

# The Consumer Compromise in Revised U.C.C. Article 9: The Shame of it All

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*Revised Uniform Commercial Code (U.C.C.) Article 9 is a highly successful uniform law project by almost all accounts. It was enacted by all states in a surprisingly short period. Some have credited the legislative success of Revised Article 9 to the so-called “consumer compromise” in the drafting process. This claim is based on the idea that the compromise eliminated substantial criticism and potential legislative opposition by advocates for both consumer interests and the consumer credit industry. This article casts doubt on this claim. It offers two critiques of the consumer compromise. First, it explains how the Article 9 drafting committee abandoned the usual methods of debate, deliberation, and drafting and how it gave in to a “take-it-or-leave-it” ultimatum by a subgroup. Second, it points out the various substantive weaknesses of the provisions that resulted from the compromise.*

## I. INTRODUCTION

Revised Uniform Commercial Code (U.C.C.) Article 9 (Revised Article 9)<sup>1</sup> was promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and The American Law Institute (ALI) in 1998, after more than eight years of study and drafting.<sup>2</sup> Subsequently, through early 2000, mostly “technical” changes and corrections to the statutory text and official comments were made by a standby committee and approved by the NCCUSL and the ALI.<sup>3</sup> On July 1, 2001, Revised Article 9 became effective in all but

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<sup>1</sup> A.L.I., NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: 1999 OFFICIAL TEXT WITH COMMENTS.

<sup>2</sup> The Permanent Editorial Board (PEB) U.C.C. Article 9 Study Group began its work in the spring of 1990. It completed its work in December, 1992. See PERMANENT EDITORIAL BOARD STUDY GROUP, UNIFORM COMMERCIAL CODE ARTICLE 9, REPORT (1992) (hereinafter REPORT). For background on the Study Group, including its organization and methodology, see REPORT, *supra* at 1–17. The Committee's chair and Reporters also issued an interim report. See William M. Burke, Steven L. Harris, & Charles W. Mooney, Jr., *Interim Report of the Activities of the Article 9 Study Committee*, 46 BUS. LAW. 1883 (1991). I served with Steven L. Harris as a Reporter for the PEB U.C.C. Article 9 Study Group and with Professor Harris as a Reporter for the Drafting Committee to Revise U.C.C. Article 9. However, the views expressed in this paper are not necessarily those of any person or organization other than myself.

<sup>3</sup> See THE NEW ARTICLE 9 v–vi & app. III (Corinne Cooper ed., 2d ed. 2000) (background and details of amendments and errata).

three states, and by January 1, 2002, it was effective in all states, the District of Columbia, and the Virgin Islands.<sup>4</sup>

By all accounts the promulgation and rapid enactment of Revised Article 9 was a striking legislative success. Earlier revisions of the U.C.C. in the 1980s and 1990s moved more slowly along rockier paths to enactment when compared with the Revised Article 9 enactment process. Why did Revised Article 9 meet with such rapid success in the legislatures? Two factors are obvious. First, NCCUSL gave the enactment of Revised Article 9 its highest priority. This emphasis and the “uniform” effective date of July 1, 2001 were adopted to avoid problems that would have arisen if both Revised Article 9 and former Article 9 were effective simultaneously in a substantial number of states.<sup>5</sup> Second, there was no organized opposition to its enactment. Some will argue that the absence of organized opposition was in no small part the result of the so-called “consumer compromise.”

The compromise was struck by the Drafting Committee and advocates of both consumer creditor and consumer debtor interests who participated in the drafting process. In this paper I criticize the process by which the consumer compromise was created and implemented in the drafting process. I also raise questions about the value of the compromise in the enactment process. Moreover, even if the compromise in fact provided material value in obtaining rapid enactment, the legislative successes may well not have been worth the attendant costs. In particular, the near-term benefits of the rapid enactment of Revised Article 9 may be swamped by the longer-term costs of the compromise. These costs include the failure of Revised Article 9 to resolve important and controversial issues in consumer secured transactions and the inclusion of unwise and incoherent provisions.

## II. THE “CONSUMER COMPROMISE”

William M. Burke, chair of the Article 9 Drafting Committee, formed a small, informal “Consumer Issues Task Force” early in the drafting process.<sup>6</sup> The consumer task force consisted of advisors to the committee, most of whom were self-identified advocates for the interests of consumer debtors or consumer creditors.<sup>7</sup> Burke and others were concerned that the uniform law process in the

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<sup>4</sup> UNIFORM COMMERCIAL CODE, 3 U.L.A. 14–18 (2002).

