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## Uniform Commercial Code: Does One Size Fit All

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# UNIFORM COMMERCIAL CODE: DOES ONE SIZE FIT ALL?

*George A. Hisert\**

## I. INTRODUCTION

One of the basic premises of the Uniform Commercial Code (UCC) is conveyed by its name: the “Commercial Code” should be “uniform” throughout the United States. Uniformity promotes commerce by standardizing and streamlining the process by which commercial parties negotiate, conclude, and enforce contracts. The ability of businesspeople, lawyers, and courts to address issues arising in interstate commerce from the same common conceptual perspective with the same set of rules is a vast improvement over the situation that would prevail if there were fifty or more disparate sets of commercial laws throughout the United States.

In contrast, one of the basic precepts of federalism is the individual state’s ability to experiment with alternative solutions to problems commonly shared with other states and to address those which may not exist in other states. My purpose is to discuss the interplay between the uniformity the UCC imposes and the desire for experimentation on a local basis. This Essay argues that the UCC, by creating the ability to balance the competing interests of uniformity and local flexibility, maintains a strong substantive advantage over encroaching federal legislation. The issues are discussed both generally and in the context of UCC section 5-114, which permits injunctive relief against fraudulent draws on letters of credit.<sup>1</sup>

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1. U.C.C. § 5-114 (1990).

## II. HOW UNIFORM IS THE UCC?

The National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the UCC in 1951<sup>2</sup> and presented it to each state legislature as a unit composed of nine separate articles.<sup>3</sup> The District of Columbia, the Virgin Islands, and every state except Louisiana<sup>4</sup> have adopted this version.<sup>5</sup> The UCC is one of many uniform acts the NCCUSL has promulgated. Others include the Uniform Limited Partnership Act,<sup>6</sup> the Uniform Transfers to Minors Act,<sup>7</sup> the Uniform Consumer Credit Code,<sup>8</sup> the Uniform Controlled Substances Act,<sup>9</sup> the Uniform Durable Power of Attorney Act,<sup>10</sup> the Uniform Foreign Money-Judgments Recognition Act,<sup>11</sup> the Uniform Foreign Money-Claims Act,<sup>12</sup> the Uniform Fraudulent Transfer Act,<sup>13</sup> the Uniform Parentage Act,<sup>14</sup> and the Uniform Probate Code,<sup>15</sup> just to name a few of approximately 100 uniform acts currently in effect. From the perspective of widespread adoption by almost every state, the UCC's success has been exemplary.<sup>16</sup>

### A. Official Variations

#### 1. Official alternatives

Even in the original UCC, a number of local options enabled individual states to choose from several alternative formulations.<sup>17</sup>

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2. 1 U.L.A. xv (1989). *Uniform Laws Annotated* is an excellent collection of the primary uniform acts, annotated to show the nonuniform variations in each state.

3. *See id.* at xx.

4. Louisiana has since adopted major portions of the UCC in its revised form. *Table of Jurisdictions Listing Uniform Acts Adopted*, in *Directory of Uniform Acts and Codes* U.L.A. 9, 31 & n.1 (1994 Pamphlet).

5. *See id.* at 9-73.

6. UNIF. LIMITED PARTNERSHIP ACT, 6 U.L.A. 561 (1969 & Supp. 1994).

7. UNIF. TRANSFER TO MINORS ACT, 8B U.L.A. 497 (1969 & Supp. 1994).

8. UNIF. CONSUMER CREDIT CODE, 7 U.L.A. 579 (1985).

9. UNIF. CONTROLLED SUBSTANCES ACT, 9 U.L.A. 1, pt. 2 (1988 & Supp. 1994).

10. UNIF. DURABLE POWER OF ATTORNEY ACT, 8A U.L.A. 309 (1993).

11. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 261 (1986 & Supp. 1994).

12. UNIF. FOREIGN MONEY-CLAIMS ACT, 13 U.L.A. 42 (Supp. 1994).

13. UNIF. FRAUDULENT TRANSFER ACT, 7A U.L.A. 639 (1985 & Supp. 1994).

14. UNIF. PARENTAGE ACT, 9B U.L.A. 287 (1987 & Supp. 1994).

15. UNIF. PROBATE CODE, 8 U.L.A. 1 (1988 & Supp. 1994).

16. *See Table of Jurisdictions Adopting Uniform Acts Listed*, in *Directory of Uniform Acts and Codes* U.L.A. 9, 9-73 (1994 Pamphlet).

