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THE UCC THRIVES IN THE LAW OF COMMERCIAL PAYMENT

Thomas C. Baxter, Jr.*

I. Introduction

If I had been asked to write this Essay twenty-five years ago and render a prognosis about the future of the Uniform Commercial Code (UCC) in the law of payments, it would not have been good. At that time, the banking industry was on the verge of an incredible technological change, a change that would make a bank's brick-and-mortar facilities less necessary and less meaningful. While state boundaries and laws would continue to impose significant barriers to bank expansion, even in 1970 it was clear that market forces would gradually break those barriers down. One did not need to be clairvoyant to predict increasing concentration and interstate expansion in the banking industry. With technological change and multistate operation, predicting a decline in the importance of state law, including the UCC, would have seemed to be a safe bet.

Looking at the banking industry twenty-five years later reveals that it would have been safer to bet on the price of pork bellies. The UCC, with one significant exception, has flourished rather than floundered in the law governing payments—the backbone of banking operations—during the last twenty-five years. In 1994, the UCC is probably more important to the law of payments than it was in 1970. Any talk of the death of the UCC is not only exaggerated, it is just plain wrong.

In this Essay, I will explain the significance of the law of payments in our banking system and, more broadly, in our national economy. I will discuss how technological change and an increase in scale could have worked together to render the UCC a relic of bygone days. This will lead to my central thesis—that uniformity of the substantive law and the high quality of the lawmaking process itself avoided this untoward result. Following an exposition of my central thesis, I will discuss what I perceive to be one of the few weaknesses in the UCC.

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law-making process, that being insufficient representation of consumer interests. Finally, I predict that the UCC will continue to prosper into the foreseeable future, at least with respect to commercial payments.

II. The Law of Payments and the National Economy

At the outset, it is useful to discuss what I mean by "payment." In this Essay, payment describes a concept, the commercial mechanism that people use either to discharge some underlying indebtedness or to transfer money from one place to another. Often a payment is associated with the acquisition of goods or services, but that is not always the case. A payment may be made by a party simply to transfer bank credit from one point to another; for example, from a demand deposit account to a money market mutual fund account.

A smoothly functioning payment system is essential to a safe and sound economy in a sophisticated economic system like we have in the United States. In some industrialized countries, the payment system is regarded as so important that it is operated by the government, and payments are effected by a governmental agency, such as the postal, telephone, and telegraph service. In the United States, the payment system is operated by a cooperative blend of public and private organizations. There are quasi-governmental organizations, like the Federal Reserve Banks and the Federal Home Loan Banks, and there are commercial banks, which are wholly private corporate entities.

Although the operation of the U.S. payment system is rightly seen as a collaborative mix of public and private elements, it is so important to our economy that it is closely watched and nurtured by governmental oversight and participation. One of the significant functions performed by the Federal Reserve System, in addition to its


2. See Payment Systems, supra note 1, at 215-17. For helpful background material regarding the history of federal regulation of banking in the United States, brief definitions of the various types of depository institutions, and an explanation of the roles of various federal regulatory agencies, also see Miles A. Cobb, Federal Regulation of Depository Institutions: Enforcement Powers and Procedures ¶¶ 1.02-.04 (1984 & Supp. 1991).

monetary policy making and bank supervision functions, is to assure that the U.S. payment system remains safe and sound. The Federal Reserve has performed this particular function very well during its seventy-five-year history. The proof may be seen in the U.S. payment system, which boasts an efficiency and reliability that make it one of the more attractive aspects of the U.S. banking industry. It is also the backbone that supports our securities and financial markets, which are probably the most sophisticated in the world. A well-functioning financial system must have efficient and effective clearings and settlements.

To assure a safe and sound payment system, it is necessary to understand and control payment system risk. Payment law is directly related to payment system risk, and payment risk is uncontrollable if there is uncertainty in payment law. To understand and control the risk of any participant in the payment system, it is necessary to predict, with certainty, the participant's liability in various factual situations.

