

# Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code

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## NOTE

### THE JURISPRUDENCE AND JUDICIAL TREATMENT OF THE COMMENTS TO THE UNIFORM COMMERCIAL CODE

Although the Uniform Commercial Code<sup>1</sup> (the "UCC" or the "Code") has been one of the most influential statutes of recent time, and has generated extensive discussion, its "Official Comments"<sup>2</sup> have received almost no scholarly consideration.<sup>3</sup> Nearly forty years of experience has shown that courts defer, and, this discussion will argue, *ought to* defer to the guidance the Comments offer as to the proper application of Code provisions. The Comments occupy an unusual position as aids to statutory interpretation. They cannot accurately be described as legislative history in the traditional sense, as there is little evidence that the state legislatures gave any extensive consideration to them when adopting the Code.<sup>4</sup> The Comments are not a treatise either, for the drafters clearly intended them to fulfill a more important role.<sup>5</sup> Part I of this Note proposes that we can only fully understand the proper role of the Comments, and therefore their authoritative value, in light of the jurisprudence of the Code.

The importance of the Comments notwithstanding, several factors may have contributed to confusion and frustration in their application. Among these, the effect of the drafting process and internal inconsistencies of form and purpose play important roles. Part II of this Note examines these factors as a means of further understanding why, despite their obvious importance to proper application and construction of the Code, the Comments sometimes fall short of the mark.

Once the proper role of the Comments and the possible reasons for their shortcomings are understood, the question becomes whether and under what circumstances courts properly should ig-

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<sup>1</sup> Unless otherwise indicated, all references hereinafter to the Uniform Commercial Code are to the 1989 Official Text with Comments.

<sup>2</sup> All references hereinafter to the "Comments" or "Official Comments" are to the "Comments of the National Conference of Commissioners on Uniform State Laws and the American Law Institute."

<sup>3</sup> The sole exception is Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597.

<sup>4</sup> See HONNOLD, SALES AND SALES FINANCING 19 (2d ed. 1962), *quoted in* Skilton, *supra* note 3, at 604.

<sup>5</sup> See *infra* text accompanying notes 34-50.

nore their guidance. When disputing the Comments' suggested interpretations, courts are apt to derogate the authority of the Comments as a whole.<sup>6</sup> This approach seems both inappropriate as a matter of jurisprudence and empirically inaccurate. Part III of this Note shows that when a court rejects the route suggested in a comment, the reason in most cases is not that the Comments as a whole lack sufficient authoritative value; rather, it is because the particular comment, or the circumstances involved, make application inappropriate.

## I

### PURPOSES OF THE COMMENTS

#### A. Role of the Comments in the Jurisprudence of the Code

Although drafters' comments to a uniform act are by no means unique to the UCC, the UCC Comments' broad scope and widespread acceptance as authoritative aids to interpretation is unusual. Earlier attempts at uniform commercial acts by the National Conference of Commissioners on Uniform State Laws ("NCC") usually contained only brief commissioner's notes regarding general purpose and policy.<sup>7</sup> Because so many courts relied on Professor Williston's commentaries on the Uniform Sales Act as "legislative history,"<sup>8</sup> the drafters of the UCC recognized the need for a more thorough and extensive commentary.<sup>9</sup> Many within the NCC believed that the subsequent formulation of such legislative histories by private individuals, even if they participated in drafting the act, was inappropriate, and that the NCC itself should provide any authoritative legislative background as part of the drafting process.<sup>10</sup> The mere proposal of extensive comments did not, however, automatically determine their role. Certainly, uniformity was a primary purpose, but one can only understand the real importance of the Comments by referring to the jurisprudence of the Code itself.

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<sup>6</sup> See, e.g., *Simmons v. Clemco Indus.*, 368 So. 2d 509, 514 (Ala. 1979); *Miller v. Preitz*, 422 Pa. 383, 393, 221 A.2d 320, 325 (1966).

<sup>7</sup> See, e.g., UNIFORM CONDITIONAL SALES ACT (1945); UNIFORM SALES ACT (1941); and UNIFORM NEGOTIABLE INSTRUMENTS LAW (1924).

<sup>8</sup> SAMUEL WILLISTON, SALES (rev. ed. 1948); SAMUEL WILLISTON, SALES (2d ed. 1924); SAMUEL WILLISTON, SALES (1909).

<sup>9</sup> Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 809 (1958).

<sup>10</sup> *Id.*; NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1944 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 149, 164 (1944).

### 1. *Karl Llewellyn and the Jurisprudence of the Code*

While scores of individuals worked on the UCC,<sup>11</sup> a fair understanding of the Code and its jurisprudence inevitably requires an examination of its chief reporter and prime mover, Karl Llewellyn. Commentators have referred to the UCC as "Karl's Kode"<sup>12</sup> and "Lex Llewellyn,"<sup>13</sup> and, according to the assistant chief reporter, "[d]espite the numbers of persons involved in the drafting of the Code, the extent to which it reflects Llewellyn's philosophy of law and his sense of commercial wisdom and need is startling."<sup>14</sup> Understanding the proper role of the Comments within the Code framework requires a discussion of those aspects of Code jurisprudence, as Llewellyn conceived them, which affect the Comments.

#### a. *The UCC as "Semi-Permanent" Legislation.*

True to the realist tradition,<sup>15</sup> Llewellyn viewed law as dynamic; based not on unchangeable rules, but finding its meaning from the developing customs and traditions of society.<sup>16</sup> He thought of the Code as "semi-permanent"<sup>17</sup> in the sense that it would provide a permanent general framework, but would allow legal rules and commercial business customs to develop within it.<sup>18</sup> Llewellyn conceived of "semi-permanency," embodied in a flexible Code, as particularly appropriate in the commercial setting. As a leading author on the jurisprudence of the UCC puts it "[c]ommercial law is at

<sup>11</sup> See Braucher, *supra* note 9; Soia Mentschikoff, *The Uniform Commercial Code: An Experiment in Democracy in Drafting*, 36 A.B.A.J. 419 (1950); see also Homer Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L.F. 321 (1962) (detailed description of the mechanics of the drafting process).

<sup>12</sup> Eugene F. Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213 (1966).

<sup>13</sup> Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330, 330 (1951).

<sup>14</sup> Soia Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 MOD. L. REV. 167, 168 n.3 (1964).

<sup>15</sup> A detailed treatment of Llewellyn's jurisprudential views and his impact on the American Realist movement may be found in WILLIAM L. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

<sup>16</sup> *Id.* at 177-79; John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 361-71 (1988). Llewellyn's jurisprudential views, particularly as they impact on contract law subjects, were spelled out in a number of law review articles written primarily in the 1930's. Among them are: Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931); Karl Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243 (1938); Karl N. Llewellyn, *Our Case-Law of Contract: Offer & Acceptance I*, 48 YALE L.J. 1 (1938); Karl N. Llewellyn, *Our Case-Law of Contract: Offer & Acceptance II*, 48 YALE L.J. 779 (1939). KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* (1960) provides a general exposition of Llewellyn's views on the law.

<sup>17</sup> U.C.C. § 1-102 comment 1.