<sup>5</sup> See U.C.C. § 9-701 & Official Comment (2000).

<sup>6</sup> Burke previously served as chair of the PEB Study Group. During the study and drafting process he was a member of the PEB and a partner of Shearman & Sterling LLP.

<sup>7</sup> Active task force members included Thomas Buiteweg (General Motors Acceptance Corporation), George Carrier (Wells Fargo Bank and California Bankers Association), Neil Cohen (Brooklyn Law School and ALI representative member of the Drafting Committee), Michael Ferry (Legal Services of Eastern Missouri), Michael Greenfield (Washington

area of consumer protection had met with only limited success. Also, the concerns of consumer advocates had been problematic in the enactment of Article 2A and revisions of Articles 3 and 4. By 1995 it appeared that the Task Force was unlikely to reach consensus on the proper treatment of consumer transactions under Revised Article 9. That year the Executive Committee of NCCUSL appointed three members of the Drafting Committee to a Consumer Issues Subcommittee (Consumer Subcommittee) of the Drafting Committee.<sup>8</sup> In the Consumer Subcommittee's first report, issued in 1996, it made several recommendations for dealing with consumer issues.<sup>9</sup> The Consumer Subcommittee's proposals were substantially accepted by the Drafting Committee and by the ALI and NCCUSL at their respective 1996 annual meetings. That should have been the end of the story. It was not.

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University School of Law), Tracy Hackman (Chrysler Financial Corporation and The American Financial Services Association), Edward Heiser (Whyte Hirschboeck Dudek S.C. and the American Financial Services Association), Gail Hillebrand (Consumers Union), David McMahon (Mountain State Justice, Inc.), Mary Price (Bank of America), Yvonne Rosmarin (National Consumer Law Center, Inc.), Norman Silber (Hofstra University School of Law), William Solomon (General Motors Corporation and the American Financial Services Association), and James Swartz (Ford Motor Credit Company). Others may have participated as well, but this list offers a good insight on the group's makeup.

<sup>8</sup> The members of the Consumer Subcommittee were Uniform Law Commissioners Marion Benfield (Wake Forest University School of Law and Subcommittee Chair), Henry Kittleson (Holland & Knight LLP), and Sandra Stern (Nordquist & Stern). For background and a more detailed description of the involvement of the Consumer Issues Task Force and the Consumer Subcommittee in the consumer compromise, see Marion W. Benfield, Jr., *Consumer Provisions in Revised Article 9*, 74 CHI.-KENT L. REV. 1255, 1256-59 (1999).

<sup>9</sup> REPORT OF THE CONSUMER ISSUES SUBCOMMITTEE OF THE U.C.C. ARTICLE 9 DRAFTING COMMITTEE (1996), *reprinted in* 50 CONSUMER FIN. L.Q. REP. 332, 333 (1996).

Both consumer advocates and consumer creditor advisors were somewhat dissatisfied with the draft of Revised Article 9 as approved in 1996. Consequently, Burke remained fearful that this dissatisfaction would stifle enactment or at a minimum would lead to lengthy debates and disputes in the legislatures. With Burke's support and encouragement (and participation, to some extent), the Consumer Subcommittee undertook further meetings with members of the Consumer Issues Task Force, sometimes meeting separately with the consumer advocates or consumer creditor advisors. Burke urged the Subcommittee to forge a compromise that would be sufficient to support pledges by the participating advisors that they and (where applicable) the organizations they represented would not oppose Revised Article 9 in the legislatures.

During the Drafting Committee's February 1998 meeting the Subcommittee succeeded. The consumer compromise was announced (perhaps "pronounced" is a more apt term) to the Drafting Committee. A memorandum of understanding was presented to the Drafting Committee at the meeting. The memorandum is set out in full in Appendix I. The announcement and substance of the consumer compromise are also reflected in the Reporters' Prefatory Note 2 to the March 1998 draft of Revised Article 9. That Note follows:

REPORTERS' PREFATORY NOTE  
MARCH, 1998, DRAFT

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2. Consumer Transactions. During the February, 1998, meeting of the Drafting Committee in Rosemont, Illinois, the Drafting Committee approved in principle, and asked the Reporters to incorporate in this draft, a list of proposed revisions relating to consumer transactions. Most of the proposals, but not all, relate to Part 6, Default. The chair of the Drafting Committee presented the proposals as a compromise, explaining that if the package of proposals were accepted by the Drafting Committee and its sponsors, representatives of consumer creditors involved in the process would actively support, and advocates of consumer interests involved in the process would not oppose, enactment of revised Article 9. The chair explained further that the alternative would be widespread opposition, with pitched battles in the various legislatures during the enactment process. This controversy could delay or inhibit enactment of the revisions. The compromise grew out of discussions among creditor and consumer representatives, a special consumer subcommittee organized by the NCCUSL leadership, and the chair of the Drafting Committee.