An example is the best method of proving this point. In the late 1970s and early 1980s, Federal Reserve officials became increasingly concerned about the risks associated with so-called "daylight overdrafts." Daylight overdrafts are intraday debit balances arising from wire transfers of funds and securities. The Federal Reserve's concern about these overdrafts had its genesis in the settlement disturbances that were experienced following the failure of Bankhaus Herstatt, a German bank, in 1974.

In the Herstatt situation, daylight overdrafts for Herstatt were so large that they threatened the liquidity of other banking institutions, raising the specter of a series of successive bank failures and a systemic problem. Over time, daylight credit exposure became enormous. Industry experts feared that, if the overdrafts were not controlled, there would be a significant risk that an individual bank failure would produce successive bank failures and a systemic crisis in the banking industry.

After extensive study and deliberation, the Federal Reserve decided to address the problem of daylight overdrafts by introducing a

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4. Id. at 4.
5. Id. at 4-5.
7. See The Crisis Crosses National Boundaries, BUS. WEEK, Sept. 22, 1975, at 92, 93 ("[T]he collapse of Germany's Bankhaus I.D. Herstatt brought the international money markets to a near standstill . . . .").
panoply of risk-reducing devices to the payment system. One of these devices was the “bilateral net credit limit.” The purpose of the bilateral net credit limit device was to force institutions to recognize their credit risk on large-value payment systems, and to control it.

The bilateral net credit limit was designed especially to address the credit risk associated with large daylight overdrafts. In a so-called “net settlement” system, wire transfers are sent and received throughout the course of the banking day, with settlement taking place at the close of the banking day. A bank receiving a wire transfer—call it “Big Bank”—from another bank—call it “Shaky Bank”—could set an intraday credit limit for that bank, say in the amount of $100,000,000. If Shaky Bank tried to send a wire transfer to Big Bank in the amount of $200,000,000, effectively making Big Bank a creditor of Shaky Bank, Big Bank would reject that wire transfer because it would exceed the bilateral net credit limit. Using the bilateral net credit limit, Big Bank’s daylight credit exposure to Shaky Bank would be limited to $100,000,000. Now, suppose that Big Bank sends to Shaky Bank a $150,000,000 wire transfer, which Shaky Bank accepts. Can Shaky Bank now send its $200,000,000 transfer to Big Bank? The answer would be “yes,” because of the “net” feature in the device. The difference between the wire transfer that Big Bank sent to Shaky Bank and the wire transfer that Shaky Bank wants to send to Big Bank is $50,000,000, which would be within the bilateral net credit limit of $100,000,000.

All of this credit information would be programmed into the computer that operates the funds transfer system effecting these payments. Thereafter, the computer would perform the work that would limit risk: It would automatically reject payments that exceed the bilateral net credit limit and accept payments that fell within it. It is noteworthy that this highly important device for risk control depends on the functioning of the computer.

As a concept, the bilateral net credit limit was well designed and relatively simple to execute. Before Article 4A of the UCC was introduced, however, it did not accurately reflect the true risk situation of banks participating in the large-value net settlement systems. The rea-

10. See id. at 1478.
son why it did not accurately reflect the true risk situation related to a legal consideration—the right of charge back.

When the bilateral net credit limit was developed, banks that received wire transfers over the large-dollar settlement systems all reserved the right to charge back the accounts of their customers if they did not receive settlement when the banking day ended. Thus, if Shaky Bank failed to settle with Big Bank at the end of the banking day for the $200,000,000 wire transfer that it had sent earlier, Big Bank would simply charge back the account of the customer who received the money. Consequently, Big Bank’s customer, rather than Big Bank itself, bore the risk of Shaky Bank’s failure. Further, Big Bank, to the extent its customer was credit worthy, really did not have a sufficient financial incentive to monitor the credit risk of Shaky Bank. If Big Bank’s credit judgment about Shaky Bank turned out to be poor, and Shaky Bank did not settle the $200,000,000 payment to the account of Big Bank’s customer, Big Bank’s customer would bear the consequences when its account was charged back by Big Bank.

