Loyola of Los Angeles Law Review

Volume 26
Number 3 *Is the UCC Dead, or Alive and Well?*

Article 8

4-1-1993

U.C.C. D.O.A.: Le Roi Est Mort, Vive Le Roi

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U.C.C. D.O.A.: *LE ROI EST MORT, VIVE LE ROI*[1]

*Egon Guttman**

Modern development of commercial law in the United States commenced with the creation of the National Conference of Commissioners on Uniform State Laws (NCCUSL). One of the first acts of the NCCUSL was to direct its Committee on Commercial Law to prepare a draft statute for negotiable instruments based largely on the British Imperial Bills of Exchange Act.[2] The use of British legislation acknowledged the United Kingdom as the predominant economic power in the world due to its banking and commercial interests, which effectively governed mercantile relationships in every hemisphere. The shift of economic power from Europe to the United States and the development of technology and changes in business approaches by U.S. entrepreneurs and banking entities resulted in the need to reevaluate the rules governing commercial transactions to reflect the approach and practices of U.S. business. Consequently, the Uniform Commercial Code was proposed as a governing law for enactment in the various jurisdictions of the United States.

Karl Llewellyn and Soia Mentschikoff, the main reporters of the proposed UCC draft, looked to the European concept of a mercantile code, an equivalent to the German Commercial Code, Handelsgesetzbuch,[3] rather than to a common-law approach to such legislation. Their approach to drafting the UCC was to represent the needs of mercantile interests and to leave consumer protection to legislative and judicial development.[4] As a result, in interpreting statutory language a problem is created once such an underlying policy determination is made. Whereas common-law courts traditionally adapt generalized laws

1. The king is dead, [long] live the king.

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2. Bills of Exchange Act, 1882, 45 & 46 Vict. ch. 61 (Eng.). The draft prepared by Mr. John J. Crawford was subsequently accepted by the NCCUSL and was enacted throughout the United States. *See* FREDERICK K. BEUTEL, BEUTEL'S BRANNAN NEGOTIABLE INSTRUMENTS LAW 1353-54 (7th ed. 1948). The first state to enact the Uniform Negotiable Instruments Law (NIL) was Connecticut in 1897. *Id.* at 1353. The last jurisdiction to do so was the Canal Zone in 1933. *Id.*

3. HANDELSGESETZBUCH [HGB] (F.R.G.).

4. *See, e.g.*, U.C.C. § 9-206 (1990) (stating that absent a statute or court decision to contrary, agreement that buyer or lessee of consumer goods cannot assert claim or defense against seller's or lessor's assignee is enforceable).

to specific circumstances and thereby create a judicial base for stare decisis to operate, civil-law courts return to the words of the statute to determine whether the situation the court is adjudicating falls within its purview. In her writings,[5] Mentschikoff suggests this civil-law approach to law students seeking to determine how to apply the UCC to situations they are called upon to resolve.

This approach creates a policy determination that severely hampers the expansion of general principles of commercial law to situations involving nonmerchant parties. This leaves lacunae in the law, which have not been filled because of an absence of specific rules. A typical example is reflected in the case of *Williams v. Walker-Thomas Furniture Co.*[6] As this case wound its way through the municipal court system of the District of Columbia, judges claimed that they were unable to protect the consumer due to an absence of a consumer sales protection statute, such as the statutes in existence in Maryland and Virginia.[7] Not until the federal court of appeals, then the highest appellate court in the District of Columbia, heard the case, was a common-law concept of *unconscionability* applied to protect the consumer from a balloon payment as well as from the invidious approach that had allowed apportionment of all payments to outstanding debts.[8]

What is said here is not intended to convey the impression that a civil-law court would not respect the pronouncements of a superior court or of another court of parallel jurisdiction. Although a puisne judge in the civil-law system has the power to interpret a clause in the civil code contrary to the interpretation adopted by a superior court, it is not likely that a judge would incense judges of a superior court by refusing to follow their interpretation. Not only would such a judge face a reversal by a superior court, but the resulting additional burdens on the superior court might interfere with the lower court judge's expectation of being elevated to a higher court in a system that provides for the judiciary as a career with inherent promotional expectations.