Under the proposal, several provisions of the prior draft would be deleted: Sections 9-104(d) and (e) (allocation of payments for determining purchase-money status in consumer transaction); 9-613(b)(3) (notice of disposition containing minor errors not seriously misleading is sufficient); 9-622

(reinstatement rights of consumer debtor or secondary obligor); 9-624(d) and (e) (reduction of secured party's liability for statutory damages by amount of loss of deficiency or actual damages awarded to consumer); 9-625, Alternative A (absolute bar rule alternative for consumer transactions); 9-627(d) (bona-fide error defense to statutory damages); 9-627(e) (limitation on recoveries in class actions); 9-628 (reciprocal attorney's fees in consumer transactions).

The proposal also calls for revision of several other provisions. Sections 9-104(f) and (g) (approving "dual status" rule and setting burden of proof) would be applicable only to non-consumer transactions, as would Section 9-625, Alternative B (rebuttable presumption rule). Either the definition of "buyer in ordinary course of business" would not be revised to provide that BICOB status depends on a possessory right as against the seller, or the proposed provisions in revised Article 2 would accompany revised Article 9 to provide protection for a prepaying buyer. (We have chosen the latter approach. See the Appendix.) The comment to Section 9-111 would contain no examples of sufficient collateral descriptions in consumer transactions (e.g., the previous approval of "all jewelry" would be deleted). Sections 9-403 and 9-404 would be expanded to make effective the FTC's anti-holder-in-due-course rule (when applicable) even in the absence of the required legend. Section 9-614A (post-disposition notice) would be revised to provide for a somewhat more general statement of how a deficiency or surplus was calculated. The comments to Section 9-614 would be modified to delete any statement that "price" is not a term of a disposition that is required to be commercially reasonable, and an explanatory comment would be added to the effect that a low price mandates enhanced judicial scrutiny of the terms of a disposition. Finally, Section 9-618 would be revised to prohibit partial strict foreclosure for consumer goods.

In implementing these changes, we generally have drawn the line between "consumer-goods transactions" and other transactions. As defined, if the secured obligation was incurred for personal, family, or household purposes and any of the collateral is consumer goods, then the transaction is a "consumer-goods transaction" even if other collateral is not consumer goods. Occasionally, as in Section 9-624(c)(2), we have drawn the line between consumer-goods and other types of collateral.

This draft, like most earlier drafts, includes explanations of changes from the prior draft and Reporters' Comments. Also as in the earlier drafts, we offer in these Comments and explanations our analyses of the pros and cons of proposed changes and the likely effects on litigation and transactions in practice. We assume that this approach is especially important in connection with the compromise proposals, inasmuch as most of the members of the Drafting Committee did not participate in the discussions and, consequently, may be unaware of the various considerations that were discussed.

We have done our best to implement the compromise. However, inasmuch as we did not participate in the discussions that culminated in the list of terms from which we worked, the draft and our Comments may not always capture the intended compromise completely and accurately. Although we sought and obtained guidance from the consumer subcommittee and selected officials of NCCUSL, time did not suffice to enable us to incorporate comments from representatives of consumer and creditor interests. We plan to solicit comments from the representatives before the meeting and will present to the Drafting Committee any suggested changes arising from those comments.<sup>10</sup>

