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## Amended Article 2: What Went Wrong

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## Amended Article 2: What Went Wrong?

*William H. Henning*<sup>1</sup>

This symposium issue explores two related questions: 1) Is the current version of Article 2 of the Uniform Commercial Code (U.C.C., or Code) satisfactory for dealing with modern sales-law issues; and 2) What problems are likely to arise as a result of amended Article 2's failure in the legislatures? My answer to the first question is "probably not, but it will have to do." The original article was drafted when manufacturers' warranties were rare and electronic contracting and products that combine goods and software were unknown. Although brilliant in conception, the drafting is often confusing and even sloppy. Judging from the massive volume of litigation that continues to this day, at least one of the article's key innovations—the so-called "battle-of-the-forms" provision<sup>2</sup>—must be rated a failure. Despite these flaws, the courts have managed to deal with the issues and are capable of continuing to do so, albeit at great cost both to litigants and to those planning transactions.

As to the second question, the failure of the amendments may go beyond merely missing an opportunity to improve the law. The inability of stakeholders to reach consensus on key issues and the willingness of some to commit resources to fight the amendments in the legislatures suggest a weakening of the consensus that in the past has supported uniformity at the state level in the field of commercial law. The failure of the amendments, coupled with other events described below, provides an occasion to think seriously about the need to keep the Code current and the problems that will arise if we are unable to do so.

Article 2 is the only one of the original articles that has not been successfully updated since the first widely adopted version of the U.C.C., the 1962 Official Text, was promulgated by the Code's sponsoring organizations, the American Law Institute (ALI) and the National Conference of Commission-

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1. Distinguished Professor of Law, University of Alabama School of Law. Professor Henning was a NCCUSL member of the Committee to Revise Uniform Commercial Code U.C.C. Article 2 – Sales from 1996 to 1999, chaired the 1999 Consumer/Industry Task Force described herein, chaired the reconstituted Committee to Amend Uniform Commercial Code U.C.C. Article 2 – Sales and Article 2A – Leases from 1999 to 2001, and was NCCUSL's Executive Director when amended Articles 2 and 2A were promulgated in 2003. The history recounted here, except the part the author actually experienced, is based on the recollections and perspectives of persons with whom the author has consulted and who were personally involved in the described events, as well as documentation available to the author.

2. U.C.C. § 2-207. In his article elsewhere in this issue, Professor Fred Miller notes that other areas of Article 2 also continue to generate a high volume of cases.

ers on Uniform State Laws (NCCUSL<sup>3</sup>). This is not for lack of trying. In 1987, the Permanent Editorial Board for the Uniform Commercial Code (PEB), in conjunction with the sponsors, appointed a Study Group and charged it with identifying major problems of practical importance in interpreting and applying Article 2. The Study Group submitted a detailed report<sup>4</sup> that identified numerous areas in which change was desirable, and a drafting project commenced in 1991. The original Reporter for the Committee to Revise Uniform Commercial Code Article 2 – Sales was Professor Richard Speidel, who had been the Project Director for the Study Group, and he was joined by an Associate Reporter, Professor Linda Rusch, in 1996. A series of unfortunate events, described below, culminated in 1999 with the resignations of Professors Speidel and Rusch, and a reconstituted committee with Professor Henry Gabriel as Reporter continued the work.<sup>5</sup> It was ultimately decided that the reconstituted committee would produce a set of discrete amendments rather than a thoroughgoing revision, and in 2003 the sponsors promulgated amended Article 2.<sup>6</sup> To date, the amendments have not been adopted in a single state. Although the full story of the drafting project's 12-year odyssey must be reserved for another day, a brief exploration of what went wrong may be instructive.<sup>7</sup>

The project was troubled from the outset. The charge to the committee was exceptionally broad and resulted in drafts that entirely reorganized the article, changed the numbering system, contained numerous entirely new provisions, and revised to some extent virtually every one of the original provisions, even when no substantive change was intended. This comprehensive approach led to a consistent refrain from some observers that the committee was engaged in “needless tinkering,” the fear being that even a small change in language might cause a court to conclude that there had been a change in substance.<sup>8</sup> Another result of the comprehensive approach

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3. The organization is now more commonly known as the Uniform Law Commission, or ULC, but it was known as NCCUSL throughout most of the events described in this essay and accordingly that is the acronym used herein.