17. *See, e.g.*, U.C.C. §§ 2-318 (third-party beneficiaries of warranties express or implied), 3-121 (instruments payable at bank), 5-114(4)(5) (certain payments on letters of credit), 6-106 (application of proceeds from bulk sales), 9-401 (place of filing of UCC financing statements), 9-407 (information from UCC filing officers) (1951). These do not

Some were driven by a sense of political necessity. For instance, the alternatives offered in section 9-401 requiring local filing of UCC financing statements, as opposed to a central filing system within the state, resulted from the concern that local filing offices might lose significant revenues in those states where local filing had been the tradition.<sup>18</sup> Even though these “uniform” alternatives created nonuniformity among the states, there was uniformity among the states which adopted the same alternatives.

## 2. Official revisions

Many of the original nine articles have undergone substantial revision as a result of the NCCUSL’s official amendments. These amendments have generally been promulgated on an article-by-article basis. Several articles have undergone several sets of revisions. In addition, new Articles 2A and 4A have been added to the original nine. As of January 1, 1994, none of the revised or new articles had been adopted by *all* of the jurisdictions that adopted the original UCC, even though the NCCUSL actively seeks to persuade state legislatures to adopt the most recently promulgated version of each article.<sup>19</sup> Moreover, in coming years major revisions to Articles 2, 5, 8, and 9 will exacerbate the disparity among the states as a result of delay in their adoption. It is possible that given sufficient time—and a cessation of further revisions—each jurisdiction will have the same version of each article of the UCC. As a practical matter, however, this is unlikely to happen in the near or midterm future.

Notwithstanding the variations described above, I will label as “uniform” any section of the UCC in effect in a state if it is identical to any edition of an official UCC text, including any of the official alternatives.

### *B. Local Variations*

When various jurisdictions adopted the original UCC and subsequent official revisions, they also adopted local variations not included in the official text. Local interest groups such as state bar organizations and law revision commissions promoted the variations, because they believed that portions of the uniform version were not appropri-

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include the numerous places where the official text contains blanks to be completed for dollar amounts, references to other statutes, and the like.

18. *Id.* § 9-401.

19. New Article 4A and the 1977 revisions to Article 8 are approaching full enactment in all jurisdictions.

ate for local consumption or, in some cases, even for national consumption. Some of these variations might be deemed "good" and others "bad." However, since the local groups pushing for a particular variation undoubtedly believed that their variation was good, such characterizations are necessarily in the eyes of the beholder.

Some states have been more prolific than others in their variations.<sup>20</sup> Some local variations evidence a rejection of significant portions of the NCCUSL's work product. The need to address discrete local issues was responsible for other variations. Still others were attempts to fine tune individual sections. The result is that, even given the broad definition of uniformity described above, the UCC is far from uniform throughout the United States.

The following is a partial list of some of the more significant variations, arranged in order of appearance in the UCC and not in order of significance.<sup>21</sup>

1. Section 5-102: Letters of credit and the Uniform Customs and Practice for Documentary Credits (UCP) (New York)

New York,<sup>22</sup> Alabama,<sup>23</sup> and Missouri<sup>24</sup> have added a subsection (4) to section 5-102 which essentially ousts Article 5 dealing with letters of credit if the UCP is incorporated into a letter of credit. The rationale, as understood by this Author, is that the New York banking community did not feel that the NCCUSL's original efforts on Article 5 were satisfactory. This particular concern has caused the current drafting committee for the revisions to Article 5 to consult closely with the New York banking community in an attempt to address these concerns and the New York variation on section 5-102.

2. Section 5-114: Injunctions and letters of credit (California)

The official text of section 5-114(2)(b) permits a court of competent jurisdiction to enjoin an issuer from honoring a letter of credit if there is "fraud, forgery or other defect not apparent on the face of the documents."<sup>25</sup> California felt that this exception to the issuer's obligation to pay a complying draw on the letter of credit did violence to the

20. California, in particular, has had a tradition of believing, rightly or wrongly, that it could improve upon the work of the NCCUSL. See *infra* part II.B.2-6.

21. Most of the examples are from California because of California's propensity for deviating from the uniform version and because the Author practices in California.