### III. PROCEDURAL CRITIQUE

The Consumer Subcommittee that pursued and generated the consumer compromise met with members of the task force outside the normal Drafting Committee processes. There is nothing unusual about that approach in a uniform law drafting process, especially when a long and complicated statute is involved. But it was unusual that none of the Reporters or other members of the Drafting Committee were invited to participate (or even observe) the discussions. Moreover, the manner and terms of presentation of the compromise to the Drafting Committee also were highly unusual (perhaps unprecedented). The compromise was presented to the Drafting Committee as a complete package. Members of the Drafting Committee who were not involved in the negotiations were not given any advance notice of the nature of the proposals or their underlying principles, inasmuch as the Consumer Subcommittee met with the task force members in closed sessions. The Consumer Subcommittee members presented the compromise as a strict “take it or leave it” proposition. They explained that a delicately balanced compromise had been reached between consumer interests (as to many of the provisions, read “defaulting consumer” interests) and creditor interests. Any material changes would upset the balance, they further explained to the Drafting Committee. They also declared that absent the Drafting Committee’s strict adherence to the compromise, legislative enactment would be in jeopardy. At the February 1998 meeting, the Drafting Committee approved the compromise in principle by a vote of ten in favor and one abstaining. The discussion preceding the vote was almost entirely about enactability and procedure, not the policies reflected by

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<sup>10</sup> Drafting Committee to Revise the Uniform Commercial Code Article 9 – Secured Transactions, Sales of Accounts, and Chattel Paper, Reporters’ Prefatory Note 2, Draft of Revised Article 9, Mar. 1998 (on file with author).

the elements of the compromise. Essentially the same pitch was made to NCCUSL and the ALI during the process of further review and final approval. During that process there was little, if any, discussion of the merits of the proposal or of the value of the various provisions (on which the Drafting Committee had already agreed) that the compromise required to be deleted from the draft.

Keeping the Reporters and the other Drafting Committee members out of the loop was entirely consistent with the Consumer Subcommittee's true agenda—mediation. In effect, the Subcommittee's approach appears to have been designed only to generate a compromise, not to work toward proposals based on sound policy if sound policy might leave some participants in the discussions unhappy. The apparent methodology was that, so long as the participants other than the Subcommittee members were happy with the package, all would be fine. Given this approach, it seems obvious why these "mediators" did not wish to allow pesky Reporters to expose risks presented by various proposals or otherwise to criticize them during the negotiations.

To put a finer point on this aspect of the critique, one might consider the selection and role of Reporters in the uniform law process (at least in the case of the process to revise Article 9). As Reporters we were expected to demonstrate more than competency in statutory drafting. We were expected to be familiar with the academic and other literature, the policy issues, transaction structures, and market practice (among other things). (For myself, I also saw my role as including the job of explicitly, candidly, and publicly noting the fact whenever someone said something demonstrating their ignorance in a Drafting Committee meeting or meeting of the ALI or NCCUSL.) This role of asking hard questions and rigorously testing positions and proposals was entirely skirted in the process leading to the consumer compromise. Moreover, in general, Reporters are expected to support drafts approved by a Drafting Committee. In the case of the consumer compromise, I was put in the difficult position of having to support positions that I strongly opposed (some are discussed in Part IV, below) and as to which I had never been given the opportunity to weigh in on the merits.<sup>11</sup>

In one small measure of defiance, I did circulate a press release that was critical of the motivations and substance surrounding the consumer compromise. But I circulated it anonymously. During the week following the February 1998 meeting, I asked a relative in another state to mail it from that state to several dozen interested persons. The cover memo and the full press release are reprinted as Appendix II. As far as I know the release was never published.

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<sup>11</sup> As noted in Reporters' Prefatory Note 2 to the March 1998 Draft of Revised Article 9, quoted above, the Reporters' Notes to that draft did include some criticism of the provisions intended to implement the compromise. But by that time, the Drafting Committee had made its decision and its members appeared to have no interest in evaluating or second-guessing the compromise.

In sum, the consumer compromise did not receive the analysis, debate, and considered judgment that the public has come to expect from the uniform law process. It was plainly and simply a pragmatic horse trade. No doubt the Drafting Committee signed on in part because of the members' tremendous (and justified) respect for Burke's abilities, dedication, and judgment. Under the circumstances, turning down the Consumer Subcommittee's proposed compromise, which Burke strongly supported, was not in the cards.

#### IV. SUBSTANTIVE CRITIQUE

Several important consumer-related provisions were cut from the draft in accordance with the compromise.<sup>12</sup> The omitted provisions reflected a balance that the Drafting Committee believed to be fair and workable as proposed by the Consumer Subcommittee and approved in principle by NCCUSL and the ALI at their respective 1996 annual meetings. Neither the consumer advocates nor the creditor advocates were particularly happy with the balance struck by the Drafting Committee, which suggests that the balance may have been just about right. But the creditor advocates were the more disgruntled. Plainly, they had fallen victim to the superior advocacy of the consumer advocates. The compromise presented them with an opening to "declare victory."