<sup>18</sup> See U.C.C. § 1-102(2)(b).

the margin of public law.”<sup>19</sup> Although the conduct of commercial transactions affects the public at large, commercial agents, or to use Code terminology, “merchants,”<sup>20</sup> largely determine the rules of commercial relationships in the conduct of their business.<sup>21</sup> Therefore, the drafters designed the Code to allow the infusion of these often informal rules and customs. The Code explicitly provides for the consideration of trade custom and usage in settling disputes.<sup>22</sup> The drafters based these allowances on a belief that, in the commercial setting, the participants are uniquely situated to determine the “law” for themselves.<sup>23</sup>

One of the central themes of Llewellyn’s jurisprudence was that law is “immanent.” Statutes and legal rules do not completely lay out the law; rather, the law inheres in the factual situation before the court.<sup>24</sup> A statute drafted thus “does not tell judges the law; it tells them how to find the law.”<sup>25</sup> The result is the generous use of the often criticized terms<sup>26</sup> “reasonable”<sup>27</sup> to describe activity allowed by the Code, and “unreasonable”<sup>28</sup> to describe actions forbidden by it. Such language requires a special reliance on the courts’ judgment and encourages development within the statutory framework.<sup>29</sup>

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<sup>19</sup> Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 622 (1975).

<sup>20</sup> U.C.C. § 2-104(1).

<sup>21</sup> Danzig, *supra* note 19, at 622-23.

<sup>22</sup> See U.C.C. §§ 1-205; 2-202; 2-208.

<sup>23</sup> Danzig, *supra* note 19, at 622-23.

<sup>24</sup> See W. TWINING, *supra* note 15, at 223-26; Danzig, *supra* note 19, at 624-26; Gedid, *supra* note 16, at 363.

<sup>25</sup> Danzig, *supra* note 19, at 626.

<sup>26</sup> See, e.g., David Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 185-86 (1967).

<sup>27</sup> See, e.g., U.C.C. § 1-102(3) (general obligation of reasonableness); § 2-205 (firm offers held open for a reasonable time); § 2-207(1) (expression of acceptance within a reasonable time effective as acceptance of offer); § 2-305(1) (open price term means reasonable price); § 2-609(1) (when reasonable grounds for insecurity arise, party may suspend performance if commercially reasonable).

<sup>28</sup> See, e.g., *id.* § 1-102(3) (parties may by agreement determine the standards by which obligations of good faith, diligence, reasonableness, and care are to be measured so long as those standards are not manifestly unreasonable); § 2-208(2) (express terms control when construction consistent with usage in trade or course of dealing is unreasonable); § 2-316(1) (exclusion or modification of warranties inoperative if unreasonable in light of express warranties).

<sup>29</sup> Danzig, *supra* note 19, at 625; see also Karl N. Llewellyn, Memorandum to the Executive Committee on Scope and Program of the NCC Section of Uniform Commercial Acts: Re: Possible Uniform Commercial Code (1940), reprinted in W. TWINING, *supra* note 15, at 524, 526 [hereinafter Llewellyn, Memorandum]. Llewellyn noted the impact of this philosophy on the drafting of the Code:

Technical language and complex statement cannot be wholly avoided. But they can be reduced to a minimum. *The essential presupposi-*

b. *The Code and the Principle of the Patent Reason.*

The principle of the patent reason played an important role in Llewellyn's notion of proper statutory drafting. Essentially, the principle of the patent reason suggests that the underlying policy of a statutory provision should be readily recognizable and available so that provision will always be construed in accordance with it.<sup>30</sup> Although the principle of the patent reason appears to merely state a truism, that statutes should be interpreted in accordance with their reasons and policies, the UCC involves a field of law where making underlying policies explicit is doubly important. The Code is unusual in that it seeks uniformity,<sup>31</sup> while still requiring liberal interpretation.<sup>32</sup> Although Llewellyn's jurisprudential views involved heavy reliance on the good faith and good judgment of the courts, he also realized that judges would need to proceed from a common point to promote uniformity and to avoid misapplication of the law. The principle of the patent reason manifests itself in the Code's statement of general objectives, in statements of policy within individual Code provisions, and in the Comments.<sup>33</sup>

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*tion of so reducing them is faith in the courts to give reasonable effect to reasonable intention of the language.*

Semi-permanent Acts must envisage and must encourage *development* by the courts.

(1) The first condition of such development is language which is clear as to direction, but which does not undertake too nicely to mark off the *outer* edges of its application. The language of principle, not that of "rule drawn in derogation," is called for. Language drawn in distrust or anxiety about courts' understanding may accomplish its immediate purpose, but it paves the way with stumbling blocks within a decade.

*Id.* (emphasis in original).

<sup>30</sup> See W. TWINING, *supra* note 15, at 321-30; Gedid, *supra* note 16, at 371-74. Llewellyn described the principle as follows:

*Drafting Techniques and Policies*

1. *The principle of the patent reason:* Every provision should show its reason on its face. Every body of provisions should display on their face their organizing principle.

The rationale of this is that construction and application are intellectually impossible except with reference to *some* reason and theory of purpose and organization. Borderline, doubtful, or un contemplated cases are inevitable. Reasonably uniform interpretation by judges of different schooling, learning and skill is tremendously furthered if the reason which guides application of the same language is the *same* reason in all cases. A patent reason, moreover, tremendously decreases the leeway open to the skillful advocate for persuasive distortion or misapplication of the language; it requires that any contention, to be successfully persuasive, must make some kind of sense *in terms of the reason*; it provides a real stimulus toward, though not an assurance of, corrective growth rather than straitjacketing of the Code by way of case-law.

Karl N. Llewellyn, Karl Llewellyn Papers, § (J)(VI)(i)(e), at 5 (1944), *reprinted in* W. TWINING, *supra* note 15, at 321-22 (emphasis in original) [hereinafter K.L.P.].

<sup>31</sup> U.C.C. § 1-102(2)(c).

<sup>32</sup> *Id.* § 1-102(1).

<sup>33</sup> W. TWINING, *supra* note 15, at 322.

## 2. *The Role of the Comments in light of Code Jurisprudence*

The drafters recognized the importance of an extensive Code commentary even before they wrote a word of the Code. Llewellyn viewed a thorough commentary as vital to effective development of the "semi-permanent" act.<sup>34</sup> In his words: "[A] condition of sound development by courts is an *adequate* commentary which guides to the legal material concerned *as a whole*. Much of the over-detail of [the NCC's] Acts have been a device to discount the absence of such a commentary."<sup>35</sup>

The Comments, under this view, do not merely serve as simple aids to understanding the Code, but are an indispensable part of the UCC framework. First, given the intentional flexibility built into the Code, they provide a necessary element of consistency. The drafters designed them to provide a bridge between often confusing or sparse Code language and the facts of specific cases. Second, based on the principle of the patent reason, the Comments provide a ready reference to the policy and purpose of particular provisions and their relationship to other provisions so as to tie the purposes and policies of disparate sections together.

Although the Comments have never been mandatory authority, the drafters initially intended that they carry greater authoritative weight than they now officially do.<sup>36</sup> A brief description of the historical treatment of the Comments in the Code text shows that the absence of any reference to the Comments in the more recent versions of the Code is primarily formal and does not affect the intended authoritative role of the Comments.

The initial undertaking of the Code project, the first Official Draft of the Uniform Revised Sales Act ("URSA"), included a spe-

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<sup>34</sup> See *supra* text accompanying notes 15-29.

<sup>35</sup> Llewellyn, Memorandum, *supra* note 29, at 526-27 (emphasis in original). Llewellyn explained the need in terms of judicial efficiency:

For the fact is that our courts have not the time, in the disposition of single cases, to fathom the handling of a whole field by a whole uniform act or code chapter. . . . The bearing of parts of an Act or Code on one another and on the whole the courts are willing to see, glad to see; but counsel do not show that full bearing, and the [NCC] has not undertaken to show it, either. The [NCC] has instead attempted to make the particular sections do the work. And that means to cripple the long-range growth of the Act.