Before Article 4A of the UCC, there was no statutory law governing wire transfers.¹¹ Contract law governed such forms of payment—to the extent that banks could get their customers to agree to their terms. One standard provision in bank wire transfer agreements was a provision permitting banks to exercise their right of charge back in the event of a settlement failure. This particular contract right worked at cross purposes to the bilateral net credit limit. The bilateral net credit limit attempted to force receiving banks to recognize and control payment system risk.¹² The charge back right, however, enabled receiving banks to “dump” such risk onto their customers, who did not recognize the risk of a settlement failure and who could not control it even if they did.

This example reveals how a prudential risk-reducing device—the bilateral net credit limit—is inextricably tied to payment law. Section 405(c) of Article 4A of the UCC abrogated the charge back right that banks had reserved in their wire transfer agreements.¹³ The bilateral net credit limit thus became even more effective. Nothing rivets the attention of a banker like the self-interest inherent in avoiding large liability. Article 4A essentially imposes the discipline of credit risk on the bank receiving a wire transfer over a net settlement system, and prohibits the receiving bank from transferring that risk to the cus-

¹². See Nelson, supra note 9, at 1478.
omer. The liability imposed by Article 4A is purposeful. It is imposed to give a real incentive to the receiving bank to employ prudential devices, such as the bilateral net credit limit, that will control credit exposure.

Today, the law—Article 4A—and the devices—bilateral net credit limits and sender net debit caps—work together to foster sound credit controls on the large-dollar transfer systems, and help to assure a safe and sound payment system. A safe and sound payment system contributes appreciably to our national economic best interest because it enables us to move safely and efficiently the funds that pay for the goods and services that keep the economy chugging.

III. STATE LAW, TECHNOLOGICAL CHANGE, AND INCREASE IN SCALE

Assuming it is established that the law of payment and national economic interest are tied together through the safe and sound operation of the payment system, leads to another, more refined question: Will the source of payment law be state or federal? In this section, I discuss how certain structural factors about the banking industry work to favor federal law as the law governing payment. The fact that the UCC has succeeded in overcoming these structural advantages makes its dominance of commercial payment law all the more remarkable.

Technological change is clearly the most significant factor affecting the banking industry. Just a few decades ago the average American bank was an organization operated by circumspect accounting types who kept, often by hand, real ledgers reflecting the bank's deposit and loan balances. Depositors themselves would safekeep small embossed passbooks, which the depositors would periodically update when they made their weekly visit to the bank. Those days are gone.

Today a bank's heart is its computer system. It is the computer system that reflects the deposit and loan balances, and if the computer system is lost or its data corrupted, the bank will die. Similarly, bank customers no longer routinely interact with bank personnel. Instead, they transact their business with automated teller machines, touchtone telephones, and personal computers. In view of these technological changes, many bank customers no longer owe their allegiance to a local bank and its local personnel, but to the place where their deposits or borrowings are given the most favorable rate. If that place is across the country, it is only a telephone call away. As alluded to in the previous section, credit judgment is often made by machine, albeit
in response to information programmed by a person. The bilateral net credit limit is an example of a computer-driven credit determination.

The advent of the computer and efficient telecommunications has made all of this possible, and the location of the banking house has become relatively unimportant. The banking house no longer needs to be visited by the depositor; a machine in a grocery store serves just as well. Thus, the banking house no longer needs to be positioned close to the home or workplace of its clientele, so long as clients can reach it electronically by telephone or computer link. In this environment, state boundaries no longer have the significance they once did. As banks compete and attract customers from outside their traditional geographic areas, less competitive institutions lose customers and become attractive takeover candidates—or worse, fail. The result is increased concentration in the banking industry.14

Another factor contributing to increasing concentration is the crumbling of legal barriers that inhibit interstate branching. This is not to suggest that banking in the United States is unusually concentrated. When compared to other industrialized countries, that is emphatically untrue. During the last twenty-five years, however, the overall number of depository institutions in the United States rose gradually until 1985, and then declined in rapid fashion by nearly twenty-five percent. The following table illustrates this trend.15

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14. One way to measure an increase in concentration is by the decline in the number of banks. On December 31, 1969, there were 14,158 banks in the United States. 57 Bd. GOVERNORS FED. RESERVE SYS. ANN. REP. 238 (1970). On December 31, 1993, there were 11,710 banks in the United States. 80 Bd. GOVERNORS FED. RESERVE SYS. ANN. REP. 308 (1993).