The general trade-off made by the creditors, who very much favored the compromise's deletion of the provisions that they opposed, was to allow advocates for consumers to continue to argue in the future for favorable rulings in the courts, and to preserve past successes, with little or no statutory guidance. For example, Revised Article 9 rationalizes the rules for determining when and to what extent a security interest is a purchase-money security interest (PMSI). It embraces the "dual status" approach, under which PMSI status is not destroyed, for example, if the collateral also secures nonpurchase-money obligations.<sup>13</sup> Under the compromise, this approach was made inapplicable to consumer transactions. No alternative rule was provided for consumer transactions. After eight years of work, an important issue for consumer transactions was left by the wayside and the recommendation of the Article 9 Study Group was rejected outright.<sup>14</sup> Moreover, the compromise required a

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<sup>12</sup> The principal deletions are summarized in Reporters' Prefatory Note 2 to the March 1998 Draft of Revised Article 9, quoted *supra*, page 6.

<sup>13</sup> See U.C.C. § 9-103(f), (g) (2000) (PMSI status is not lost as a result of cross-collateralization, purchase-money obligations being secured by nonpurchase-money collateral, or renewal, refinancing, consolidation, or restructuring, so long as secured party meets burden of proving the extent to which a security interest is a PMSI).

<sup>14</sup> REPORT, Recommendation 14.A., *supra* note 2, at 97-99 (recommending revision of the definition of PMSI to make clear that cross-collateralization, renewal, refinancing, or other restructuring does not destroy the characterization as a PMSI).

provision that calls on courts not to draw any inference from the statute as to the appropriate rule for consumer transactions, but instead instructed the courts that they “may” continue to follow existing approaches. As if that were not enough, the consumer advocates did not have any real interest in the PMSI characterization under Article 9, where it matters only for perfection and priority purposes. Instead, their angle was to preserve arguments in favor of the transformation rule in bankruptcy cases (lien avoidance of nonpossessory, nonpurchase-money security interests under Bankruptcy Code section 522(f)) and under the FTC’s “holder in due course” rule (same issue), without having to confront a conflicting PMSI rule in Revised Article 9.<sup>15</sup>

The stubbornness of the consumer advocates in the process apparently blinded them from understanding how failing to abolish the transformation rule for consumer transactions works to the detriment of consumers outside bankruptcy. For example, if agreeing to a restructuring or refinancing (such as extending the payment period and reducing monthly payment amounts) would put in jeopardy a creditor’s automatic perfection<sup>16</sup> the creditor would be less likely to enter into the otherwise mutually beneficial agreement.<sup>17</sup> But this merely reflects a consistency in attitude and approach of the consumer advocates throughout the process. They generally assumed the existence of a defaulting debtor in an existing transaction and then moved to address how a given rule would affect that debtor and those similarly situated. This static approach, of course, ignores the instrumental effects of law on behavior, whether that behavior might be the extension of credit in the first instance, or the refusal to enter into a restructuring agreement.<sup>18</sup>

A similar move was made in the context of the pre-Revised Article 9 conflicting approaches to the consequences of a secured party’s failure to comply with former Article 9’s provisions in enforcing a security interest. The pre-compromise draft provided an alternative provision for applying the so-

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<sup>15</sup> See *id.* at 99 n.6 (stating that the Study Group’s recommendation relates only to PMSI characterization under Article 9 and not to Bankruptcy Code § 522(f) [11 U.S.C.S. § 522(f) (2005)]).

<sup>16</sup> PMSIs in consumer goods generally are perfected upon attachment without any further perfection step. U.C.C. § 9-309(1) (2000). If a PMSI loses its character as such by the application of the transformation rule, the security interest would become unperfected unless a perfection step (such as filing or possession) had been taken.

<sup>17</sup> See Robert M. Lloyd, *Refinancing Purchase Money Security Interests*, 53 TENN. L. REV. 1, 75–76 (1985) (transformation rule discourages and dual-status rule encourages refinancing).