22. N.Y. COMP. CODES R. & REGS. tit. 11, § 79.2 (1994).

23. ALA. CODE § 7-5-102(4) (1993).

24. MO. ANN. STAT. § 400.5-102(4) (Vernon 1994).

25. U.C.C. § 5-114 (1990).

independence principle.<sup>26</sup> Accordingly, California did not adopt the language in section 5-114(2)(b) dealing with injunctions. As discussed below, a variation on this particular issue may result in continuing lack of uniformity in California with regard to injunctions against letters of credit under the proposed revisions to Article 5.

### 3. Article 6: Bulk sales (California)

California's original version of Article 6 on bulk sales varied significantly from the official version.<sup>27</sup> Among other things, notice to creditors (other than tax authorities) was by publication and recordation and not by direct mail.<sup>28</sup> Subsequent revisions to California's Article 6 imposed detailed escrow provisions in certain circumstances.<sup>29</sup> Even when the revised Article 6, promulgated by the NCCUSL in 1989, was adopted by California in 1990,<sup>30</sup> numerous local variations continued.

### 4. Section 9-102(4): Inventory of a retail merchant (California)

California's original version of section 9-102(4) provided that a nonpossessory, nonpurchase money security interest could not be taken in the inventory of a retail merchant.<sup>31</sup> This was a major departure from the philosophy of the uniform Article 9, causing surprise and consternation to out-of-state lenders. Although the prohibition on security interests in the inventory of retail merchants has been significantly narrowed, it has not been eliminated.<sup>32</sup> Security interests in the inventory of most retail merchants can now be obtained, but secured parties must tread their way carefully through the provisions of California's sections 9102(4), (5), (6), and (7).

### 5. Section 9-302: Deposit accounts (California)

Security interests in deposit accounts are excluded from the official version of Article 9.<sup>33</sup> However, California specifically included security interests in deposit accounts within the scope of its Article

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26. See CAL. COM. CODE § 5114 cmt. 6 (West 1964).

27. See, e.g., CAL. COM. CODE Div. 6 (Bulk Transfers) introductory cmt. (West. 1964).

28. See *id.* § 6107.

29. See CAL. COM. CODE § 6106.1 (added by Act of Aug. 21, 1978, ch. 490, § 5, 1978 Cal. Stat. 1619, 1621-22, and amended by Act of July 24, 1979, ch. 294 § 5, 1979 Cal. Stat. 1094, 1097-98, and Act of July 27, 1979, ch. 373, § 53, 1979 Cal. Stat. 1250, 1269-70).

30. *Id.* § 6101 cmt.

31. *Id.* § 9102(4) (West 1964), amended by CAL. COM. CODE § 9102(4)-(7) (West 1990).

32. CAL. COM. CODE § 9102(4)-(7) (West 1990).

33. U.C.C. § 9-302 (1990).

9.<sup>34</sup> Several other jurisdictions adopted California's version,<sup>35</sup> with still further local variation in some cases. The apparent lack of problems encountered in California and other states with such security interests, as compared to common-law methods of obtaining a lien on deposit accounts,<sup>36</sup> has prompted a debate as to whether security interests in deposit accounts should be included in the proposed revisions to Article 9.<sup>37</sup>

#### 6. Section 9-313: Fixtures (California)

Originally, California did not adopt section 9-313, primarily because of concern over its interplay with unusual features of California's real property law.<sup>38</sup> In 1980, however, the California State Bar's UCC Committee proposed and California adopted a variation of section 9-313. The committee, of which the Author was a member at the time the proposal was drafted, felt that the California version was a significant improvement over the official version of section 9-313.

#### 7. Section 9-401: Place of filing (Louisiana)

When Louisiana finally adopted Article 9, it included a local variation pursuant to which UCC financing statements could be filed in the local filing office in any parish.<sup>39</sup> The information concerning the filing would then be transmitted to the central filing office under section 9-407.<sup>40</sup> Georgia has recently adopted a similar arrangement.<sup>41</sup>

### III. HOW UNIFORM SHOULD THE UCC BE?

Some degree of uniformity is clearly desirable. But is uniformity absolutely necessary with regard to all aspects of the UCC? As evidenced by the nonuniformity that currently exists in many sections of

34. CAL. COM. CODE § 9302(1)(g) (West 1990).

35. HAW. REV. STAT. § 490:9302(1)(h) (1985); ILL. ANN. STAT. ch. 810, para. 9-302(h) (Smith-Hurd Supp. 1994); LA. REV. STAT. ANN. § 10:9-104 (West 1993); OR. REV. STAT. § 79-302(1)(h) (Supp. II 1994).