15. The statistics set forth in the preceding footnote reflect a decline of more than 17%. But during the period from January 1, 1985, until December 31, 1993, there was a nearly 25% decline in the total number of banks in the United States.
**Total Number of Depository Institutions in the United States**\(^{16}\)

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
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</thead>
<tbody>
<tr>
<td>1969</td>
<td>14,158</td>
</tr>
<tr>
<td>1970</td>
<td>14,181</td>
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<tr>
<td>1971</td>
<td>14,273</td>
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<tr>
<td>1972</td>
<td>14,413</td>
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<tr>
<td>1973</td>
<td>14,653</td>
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<tr>
<td>1974</td>
<td>14,936</td>
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<tr>
<td>1975</td>
<td>15,107</td>
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<tr>
<td>1976</td>
<td>15,146</td>
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<tr>
<td>1977</td>
<td>15,172</td>
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<td>1979</td>
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<td>1981</td>
<td>15,323</td>
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<td>15,383</td>
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<td>1983</td>
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<td>1985</td>
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<td>1988</td>
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<tr>
<td>1992</td>
<td>12,234</td>
</tr>
<tr>
<td>1993</td>
<td>11,710</td>
</tr>
</tbody>
</table>

The combined effects of technological change and increasing concentration have worked together to reduce the significance of state territorial boundaries and individual state laws. As banking organiza-

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tions conducted business in more and more states, a natural tendency to homogenize the law governing those interstate banking operations arose.

One way to homogenize the law governing banking operations would be to increase the scope of the federal law governing those operations. That trend has certainly manifested itself—for better or worse depending on one's perspective—in the area of bank supervision and regulation. However, the laws governing the "plumbing" of bank operations—such as the commercial laws governing those operations—have not been preempted by federal law. Instead, the states, through the National Conference of Commissioners on Uniform State Laws (NCCUSL), have met the needs of the banking industry with a commercial law that is essentially uniform among the states—Articles 3, 4, and 4A of the UCC.

IV. THE UCC: UNIFORM IN SUBSTANCE, METICULOUS IN PROCESS

In my view, the success of state law with respect to banking operations is the result of two critical factors: (1) the law is essentially uniform in substance among the fifty states, and (2) the process by which the law is created is meticulous and sound. State law has thrived in the area of payment as a result of these factors.

Uniformity is crucial because, given the changes in the banking industry, uniformity is what the industry needs. If the states did not provide a uniform law and banking organizations were forced to handcraft their internal operations to accommodate multiple and different state laws, those state laws would likely become the victims of federal preemption. It is likely that, given sufficient political demand, Congress would enact a commercial law to govern bank operations which, being federal law, would be uniform throughout the United States.\textsuperscript{17} The balkanization of banking operations within the fifty states would be so inefficient and antiquated that it could not withstand market forces pushing for uniformity.

Another important factor is that, in effecting payment and other bank operations, banks in different states deal regularly with each other. Consider, for example, the activity of a bank on an ordinary banking day. A bank in Chicago may purchase Japanese yen from a

\textsuperscript{17} This might also be accomplished by federal regulation. See 12 U.S.C. § 4008(c)(1)(A) (1988) (empowering Board of Governors of Federal Reserve System to regulate "any aspect of the payment system").
bank in New York, purchase government securities from a dealer in San Francisco, and make a loan to a borrower in Atlanta. Each transaction will require payments by wire transfer, the first two for the purpose of discharging the purchase price, and the third for the purpose of distributing loan proceeds. In all three, funds will need to be transferred to banks in New York, San Francisco, and Atlanta. If the laws governing such payments in Illinois, New York, California, and Georgia were all different in substance, each of these payments might need to be made differently, and the risk of effecting them separately evaluated. This simple example demonstrates a simple proposition: The law governing payment needs to be uniform among the fifty states. This is true because of the very nature of modern banking.

The NCCUSL has recognized this commercial reality and sustained a life for state law that otherwise would have died. Of course, uniformity itself is not the only explanation for the Code's success, particularly given the relative ease by which federal legislation is enacted. There is also the care and precision in the process that creates uniform state law. An excellent illustration of this process may be seen in the revision effort that created new Article 4A of the UCC.