4. PEB Study Group: Uniform Commercial Code Article 2 (Preliminary Report, March 1, 1990). *See also*, PEB Study Group: Uniform Commercial Code Executive Summary, 46 BUS. LAW. 1869 (1991).

5. The reconstituted committee also continued the work of the Drafting Committee to Revise Uniform Commercial Code Article 2A – Leases.

6. A discrete set of amendments to Article 2A that tracked, as appropriate, the amendments to Article 2 was approved at the same time.

7. *See also*, Professor Miller's article in this symposium, which also discusses some of the history.

8. The “needless tinkering” concern raises a serious and difficult issue. NCCUSL prides itself on careful drafting and has a standing Committee on Style (COS) that carefully reviews and edits each draft. The meticulous, painstaking work of the members of this committee vastly improves the quality of each draft. Often, a question posed by COS will reveal that a drafting committee has an incomplete understanding of an issue and that what is needed is not editing but additional substantive work. As an older act is revised, the general policy is for the revision to reflect current style requirements. However, when language has worked well for a long period of time there is, and should be, a great reluctance to change it. The tension between keeping language up to date and following the maxim that “if it ain't broke, don't fix it” has never been greater than in amended Article 2. Indeed, one reason for changing the designation

was that the process was exceptionally slow; as we shall see, the length of the project allowed events to overtake it. The drafts, particularly in the early years, took a significantly more regulatory and less facilitative approach than the original article,<sup>9</sup> especially as regards standard-form consumer contracts but in other contexts as well. This approach generated no small amount of controversy. The agreement between NCCUSL and the ALI calls for drafts to be prepared using the normal NCCUSL procedures, which include broad outreach to parties that might be affected by the act and open drafting meetings at which observers representing those parties are free to speak. In a successful project, observers are able at some point to buy into the product; with Article 2, too many observers remained suspicious of the motives of the drafting committee and skeptical of the product to the very end. It may well be that a less ambitious charge and a speedier process would have resulted in a successful revision. We will never know.

In addition to the circumstances described above, the project also was adversely affected by an unusual and politically charged set of circumstances related to a parallel project to develop uniform legislation dealing with software licensing transactions. In 1987, a subcommittee of the Uniform Commercial Code Committee of the American Bar Association's Section of Business Law culminated several years of work with a report authored by Professor Raymond Nimmer.<sup>10</sup> The report recommended uniform legislation in the area of software licensing and indicated that it might take the form of a freestanding act, amendments to U.C.C. Article 2, or a new U.C.C. article. The recommendation was forwarded to NCCUSL, which appointed a study committee with Professor Nimmer as Reporter, and that committee recommended a freestanding act.<sup>11</sup> Because of opposition to uniform legislation by some segments of the software industry, NCCUSL asked the Sec-

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of the project from a revision to a set of amendments was to permit the drafting committee to go back to the original language whenever possible, thereby removing needless tinkering from the long list of observers' concerns, although even as to the original language "record" was substituted for "writing" and gender-neutral pronouns were used. A careful reader will note that while the amendments reflect the modern style, the unamended language is still essentially that of Professor Llewellyn.

9. As used in this article, a facilitative approach is one that, like original Article 2, relies primarily on such principles as unconscionability, good faith, and reasonableness, as supplemented by common-law and equitable principles, to constrain seller misconduct. Examples of a more regulatory approach that were considered at various times in the revision process were identifying and prohibiting discrete types of seller misconduct, explicitly permitting courts to find terms unconscionable on substantive grounds alone, and adopting a reasonable-expectations test to determine whether standard terms should be enforced against consumers. Even participants who supported a more facilitative approach agreed that there should be a new category of "consumer contract" and a somewhat more robust consumer-protection regime.

10. Raymond T. Nimmer, *Software Licensing Contracts: Proposal for Study by the A.B.A. Ad Hoc Committee on the Scope of the U.C.C.* (1987).