36. See generally Gerald T. McLaughlin, *Security Interests in Deposit Accounts: Unsolved Problems and Unanswered Questions Under Existing Law*, 54 BROOK. L. REV. 45 (1988) (discussing problems with common-law methods of obtaining liens on deposit accounts and suggesting deposit account financing be included in UCC).

37. PERMANENT EDITORIAL BD. FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP, UNIFORM COMMERCIAL CODE ARTICLE 9 REPORT (Dec. 1, 1992).

38. CALIFORNIA SENATE FACT FINDING COMMITTEE ON JUDICIARY, SIXTH PROGRESS REPORT TO THE LEGISLATURE, Part 1, at 400 (1959-1961).

39. LA. REV. STAT. ANN. § 10:9-401(1)(b) (West 1993).

40. *Id.* § 10:9-401.

41. GA. CODE ANN. § 109A-9-401(1)(b) (Harrison Supp. 1993).

the UCC, the answer to the last question is "no." However, there is little question that some of the nonuniform variations are troublesome, while others are not. How does one distinguish between the two? The following criteria might be employed.

*A. Is the Impact Primarily Local?*

Some articles, such as Article 4A on wire transfers,<sup>42</sup> envision transactions that are frequently interstate. Indeed, three or more states may be involved in a wire transfer because of the location of the banks acting as intermediaries. Subjecting a wire transfer passing through several states to nonuniform requirements would significantly reduce the efficiency of the wire transfer, particularly if the variations dealt with the actual mechanics of the transfer.

On the other hand, the bulk sales law in revised Article 6, that now limits the application of Article 6 to the state of the transferor's chief executive office,<sup>43</sup> addresses a much more localized transaction. Original Article 6, under which the laws of several states might need to be complied with,<sup>44</sup> suffered greatly because of the nonuniformity among jurisdictions.

Under revised Article 6, compliance with the bulk transfer requirements is focused on the laws of a single state.<sup>45</sup> The parties in that state are presumably familiar with any nonuniform provisions and the infrequency of bulk transfers minimizes the need for out-of-state creditors to constantly monitor the laws of other jurisdictions. In such a situation, local variations do not have as significant a negative impact.

*B. Does the Variation Affect the Formation, Validity, Operation, or Enforcement of the Contract?*

Variations that affect the formation, validity, or operation of a contract are particularly troublesome. For instance, California's original version of section 9-102(4), which prohibited nonpossessory, non-purchase money security interests in the inventory of a retail merchant,<sup>46</sup> created a trap for the unwary and ran counter to the normal expectations of the parties.

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42. U.C.C. § 4A-206 (1990 Official Text).

43. U.C.C. § 6-103(1)(b) (1989 Official Text).

44. *See id.* § 6-103 (1989 Official Text).

45. *See* U.C.C. § 6-103 (1990 Official Text).

46. CAL. COM. CODE § 9102(4) (West 1964) (amended by CAL. COM. CODE § 9102(4)-(7) (West 1990)).



On the other hand, variations as to available remedies are less problematic, at least in some circumstances. For instance, the ability of a customer in a letter of credit transaction to enjoin honor of a letter of credit in the event of fraud in the underlying transaction does not affect the letter's basic operation. Indeed, the availability of injunctive relief is an exception to the independence principle that normally governs the operation of letter of credit law. Accordingly, the failure of a state to adopt that exception does not detract from the normal operation of a letter of credit.

*C. Does the Variation Grant the Parties More Flexibility?*

If the variation permits the parties more freedom or convenience in structuring their transaction without curtailing their ability to structure the transaction as if the variation did not exist, it is hard to argue that the variation negatively impacts interstate commerce. For instance, the ability of a debtor to grant a security interest in deposit accounts under the UCC in California<sup>47</sup> and several other states<sup>48</sup> can only be viewed as positive, at least from the Article 9 perspective. Out-of-state debtors and secured parties who structure their transactions in California without regard to the California variation will not have their expectations upset. They will only have experienced the extra inconvenience of complying with the common-law requirements for liens on deposit accounts which they would have faced in most states.

Similarly, Louisiana<sup>49</sup> and Georgia<sup>50</sup> have filing systems under Article 9 that permit filing at any local filing office. Because they have statewide effect, however, they will not disadvantage any out-of-state secured party who, unfamiliar with the system, files only with the central filing office or with both the central filing office and multiple local offices.