Article 4A of the UCC governs wire transfers, the means by which the most significant commercial transactions in the United States are settled. In 1993, on any business day, between $2 trillion and $3 trillion was transferred over the two principal wire transfer systems, Fedwire and CHIPS. Both of these systems are wholly dependent on sophisticated computer technology, and they effect payments based upon information that is in electronic rather than paper form. A commercial law was needed to govern the rights and obligations of parties involved in wholesale electronic payments, because the old statutes developed for a paper-based world were no longer suitable.

In the early 1980s, the NCCUSL was determined to update Articles 3 and 4 of the UCC, its other enormously successful laws governing bank operations. Articles 3 and 4 govern commercial paper—or more aptly, negotiable instruments—as well as bank deposits and collections. They were originally drafted with the paradigm "old fashioned bank" in mind—the bank described earlier in this Essay. When

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the NCCUSL was contemplating the scope of its update of Articles 3 and 4, it became aware of the need for statutory law governing wire transfers; thus, the NCCUSL decided to create a new UCC article, Article 4A, for that purpose.¹⁹

During this same period of time, the Federal Reserve System was making noise about payment system risk, and particularly about the absence of law that would make risk measurement and control less of an art and more of a science. The NCCUSL was certainly wise in sensing that there was a significant “gap” in commercial law, but the decision to fill the gap with a new UCC article was, perhaps, wiser still.

In 1986 the NCCUSL formed a drafting committee.²⁰ Between 1986 and 1989 the drafting committee performed its law-writing work. The composition of the committee was important to the process, and the NCCUSL was careful to obtain representation from the three groups most interested in wire transfers: (1) large corporate customers who use the wire transfer services offered by banks; (2) banks that provide these wire transfer services; and (3) the Federal Reserve, which both participates in the payment system and regulates banks offering payment services. Reconciling the disparate interests of these three groups was no easy task, but the drafting committee, through extensive debates and a series of drafts, accomplished the objective.

Article 4A became one of the NCCUSL’s most impressive success stories. Between 1990 and 1994 Article 4A was enacted in record-setting time in forty-eight states and the District of Columbia.²¹ Perhaps even more importantly, on January 1, 1991, the Board of Governors of the Federal Reserve System incorporated Article 4A as part of its Regulation J.²² In effect a federal agency, the Board of Governors gave Article 4A the force and effect of federal law by adopting it as a federal regulation to govern Fedwire.²³

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article 4A as the law governing Fedwire also assured uniformity between federal and state law, and made the law governing Fedwire consistent with the law governing other wire transfer systems, like CHIPS.

In considering whether the UCC is alive or dead, the example of Article 4A cannot be overemphasized. Most commentators would agree that the greatest threat to state commercial law is federal preemption. Article 4A is remarkable because it is the perfect converse. Instead of the federal government preempting or overriding state law and rendering state law a nullity, Article 4A was embraced by the Board of Governors and incorporated as a part of federal law.

Because such federal action is extraordinarily unusual, it is important to pause and consider how it happened. The answer lies in the process. For three years, the three parties most interested in wire transfers labored, through the efforts of their counsel, to produce a law with which all three groups could live. Eventually, they developed a product reflecting what was most important to each group, and also reflecting compromises on those matters that were less important. In the end, while no one of the groups would claim that Article 4A was, from the perspective of their constituency, perfect, none could say that it was unfair. It was the best product that reasonable people with differing interests could create. For this reason, Article 4A was enacted virtually unopposed in forty-eight state legislatures from 1990 to 1994.24

V. A GREAT STRENGTH CAN ALSO BE A WEAKNESS

The meticulous, time-consuming process that worked so well with Article 4A can also be a detriment. The Article 4A process worked so splendidly because each of the interested groups had the resources to support an exhaustive law revision effort. Each had the staying power to participate in a three-year battle. During those three years, there were approximately four meetings each year in various locations throughout the United States, each lasting about two-and-one-half days. To send sophisticated counsel to each of these meetings and to afford the intermeeting preparation time that is essential to effective representation requires substantial resources.