11. See *Report of the Study Committee on a Computer Software Contracts Act* (April 11, 1989). The report was updated on October 25, 1989, and on November 9, 1989. One can only speculate on what the course of events might have been if NCCUSL had accepted the report's recommendation and appointed a committee to draft a freestanding act at about the same time the Article 2 drafting committee began its work.

tion of Business Law to form an ad hoc group to advise it, and that group suggested areas deserving further consideration.<sup>12</sup> NCCUSL then asked its study committee to prepare another report in light of the ad hoc group's suggestions, and that report reiterated the recommendation for uniform legislation but indicated that the most appropriate vehicle would be Article 2.<sup>13</sup> In 1991, at the same time NCCUSL appointed the Article 2 drafting committee, it appointed a Special Committee on Computer Software Contracts to work with the Article 2 committee and the existing Article 2A Standby Committee<sup>14</sup> to identify "the areas, if any, in Articles 2 and 2A which should be modified in order properly to accommodate or exclude computer software transactions within the scope of those Articles" and, upon request, to draft appropriate language.<sup>15</sup>

In 1993, a "hub-and-spoke" approach was adopted under which Article 2 was to consist of a chapter containing general principles (the hub) and separate chapters containing special rules for sales and licensing transactions (the spokes). In 1995, it was determined that the range of differences between the transaction types made the hub-and-spoke approach unworkable, and a separate committee was appointed to draft a new Article 2B on licensing.<sup>16</sup> Around this time, yet another drafting committee, with Professor Marion Benfield as Reporter, was charged with revising Article 2A in light of the work on Articles 2 and 2B and also the work of the drafting committee that was revising Article 9. Although the "terrible twos" were to be separate articles, procedures were established to harmonize their provisions to the extent practicable.<sup>17</sup>

Ultimately, it became apparent that consensus could not be reached on some of the key issues confronting the drafters of Article 2B. In retrospect this is not surprising as software licensing is so new that case law has not yet identified and provided solutions to a wide spectrum of issues as was the case before the initial codifications of goods law in the English Sale of Goods Act and Article 2's predecessor, the Uniform Sales Act. It eventually became apparent that Article 2B was unlikely to gain widespread enactment,

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12. Report to the National Conference of Commissioners on Uniform State Laws from the Ad Hoc Group of the American Bar Association Section of Business Law With Regard to the Proposed Uniform Software Contracting Act (June 4, 1990).

13. See Report of the Study Committee on Computer Software Contracts (May, 1991).

14. After promulgating an act, NCCUSL discharges the drafting committee and forms a standby committee, usually consisting of some or all of the members of the drafting committee, to give advice as problems arise during enactment efforts.

15. Minutes of NCCUSL's Executive Committee (August 6, 1991). The Special Committee was later folded into the Article 2 drafting committee.

16. Professor Nimmer continued his work as Reporter for the Special Committee on Computer Software Contracts and the Article 2B drafting committee.

17. The responsibility for supervising the process of harmonizing the provisions of Articles 2, 2A, 2B, and 9 was assigned to the Drafting Committee to Revise Uniform Commercial Code Article 1 - General Provisions. See Article 1 Drafting Committee: Reporter's Introductory Memorandum (October 10, 1996). Professor Neil Cohen, the original Reporter for revised Article 1 and author of the Memorandum, was later joined by an Associate Reporter, Professor Kathleen Patchel.

and in 1999 it was determined that software licensing would not be covered by the Code but that NCCUSL instead would promulgate a freestanding Uniform Computer Information Transactions Act (UCITA). The decision was explained in a press release that stated in part as follows:

As the nation moves from an economy centered around transactions in goods and services to an information economy, the need has grown dramatically for coherent and predictable legal rules to support the contracts that underlie that economy. Lack of uniformity and lack of clarity of the legal rules governing these transactions engender uncertainty, unpredictability, and high transaction costs. Nonetheless, it has become apparent that this area does not presently allow the sort of codification that is represented by the Uniform Commercial Code.<sup>18</sup>

As we shall see, the decision to drop Article 2B and move to a freestanding act had profound effects on the Article 2 process, but before discussing those effects it is important to discuss a problem that surfaced in the mid-1990s as a result of two Seventh Circuit decisions, both authored by Judge Frank Easterbrook, validating terms first disclosed to a vendee after payment for and delivery of a product.<sup>19</sup> Some participants in the drafting process wanted to preclude a seller's deferred terms from becoming part of the contract unless the buyer expressly manifested assent to them, while others preferred that such terms become part of the contract if the buyer was given a reasonable post-delivery right of return for a refund. The dispute over the treatment of deferred terms became the most visible and contentious issue faced by the original Article 2 drafting committee, but as noted above the regulatory/facilitative split was playing out in other areas as well.

