofore absent. For example, separating a “good faith purchaser,” under subdivision (1) of section 2-403, from a “buyer in [the] ordinary course of business,” under subdivision (2), is not difficult. The former includes one who takes as security; the latter does not. Is this undue complexity, or the reasonable creation of a useful distinction?

Though it is almost impossible to measure, the increased definitions seem to have resulted in minimal discomfort in practice and little judicial confusion. Of course, the real problems remain. The new UCC made it neither more nor less difficult to establish whether a person has “notice” of a claim or defense. The test in section 1-201 that a person has “notice” if “from all the facts and circumstances known to him at the time in question he has reason to know that it exists” is innately difficult to apply to all fact situations.²⁹

It was always a judgment call whether the UCC improved or worsened the state of the law. Certainly, the overwhelming majority of its reviewers found it an improvement.³⁰ But conflicting opinions accompany almost any major statutory change. The debate has continued with the adoption of amendments to the UCC throughout the years.³¹

IV. IT IS NOT A CODE BUT AN UNWORKABLE COLLECTION OF STATUTES

Undoubtedly, the UCC is something other than a traditional civil-law code. It brings together what can reasonably be considered a disparate group of statutes dealing with separate subject matters. Each article was drafted separately, often with its own language and usually with its

29. U.C.C. § 1-201(25)(c) (1990).

30. *But see* HENRIK IBSEN, AN ENEMY OF THE PEOPLE, act 4 (“The minority is always in the right.”).

31. “The one thing that should not be done is for state legislatures to enact the proposed revisions [of Articles 3 and 4].” Edward L. Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551, 593 (1991); *see also* Julianna Zekan, *Comparative Negligence Under the Code: Protecting Negligent Banks Against Negligent Customers*, 26 MICH. J.L. REFORM (forthcoming Apr. 1993) (discussing 1990 amendments to Article 4 of the UCC).

own theories and goals.³² The UCC is a code only in that it brings together the major enactments comprising what is thought of as commercial law.

After forty years of experience, the commercial world has not found the collection to be unworkable. It is probably impossible to estimate the difference between the litigation that the UCC statutes engendered and the conflicts that would have existed under the separate acts that preceded the UCC. The commercial world has grown larger, transactions are more complex and lawyers are fiercer and more litigious. In my judgment, albeit completely unscientific,³³ the number of UCC cases has not been untoward.

V. THE RULES OF INTERPRETATION AND APPLICATION ARE IMPRACTICAL

Professor Beutel was particularly critical of the UCC provisions dealing with conflicts of law. He summarized the effects of these provisions with the comment that "whenever a transaction whose subject matter is covered by this 'Code' in any way touches the forum, this 'Code' shall apply."³⁴ Because we may anticipate variations on the pristine UCC in different states, this, he continued, "would be the death of uniformity,"³⁵ would make "legal advice . . . impossible,"³⁶ and later said that "at least a half a century of confusion seems to be assured."³⁷

Indeed, the UCC has not been adopted with complete uniformity. At least one commentator has opined that this core of uniformity, with the potential for individual state variation where appropriate, is one of the UCC's unanticipated benefits.³⁸

32. Whether this has created the problems that Professor Beutel predicted was disputed even in 1952. To exemplify the disparate treatment of commercial issues in the UCC, Beutel pointed out an internal conflict in the handling of documentary drafts. If one focuses on the transfer of the draft, there will be one treatment through the "commercial paper" article. If, however, one concentrates on the transfer of the documents, the "documents of title" article will lead in another direction. Beutel, *supra* note 1, at 349. In his *Reply*, Professor Gilmore concluded that "Beutel is in error" in maintaining that the UCC creates this conflict, which actually "has existed under the old Acts for nearly fifty years." Gilmore, *supra* note 3, at 370-71.

33. If one hefts Professor Beutel's treatise on commercial law, BEUTEL, *supra* note 12, one gets a clear impression that conflicts under the statutes preceding the UCC were not rare.