<sup>18</sup> See Steven L. Harris & Charles W. Mooney, Jr., *Revised Article 9 Meets the Bankruptcy Code: Policy and Impact*, 9 AM. BANKR. INST. L. REV. 85, 98–99 (2001) (criticizing static analyses of security interests in bankruptcy for the failure to take account of the instrumental effects of secured transactions in facilitating the extension of credit).

called “absolute bar” rule in consumer transactions.<sup>19</sup> It also provided for a version of the so-called “rebuttable presumption” rule as its principal approach. That structure would have facilitated a legislature’s choice to apply the rebuttable presumption rule in all cases or to adopt the alternative absolute bar rule for consumer transactions. Under the compromise, the absolute bar alternative was scrapped<sup>20</sup> and the rebuttable presumption approach was limited to non-consumer transactions.<sup>21</sup> The rule for consumer transactions was left to the courts, with no inferences, as were the PMSI reforms described above.

Former Article 9 contained no hint that the absolute bar rule could be applied. The misguided adoption of absolute bar by some courts resulted, at least in large part, from historical misunderstandings of pre-U.C.C. law.<sup>22</sup> Former section 9-507(1) was quite straightforward. It provided that a debtor is entitled to recover its loss if its secured party fails to comply with the requirements for enforcement following default. However, in this context Revised Article 9 makes a radical departure from the statutory construct of Former Article 9. Article 9 now contains a strong, powerful indication that an approach other than the rebuttable presumption rule may be appropriate for consumer transactions. Moreover, by expressly empowering courts to “continue to apply established approaches” in consumer transactions, for the first time Article 9 actually embraces the adoption of the absolute bar rule as an appropriate alternative for courts to consider. Given this, the statutory

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<sup>19</sup> Under the absolute-bar rule a secured party’s failure to comply with the provisions of Article 9 (as by failing to dispose of collateral in a commercially reasonable manner in accordance with U.C.C. § 9-610 or failing to notify the debtor of an intended disposition under U.C.C. § 9-611) would bar the secured party from recovering a deficiency from the debtor.

<sup>20</sup> The alternative provision that was deleted also addressed the effect of noncompliance with respect to some collateral when other collateral remains.

<sup>21</sup> U.C.C. § 9-626(a) (2000).

<sup>22</sup> See Robert M. Lloyd, *The Absolute Bar Rule in UCC Foreclosure Sales: A Prescription for Waste*, 40 UCLA L. REV. 695, 724–26 (1993) (explaining the misunderstandings of pre-U.C.C. case law). Grant Gilmore’s faulty interpretive analysis also must bear some blame. Gilmore wrote:

One of the more interesting aspects of the [Uniform Conditional Sales Act] litigation is that the courts rarely bothered to argue or discuss the point [that noncompliance barred recovery of a deficiency]; that a proper resale was a condition precedent to the recovery of a deficiency seemed too obvious to require either a reasoned analysis or the citation of precedent.

What was obvious under USCA may be equally obvious under Article 9. . . . We may conclude that the secured party’s compliance with the default provisions of Part 5 [of Former Article 9] . . . is a condition precedent to the recovery of a deficiency.

2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.9.4 (1965).

instruction for courts to draw no inferences from the treatment of noncompliance in non-consumer transactions (i.e., rebuttable presumption) for the proper treatment in consumer transactions rings hollow indeed.<sup>23</sup> How could a court not draw such an inference? Indeed, the statute effectively invites counsel for consumer debtors in (pre-Revised Article 9) rebuttable presumption states to argue that courts are to reject that rule in favor of the absolute bar rule. The claim that the “no inference” statutory injunction amounts to “no change” is untenable. Both the statutory structure and the underlying principle are incoherent.

As with PMSIs discussed above, in following the consumer compromise, Revised Article 9 rejects the recommendations of the Article 9 Study Group with respect to the effect of noncompliance in consumer transactions. The Study Group recommended that Article 9 be revised to specify clearly the effect of noncompliance and that the general rule be the rebuttable presumption rule.<sup>24</sup> Instead of a clear rule the consumer compromise leaves the matter to the courts in consumer transactions.

Finally, might these self-evident deficiencies have been outweighed by the benefits of a speedy and essentially uniform enactment of Revised Article 9 by the state legislatures? This was, of course, the mantra of the proponents of the compromise. But consumer credit regulation is in no way uniform in the states now. Nor has it ever been. Some states may have expanded the uniform version of Revised Article 9 to incorporate more protection. Others might have omitted some of the protections. The pre-compromise draft offered an explicit alternative for choosing or rejecting the absolute bar rule. Legislatures could have made other adjustments in the treatment of consumer transactions. But it is difficult to imagine why a legislature would have any incentive to oppose the enactment of Revised Article 9 in its entirety over these minor differences. It is true enough that there would have been additional work for the Uniform Law Commissioners and others involved with the legislative process in states where the treatment of consumer transactions might have been controversial. But it seems likely that most states would have opted for a package similar to the

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<sup>23</sup> U.C.C. § 9-626(b) provides:

The limitation of the rules in subsection (a) [i.e., the codified rebuttable presumption rule] to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches.