An absence of consumer-oriented rules in the UCC has led courts to draw analogies from other legal rules in order to apply acceptable concepts to consumer situations. It also has forced the development of some consumer-oriented legislation. But the concomitant to the Llewellyn-

5. *See* SOIA MENTSCHIKOFF, COMMERCIAL TRANSACTIONS 7-12 (1970).

6. 350 F.2d 445 (D.C. Cir. 1965) (remanding case to correct lower court's mistaken assumption that unconscionability is not sufficient ground for court to refuse to void installment sales contract).

7. *Id.* at 448 (citing Williams v. Walker-Thomas Furniture Co., 198 A.2d 914, 916 (D.C. 1964)).

8. *See id.* at 449.

Mentschikoff approach would have been a body of statutory law equivalent to a civil-law code on "obligations."

The problem that now exists in the United States is that there is no comprehensive body of consumer legislation developing. The progress made during the 1960s seems to have come to a halt. Only twelve U.S. jurisdictions have enacted the Uniform Consumer Credit Code.[9] As a result, the consumer movement turned to the Federal Trade Commission (FTC) and Congress for help. The FTC responded, for example, by promulgating various rules to prevent the abusive use of negotiable instruments. By prohibiting a credit seller—or a lender for the purpose of consumer sales—from taking a negotiable instrument, the FTC ensured that consumers would no longer be confronted by a holder in due course[10] demanding payment when the underlying obligation was not performed or otherwise would be subject to a valid defense to payment.[11] Further, to obviate pressure tactics in home solicitation sales, the FTC created a seventy-two hour cooling-off period allowing a consumer buyer to recant his or her contractual undertaking.[12] These rules were promulgated under the authority of the Federal Trade Commission Act, which authorizes the FTC to promulgate rules to prevent unfair trade practices.[13]

This approach to resolving consumer issues is not only slow, but also haphazard. It became clear that legislation was needed. Turning to Congress, consumer advocates achieved the enactment of a series of consumer laws. Foremost in such legislation is the Magnuson-Moss Warranty Act,[14] which sets a minimum market morality below which state laws governing consumer transactions must not fall. This federal legislation allows states to set their own higher standards and thus permits

9. The 1968 Act was enacted in Colorado, Guam, Indiana, Oklahoma, South Carolina, Utah, Wisconsin and Wyoming. *See* 7 U.L.A. 208 (Supp. 1992). The 1974 Act was enacted in Idaho, Iowa, Kansas and Maine. 7A *id.* 1 (Supp. 1992). Various states have enacted their own versions of consumer protection laws. Thomas D. Crandall, *It Is Time for A Comprehensive Federal Consumer Credit Code*, 58 N.C. L. REV. 1, 19-20, 19 n.114 (1979).

10. *See* U.C.C. § 3-302(a) (defining "holder in due course").

11. *See* FTC Rule 433, 16 C.F.R. §§ 433.1-.3 (1992) (prohibiting taking a negotiable instrument in connection with consumer credit sales transaction so as to prevent abuses that could result from negotiation of such instrument to holder in due course and requiring that an instrument be legended to indicate that the issuer may have defenses against the seller or lender that can also be asserted against the holder of the instrument); *see also* U.C.C. § 3-106(d) (stating that there cannot be a holder in due course where an instrument is legended in accordance with statutory or administrative law indicating that the holder or transferor is subject to defenses the issuer could assert against the original payee).

12. Cooling-off Period for Door-to-Door Sales, 16 C.F.R. § 429.1 (1992).

13. 15 U.S.C. §§ 49, 52 (1988).