A commentary is thus an integral part of any thought about a Code.

*Id.* at 527.

<sup>36</sup> See W. TWINING, *supra* note 15, at 327-28; Braucher, *supra* note 9, at 808-09; Skilton, *supra* note 3, at 599-600. Much of this discussion centers on the original section 1-102(3)(f) of the 1952 text which provided that "[t]he Comments of the [NCC] and the American Law Institute may be consulted in the construction and application of this Act but if text and comment conflict, text controls . . . ."

cific reference to the Comments as interpretative aids.<sup>37</sup> Even though the Act made reliance on the Comments permissive, the importance of their role was readily apparent. The comment to section 1 noted that:

Under Subsection (2) the courts are expressly authorized to consult the Comments in interpreting and applying the principles of the Act. The Comments thereby acquire a status *more than equivalent* to that of a Committee Report on the basis of which a proposed bill has been enacted by the legislature. . . .<sup>38</sup>

After this bold beginning, the official status of the Comments gradually eroded. The initial draft of the UCC contained a section similar to URSA section 1(2), specifically authorizing courts to consult the Comments.<sup>39</sup> The attendant comment, however, deleted any reference to the status of the Comments as legislative history, emphasizing instead their role as promoters of uniform interpretation.<sup>40</sup> Subsequent drafts and the first official version of UCC section 1-102(3)(f) retained the reference to permissive use of the Comments.<sup>41</sup>

The initial version of the UCC met with both widespread enthusiasm and widespread resistance.<sup>42</sup> Only Pennsylvania enacted the 1952 version of the Code, and the NCC realized that universal adoption of the Code was in jeopardy.<sup>43</sup> In 1953 the New York State Legislature submitted the Code to the State Law Revision Commission to determine whether New York should adopt it.<sup>44</sup> The impact of the Law Revision Commission study and recommendations cannot be overstated, as adoption by New York was to provide the impetus for widespread acceptance of the Code.<sup>45</sup> The Law

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<sup>37</sup> UNIFORM REVISED SALES ACT (1940 Official Draft) § (1)(2), which provided: (2) The Official Joint Comments of the National Conference of Commissioners on Uniform State Laws and the American Law Institute may be consulted by the courts to determine the underlying reasons, purposes and policies of this Act and may be used as a guide in its construction and application.

<sup>38</sup> *Id.* § (1) comment 1 (emphasis added).

<sup>39</sup> U.C.C. § 1-102(2) (May 1949 Draft).

The Official Comments of the National Conference of Commissioners on Uniform State Laws and the American Law Institute may be consulted by the courts to determine the underlying reasons, purposes and policies of this Act and may be used as a guide in its construction and application.

<sup>40</sup> *Id.* § 1-102 comment 3.

<sup>41</sup> See U.C.C. § 1-102(3)(f) Proposed Final Draft No. 2 (Spring 1951); U.C.C. § 1-102(3)(f) (1952 Official Draft).

<sup>42</sup> Braucher, *supra* note 9, at 801-02.

<sup>43</sup> See *id.* at 802-03.

<sup>44</sup> *Id.*

<sup>45</sup> JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 11 (3d ed. 1988); Braucher, *supra* note 9, at 803-04.

Revision Commission explicitly questioned whether the inclusion of the specific reference to the Comments contained in section 1-102(3)(f) was proper statutory drafting practice.<sup>46</sup> The Commission regarded the problem as one of "legislative technique," and believed that the reference to extrinsic materials in aid of interpretation was unconventional and unnecessary.<sup>47</sup> The Commission noted that courts had referred to similar commentaries to other uniform acts as part of a "general legislative history," and that they would probably do so with those of the UCC.<sup>48</sup>

The 1957 version of the UCC did not contain section 1-102(3)(f).<sup>49</sup> Notwithstanding the Law Revision Commission's misgivings, the Editorial Board stated that the reason for the deletion was "because the old Comments were clearly out of date and it was not known when new ones could be prepared . . . ."<sup>50</sup> Despite subsequent revision of both the Code and Comments, no code section specifically referring to the Comments as interpretive aids has been readopted.

This brief exposition of the Comments as they relate to the jurisprudence of the Code shows that the form and nature of the Code require that the Comments be considered an important part of the overall Code framework, and thus entitled to considerable authoritative weight. In addition, the history of the treatment of Comments in the text of the Code itself shows that the absence of any reference to the Comments in the text of the present Code does not vitiate their importance. Initial inclusion indicates that the drafters considered the role of the Comments important and the exclusion of reference to them primarily a matter of form.

## B. The Goal of Uniformity and the Comments

As reflected in the title to the Code and its general statement of purpose, a central goal of the UCC is uniformity.<sup>51</sup> The scope of the Code project, however, often contributed to ambiguities in the text of the Code and doubts as to its proper application. Because experience with earlier uniform acts demonstrated that the courts could quickly emasculate even the most valiant efforts at uniformity through non-uniform interpretation,<sup>52</sup> the drafters frequently relied on the Comments to clarify intent and promote uniform

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<sup>46</sup> 2 N.Y. State Law Revision Comm'n Report 30-37 (1955).

<sup>47</sup> *Id.* at 32, 37.

<sup>48</sup> *Id.* at 37.

<sup>49</sup> U.C.C., 1957 Official Text with Comments (1958).

<sup>50</sup> 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 3 (1957) [hereinafter 1956 RECOMMENDATIONS].

<sup>51</sup> See U.C.C. § 1-102(2)(c).

<sup>52</sup> J. WHITE & R. SUMMERS, *supra* note 45, at 3; Gedid, *supra* note 16, at 344-46.

interpretation.<sup>53</sup>

The nature of the Code further highlights the purpose of the Comments as aids to uniform construction. In Llewellyn's words, the Code is drafted in "the language of principle";<sup>54</sup> the Code provides a framework of general principles upon which the commercial community, and more particularly the courts, should build. In light of the intentional flexibility of the Code text and the heavy reliance on judicial construction,<sup>55</sup> the Comments serve as indispensable aids to uniform construction *and* development.

### C. The Comments as a Lawyer's Aid

The simplification of then-existing commercial law was among the central reasons for the creation of the UCC.<sup>56</sup> The perceived woeful state of knowledge of commercial law and commercial practices of the bar at large greatly concerned the drafters.<sup>57</sup> They blamed much of this ignorance on the complexity of commercial law as it developed in the late nineteenth and early twentieth centuries, and on the failure of the law to adapt to modern commercial practices.<sup>58</sup> Even when lawyers knew the law, they were apt to understand it only as abstract theory with little relation to actual commercial practice.<sup>59</sup> The drafters envisioned the UCC as a flexible statute which would adapt to changing commercial practices, and a simplified, unified source of commercial law which the average lawyer could understand.<sup>60</sup>

The drafters designed the Comments to aid the bar in two ways. First, the Comments would act as a road map to direct the lawyer through the Code by relating sections to one another and by explic-

<sup>53</sup> The comment to section 1-102 of the 1952 version of the Code states in part:

Uniformity throughout American jurisdictions is one of the main objectives of this Code; and that objective cannot be obtained without substantial uniformity of construction. To aid in uniform construction these Comments . . . set forth the purpose of various provisions of this Act, thus disclosing the uniform intent of the lawmaking bodies in enacting the Code. Therefore, subsection 3(f) of the present section recommends these Comments to . . . the courts to promote uniformity . . . .

See also Maurice H. Merrill, *Uniformly Correct Construction of Uniform Laws*, 49 A.B.A. J. 545, 546 (1963) (developing role of comments to clarify intent).