In the spring of 1999, in an effort to bring the project to a conclusion, a special Consumer/Industry Task Force consisting of three drafting committee members and two observers, one with a consumer perspective and one with an industry perspective, engaged in a valiant effort to bridge the regulatory/facilitative divide. The Task Force had not completed its work when the ALI held its 1999 Annual Meeting in May, but the draft presented there reflected a likely compromise on a range of issues and was given final approval. Unfortunately, although the two sides came tantalizingly close to resolving their differences, the compromise fell apart before NCCUSL held its 1999 Annual Meeting in July and commissioners were inundated with letters of objection, primarily from industry stakeholders. There was even a

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18. Joint ALI/NCCUSL Press Release (April 7, 1999).

19. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (software), and *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (computer). The terms "vendee" and "product" are used in order to avoid the debates over whether software constitutes goods and whether a transfer of software for a price constitutes a sales transaction or a license transaction.

full-page ad in USA Today urging that the draft be rejected.<sup>20</sup> The floor debate began after a long and difficult debate over UCITA, and it consumed so much time that it threatened to derail other important projects. As it was apparent that even if the debate continued it would not produce a product that could successfully gain widespread enactment, NCCUSL's leadership, in consultation with the leadership of the ALI, made the controversial decision to stop the debate. Although necessary and appropriate from the perspective of your author, the decision was dispiriting to all who had labored so long and hard to bring the project to a successful conclusion. Professors Speidel and Rusch made the difficult and honorable decision to resign, and the sponsors had to decide whether to continue the project or bring it to a close. Perhaps it would have been better to end it, but so much time and effort, and so many resources, had been devoted to the project that the decision was made to reconstitute the drafting committee with a somewhat more limited charge and to give it just one more year to come back with an acceptable product.

Unfortunately, the collapse of Article 2B and the promulgation of a freestanding UCITA had created an obstacle that no one clearly foresaw at that time. The problem had to do with the scope of Article 2 as it relates to products that consist of goods and software. Going into 1999, Articles 2 and 2B had complementary scope provisions; that is, products outside the scope of Article 2 were within the scope of Article 2B, and vice versa. As long as both articles were going to be part of the same Code and products would be subject to generally the same rules no matter which side of the line they fell on, the fact that the line could not be crafted with precision was not alarming. With UCITA now a freestanding, highly controversial act with uncertain but not encouraging prospects for enactment,<sup>21</sup> there was a strong desire among consumer representatives and representatives of some commercial software vendees for as many products as possible to be subject to the familiar rules of Article 2 and an equally strong desire among representatives of other industries, particularly high-tech industries, for as many products as possible to be outside the scope of the article and governed either by UCITA or by the common law. Even though the ALI in 1999 had given final approval to a scope provision that complemented UCITA, it quickly became

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20. The ad was entitled "A Critical Message to NCCUSL from the Business Community" and it appeared in the Friday, July 23, 1999, edition of USA Today. The ad's final sentence stated in bold that "Adoption by NCCUSL of the proposed revision will pave the way to a non-uniform commercial code."

21. UCITA was enacted quickly by Maryland and Virginia but its opponents, including a well organized and financed opposition group called Americans for Fair Electronic Commerce Transactions (AFFECT), successfully stalled the enactment effort and even convinced several states, including West Virginia, North Carolina, and Iowa, to enact statutes invalidating an agreement on choice of law that selects UCITA (sometimes referred to as "UCITA bombshelter" statutes). Responding to the criticisms of AFFECT and others, and to an ABA Board of Governors Working Group Report (January, 2002), NCCUSL revisited UCITA in 2002 and adopted a number of substantive changes. Despite that effort, and despite the fact that the lack of complaints and litigation suggests that UCITA is working well where enacted, no additional states have approved the act.

apparent that the provision was no longer acceptable to many who had reservations about it but had supported it as the price for gaining approval of the 1999 draft.