14. *Id.* §§ 2301-2312 (1988).

them to enact more protective legislation.[15] Unfortunately, congressional preoccupation with what it considers more momentous matters has slowed and practically stopped the development of consumer protection legislation.

Meanwhile, commercial and technological developments have shown the UCC to be unresponsive not only to the needs of the consumer/customer, but also to the expectations of the mercantile community.[16] The UCC was enacted in what can now be described as a "horse and buggy age"[17] of paper driven activities. Business has become computerized, and, as a result, electronic data input (EDI) has made many provisions of the UCC archaic and out of touch with the realities of the marketplace. As a result, many UCC provisions are either ignored or only act as a means of slowing mercantile expectations. In many instances, these provisions are used to avoid obligations that turn out to be financially unrewarding, but that otherwise would have been completed. Foremost in this are the various statutes of fraud provisions in the UCC.[18]

The origin of the statute of frauds lies in the former inability of litigants to testify for fear of inadvertently committing perjury, which would condemn their soul to ever-lasting purgatory. The statute of frauds regarding the sale of goods[19] has been repealed in England,[20] whence this statute found its way into the laws of the United States.[21] In addition, the commercial laws of most developed countries do not have an equivalent provision. Thus, even though there is a need for an audit trail, it is difficult to justify this formalistic anachronism. The approach of the UCC in linking the demands of the statute of frauds to a written memorandum in order to make a contract enforceable, and then defining a writing in a way to make it dependent on an "intentional reduction to tangible form,"[22] is ridiculous. Illustrating this is the case of *Ellis Can-*

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15. *Id.* § 2311(c)(2).

16. I, therefore, use the term "consumer/customer" to refer not only to a purchaser of an item relevant to a personal or household purpose, U.C.C. § 9-109(1), but also to a purchaser of a "consumer product." *See* 15 U.S.C. §§ 2301(1), 2312 (1988); 16 C.F.R. § 701.1(b) (1992).

17. *See* Karl N. Llewellyn, *On Warranty of Quality, and Society* (pt. 2), 37 COLUM. L. REV. 341, 395 n.137 (1937) ("Sales law, like the broader fields of Contract and Property, of whose nature it partakes, has need to take as one motto of revision: 'The old grey mare, she ain't what she used to be.' ").

18. *See* U.C.C. §§ 1-206, 2-201, 2A-201, 8-319, 9-402.

19. An Act for Prevention of Frauds and Perjuries, 1676, 29 Car. 2, ch. 3 (Eng.) (repealed 1954).

20. Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, ch. 34 (Eng.).

21. *See* Egon Guttman, *Investment Securities Under the Uniform Commercial Code*, 11 BUFF. L. REV. 1, 19-20 (1962).

22. U.C.C. § 1-201(46).

ning Co. v. Bernstein,[23] in which the court allowed the admission of a tape recording, but then required that the cassette be signed by the party to be charged under the contract.[24] What effect does this have on an EDI communication? Would the possibility of reduction to a hard copy print-out satisfy the requirement for a memorandum in writing?[25] How do you append a signature to such a print-out when the parties communicate through EDI?

To understand changes in the courts' approach to issues affecting the commercial activities of producers, merchants and banks, requires an evaluation of the existing provisions of the UCC. In such an evaluation, technological developments as well as the practice of merchants illustrate that some of the archaic requirements of existing laws no longer serve the purpose for which they were originally embodied in the UCC. Unfortunately, the Permanent Editorial Board of the UCC[26] is reactive and unable to keep up with the changing mercantile scene.

The need for revision has been recognized, however, and the ABA together with the American Law Institute (ALI) created a number of ad hoc committees and task forces to review existing provisions in the UCC and, if necessary, to propose amendments. Once these committees complete their work, the NCCUSL delegates to a drafting committee the task of drafting revisions. Some of the former members of the ABA and ALI committees continue as advisors to the NCCUSL. On completion of this drafting effort, the draft is presented to both the ALI and NCCUSL and then recommended for enactment by the various state legislatures.