<sup>54</sup> Llewellyn, Memorandum, *supra* note 29, at 526.

<sup>55</sup> See *supra* note 29 and accompanying text.

<sup>56</sup> U.C.C. § 1-102(2)(a).

<sup>57</sup> Karl N. Llewellyn, Statement to the New York State Law Revision Commission: A Simple Case on Behalf of the Code, *reprinted in* W. TWING, *supra* note 15, at 530, 536-37 [hereinafter, Llewellyn, Statement].

<sup>58</sup> See generally Karl N. Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367 (1957).

<sup>59</sup> *Id.* at 373.

<sup>60</sup> Llewellyn, Memorandum, *supra* note 29, at 525.

itly delineating the policies promoted by particular sections.<sup>61</sup> Second, they would show the relation of the law to commercial practice. By making commercial law more understandable and therefore more accessible to lawyers, it would become more accessible to the larger business community.<sup>62</sup>

Even a leading critic of the Comments stated that “[s]tudy of the comments is indispensable to a knowledge of the Code.”<sup>63</sup> In fact, nearly four decades of experience has shown that judges, lawyers, and law students gain a significant part of their understanding of the Code from the Comments. While reliance by the legal community does not of itself make the Comments authoritative, the Comments do provide a common frame of reference and understanding of the Code, a factor which should not be ignored when considering their authority.

## II

### PROBLEM SOURCES

Despite its importance to the development of commercial law and its significant improvement upon pre-existing law, the UCC and the Comments are by no means perfect. This section outlines several factors which may have contributed to confusion and imprecision in the Code and more particularly in the Comments. The Comments’ lack of authority in certain instances often stems from these problems.

Above all, one must remember that “the comments are the work of human beings—gifted human beings, to be sure, but still human beings.”<sup>64</sup> The drafting and revision process itself is a source of inconsistency. The scope and scale of the UCC project, along with differences in approach and agenda among the participants and the difficult and ongoing process of revision, all have contributed to confusion in the Code.<sup>65</sup> As for the Comments themselves, inconsistency in form and purpose often lead to confusion in application.<sup>66</sup>

#### A. The Effect of the Drafting and Revision Process

Designed to replace seven then-existing uniform acts,<sup>67</sup> the

<sup>61</sup> Karl N. Llewellyn, *Why a Commercial Code*, 22 TENN. L. REV. 779, 782 (1953).

<sup>62</sup> *Id.* at 782-83; Llewellyn, Memorandum, *supra* note 29, at 525; Llewellyn, Statement, *supra* note 57, at 536.

<sup>63</sup> Skilton, *supra* note 3, at 631.

<sup>64</sup> *Id.*

<sup>65</sup> See *infra* notes 67-85 and accompanying text.

<sup>66</sup> See *infra* notes 86-88 and accompanying text.

<sup>67</sup> These acts were:

UCC project is of a scope unmatched in American law making. Over 1000 lawyers and business people participated in drafting the initial version of the Code.<sup>68</sup> The UCC covers a broad area of law. Although its central concern is with the "movement of goods, the payment therefor, and the financing thereof,"<sup>69</sup> the Code also deals with investment securities,<sup>70</sup> bank deposits and collections,<sup>71</sup> and more recently the leasing of goods.<sup>72</sup> The Code thus provides a large and fertile field for the growth of confusion and ambiguity.

Only the adoption of the Code in most if not all American jurisdictions could achieve the goal of uniformity.<sup>73</sup> The drafters, therefore, sought throughout the process to write a document that would be widely acceptable. Such concerns led to consideration of the often conflicting interests of bankers and merchants, legal scholars, practicing attorneys, and state legislatures.<sup>74</sup> Satisfying the interests of such diverse groups required compromise which could not help but infuse unclarity and confusion into the drafting process. Aside from these competing interests, there was an inherent conflict between those who actually drafted the Code and their parent organizations.<sup>75</sup>

Both the American Law Institute (the "ALI") in their Restatement projects and the NCC in its numerous uniform acts created relatively conservative products.<sup>76</sup> The law professors who actually wrote the initial drafts of the Code text and Comments, however,

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<i>Uniform Act</i>	<i>Promulgated</i>	<i>Last Enacted</i>	<i>Number of States</i>
Negotiable Instruments Law	1896	1924	48
Uniform Sales Act	1906	1941	34
Uniform Warehouse Receipts Act	1906	1945	48
Uniform Stock Transfer Act	1909	1947	48
Uniform Bills of Lading Act	1909	1947	31
Uniform Conditional Sales Act	1918	1945	10
Uniform Trust Receipts Act	1933	1955	32

Adapted from Braucher, *supra* note 9, at 799.

<sup>68</sup> Llewellyn, Memorandum, *supra* note 29, at 528 (emphasis in original). See generally 1 New York States Law Revision Comm'n Report 8 (1955); Braucher, *supra* note 9, at 799; Mentschikoff, *supra* note 14, at 167.

<sup>69</sup> Mentschikoff, *supra* note 11, at .

<sup>70</sup> U.C.C. Article 8.

<sup>71</sup> U.C.C. Article 4.

<sup>72</sup> U.C.C. Article 2A.

<sup>73</sup> See *supra* notes 51-55 and accompanying text.

<sup>74</sup> Kripke, *supra* note 11, at 327.

<sup>75</sup> The Code project was initiated by the National Conference of Commissioners on Uniform State Laws (NCC), but they later invited the American Law Institute (ALI) to participate in the project. Thereafter, the drafting process was largely modeled on the ALI method developed in preparing the *Restatements*. See Braucher, *supra* note 9, at 800. For a detailed description of the organization of the drafting process, see W. TWINING, *supra* note 15, at 278-85.

<sup>76</sup> Kripke, *supra* note 11, at 326-28.

were much more willing to adopt fundamental changes in the law than were the members of the sponsoring organizations.<sup>77</sup> Although usually held in abeyance by either the drafting staff itself or by the Code's subsequent editors, some of these iconoclastic tendencies still appear in the Code.<sup>78</sup> The Comments provided a ready vehicle to smooth over such differences and promote compromise, a factor which can occasionally result in seeming conflicts between the text and the Comments.<sup>79</sup>

The ongoing revision of the Code also contributes to conflict between the Code text and the Comments. In the 1950's, the Code's proponents continuously altered the text and Comments to satisfy the sponsoring organizations, the ABA, and numerous state legislatures.<sup>80</sup> Since 1961, the Permanent Editorial Board (PEB) has continuously reviewed the Code for potential changes and improvements.<sup>81</sup>

The most striking example of this revision process remains the work of the New York State Law Revision Commission which recommended changes to almost every aspect of the Code.<sup>82</sup> Approximately ninety percent of these recommendations were incorporated in the 1957 version of the Code.<sup>83</sup> Between the earliest discussion of the Code in 1940 and the 1957 Official Text and Comments, the Code underwent innumerable changes, and has since undergone numerous revisions.<sup>84</sup> The effect of this constant revision on the compatibility of the Comments with the Code text cannot be clearly demonstrated, but the recommendations for the 1956 version noted that the Comments were out of date,<sup>85</sup> showing that, at least in that instance, the revision process affected the compatibility of Code and Comments. Although the NCC subsequently has revised the Com-

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<sup>77</sup> *Id.* at 322-23.

<sup>78</sup> *Id.* at 322-26.

<sup>79</sup> J. WHITE & R. SUMMERS, *supra* note 45, at 13.

<sup>80</sup> Braucher, *supra* note 9, at 801-04.