The reconstituted drafting committee found itself in a box. It had to deal with all the hot-button issues that had plagued the prior committee and it also had to craft a scope provision that would determine the extent to which Article 2 would govern transactions involving software. Although it was given additional time and worked tirelessly, it never successfully resolved either the deferred-terms issue or the scope issue. As to deferred terms, Comment 5 to amended Section 2-207 states as follows:

The section omits any specific treatment of terms attached to the goods, or in or on the container in which the goods are delivered. This article takes no position on whether a court should follow the reasoning in *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991) and *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000) (original 2-207 governs) or the contrary reasoning in *Hill v. Gateway 2000*, 105 F. 3d 1147 (7th Cir. 1997) (original 2-207 inapplicable).

With regard to the scope issue, numerous approaches were drafted and exposed for comment but none proved satisfactory. It was suggested that perhaps the issue could simply be ducked, leaving the law where it was, but representatives of high-tech industries argued that since courts, in the absence of other law, had been applying Article 2 to software transactions,<sup>22</sup> a change in the law was necessary and appropriate. They also argued that by attempting to solve the scope issue and then retreating, the status quo would not be preserved; rather, the sponsors would be deterring further development of the law in the courts by signaling that they were comfortable with the application of Article 2. The committee couldn't find a path forward and it couldn't go back. Eventually, the effort to amend the scope provision was abandoned but the definition of goods was amended to exclude information, a term that was not defined in the amendments.<sup>23</sup> The exclusion was not a substantive change in the law—information is not goods and never has been—but it provided a basis for a comment explaining to the courts that they needed to be thoughtful in deciding the extent to which Article 2 or other law should apply. Comment 7 to amended Section 2-103 states as follows:

The definition of “goods” in this article has been amended to exclude information not associated with goods. Thus, this article does not di-

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22. See, e.g., *I.Lan Sys., Inc. v. Netscout Service Level Corp.*, 183 F. Supp. 2d 328, 46 U.C.C. Rep. Serv. 2d 287 (D. Mass. 2002) (court explicitly stated that it was applying Article 2 because of the lack of other law).

23. Amended U.C.C. § 2-103(1)(k)(2007).



rectly apply to an electronic transfer of information, such as the transaction involved in *Specht v. Netscape*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002). However, transactions often include both goods and information: some are transactions in goods as that term is used in Section 2-102, and some are not. For example, the sale of “smart goods” such as an automobile is a transaction in goods fully within this article even though the automobile contains many computer programs. On the other hand, an architect’s provision of architectural plans on a computer disk would not be a transaction in goods. When a transaction includes both the sale of goods and the transfer of rights in information, it is up to the courts to determine whether the transaction is entirely within or outside of this article, or whether or to what extent this article should be applied to a portion of the transaction. While this article may apply to a transaction including information, nothing in this Article alters, creates, or diminishes intellectual property rights.

The bottom line for the drafting committee was that the hot-button issues would have to be resolved in the courts, with no guidance as to deferred terms and limited guidance as to scope. From your author’s perspective, this solution was entirely appropriate: The courts have always been partners with the Code’s sponsors in developing commercial law. Given the rate of change in society and in the ways in which goods are developed and marketed, it seems unlikely that there will ever be a time when an Article 2 revision process will reach consensus on all the hot-button issues of the day. From the perspective of many stakeholders, however, the failure to resolve the issues made amended Article 2 unacceptable, and some have worked diligently and expended considerable resources to prevent its enactment. In an article elsewhere in this issue, Professor Fred Miller sets out the various concerns expressed by the National Association of Manufacturers (NAM)<sup>24</sup> but chooses not to comment on the validity or accuracy of those concerns. Your author is not so reticent and will provide some comments below. However, it is my belief that most of the concerns amount to grumbling and that only the concerns over deferred terms and scope have motivated NAM and others to expend resources opposing amended Article 2.

The Uniform Commercial Code (UCC) Committee of the State Bar of California’s Business Law Section analyzed the NAM report and in a thoughtful and carefully researched report<sup>25</sup> disagreed with each and every one of NAM’s conclusions. For example, NAM concluded that amended

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24. National Association of Manufacturers, Industry Concerns About Final Article 2 Revisions, available at, <http://www.nam.org/PolicyIssueInformation/CourtCasesAffectingManufacturers/UniformCommercialCode.aspx?DID={EA780F48-E7D4-453E-9A95-F1700C496BA5}>.

25. Analysis by the UCC Committee of the State Bar of California Business Law Section, of the NAM Industry Concerns about the UCC Article 2 Revisions (Feb. 25, 2005).