A number of UCC articles have now been reviewed. These reviews and evaluations have resulted in revisions of UCC Articles 3, 4, 6, 8 and 9, as well as proposals for the enactment of two new UCC Articles: 2A (Leases) and 4A (Funds Transfers). Newly enacted Article 2A recog-

23. 348 F. Supp. 1212 (D. Colo. 1972).

24. *Id.* at 1228. The contract involved an investment securities transaction and was governed by U.C.C. § 8-319 (1977). *Ellis Canning Co.*, 348 F.Supp. at 1227-29. *But see* Roos v. Aloi, 487 N.Y.S.2d 637, 642-43 (1985) (holding that tape recording of oral agreement is not "writing" under statute of frauds under New York General Obligations Law § 5-701 (McKinney 1978) (codified without amendment at N.Y. GEN. OBLIG. LAW § 5-701 (McKinney 1989))).

25. Revisions of UCC Article 1 are at present under consideration by an ABA task force studying this problem.

26. The American Law Institute established the Permanent Editorial Board of the UCC to evaluate proposed revisions and non-uniform amendments to the UCC. Agreement Between the American Law Institute and National Conference of Commissioners on Uniform State Laws Establishing Permanent Editorial Board for the Uniform Commercial Code, Aug. 5, 1961, *in* NCCUSL, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 168 (1961).

nizes that economic and tax advantages can be gained by leasing rather than purchasing durable goods. The acceptance of such practices required that the law come to grips with leasing issues. Prior to the enactment of Article 2A, leasing issues were solved by analogy to Article 2 (Sales).[27] Although many provisions applicable to sales were relevant to leasing issues, solving by analogy was a tenuous method at best.

The driving forces behind the movement to amend the UCC are technology and efficiency; both are valuable assets for sophisticated participants in market transactions—such as banks, clearing houses, brokers and clearing corporations and so on. As a result, amendments are driven by the needs of industry. They reflect the needs of "merchants,"[28] rather than those of the customer/consumer. Nowhere is this more apparent than in connection with the proposed revisions of Article 8 (Investment Securities).

Since the New York State Law Revision Commission thoroughly analyzed the UCC, including Article 8,[29] fundamental changes have occurred in the securities industry. The 1977 amendments created a parallel approach to securities issued in uncertificated form by their issuers. These amendments were based on the sleepy activities of the 1950s securities markets; today, however, we must deal with the veritable deluge of trades that occur daily in the market. In 1962, it was considered a busy day on the New York Stock Exchange (NYSE) if ten million shares were traded. Today, 200 million shares traded in a single day does not cause a ripple and is scarcely newsworthy. The "paper crunch" of 1968-1969, that developed as a result of trading in excess of ten million shares in one day, was alleviated by immobilizing the stock certificate in depositories and by allowing settlement of trades by means of book entries. These entries can be triggered by electronic communication to a depository, such as the Depository Trust Company (DTC), instigated, for example, by the National Securities Clearing Corporation (NSCC). The NSCC acts as a clearing agent for trades on the NYSE and interposes itself into trades between members of the NYSE that trade on the exchange. The 1977 revisions of Article 8 created a parallel rule for transfers of securities in uncertificated form to those applicable to certificated securities, but has not been very successful. It is unable to cope with the problems produced by the large trading volume on a securities market.

27. For example, with regard to warranties, compare U.C.C. § 2-313 with § 2A-213, § 2-312 with § 2A-211, § 2-314 with § 2A-212, § 2-315 with § 2A-213, and § 2-317 with § 2A-215.

28. *See id.* § 2-104(1) (defining merchant as term of art).

29. *See* LAW REVISION COMM'N OF N.Y., REPORT TO THE LEGISLATURE FOR 1955, at 1873-2004 (1955).