<sup>81</sup> J. WHITE & R. SUMMERS, *supra* note 45, at 5. More recently, however, some commentators have accused the PEB of acting more as a force of inertia than of change. See Mellinkoff, *supra* note 26, at 224-25.

<sup>82</sup> See generally N.Y. State Law Revision Comm'n Report (1956); 1-3 N.Y. State Law Revision Comm'n Report (1955); 1-2 N.Y. State Law Revision Comm'n Report (1954); see also *supra* text accompanying notes 45-48.

<sup>83</sup> NATIONAL CONFERENCE OF COMMISSIONERS IN UNIFORM STATE LAWS, 1957 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 100-01 (1957), reprinted in W. TWING, *supra* note 15, at 296.

<sup>84</sup> Major revisions were made in 1962, 1972, 1977, 1987 (with the inclusion of Article 2A - Leases) 1989, (with the recommended repeal of Article 6 - Bulk Sales), and Articles 3 and 4 are currently undergoing revision, and Article 4A dealing with electronic funds transfers is being considered. J. WHITE & R. SUMMERS, *supra* note 45, at 10, 20.

<sup>85</sup> 1956 RECOMMENDATIONS, *supra* note 50, at 3; see also notes 44-50 and accompanying text (developing other objections of New York to the comments).

ments, the process of revision is obviously fraught with opportunities for confusion and inaccuracy.

### B. Inconsistency in Comment Form and Substance

Each section of the Code has a comment, and outwardly all of the Comments to the UCC share the same format.<sup>86</sup> Despite this outward consistency, the content of any individual comment will not necessarily match or even resemble another in terms of actual purpose. In the only extensive treatment of the Comments as a whole, Robert Skilton describes the functional character of individual comments as:

- (1) expository—seeking to describe the meaning and application of a section of the Code and its relationship with other sections,
- (2) gap-filling—seeking to suggest answers to questions not precisely covered by the text, or (3) promotional and argumentative—seeking to “sell” a controversial section. . . . The classifications are not mutually exclusive.<sup>87</sup>

This inconsistency in purpose creates additional difficulties in applying the Comments to specific problems arising under the Code. Ideally, the Comments should provide “straight exposition[s] of purpose and effect of [each] section and its relation to the prior law and other portions of the Act.”<sup>88</sup> As a comment strays from this ideal in form and purpose, its authority is undermined. Although a comment’s gap-filling suggestion may provide the appropriate solution to a novel problem, the Comments retain their greatest authority when they focus on the exposition of the purposes and policies of the Code.

## III

### JUDICIAL DISREGARD OF THE COMMENTS

Although authority often is neatly compartmentalized as either primary or secondary, a more appropriate and functional conception is one which views authority as existing on a continuum, with constitutions and statutes occupying a position at one end, and continuing to scholarly works and even social custom at the other. To say that the Comments are not the Code says no more than that their authority differs from that of a statute. Proper consideration of the Comment’s authoritative value should begin with a recognition

<sup>86</sup> K.L.P., *supra* note 30, § (J)(V)(2)(d)(i) (1943), *reprinted in* W. TWINING, *supra* note 15, at 327.

<sup>87</sup> Skilton, *supra* note 3, at 608.

<sup>88</sup> K.L.P., *supra* note 30, § (J)(V)(2)(d)(i) (1943), *reprinted in* W. TWINING, *supra* note 15, at 327.

of the Comments' inherent authority as derived from their role in Code jurisprudence.

In the great majority of cases, courts cite the Comments to support the application or purpose described in them.<sup>89</sup> In some cases, however, courts specifically reject the Comments as authority for their propositions. This section discusses several cases where courts have rejected the Comments and shows how aspects of the dispute involved or specific deficiencies in the particular comment, rather than a lack of authoritativeness of the Comments as a whole, undermine that particular comment's authority.

### A. Rulemaking: Comments Acting as Code

In a few instances, the Comments prescribe requirements that are so specific that they overstep their proper role as interpretive guides. In these instances, the Comments go beyond explication or gap-filling, and take on a rulemaking character which their role in the Code framework does not justify. Although some courts may adopt the solution provided in such comments, comments that stray into areas more properly left to the Code text generally lose some of their authoritative value. The comments to sections 2-507 and 2-702 illustrate two specific examples of this rulemaking tendency.

#### 1. *Cash Sale Reclamation Waiver: Section 2-507*

Section 2-507(2) conditions a buyer's rights as against a seller on payment for delivered goods or documents of title.<sup>90</sup> The section is mute, however, on the question of when the seller has waived his right to reclaim the goods for failure to pay.<sup>91</sup> Despite this silence, comment 3 to the section suggests that a ten day limit on reclamation applicable to credit sales<sup>92</sup> should apply to cash sales as

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<sup>89</sup> See, e.g., *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879 (10th Cir. 1985), cert. denied, 475 U.S. 1015 (1986); *Contrail Leasing Partners, Ltd. v. Consolidated Airways, Inc.*, 742 F.2d 1095 (7th Cir. 1984); *United States v. Squires*, 378 F. Supp. 798 (S.D. Iowa 1974); *ABM Escrow Closing & Consulting, Inc. v. Matanuska Maid, Inc.*, 659 P.2d 1170 (Alaska 1983); *Citicorp Person-to-Person Financial Center, Inc. v. Fremont Nat'l Bank*, 738 P.2d 29 (Colo. Ct. App. 1987); *New England Merchants Nat'l Bank of Boston v. Old Colony Trust Co.*, 11 Mass. App. Ct. 539, 417 N.E.2d 471 (1981); *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W.2d 697 (1981); *Village Motors, Inc. v. American Federal Savings & Loan Ass'n*, 231 Va. 408, 345 S.E.2d 288 (1986).

<sup>90</sup> "Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due." U.C.C. § 2-507(2).

<sup>91</sup> *Id.*

<sup>92</sup> "Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt . . ." *Id.* § 2-702(2).

well.<sup>93</sup> This problem occurs most often in the case of a dishonored check.

In *Burk v Emmick*,<sup>94</sup> the buyer paid for 950 steers, in part with a sight draft which the bank subsequently dishonored. The seller then reclaimed the cattle and sold them for less than the contract price.<sup>95</sup> The buyer raised the defense that the seller waived his right to reclaim the goods when he failed to reclaim the goods within ten days of receipt as suggested in comment 3 to section 2-507.<sup>96</sup> The comment reads in part:

Should the seller after making such a conditional delivery fail to follow up his rights [*i.e.*, reclaim the goods], the condition is waived. The provision of this Article for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here.<sup>97</sup>

The court rejected the comment and instead applied a test of reasonableness, emphasizing the issue of prejudice to the buyer.<sup>98</sup> The comment could not "impose restrictions unwarranted by the statutory language."<sup>99</sup> Clearly, the suggestion of this case is that the ten day restriction is so specific that it should properly be contained in the Code. In this instance, the comment is neither explicative nor gap-filling, but rulemaking, a role wholly outside its proper function. In the absence of a specific restriction on the exercise of remedial rights, courts will, and probably should, retain the flexibility necessary to achieve equitable results.<sup>100</sup>

## 2. *Exception to the Ten Day Reclamation Right: Section 2-702(2)*

An additional, but perhaps less striking, example of the Comments acting as Code may be seen in comment 2 to section 2-702. As noted in the preceding discussion, a seller's right to reclaim goods sold on credit is good only for ten days after the buyer's receipt of the goods.<sup>101</sup> This limitation does not apply, however, "if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery."<sup>102</sup> Although generally explicative, comment 2 contains an additional requirement that

<sup>93</sup> *Id.* § 2-507 comment 3. *But see* *Citizens Bank of Roseville v. Taggart*, 143 Cal. App. 3d 318, 191 Cal. Rptr. 729 (1983) (declining to apply Comment 3 to § 2-507).