281, 295-96 (1979) (stating federal regulations have force and effect of law). Of course, Article 4A is "federal" law only to the extent that it governs wire transfers effected by Fedwire, the wire transfer system owned and operated by the Federal Reserve Banks. See 12 C.F.R. §§ 210.25-.32.

24. See supra note 21 and accompanying text.
If such a law-making process affected a party who lacked substantial resources, it could quickly be perceived as unfair. Being unable to fund attendance at an NCCUSL meeting essentially means that the party is disenfranchised from voting in the drafting decisions made at that meeting. One criticism of certain of the amendments that the NCCUSL has recommended for Articles 3 and 4, for example, is that the amendments do not sufficiently account for consumer interests. What is noteworthy about these amendments is that they were prepared by the same drafting committee that produced Article 4A. But unlike Article 4A, the amendments to Articles 3 and 4 have generated considerable controversy.

Most consumer groups simply do not have the resources to afford counsel who can participate throughout an NCCUSL lawmaking project. Thus, some charge that the process is unfair to consumers. In my view, this may be one reason why there has been an erosion of state law through federal preemption in the area of consumer commercial law. Two examples of this are the Electronic Funds Transfer Act (EFTA)\(^2\) and the Expedited Funds Availability Act.\(^2\)

Consider, first, the EFTA and the Board of Governors' implementing regulation, Regulation E.\(^2\) This legislation is to consumer electronic payments what Article 4A is to commercial electronic payments. Why is it that consumer electronic payments in the United States are governed by federal law and commercial electronic payments in the United States are governed by state law? While there is no obvious answer to this question, one explanation relates to the factor that I characterize under the label of "process."

It is far easier for consumer groups to participate in the federal legislative process, which tends to be remarkably less laborious than the NCCUSL process. Consumer groups are involved in many different lobbying efforts in Washington. These lobbyists can easily be used for legislation or regulation in the payments area, as well as for other legislative initiatives. In lobbying, like in banking, there are economies of scale.

The NCCUSL itself seems to see its mandate as commercial law, and regards consumer protection legislation as outside that mandate. Furthermore, the experience of the NCCUSL with consumer protection efforts has not been good. The effort to develop a Uniform Consumer Credit Code, which consumed more than a decade and many

person-years of NCCUSL resources, is generally regarded as a failure.\footnote{28} In the law of payments, the predecessor group to the drafting committee that produced the amendments to Articles 3 and 4, and new Article 4A, worked on a project called the “Uniform New Payments Code.”\footnote{29} The Uniform New Payments Code contained many provisions that provided increased protection to consumers of payment services. But the Uniform New Payments Code, unlike its successor, was opposed by all interested parties and is widely regarded as an NCCUSL failure.\footnote{30} Even though it contained many consumer protection features, the Uniform New Payments Code failed to gain the support of consumer interests and was an anathema to the banking industry.\footnote{31}

The sad experience with the Uniform Consumer Credit Code and, on the heels of this foundered effort, the debacle of the Uniform New Payments Code understandably may have influenced the NCCUSL’s decision to avoid covering consumer payments in Article 4A.\footnote{32} This practical decision is reflected in a specific statutory provision designed to exclude all consumer payments from Article 4A’s scope.\footnote{33} One might conclude that the NCCUSL, having been twice burned in projects affecting consumer interests, was twice shy when it came to revising Articles 3 and 4 and drafting Article 4A.

The amendments proposed for Articles 3 and 4 are, for the most part, intended to update those articles to reflect changing technology. The drafting committee felt that this was its mandate, rather than to engraf onto existing law new provisions designed to protect consum-


\footnote{29} \textit{Unif. New Payments Code, PEB Draft No. 3} (June 2, 1983).


\footnote{32} Of course, at the time that Article 4A was being drafted, the Electronic Funds Transfer Act and Regulation E were on the books. But transfers over CHIPS and Fedwire, the principal systems covered by Article 4A, were exempt from Regulation E.

ers. In states where consumer groups have proposed consumer protection amendments, the official position of the NCCUSL is that such amendments, if necessary, should be done through complementary consumer legislation. For very good reasons, the NCCUSL prefers to leave the UCC in a uniform format. If consumer protection features are needed, it is recommended that they be provided in separate state legislation.