Since the adoption of the UCC by all U.S. legal systems, albeit with some amendments reflecting specific influences, the world of commerce has expanded and become global in nature. The United States is now firmly established as the focal point in trade. As a result, international trades no longer refer to English law, nor is it usual for such trades to incorporate a reference to the civil-law countries to deal with new developments. International commerce pays attention to the commercial law practices in the United States when resolving issues of commerce. Many contracts entered into by United States merchants with foreign concerns contain clauses referring to the UCC as the governing law. Such reference is either a general reference, or it refers to the UCC as applied in the state from which the United States merchant operates.

In addition, the United Nations Commission on International Trade Law (UNCITRAL) is attempting to set basic international standards for international commerce.[30] In discussions concerning standards for modern global trading activities, negotiators and drafters pay great attention to approaches adopted in the United States. For example, UNCITRAL activities have led to the promulgation of the United Nations Convention on International Bills of Exchange and International Promissory Notes,[31] as well as the United Nations Convention on Contracts for the International Sale of Goods,[32] which became self-executing upon ratification.[33] UNCITRAL is considering other conventions and model laws, such as a proposal for a model law governing guaranty letters.[34] Many of these developments will affect the legal rules to be stated in revised provisions of the UCC, because the United States must now consider itself part of a global economy and U.S. trade is no longer purely a domestic affair.[35]

30. *See* Kenneth T. Ungar, Note, *The Enforcement of Arbitral Awards Under UNCITRAL's Model Law on International Commercial Arbitration*, 25 COLUM. J. TRANSNAT'L L. 717, 718-21 (1987).

31. G.A. Res. 165, U.N. GAOR, 43rd Sess., 76th mtg., U.N. Doc. A/43/165 (1988), *reprinted in* 28 I.L.M. 176 (1989). This convention does not apply to checks and has not yet been ratified by the United States.

32. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. No. 9, 98th Cong., 1st Sess. (1983), *reprinted in* 52 Fed. Reg. 6264 (1987).

33. *Id.* art. 99(1), (6), *reprinted in* 52 Fed. Reg. at 6279.

34. *See Report of the Working Group on International Contract Practices on the Work of Its Seventeenth Session*, U.N. GAOR 9th Comm., 25th Sess., at 5, U.N. Doc. A/CN.9/361 (1992).

35. *See* Egon Guttman, *Bank Guarantees and Standby Letters of Credit: Moving Toward A Uniform Approach*, 56 BROOK. L. REV. 167 (1990); *see also* UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (Int'l Chamber of Commerce Proposed Final Text 1993) (ICC Publication No. 500). These rules and practices are expressly incorporated into versions

Although in revising the commercial laws of any country drafters must consider the wider question of private international law, in the United States when considering uniform state laws we must also consider the question of federal law. In many instances, federal law challenges state law to update itself; or it may intervene to preempt the area. This occurred in connection with the Magnuson-Moss Warranty Act.[36] Another example is the Market Reform Act of 1990.[37] Section 5 of that Act provides that after investigation and consultation with the Secretary of the Treasury and with the Board of Governors of the Federal Reserve System, the Securities and Exchange Commission (SEC) has the power, "[n]ot withstanding any provision of State law, . . . [to] adopt rules concerning . . . the transfer of certificated or uncertificated securities . . . or limited interests (including security interests) therein" if it finds that such rules are necessary to protect investors or the public interest, and an absence of such rules inhibits "the safe and efficient operation of the national system for clearance and settlement of securities transactions."[38] Should such rules "impair or diminish, directly or indirectly," the rights of parties to such transactions under state law the SEC may exercise these powers only if it determines that "the benefits of such rule[s] outweigh such impairment or diminution of rights."[39] This exhortation reflects the policy of the Congress to create an efficient national market system in securities, even at the cost of preempting state law.[40]

In this drive towards efficiency, the individual seems to lose out. It is often forgotten that without the customer/consumer there is no trade, that without the investor there is no need for a securities market. Also overlooked is that the infusion of capital into the market requires not only that the rights of the lender be protected, but also that the individual investor/customer be protected as well.