Section 2-207 “creates confusion on contract formation.” In response, the UCC Committee report states that:

Under Existing UCC § 2-207 there is a deference to the first writing. Amended UCC § 2-207 treats the varying terms on an even-handed basis, removing this artificial deference to one writing over another. Elimination of the arbitrary battle of the forms rule under Existing UCC § 2-207 is a beneficial change. Existing UCC § 2-207 has spawned expensive litigation over the years due to its lack of clarity. Amended UCC § 2-207 will eliminate unfair advantage, provide more clarity, and should lead to less litigation.

For another example, NAM expressed the following concerns about amended Section 2-313B, which deals with warranty-like obligations to a remote purchaser created by advertisements and similar communications to the public:

The new rule is a major change that conflicts with the direction of most recent court and legislative action. It creates liability for public communications, even though the communication was **not** a part of the agreement and even if it did not cause personal injury. The rule may be unconstitutional under the First Amendment. In any event, this is a contract statute and should deal with contracts. This rule is a huge step backward that invites class action litigation and is outside the domain of a commercial *contract law*. [bold and italics in original]

In response, the UCC Committee stated in part that:

A majority of state courts that have ruled on the issue have held that statements contained in brochures, catalogs and other advertisements could create a basis for an express warranty under Existing UCC Section 2-313. Many states have also held that privity is not required in order for an express warranty to be asserted. Furthermore, to a large extent, the absence of privity is either effectively conceded, or not raised, in such litigation. To the extent a state has adopted these rules, Amended UCC § 2-313B codifies these rules, and does not create any new liability (indeed, it might even serve in some jurisdictions to limit liability that might exist by virtue of prior court decisions). In a state which has not adopted these rules, Amended UCC § 2-313B may create a new potential liability for sellers in that state. One of the goals of the UCC is to promote commerce through a uniform set of rules governing commercial transactions in all states. This not only protects customers, but also creates a level playing field among competing sellers. Thus, when different states have different rules, it is a necessary and desirable

outcome that, when a uniform rule is adopted, the rule in some states will change.<sup>26</sup>

Like so many of its criticisms, NAM's statements about amended Section 2-313B appear designed for political effect and are without basis in fact. The section is consistent, not in conflict, with recent decisional law, and it is not in conflict with recent legislative action. The concern about class actions is similarly misplaced: For an advertisement to be actionable, a remote purchaser must enter into the transaction with knowledge of the representations in the advertisement and with an expectation that the goods will conform to them. These individualized, fact-based requirements make the section a singularly poor candidate for use in class actions. Perhaps closer to the real reason for NAM's opposition is something your author heard more than once during the drafting process and in more contexts than obligations arising from advertising: An acknowledgment that a theory is generally consistent with decisional law but a fear that putting it in the black letter will bring it to the attention of more buyers. Those expressing this concern would prefer for NCCUSL and the ALI to keep theories routinely recognized by the courts out of the statute because otherwise more buyers might exercise their rights.

Further analysis of NAM's concerns and the California Bar UCC Committee's response is unnecessary because the point is clear: Amended Article 2 is hardly revolutionary, but on point after point it represents an improvement and clarification of the law. Perhaps its failure is the result of the unique set of circumstances described above: It was too ambitious an undertaking, the process went on too long and engendered too much controversy, and the drafters were caught up in events beyond their control. There is, however, a possibility that something more is at work here and, if this is true, it is cause for considerable concern.

In recent years some, including your author,<sup>27</sup> have remarked that there seems to be more of a willingness on the part of observers to play what might be called "legislative hardball." This occurs when an interest or coalition of interests concludes that it will pull out all the stops to block enactment in the states if it does not get its way on key issues. Unfortunately, as the Article 2 project demonstrates, this can be done quite effectively. The preparation of a uniform act is not an exercise in idealism; rather, it is a democratic process and the members of a drafting committee need to understand how any particular provision will impact the interests that will be affected by it. It is not surprising that various interests will attempt to leverage a draft, but by over-emphasizing short-term gains they tend to lose sight of

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26. The UCC Committee report also refutes NAM's statement that the amended section deals with issues beyond the domain of contract law and its First Amendment concerns.