Of course, when these "beneficial" variations become the majority rule, it is the uniform version which might be deemed to be restrictive and a pitfall for the unwary.

*D. Presumption in Favor of Uniformity*

Even if a proposed variation is not problematic under the above criteria, there should be a rebuttable presumption in favor of uniform-

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47. CAL. COM. CODE § 9102 (West 1990).

48. See *supra* note 35.

49. LA. REV. STAT. ANN. § 10:9-401 (West 1993).

50. GA. CODE ANN. § 109A-9-401 (Harrison Supp. 1993).

ity for uniformity's sake. Variations, even those which are not problematic in their impact on individual transactions, nevertheless create certain inefficiencies and expense, both in terms of the need to educate lawyers and judges as to their existence and the need to analyze the impact of the nonuniformity. However, this presumption in favor of uniformity should be able to be overcome for compelling reasons.

California lawyers, as well as lawyers in other states, have been known to defend their local variations as being the "better rule." Clearly the better rule, if it is indeed significantly better, should be adopted if it is not problematic under other criteria, such as those suggested above. However, the characterization of a variation as the better rule is often subjective. In the real world, there may be two—or more—solutions to a particular problem addressed by the UCC, and it is a matter of legitimate debate among reasonable lawyers as to which solution is the better.

This difficulty in characterizing one solution as better than another is highlighted by the process by which both the original UCC and the subsequent uniform revisions have been and are currently drafted. The drafting committees consist of knowledgeable commissioners from the NCCUSL who receive advice, comments, and exhortations from various advisors and observers. All of the players are knowledgeable, talented, and committed to producing a good final product. Many of the players also have substantial practical daily experience on the topics upon which they are commenting. Nevertheless, the factual basis for many of the arguments for or against the choice of particular rules is usually anecdotal. Seldom is there any scientific or methodical study underlying the factual assertions made in support of the choice of one solution over another. Because of the lack of hard facts or statistics, it is hard to say that one solution is "better" than another, even if the parties agree on a common goal.

One of the reasons for the lack of empirical evidence with regard to various proposed solutions is that one cannot study the impact of a particular rule unless the rule is actually in effect. If a proposed solution has never been implemented in any jurisdiction, one can only speculate as to its consequences. If one can only speculate, it is hard to argue that a proffered solution is in fact the better rule. Absent this empirical evidence, the presumption should be in favor of uniformity.

#### IV. INJUNCTIONS AND LETTERS OF CREDIT

One of the most frequently touted strengths of our federal system is the freedom of individual states to experiment with various solu-

tions. If New York and California adopt different legislative solutions to the same problem—assuming other factors are generally equal—one would anticipate that after some time the experience in the two states could be compared to determine if in fact one rule is better than the other.

An experiment as to the better rule for dealing with the possibility of fraud in the letter of credit context has been underway in California since its original adoption of the UCC in 1963. The official version of the text of section 5-114(2)(b) reads as follows:

(b) [I]n all other cases as against its customer, an issuer acting in good faith may honor the draft or demand for payment despite notification from the customer of fraud, forgery or other defect not apparent on the face of the documents *but a court of appropriate jurisdiction may enjoin such honor.*<sup>51</sup>

The California Legislature deleted the *underscored* words at the end of subparagraph (b).<sup>52</sup> The reason for this significant omission is stated in the commentary to California's Commercial Code section 5114:

"By giving the courts power to enjoin the honor of drafts drawn upon documents which appear to be regular on their face, the Commissioners on Uniform State Laws do violence to one of the basic concepts of the letter of credit, to wit, that the letter of credit agreement is independent of the underlying commercial transaction."<sup>53</sup>

California's experiment has been instructive. Courts throughout the rest of the country have struggled with the level, degree, and type of fraud necessary as a basis for an injunction under section 5-114.<sup>54</sup> Many of these non-California courts have broadly defined "fraud"<sup>55</sup> or have ignored the non-UCC requirements for injunctions, thus fulfilling the original California prophecy that, unless injunctions were prohibited, the independence principle would be seriously eroded.

In contrast, California has had very few cases dealing with injunctions under section 5-114. When an applicant seeks an injunction, most banks cite the nonuniform version of section 5-114 and the California legislative history in their motions for summary judgment.

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51. U.C.C. § 5-114(2)(b) (1990) (emphasis added).