In securities transactions, state laws too often reject this obligation and attempt to relinquish it to federal laws. For example, the Federal Securities Investor Protection Corporation (SIPC),[41] created by the Se-

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of the UCC in New York, N.Y. U.C.C. LAW § 5-102(4) (McKinney 1991); Illinois, *see* Beathard v. Chicago Football Club, Inc., 419 F. Supp. 1133 (N.D. Ill. 1976); Alabama, ALA. CODE § 7-5-102(4) (1975); Arizona, ARIZ. REV. STAT. ANN. § 47-5102(D) (1988); and Missouri, MO. ANN. STAT. § 400.5-102(4) (Vernon Supp. 1992).

36. 15 U.S.C. §§ 2301-2312.

37. 15 U.S.C. §§ 78a-78q-1 (Supp. III 1991).

38. *Id.* § 78q-1(f), (f)(1)(A), (f)(2)(A)(ii).

39. *Id.* § 78q-1(f)(2)(A)(iii).

40. *See* Egon Guttman, *Investment Securities Law: New Federal and State Developments and Their Effect on Article 8*, 24 UCC L.J. 307 (1992).

41. *See* 15 U.S.C. § 78ccc (1988).

curities Investor Protection Act (SIPA),[42] is designed to protect the customer of a brokerage house in the event of a failure of the broker.[43] To do so the SIPC levies a charge on brokerage houses based on their trading volume[44] and may obtain a loan from the SEC which will obtain the funds from the U.S. Treasury.[45] This approach led to the argument that in a liquidation, a lender to a securities industry professional should be allowed to claim a priority to any claims of customers. Admittedly, traditional approaches to secured lending would allow this. The lender in possession will always have priority over creditors who fail to protect themselves by perfecting a security interest in a negotiable instrument.[46] The situation becomes more complicated when we deal with an incorporeal or intangible right created in an uncertificated security or in an immobilized security. In that situation we could find that neither the customer nor the lender would be in physical possession of the security. Where securities are held in street name, rights against or to such securities would be asserted against the rights of a securities industry professional rather than against the security itself, i.e. there is as an indirect holding of the securities. Additionally, brokers enter into short term collateralized credit arrangements by giving as collateral, securities held in their account with a securities depository, or kept by them in-house in street name registration. These types of Held In Custody, or Agreement to Pledge (ATP), security transactions are regular features of daily trading.[47] The present version of Article 8 provides for the perfection of security interests in such ATP pledges,[48] which raises the question of conflict in situations in which the broker may have improperly used customer assets to raise funds by this method.[49] The situation often arises where a priority assertion is made by an upstream lender who advances funds while in possession (or control) of the securities.[50]

The underlying premise, that the federally funded SIPC would protect the individual investor, is an abrogation of the principle that the law should be responsible for those that deal with members of the industry. When it is realized that this protection, at present, only extends to

42. *Id.* §§ 78aaa-78*lll* (1988).
43. *See id.* § 78eee.
44. *Id.* § 78ddd(f).
45. *Id.* §§ 78ddd(g), (h).
46. *See* U.C.C. §§ 9-305, 9-312(5).
47. *See id.* § 8-321(2).
48. *See id.*
49. *See* 17 C.F.R. § 240.15c3-3 (1992) (indicating how customers' fully-paid securities are to be safeguarded from claims of creditors of brokerage house).
50. *See* EGON GUTTMAN, MODERN SECURITIES TRANSFER 5-1 to -80, 55-1 to -51 (3d ed. 1987 & Supp. 1992).

$500,000,[51] it is apparent that the amount of federal protection offered is insufficient to cover the needs of a retiree from a profession.