<sup>94</sup> 637 F.2d 1172 (8th Cir. 1980).

<sup>95</sup> *Burk*, 637 F.2d at 1173.

<sup>96</sup> *Id.* at 1175.

<sup>97</sup> U.C.C. § 2-507 comment 3.

<sup>98</sup> *Burk*, 637 F.2d at 1176.

<sup>99</sup> *Id.* at 1175 n.5.

<sup>100</sup> *See* U.C.C. § 1-106(2) ("Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect.")

<sup>101</sup> U.C.C. § 2-702(2). *See supra* note 92 for language.

<sup>102</sup> *Id.*

the written misrepresentation also be *dated* within the same three month period.<sup>103</sup>

In the bankruptcy case of *In re Bel Aire Carpets*,<sup>104</sup> a seller received a written misrepresentation of solvency within the prescribed three month period, but the document was dated thirteen months prior to the transaction. The trustee in bankruptcy sought to void the reclamation and characterize it as a post-bankruptcy transaction, relying on the "dated" requirement contained in the comment.<sup>105</sup>

In upholding the reclamation under section 2-702, the court centered on the prevention of fraud as the policy basis for the misrepresentation excuse. The central issue was whether the seller's reliance on the misrepresentation was reasonable under the circumstances, not whether a specific technical requirement had been met.<sup>106</sup> The Code text requires some care on the part of the seller by requiring a writing and imposing the three month limit. An additional specific requirement of care on the part of the seller would, given the underlying policy of preventing fraud, be more appropriately contained in the Code text.

One cannot always easily determine whether a particular comment imposes an additional rule-like requirement or merely clarifies the requirements of the Code text. In light of the preceding examples, however, at least one characteristic may be identified which can assist the interpreter. When a comment includes specific technical requirements as opposed to general policy guidance, this may be some indication of the "rulemaking" error.

The inclusion of such specific rulemaking language provides perhaps the clearest example of overstepping by the Comments. The Comments derive their authority from their role in the Code structure. In those instances when they go beyond explanation of purpose and general gap-filling and cross into the territory of the Code itself, they undermine that authority. Additionally, by engaging in a rulemaking function, the Comments may even run afoul of some of the most basic principles and policies of the Code, including the mandate of liberal interpretation and the requirement of liberal administration of remedies.

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<sup>103</sup> "To fall within the exception the statement of solvency must be in writing, addressed to the particular seller and *dated* within three months of the delivery." *Id.* § 2-702 comment 2 (emphasis added).

<sup>104</sup> 452 F.2d 1210 (9th Cir. 1971).

<sup>105</sup> *Id.* at 1211-12.

<sup>106</sup> *Id.* at 1212-13.

## B. External Inconsistency: Comments in Conflict with Independently Developed Policies

A problem arises when the comment to a particular Code section outlines policies or makes gap-filling suggestions which come into conflict with other independent policies. The UCC is extensive and cannot help but intersect with many areas of the law. This overlap may result in external inconsistency where the policies of the Code, as outlined in the Comments, conflict with policies which developed independent of the Code and which manifest themselves in other statutes, judicial policies, or as non-uniform amendments to the Code itself. Section 2-607's breach of warranty notification requirement, section 4-207's damages provision, and section 9-107's definition of a purchase money security interest provide examples of this problem.

### 1. *Section 2-607's Breach of Warranty Notification Requirement as Applied to Third-Party Warranty Beneficiaries*

Section 2-607(3)(a) requires a *buyer* to notify his seller of any breach of warranty within a reasonable time or be barred from any remedy.<sup>107</sup> Section 2-318 extends warranty coverage to non-buyer third parties for personal injuries resulting from breach of warranty.<sup>108</sup> A central issue is whether courts should apply the reasonable time notification requirement imposed explicitly on buyers to third-party beneficiary claimants as well.

Any breach of warranty action brought by a buyer under the UCC includes a reasonable time notification inquiry.<sup>109</sup> The reasons for the reasonable time notification requirement are: 1) to allow the seller an opportunity to make adjustment, cure defects and generally mitigate damages; 2) to enable the seller to prepare sufficiently for negotiation or litigation (*e.g.*, assemble evidence and prevent changes in circumstances); and 3) to allow the seller peace of mind.<sup>110</sup>

Comment 5 to section 2-607 suggests that the drafters of the Code believed that at least some of the above reasons applied to third-party warranty beneficiaries as well as buyers. That comment states:

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<sup>107</sup> "Where tender has been accepted . . . (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . ." U.C.C. § 2-607(3)(a).

<sup>108</sup> See *infra* notes 146-54 for a more complete explanation.

<sup>109</sup> See U.C.C. § 2-607(3)(a). Although comment 4 to section 2-607 recognizes that a longer period may be appropriate when the buyer is a consumer, the reasonable time inquiry still remains.

<sup>110</sup> J. WHITE & R. SUMMERS, *supra* note 45, at 481.

Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. *However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred.* What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.<sup>111</sup>

The comment thus recognizes that the difference between a buyer's obligation and a third-party beneficiary's obligation to notify the seller of a breach of warranty parallels their different roles in the transaction. The policy basis for notification differs only as to warranty breaches discoverable at acceptance or shortly thereafter. The comment recognizes no difference as to warranty breaches which result in injury.

Based on the principle of liberal construction in accordance with purpose,<sup>112</sup> a reasonable construction of the buyer notification requirement could include third-party warranty beneficiaries. While some commentators have supported comment 5's argument that the policies underlying the section apply to third-party beneficiaries as well as buyers,<sup>113</sup> courts consistently have held to the contrary.<sup>114</sup> They usually justify ignoring the comment's suggestion in terms of proper statutory construction: if the statute meant to include both buyers and third-party beneficiaries it would have said so.<sup>115</sup> A more principled explanation of judicial disregard of the comment's suggestion is that extrinsic and independent policy considerations require a narrower reading.

Among the cases that reject the comment is *Simmons v. Clemco Industries*.<sup>116</sup> Although the court adopted the standard statutory interpretation argument,<sup>117</sup> the case is unusual in that it explicitly discusses a collateral policy which militates against application of the comment. *Clemco Industries* involved an action by several workers for

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<sup>111</sup> U.C.C. § 2-607 comment 5 (emphasis added).

<sup>112</sup> U.C.C. § 1-102(1).

<sup>113</sup> See, e.g., . Phillips, *Notice of Breach in Sales and Strict Tort Liability Law*, 47 IND. L.J. 457, 463-64 (1972).

<sup>114</sup> See Taylor v. American Honda Motor Co., 555 F. Supp. 59 (M.D. Fla. 1982); Tomczuk v. Town of Cheshire, 26 Conn. Supp. 219, 217 A.2d 71 (1965); Chaffin v. Atlanta Coca Cola Bottling Co., 127 Ga. App. 619, 194 S.E.2d 513 (1972); Frericks v. General Motors Corp., 278 Md. 304, 363 A.2d 460 (1976).

<sup>115</sup> See, e.g., Frericks, 278 Md. at 312, 363 A.2d at 464 (quoting Wright v. Bank of California Nat'l Ass'n, 276 Cal. App. 2d 485, 490, 81 Cal. Rptr. 11, 14 (1969)) ("[T]he plain language of the statute cannot be varied by reference to the comments.").