52. See CAL. COM. CODE § 5114(2)(b) (West 1964).

53. *Id.* § 5114 cmt. 6 (quoting CALIFORNIA SENATE FACT FINDING COMMITTEE ON JUDICIARY, SIXTH PROGRESS REPORT TO THE LEGISLATURE, Part 1, at 337 (1959-1961)).

54. JOHN F. DOLAN, THE LAW OF LETTERS OF CREDIT ¶ 7.04(3)(b) (2d ed. 1991).

55. *Id.*

More importantly, counsel for applicants routinely advise them that, even if they may eventually be able to prove fraud—usually with the assistance of drawn-out discovery—the California statute presents a major roadblock. As a result, many applicants do not even make the attempt to get an injunction. Accordingly, the independence principle has not suffered the same challenges as it has in other states.

The Author is not aware of any evidence that the diminished ability to obtain injunctions in California has either promoted fraud or permitted applicants to be defrauded under letters of credit. The few reported California cases involve situations where the alleged fraud would be in a gray area under a narrow definition of fraud.

In the Article 5 revision process, the rationale of proponents in favor of retaining injunctive relief against fraud has been that it is important to prevent fraud. The proponents acknowledge that some courts have not correctly understood the proper standards for the imposition of injunctions under section 5-114, but they argue that recent cases now evidence a more informed view on the topic. The proponents further opine that clarification of the standards in revised Article 5 would ensure that courts would not misunderstand what the proper standard should be.

Many California lawyers are now willing to accept this argument, particularly given the stricter standards in proposed revisions to Article 5. Others still contend that the original California prohibition on injunctions is the better rule.

Even if California is willing to permit injunctions against honor, many Californians involved in the Article 5 revision process nevertheless believe that the proposed uniform version goes too far with regard to the time during which injunctions may be granted. To simplify a complex topic, a change in the definition of “honor” clarifies that an injunction can be granted up to the actual time that the issuer pays an accepted time draft or deferred payment obligation. Letters of credit can involve either (1) a sight draft or demand, which will be paid promptly after the issuer determines that the documents submitted under the letter of credit are complying; or (2) a time draft or a deferred payment obligation under which payment is not due until a specified time (often ninety or 180 days) after the issuer determines that the documents submitted are complying. For ease of reference, the term “acceptance” will be used to mean acceptance of the documents. In the first scenario—involving a sight draft or demand—acceptance and honor are substantially contemporaneous. Under the second scenario—involving a time draft or deferred payment obliga-

tion—a significant time period can intervene between acceptance and honor.

Many California lawyers involved in the Article 5 revision process believe that, although preacceptance injunctions may be appropriate, postacceptance injunctions are not. The proposed revisions to Article 5 would permit postacceptance injunctions up to the time of final honor.<sup>56</sup> These different views as to postacceptance injunctions will be referred to as the "California Proposal" and the "Majority Proposal."<sup>57</sup>

The proponents of the Majority Proposal argue that, so long as there is an opportunity to prevent payment to a true "fraudster," the courts should have the injunctive power to do so. In their view, prohibiting injunctions will encourage fraud.

The proponents of the California Proposal are not in favor of condoning fraud. The issue is whether the attempt to enjoin the true fraudster from getting paid is worth the risk of the potential proliferation of cases in which there will be alleged but not actual fraud ("merely alleged fraud"). After acceptance it is very probable that a true fraudster will immediately discount its accepted time draft or deferred payment obligation to an innocent party. Thus, promptly after acceptance, the likelihood of enjoining a true fraudster diminishes significantly. At the same time, applicants usually do not receive goods until after acceptance. Although an applicant may discover garbage instead of the anticipated goods upon opening the shipping crates, the more common scenario in a dispute is that the goods are not quite what the applicant anticipated—that is, a routine contract dispute. Experience has shown that applicants—or their lawyers—are very adept at elevating routine contract disputes into claims of fraud.

In short, the proponents of the California Proposal feel that the deterrence of cases involving merely alleged fraud outweighs the likelihood that a true fraudster will be able to perpetrate a fraud because of the inability of California courts to issue injunctions. Accordingly, the proponents of the California Proposal believe that it is the better rule for proposed section 5-109(b)(1).

While the proponents recognize the desirability of uniformity, they also believe that nonuniformity may be warranted under the cri-

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56. There are some exceptions, particularly with regard to the interplay between Section 4-303 and Article 5.