27. Fred Miller & William Henning, *The State of the Uniform Commercial Code - 2001*, U.C.C. Bulletin, Vol. 45, Release 2 (Nov. 2001).

the enormous benefits of keeping commercial law uniform and at the state level.

If the U.C.C. cannot be kept viable, commercial law will inevitably gravitate towards the federal level, where uniformity can be readily achieved. The downsides of this would be enormous. Some have complained that industry groups have too much influence in the preparation of uniform laws, although the very fact that amended Article 2 has failed because of the opposition of industry groups suggests otherwise. Be that as it may, consider what will happen if commercial law emanates from the federal government. The process is almost certain to be political, and only well-funded interest groups are likely to have access to the decision-makers. The drafting will typically be done by staffers, perhaps in cooperation with interest groups, and it is unlikely that there will be an extensive effort to make certain that each word works and that the provisions of an act do not have inadvertent and unanticipated negative consequences.<sup>28</sup> Regarding this last point, there can be no better illustration than a comparison of the quality of the drafting in the federal E-Sign legislation<sup>29</sup> and in the Uniform Electronic Transactions Act. By contrast with the federal process, the process by which Code amendments and revisions are produced involves multiple years of careful work by a dedicated committee drawn from the ranks of NCCUSL and the ALI, none of whose members have a political stake in the outcome; at least one dedicated reporter who is a top scholar in the field; hands-on oversight by the leadership of the sponsoring organizations; an open process where the only price of admission is the travel costs involved in attending meetings and where there is a full opportunity to explain one's needs to the committee and other observers; and multiple exposures at annual meetings of both sponsoring organizations, where many members have a deep knowledge of commercial law and long experience as judges, practitioners, and academics.

Keeping the Code's subject matter at the state level requires that amendments and revisions be universally and rapidly enacted and that they be kept uniform, at least as to core concepts, by the state legislatures. Among its many benefits, uniformity reduces transaction costs, avoids provincialism, fosters inter-state cooperation, and reduces forum shopping.<sup>30</sup>

Although there is cause for concern, there is no reason for pessimism. On the negative side, we have recently seen the failure of amended Article 2 and of the original choice-of-law rule in revised Article 1. Although that rule as

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28. There are occasional examples of thoughtful and careful drafting at the federal level, notably the Bankruptcy Reform Act of 1978. However, even in that case the quality of the Act has deteriorated over time as it has been the subject of less thoughtful and less carefully drafted amendments, such as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

29. Electronic Digital Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001-70031.

30. A listing of these and other benefits of uniformity, as well as the negative consequences of federalization, may be found in Steven Weise, *Whether State Non-Uniformity in Article 9 Enhances the Productive Development of Commercial Law* (materials prepared for CLE program presented at the ABA's 2008 Annual Meeting).

originally drafted represented a significant advance in the law and its opponents never articulated a compelling, or even a particularly coherent, argument against it, they nevertheless were able to block its enactment and as a result the choice-of-law rule adopted by the enacting states has been the rule found in the original article.<sup>31</sup> There was also opposition to the handful of amendments to Articles 3 and 4 that were promulgated in 2002, and they have had only sporadic success in the states. On the positive side, the last twenty years have seen successful revisions of Articles 1 (except for choice of law), 3, 4, 5, 7, 8, and 9, and a successful new Article 4A.

Perhaps it is inevitable that there will be bumps along the way, but the hardball tactics used by industry to stop the Article 2 project sound a cautionary note. The sponsors will have to be more careful about the scope of a revision process; they will have to do more advance outreach to potential stakeholders to sound them out about the need for a project,<sup>32</sup> the prospects for their participation in the drafting process, and the likelihood of their ultimate support; and they will have to do a better job of educating and re-educating participants about the desirability of maintaining the pre-eminence of the Uniform Commercial Code and the negative consequences of failing to do so. As painful as the Article 2 failure is, it provides an opportunity for thought, and for improvement.

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31. In 2008, the sponsors, upon the recommendation of the PEB, officially rescinded the language of revised § 1-301 as promulgated in 2002 and replaced it with the language of original § 1-105.

32. Enhanced use of early stakeholder meetings is already occurring. For a different view of the value of stakeholder participation, see Edward Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 1 ALR 569, 585-86 (1998) (suggesting that NCCUSL and the ALI are subject to capture by interest groups).