<sup>116</sup> 368 So. 2d 509 (Ala. 1979).

<sup>117</sup> *Id.* at 513-14.

personal injuries caused by defective sandblasting hoods.<sup>118</sup> Defendants sought to convince a federal court that the plaintiffs failed to provide notice of the breach within a reasonable time. In answering a series of certified questions regarding Alabama law, the Alabama Supreme Court held that despite comment 5's suggestion, the reasonable time requirement imposed on buyers did not extend to third-party warranty beneficiaries.<sup>119</sup>

The court particularly noted that Alabama had adopted several non-uniform amendments to the UCC which indicated "an intent to expand the right of recovery for personal injury arising from a breach of warranty."<sup>120</sup> These changes included a prohibition on warranty limitation and waiver clauses for personal injuries in the case of consumer goods,<sup>121</sup> the adoption of the more liberal Alternative 2 of section 2-318 abolishing the privity requirement for personal injury claims,<sup>122</sup> and a provision clearly stating that the statute of limitations tolls from the date of the injury and not from the date of the sale.<sup>123</sup>

Although the court ultimately justified its decision by reference to a plain meaning rule and discounted the authority of the Comments as a whole,<sup>124</sup> the case demonstrates how independently developed state policies can conflict with and affect the authority of the Comments.

## 2. Section 4-207: Attorney Fees as Awardable Expenses

Some cases applying the comment to section 4-207 provide examples of conflict between the suggestions of the Comments and judicial policy. Section 4-207 deals with presentment warranties and engagements to honor.<sup>125</sup> Under section 4-207(3),<sup>126</sup> damages for breach of such warranties or engagements include consideration paid, finance charges, and related *expenses*. The comments to the section state that "[t]he 'expenses' referred to in this phrase may be

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<sup>118</sup> *Id.* at 511.

<sup>119</sup> *Id.* at 513-14.

<sup>120</sup> *Id.* at 514.

<sup>121</sup> Ala. Code § 7-2-316(5) (1972).

<sup>122</sup> *Id.* § 7-2-318 (1972); see *infra* notes 146-49 and accompanying text.

<sup>123</sup> *Id.* § 7-2-725(2) (1972).

<sup>124</sup> *Simmons*, 368 So. 2d at 513-14.

<sup>125</sup> Generally, this is a warranty by a depositor to a collecting bank and by both to subsequent collecting banks that a check has not been materially altered or does not bear forged endorsements. For a full discussion, see J. WHITE & R. SUMMERS, *supra* note 45, at 678-86.

<sup>126</sup> Section 4-207(3) provides that "[d]amages for breach of such warranties or engagements to honor shall not exceed the consideration received by the customer or collecting bank responsible plus finance charges and expenses related to the item, if any."

ordinary collection expenses and in appropriate cases could also include such expenses as attorneys fees."<sup>127</sup> Although some courts have allowed attorneys fees as damages,<sup>128</sup> the suggestion that a court may award attorneys fees as damages in some circumstances has not met with universal acceptance.

In *Riedel v. First National Bank of Oregon*,<sup>129</sup> the Oregon Supreme Court gave a typical response to this suggestion, stating in part:

Given the historical antipathy of this court to awarding attorney fees in the absence of express authority and legislative presumed awareness thereof we find it reasonable to conclude that had the legislature of this state meant that attorney fees could be awarded . . . , it would not have left that authority to be found only in the Commissioners' Comment.<sup>130</sup>

It seems puzzling indeed, given the general conservative tenor of the Code project,<sup>131</sup> that the drafters would suggest that a court could in some circumstances award attorney fees, a traditionally disfavored concept in the American system.<sup>132</sup> Nevertheless, this comment provides a striking example of the Comments at loggerheads with a substantial independently developed judicial policy.

### 3. Section 9-107 and the "Transformation Rule"

Article 9 of the Code dealing with secured transactions often intersects with bankruptcy law. Under the Bankruptcy Code,<sup>133</sup> a debtor may avoid creditor's liens on certain consumer goods if they are not purchase money security interests.<sup>134</sup> A problem arises when the debtor refinances with the same creditor using the same collateral. Such refinancing usually involves restructuring the debt to allow for an extended repayment schedule, and is often compli-

<sup>127</sup> U.C.C. § 4-207 comment 5.

<sup>128</sup> *E.g.*, *Perkins State Bank v. Connolly*, 632 F.2d 1306, 1315 (5th Cir. 1980); *Bagby v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 491 F.2d 192 (8th Cir. 1974).

<sup>129</sup> 287 Or. 285, 598 P.2d 302 (1979).

<sup>130</sup> *Id.* at 291, 598 P.2d at 305.

<sup>131</sup> *See supra* note 76 and accompanying text.

<sup>132</sup> For a discussion of the policy implications of attorney fee shifting, see generally Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651 (1982).

<sup>133</sup> 142 Title 11, U.S.C., Bankruptcy, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified at 11 U.S.C. §§ 1-1330).

<sup>134</sup> 11 U.S.C. § 522(f). A security interest is a "purchase money security interest" to the extent that it is

(a) taken or retained by the seller of the collateral to secure all or part of its price; or

(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

cated by the inclusion of small cash advances beyond that owed on the original purchase money debt.<sup>135</sup> The issue becomes whether the refinancing "transforms" the purchase money security interest into a non-purchase money security interest.<sup>136</sup>

Comment 2 to section 9-107 states in part:

This section therefore provides that the purchase money party must be one who gives value "by making advances or incurring an obligation": the quoted language *excludes from the purchase money category any security interest taken as security for or in satisfaction of a preexisting claim or antecedent debt.*<sup>137</sup>

Some courts applying a literal reading of the comment have taken the position that refinancing results in a transformation of the purchase money debt into a non-purchase money debt.<sup>138</sup>

In rejecting this interpretation of the comment, some courts have emphasized that the "transformation rule" undermines some basic policies underlying bankruptcy law. Applying the transformation rule discourages purchase money creditors from helping troubled debtors to restructure their debt and avoid bankruptcy all together.<sup>139</sup> Additionally, the rule does not comport with the reason for the exemption for non-purchase money debt, which is to protect consumer debtors from general creditors who might seek to improve their position in a bankruptcy situation by attaching security interests to household possessions.<sup>140</sup>

A strict reading of the solution suggested in Comment 2 to section 9-107 comports with some aspects of Code policy, such as simplification<sup>141</sup> and the general disposition to protect consumers in credit transactions.<sup>142</sup> However, such a reading conflicts with other independent policies of bankruptcy law and tends to undermine the comment's authoritative value, especially in the bankruptcy context.

These instances where the Comments conflict with other in-

<sup>135</sup> See, e.g., *In re Billings*, 838 F.2d 405, 406 (10th Cir. 1988).

<sup>136</sup> Mary Aronov, *The Transformation Rule Applied to Purchase Money Security Interests in Commercial Transactions*, 16 MEM. ST. U.L. REV. 15 (1985); , *The Overloaded PMSI in Bankruptcy: A Problem in Search of Resolution*, 60 TEMP. L.Q. 1 (1987); Note, *The Transformation Rule Under Section 522 of the Bankruptcy Code of 1978*, 84 MICH. L. REV. 109 (1985) (authored by Raymond B. Check); Note, *Preserving the Purchase Money Status of Refinanced or Commingled Purchase Money Debt*, 35 STAN. L. REV. 1133 (1983) (authored by Bernard A. Bark).

<sup>137</sup> U.C.C. § 9-107 comment 2 (emphasis added).