Yet another manifestation of what might be characterized as an aversion to state consumer payment legislation is evident in the Expedited Funds Availability Act (EFAA), and the Board of Governors’ implementing regulation, Regulation CC. Here, federal law has preempted many of the provisions of Article 4 of the UCC that govern returned checks. In an effort to force banks to make the proceeds of deposited checks available to bank customers more quickly—a reaction to consumer concern about check holds—Congress and the Board of Governors decided to accelerate the return item process. This was accomplished through a federal law and an implementing regulation that superseded state law that was unfavorable to consumers. In this particular area of payments law, the UCC died.

Whether these specific legislative initiatives would have been done at the state rather than the federal level if the NCCUSL process were more accommodating of consumer interests is a difficult question. It is possible that the legislation would have been enacted at the federal level regardless. But a comparison of the states’ experience with Article 4A, and the federal government’s experience with EFTA and EFAA, is instructive because it points out the relative strengths and weaknesses of the NCCUSL process. In the area of “commercial” payment law, the UCC has lived and prospered. In the area of “consumer” payment law, it has been eclipsed. Those who advocate the continuing role of state law in matters of commerce—and I count myself among that group—can look at these experiences and learn from them.

While the meticulous process that yields uniform state law tends inadvertently to discourage consumer participation, nearly all commentators agree that the NCCUSL “process” tends to make for a better quality product. The uniform state law, by the time it becomes such, has been closely scrutinized by scores of able lawyers, and has

been drafted and redrafted by individuals who, for the most part, are intimately acquainted with the subject matter of the law. Congressional legislation, by contrast, tends to be drafted in smoke-filled rooms by generalists who may have little knowledge of the underlying subject matter. Commercial affairs are better guided through the former process, rather than the latter.

VI. The Next Twenty-Five Years

In gauging the health of the UCC during the last twenty-five years, it seems plain to me that the patient—state law—is doing remarkably well. The success of Article 4A tends to prove the point, but there are other indicators. The Article 8 revision project is proceeding well, and the composition of the drafting committee has a remarkable similarity to the composition of the committee that produced Article 4A. Two other initiatives are the new projects concerning Article 2 and Article 9. It is encouraging that each of the revision efforts is supported by interested groups with the resources to support a successful effort.

These projects, if as successful as Article 4A, will guarantee the UCC's continuing vitality during the next twenty-five years. In considering such projects, and for those counsel who are members of the respective drafting committees, it is useful to remember the two factors that have served the Code so well in the past—uniformity and process. The product must be uniform, and the process that produces the uniform product must involve all interested groups.

The external factors affecting the banking industry that have been described here—increasing concentration and rapid technological change—should also be considered as we contemplate the future. During the last twenty-five years, an increase in scale has rendered state boundaries less significant. During the next twenty-five years, that same process may also reduce the economic significance of national boundaries. Banking organizations will operate not only in multiple states, but in multiple nations. Technology, of course, will continue to change, probably at an even faster pace. These tendencies, if they materialize, might well lead to pressure to homogenize the commercial law across national frontiers.38 To the extent that the NC-

38. There is already evidence of this in commercial payment law. The United Nations Commission on International Trade Law has prepared a model law regarding International Credit Transfers that is heavily influenced by UCC Article 4A. See Comments on the Draft Model Law on International Credit Transfers: Report of the Secretary-General, [1991] 22
CUSL process can adapt to that type of development, the UCC might actually increase its importance in the area of commercial law.

It is also useful to consider what may be one of the few weaknesses of the NCCUSL process—the absence of consumer representation on drafting committees. To the extent that consumer groups can be more effectively incorporated into the process, and this probably requires some mechanism for funding their participation, then some of the problems of the past can be avoided. While this might be relatively unimportant in the Article 8 revision effort, given that consumers are not routinely involved in securities transfers and clearing, it could be very important to the success of the Article 9 and Article 2 revision projects.

Having said all of this, it becomes relatively easy to answer the question presented by this Symposium. The UCC is alive and well in the law of commercial payment, and is likely to remain so into the foreseeable future.