34. Beutel, *supra* note 1, at 350-51.

35. *Id.* at 352.

36. *Id.*

37. *Id.*

38. Professor Norman Silber of the Hofstra Law School is exploring this idea in an article tentatively titled *The Substantially Uniform Uniform Commercial Code*. Norman Silber, *The*

The UCC has not resulted in the chaos predicted by Professor Beutel probably because of the essential uniformity achieved by the nationwide adoption process. Variations in the UCC's adoption tend to be within a narrow compass and do not injure the identity of principles around which the UCC is structured. Generally, it does not make any particular difference whether a dispute is litigated in state *A* or state *B*. It does not seem that adoption of the UCC has presaged the death of uniformity, or that practitioners have been impeded in giving legal advice because of the UCC variations.

VI. THERE IS NOT SUFFICIENT IMPROVEMENT IN SUBSTANTIVE PROVISIONS TO JUSTIFY REPLACEMENT OF THE PRESENT UNIFORM STATUTES

Professor Beutel found the UCC an insufficient improvement—where it improved at all—on existing law to warrant the massive statutory change. He warned against replacing existing law with the UCC in part because the prior law had been explicated in a group of treatises, including his own.³⁹ Beutel was not in a position to predict the growth of a set of new treatises both on particular articles of the UCC⁴⁰ and on the UCC in general.⁴¹

Professor Beutel referred to Security Interests in Article 9 as “truly the mad genius article of the ‘Code.’”⁴² Genius it is; mad it is not. In sweeping out the multitude of statutes dealing with conditional sales, chattel mortgages, trust receipts, factors liens, pledges, consignments and the like and replacing them with the unitary “security interest” of Article 9, the UCC justified its presence.⁴³ Article 9 is a man-made construct that logically and intelligibly moves one through the security process from its creation in Article 9, Part 2 through its liquidation in Part 5. It

Substantially Uniform Uniform Commercial Code (unpublished manuscript, on file with author).

39. See BEUTEL, *supra* note 12.

40. Beutel particularly mentioned *Williston on Sales* as reducing possible misunderstandings. *Williston on Sales* has been replaced by ALPHONSE M. SQUILLANTE & JOHN R. FONSECA, *WILLISTON ON SALES* (4th ed. 1974 & Supp. 1992). One may also mention GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* (1965).

41. See, e.g., WILLIAM D. HAWKLAND, *UNIFORM COMMERCIAL CODE SERIES* (1982 & Supp. 1992); THOMAS M. QUINN, *QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST* (2d ed. 1991 & Supp. 1992); JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* (3d ed. 1988).

42. Beutel, *supra* note 1, at 356.

43. Professor Beutel was less than ingenuous when he wrote that Article 9 would replace only the Uniform Conditional Sales Act. *Id.* at 354.

should not be considered an insubstantial improvement on the existing law.⁴⁴

VII. ARTICLE 4—BANK DEPOSITS AND COLLECTIONS, IS A PIECE OF VICIOUS CLASS LEGISLATION

As the foregoing title demonstrates, Professor Beutel saved his most ferocious salvo for Article 4.⁴⁵ Article 4 has been widely criticized as a pro-bank and anti-consumer statute.⁴⁶ I shall not enter into the continuing debate on specific provisions of Article 4, other than to make a few comments.

Article 4 has not been discriminatory in practice. Whether this is because banks used self restraint fearing that "any banker who insisted on exercising the rights given him by this 'Code' would probably be under suspicion by the better business bureau,"⁴⁷ or because Article 4 is not as anti-consumer as Beutel alleges,⁴⁸ I leave to studies elsewhere.