<sup>138</sup> See, e.g., *Dominion Bank of The Cumberland v. Nuckolls*, 780 F.2d 408 (4th Cir. 1985); *In re Matthews*, 724 F.2d 798 (9th Cir. 1984).

<sup>139</sup> *Billings*, 838 F.2d at 409.

<sup>140</sup> *Id.* at 410.

<sup>141</sup> U.C.C. § 1-102(2)(a).

<sup>142</sup> See, e.g., *id.* § 9-204(2) restricting security interests in after acquired property in the case of consumer goods. For a discussion of "strong against the weak" provisions in the Code, see also Kripke, *supra* note 11, at 323-24.

dependent policy considerations are less a fault in the Comments themselves and more the inevitable result of the vast scope of the UCC.<sup>143</sup> As the examples discussed show, Code provisions may touch on aspects of tort law,<sup>144</sup> damages, civil procedure,<sup>145</sup> and bankruptcy.<sup>146</sup> In so doing, the Code and the Comments may stray into unanticipated, and therefore unplanned-for contingencies. This results, as perhaps it should, in courts disregarding comment suggestions which conflict with other important policy considerations.

### C. A Comment Inviting Expansion: Comment 3 to Section 2-318

Section 2-318 extends the benefits of implied and express warranties of merchantability and fitness for ordinary use beyond the buyer to third parties. The section is written in three alternatives, each with progressively broader application.<sup>147</sup> Alternative A extends warranty coverage for personal injuries to members of the buyer's family and guests.<sup>148</sup> Alternative B extends coverage for personal injuries to any person who may reasonably be expected to use, consume or be affected by the goods.<sup>149</sup> Alternative C is substantially the same as Alternative B, except that it extends coverage to any injury whether to person or property.<sup>150</sup>

The initial draft of the Code included only Alternative A.<sup>151</sup> In 1966, the section was amended to add the other alternatives in recognition of common law tort developments.<sup>152</sup> The Comments

<sup>143</sup> See *supra* notes 67-72 and accompanying text.

<sup>144</sup> See *supra* notes 107-24 and accompanying text.

<sup>145</sup> See *supra* notes 125-32 and accompanying text.

<sup>146</sup> See *supra* notes 133-42 and accompanying text.

<sup>147</sup> U.C.C. § 2-318.

<sup>148</sup> Alternative A

A seller's warranty . . . extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.

*Id.*

<sup>149</sup> Alternative B

A seller's warranty . . . extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty.

*Id.*

<sup>150</sup> Alternative C

A seller's warranty . . . extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty.

*Id.*

<sup>151</sup> U.C.C. § 2-318 (1952).

<sup>152</sup> U.C.C. § 2-318 (1966).

were also amended at this time. Comment 3 to section 2-318 now states that Alternative A, in spite of its apparent limitation on third-party beneficiaries, "is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."<sup>153</sup> Thus, the comment suggests that the Code does not intend to restrict the courts from further rolling back the privity requirement despite the clear statutory prescription. Despite the comment's interpretation of Alternative A, many courts feel that "[s]ince the advent of the U.C.C., commercial sales law is statutory. We have no precedent for changing statutory law by court decision . . . ." <sup>154</sup>

Comment 3 to section 2-318 shows how the purpose of a comment can influence its authoritative value. The comment seeks not to explain the policy of the Code provision, but to promote a particular view of the law. In this case, it appears that, although the 1966 revision retained the original alternative of section 2-318, it sought to encourage development toward the more liberal formulations. By straying from an expository role to a promotional role, the comment thus undermines its own authority.

#### D. The Internally Inconsistent Comment

The simplest way to ensure that courts will not accept a comment as authority is to apply it without reference to the Code. Occasionally, perhaps as a result of the infirmities in the drafting process itself,<sup>155</sup> a comment sneaks in which is basically inconsistent with Code language or policy. Comment 2 to section 2-326 illustrates such a problem.

Section 2-326 deals with the rights of creditors and consignors in consigned goods.<sup>156</sup> Section 2-326(2) contains a general rule that consigned goods are subject to the rights of "creditors" while in the consignee's possession.<sup>157</sup> A consignor may avoid this result if, among other things, she complies with the filing provisions of Article 9.<sup>158</sup> Section 9-114 outlines the steps necessary to have priority over prior secured parties in the consigned goods.<sup>159</sup> Comment 2

<sup>153</sup> U.C.C. § 2-318 comment 3.

<sup>154</sup> *Williams v. Fulmer*, 695 S.W.2d 411, 414 (Ky. 1985); *accord Miller v. Preitz*, 422 Pa. 383, 221 A.2d 320 (1966).

<sup>155</sup> See *supra* notes 67-85 and accompanying text.

<sup>156</sup> U.C.C. § 2-326.

<sup>157</sup> *Id.* § 2-326(2).

<sup>158</sup> Section 2-326(3)(c) makes goods delivered on consignment subject to prior creditors' claims except when he "complies with the filing provisions of the Article on Secured Transactions (Article 9)". *Id.* § 2-326(2).

<sup>159</sup> These requirements are filing before the consignee receives possession of the

to section 2-326 explains that "subsection (3) resolves all reasonable doubts as to the nature of the transaction in favor of the *general creditors* of the buyer."<sup>160</sup> The comment correctly notes that subsection 3 serves to protect general creditors. However, the Code text seeks to resolve disputes between consignors and "creditors," a term which would include both general and secured creditors.<sup>161</sup> Additionally, both the subsection itself, by allowing the consignor to protect herself by filing,<sup>162</sup> and Article 9 provisions dealing with filing for consignments,<sup>163</sup> suggest that the section is applicable to secured creditors as well as general creditors.

Inconsistencies, such as the one just described, result more from incompleteness than from outright contradiction. The Comments often deal with ambiguous situations. However, when a reading of the Comments renders an interpretation absurd in light of the Code text, they cannot be considered authority for that position. As the example of section 2-326 shows, the saving grace of such inconsistent comments is that when read in light of the entire Code structure their shortcomings become readily evident, and their application can be limited accordingly.

#### CONCLUSION

For a variety of reasons, courts seem compelled to minimize the authority of the Comments almost every time they refer to them. The incantation that the Comments "were not enacted by the . . . legislature"<sup>164</sup> ill serves those seeking to determine their authoritative value. The truth of the matter is that the Comments *are* authoritative. To say that legislatures did not enact them says nothing more than that their authority is not the same as a statute's. Legislatures do not enact common law rules and precedent, yet they have authoritative value. Because the Comments are an unusual source of legal authority which do not fit neatly into any pre-defined category, the nature of their authority is often overlooked.

The Comments derive their authority not only from their character as largely contemporaneous notations of the drafters of the Code itself, but more importantly from their role in the jurisprudence of the Code. Like any authority, however, the Comments are subject to infirmities, many of which are unique to it. Often these

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goods and providing within five years of delivery written notification, which states that the consignor expects to deliver goods on consignment and describes the goods to prior secured parties.

<sup>160</sup> U.C.C. § 2-326 comment 2 (emphasis added).

<sup>161</sup> *Id.* § 1-201(12).

<sup>162</sup> *Id.* § 2-326(3)(c).

<sup>163</sup> *Id.* § 9-114.

<sup>164</sup> *Miller v. Preitz*, 422 Pa. 383, 393, 221 A.2d 320, 325 (1966).

infirmities contribute to situations in which the Comments are not and probably should not be authoritative. What the judicial treatment of the Comments lacks is a recognition of their authority, an identification of its sources, and an appropriate consideration of their weight in light of their limitations in given contexts.

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