57. The California Proposal is also supported by a number of non-California lawyers and bankers as being the better rule. Because the most vocal proponents are from California, however, the proposal has been identified with California.

teria discussed in Part III. First, although the beneficiary may not be local, California's nonuniformity on injunctions will not adversely affect the beneficiary. Any negative impact will be on the applicant, who in most cases will be located in California if the letter of credit is issued in California.

Second, nonuniformity with respect to proposed section 5-109(b)(1) will not have an adverse impact on the operation of proposed Article 5. Proposed section 5-109 is an exception to the independence principle. If California has a narrower exception, it will enhance—not detract from—the independence principle.

Third, time drafts and deferred payment obligations permit applicants to obtain seller credit even when a letter of credit is used. Under the Majority Proposal, the increased likelihood that applicants would seek injunctions because of merely alleged fraud would cause beneficiaries to curtail the credit extended to applicants. Thus, the California Proposal actually encourages beneficiaries to extend credit to applicants and creates greater flexibility in the underlying transaction.

In summary, the proponents of the California Proposal believe that the California experience with its nonuniform version of section 5-114 may warrant continued nonuniformity with regard to postacceptance injunctions.

## V. FEDERAL LAW

It is often argued that ultimate uniformity among the states on commercial issues could be achieved more efficiently by enactment of a federal statute.<sup>58</sup> Federal statutes not only preempt the possibility of local variations but also resolve the problem of different enactment dates in various states. Others have persuasively argued that, notwithstanding some of the advantages of federal legislation, federal legislation is a much less desirable product than that created by the NCCUSL.<sup>59</sup>

Even at the federal level, legislators have become more cognizant of the need for local variation. Many federal statutes now permit indi-

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58. See, e.g., David M. Phillips, *Secured Credit and Bankruptcy: A Call for the Federalization of Personal Property Security Law*, 50 *LAW & CONTEMP. PROBS.* 53, 54-57 (1987).

59. See, e.g., Neil B. Cohen & Barry L. Zaretsky, *Drafting Commercial Law for the New Millennium: Will the Current Process Suffice?* 26 *LOY. L.A. L. REV.* 551, 557-62 (1993); Fred H. Miller, *Is Karl's Kode Kaput?*, 26 *LOY. L.A. L. REV.* 703, 705-06 (1993).

vidual states to opt-out of federal schemes under various conditions.<sup>60</sup> Congress has recognized that individual states may have strong local reasons for adopting a different solution to a particular problem. Unfortunately, the ability to opt-out under many of these federal statutes is often limited to state legislation adopted within specific time or other constraints.<sup>61</sup> If a time deadline passes, the state no longer has the ability to address a particular problem differently than that dictated by Congress.

The UCC, on the other hand, permits ongoing experimentation with different solutions. For instance, although the basic structure of the filing system under Article 9 (either central filing only or central and local filing) has been a cornerstone of the UCC for decades, Louisiana<sup>62</sup> and Georgia<sup>63</sup> have been able to take advantage of technological advances to create a "new, improved" filing system which logistically would not have been possible in the early stages of the UCC. Other states will be able to study the strengths and weaknesses of this new filing system and further refine it. Although the desirability of uniformity in filing systems should caution states against taking a freewheeling approach to variations, the desire for uniformity should not stultify a carefully considered experiment.

This ability to experiment with different solutions has proven to be one of the greatest strengths of the UCC as compared to federal legislation. Local experimentation permits the UCC to be a living and growing body of law. So long as nonuniform variations are carefully considered and maintained within appropriate bounds, it is possible to achieve most of the advantages of uniformity without creating rigidity.

## VI. CONCLUSION

To respond to the question addressed in the title of this Symposium, *Is the UCC Dead, or Alive and Well?*, the answer is that it is "alive and well," particularly because the UCC is flexible enough to achieve uniformity in basic structural issues while permitting local variations to address different and changing circumstances. To answer the question addressed in the title of this Essay, the answer is that one

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60. Norman Silber, *Why the U.C.C. Should Not Subordinate Itself to Federal Authority: Imperfect Uniformity, Improper Delegation and Revised Section 3-102(c)*, 55 U. PITT. L. REV. 441, 481 (1994).

61. See e.g., 12 U.S.C. § 1735f-7a(b)(2) (1988).

62. See LA. REV. STAT. ANN. §§ 10:9-401 to -407 (West 1993).

63. See GA. CODE ANN. §§ 109A-9-401 to -407 (Harrison Supp. 1993).

size, with judicious alterations as appropriate for different seasons and local requirements, should fit all.