Professor Beutel failed to anticipate what has become the major consumer abuse under Article 4. Article 4 allowed banks into which a check was deposited to withhold giving the depositor credit for the check more or less at the bank's choosing.⁴⁹ Many banks' abuse of this ability resulted in the Federal Expedited Funds Availability Act,⁵⁰ which imposed time limits within which depository banks were forced to honor checks.⁵¹ While less than a complete justification of Article 4, it does seem that at least Article 4's major deficiencies are subject to correction.⁵²

Strangely, in view of his distaste for Article 4, Professor Beutel was critical of it because "[t]he bank may also change by contract any of the

44. Professor Grant Gilmore, who wrote the *Reply to Professor Beutel*, see *supra* note 3, was a principal draftsman of Article 9.

45. See Beutel, *supra* note 1, at 362. Indeed, Grant Gilmore, in his *Reply to Frederick Beutel* came close to agreement when he said, "I do not care to urge enactment of the present text of the Article." Gilmore, *supra* note 3, at 374. Professor Gilmore did not believe, however, that an insufficient Article 4 warranted rejection of the entire UCC. *Id.* at 377.

46. See Rubin, *supra* note 30, at 592.

47. Beutel, *supra* note 1, at 362.

48. *Id.* at 357-63.

49. U.C.C. § 4-213(4).

50. Pub. L. No. 100-86, 101 Stat. 552 (1987) (codified at 12 U.S.C. §§ 4001-4010 (1988 & Supp. III 1991)).

51. Expedited Funds Availability Act § 41.

52. The predecessor to § 4-214(4), in its creation of a preference upon bank insolvency, was found unconstitutional in that it could not preempt the federal law applicable to national banks. Beutel, *supra* note 1, at 359-60 & n.145. Professor Beutel contemptuously noted that the UCC "even re-enacts" that provision. *Id.* at 359. The drafters recognized this problem and, in comment 3 to the section, wrote that "there is no reason why it should not apply to others." U.C.C. § 4-214(4) cmt. 3.

rules set out in this act except the duty of due care.”⁵³ This, of course, is hardly a criticism—if criticism it is—of Article 4 alone. Article 1 makes the right to alter UCC rules by individual contract fundamental to the entire UCC.⁵⁴

More basically, what neither Professor Beutel nor Professor Gilmore addressed was the appropriate place of a bank in our economy. Simply finding that a particular provision acts against the interests of the consumer should not end the discussion. For example, Beutel wrote that “fairness in bank collections would require that the bank be the insurer of the paper that it is to collect.”⁵⁵ Banks typically respond to arguments like this with the assertion that to be an “insurer,” one must collect a “premium.” For bank customers to get more financial responsibility from banks, they would be forced to increase the service fees paid to banks. Whether this would be an acceptable trade-off is questionable and is a subject for debate.

Banks most recently squarely faced the issue during the drafting of Article 4A (Funds Transfers). Users of bank electronic funds transfer systems wanted the banks to accept greater responsibility in their handling of funds transfers. The banks replied that this would entail higher costs.⁵⁶ The issue was probably the single most difficult problem in the drafting of Article 4A. Ultimately, Article 4A established a structure that all parties agreed upon, which balanced low bank liability against low cost.⁵⁷

VIII. CONCLUSION

Professor Beutel’s objections carry little weight today. Some of them—the UCC is not really a code—were not relevant to the passage of the UCC in the first place. Others—it does not improve on existing law—were at worst only modest objections to the UCC. Some—the UCC is too complicated—may not have been true in 1952 and have disappeared into the mists of time. Some of his objections have been eliminated, or at least relieved, through the amendment process. Some articles, Article 8 for example, have become suitable for new commercial devices through the amendment process. At least one article, Article 9,

53. Beutel, *supra* note 1, at 361.

54. U.C.C. § 1-102(3).

55. Beutel, *supra* note 1, at 361.

56. See Carl Felsenfeld, *The Compatibility of the UNCITRAL Model Law on International Credit Transfers with Article 4A of the UCC*, 60 *FORDHAM L. REV.* S53, S68 (1992).

57. Compare § 4A-305(a), (b) (consequential damages for bank error clearly rejected) with § 4A-402 (establishing “money back guaranty” in favor of sender).

is generally perceived as a legislative triumph. Probably as well as any law of its size and scope, the UCC has been a success.