If, in the interest of efficiency, the immobilization of the investment security is called for, then a protective step must be taken in the interest of the supplier of the lifeblood of the industry. Presently the proposed provision in the NCCUSL draft of section 8-513(a) gives the customer some protection, provided the customer has not assented to the broker using the securities to raise funds. But where such funds are needed to support a customer's margin account, a conflict may arise between the customer and a lender. The secured party will have priority if the secured party takes control of the securities—for example, by having the securities transferred to it. This would be the effect even though such transfer may be a violation of federal rules demanding the segregation of securities held for a customer who has fully paid any obligations owed the broker.[52]

Efficiency rears its head in other areas of the UCC. As a result, the law does not lead the technical developments, the technical developments drive the law. This is a change from prior approaches to law and technological developments following the demands of industry. The revision of section 4-406(a) is a good example of this change in approach to law revision. After indicating that the statement of account made available to the customer must allow the customer to reasonably identify items paid by the bank, the section provides a safe harbor.[53] Section 4-406(a) states: "The statement of account provides sufficient information if the item is described by item number, amount and date of payment."[54] These informational details can be determined from the Magnetic Ink Character Recognition Symbols. They do not, however, help to identify the person to whom payment was made or who may have endorsed, or may have failed to endorse, the instrument. Linked to this approach are revisions encouraging truncation, including total truncation which would allow the depositor to make electronic presentment[55] and even electronic deposits. A drawer may not discover that payment was made to a wrong party until a considerable amount of time has passed, at which time it may no longer be possible to remedy the situation, or when to do so would be costly and time consuming. The reason for this approach in the revision of section 4-406 is explained on the basis that

51. 15 U.S.C. § 78fff-3(a).
52. *See* 17 C.F.R. § 240.15c3-3(d).
53. U.C.C. § 4-406(a).
54. *Id.*
55. *Id.* §§ 4-110.

> [t]his policy results in less cost to the check collection system and thus to all customers of the system. It is expected that technological advances such as image processing may make it possible for banks to give customers more information in the future in a manner that is fully compatible with automation or truncation systems.[56]

This short outline of developments in the revisions of the UCC leads to the conclusion that, from the point of view of a consumer advocate, the UCC was "dead on arrival," or at best *in extremis*. Even those that can be classified as commercial sophisticates, being members of the industry, find that the UCC has lost touch with the realities of the marketplace. There is a need to review and revive this patient. So far, however, this merely meant that *"le roi est mort, vive le roi."* It is, in the immortal words of Yogi Berra, "déjà vu all over again."

Proposals for revising the UCC are increasingly formulated in accordance with the interests of industry, without regard to the non-industry participants who make industry possible. From a consumer advocate's point of view, the UCC never provided a real base for consumer protection. The UCC appears biased against both the retail consumer and the nonmerchant industrialist engaged in transactions involving one of the sophisticates in this area. Unfortunately, both of these parties start in a deprived position. The UCC has survived only because of the common-law courts' approaches in applying their genius of reaching a fair result to the interpretation of a common-law statute, rather than adopting a civil-law approach to the interpretation of the UCC. However, there is little solace in the expectation that the courts *may* interpret a provision of the UCC so as to provide a level playing field. One cannot expect courts to expand provisions such as section 2-302 because the industry insider has taken an unconscionable advantage. There has been no real attempt to protect the ordinary consumer by providing the type of law that makes the Magnuson-Moss Warranty Act so attractive: law that tells states that they cannot go below this minimum of market morality. As a result, the present revisions still leave the "emperor without clothes."

What can we recommend? The UCC is clearly not meeting the demands of all parties involved in a commercial transaction. All the present revisions show is *plus ça change, plus cést la même chose*.[57] When applied to a "nonmercantile" relationship—one not between industrial

56. *Id.* § 4-406 cmt. 1.

57. The more things change, the more they remain the same.

insiders—we must rely on the court to apply its provisions by analogy. We have but one alternative, and that is to press for the adoption of specific "user" oriented laws that will consider the need for efficiency but will not sacrifice the protection of the user at the altar of market efficiency. This would be dousing the fuel that drives the market.