U.C.C. § 9-626(b) (2000).

<sup>24</sup> REPORT, Recommendation 28.A., *supra* note 2, at 199–201. The Study Group also recommended that the Drafting Committee consider whether the absolute bar rule should be applied to a special class of transactions, such as consumer or small business transactions. *Id.* at 201–02. The Study Group did not reach a consensus on this issue.

status quo in those states.<sup>25</sup> The consumer compromise produced a uniform text of Revised Article 9, but the substance of the law applicable to consumer secured transactions remained nonuniform.

## V. CONCLUSION: LESSONS ON THE UNIFORM LAW PROCESS

The story of the consumer compromise presents positive as well as negative dimensions. First, it presents a colorful picture of the nitty-gritty negotiations inherent in the legislative process. Second, the story provides an illustration of how the roles of individuals in the process do make a difference. The proponents of the compromise had a decisive effect on the direction of the treatment of consumer transactions in Revised Article 9. Individuals who decide to cause the law to change are the driving force in the process.<sup>26</sup> These are not individuals playing a scripted role. They have names, agendas, biases, and reputations to make or maintain. The process is as rich as human behavior itself.

On the negative side, the consumer compromise drama illustrates the dangers of radically corrupting the traditional practices of Drafting Committees. To be sure, those who struck and supported the consumer compromise were well-intentioned and genuinely believed that the compromise was, on balance, good policy. But the process of meeting privately, striking a comprehensive bargain, and then presenting the package as a take-it-or-leave-it proposition to a Drafting Committee runs roughshod over the process. Let us hope that the consumer compromise was a one-time calamity and not the beginning of a calamitous trend.

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<sup>25</sup> It is interesting that the consumer advocates and the creditor advisors were united on one general point. Neither group favored a group of alternative provisions that would have allowed each legislature to pick and choose from among a menu of special consumer provisions. Instead, they expressed a preference for a uniform version that they could support, even if the version was imperfect. I suspect that each group harbored a high level of insecurity and uncertainty about how the legislative battles would turn out.

<sup>26</sup> For a personal account in another context, see Charles W. Mooney, Jr., *The Roles of Individuals in UCC Reform: Is The Uniform Law Process a Potted Plant? The Case of Revised UCC Article 8*, 27 OKLA. CITY U. L. REV. 553 (2002).

## APPENDIX I

Memorandum of Consumer and Creditor Understanding of Proposal on  
Consumer Issues  
(Subject to seeing final language.)

(Note: language in [brackets] is suggested by consumer representatives;  
language in {braces} is suggested by creditor representatives.)

1. Statutory damages as per current law (for all violations of Part 6 except the new notice of 9-614A).
2. Attorneys' fees as per current law.
3. Silent on class action.
4. No bona fide error defense.
5. No partial strict foreclosure for consumer secured transactions.
6. Complete silence on absolute bar. (Rebuttable presumption language for commercial transactions only). Comment a la: "Under former Article 9 courts have adopted a variety of approaches with respect to [the consumer's liability for a deficiency] or {establishing the deficiency when the creditor fails to comply with Part 6}. The silence in this section with respect to consumer transactions leaves courts free to [select the appropriate remedy] or {continue to apply established approaches}."
7. Pre-sale notice as in the draft (with safe harbor form) but eliminate new "minor errors not substantially misleading." For information included in the safe-harbor notice but which is not required by Article 9, there would be a defense as to that information if it is not misleading as to Article 9 rights and remedies. This defense applies only to the effect of the non-required language under Article 9.
8. Post sale notice must still include calculation as below, but a minor error not seriously misleading defense is OK. Add post sale notice to list of non-waivable sections.

Gross balance  
Proceeds of sale

Net balance

Known expenses (not itemized)

Known rebates and credits (lumped together but types listed)

Net balance

Legend a la “Other rebates, credits, and expenses may affect this total. For complete information, call or write . . . .”

9. Delete right to reinstatement altogether from the Article 9 draft.

10. Post sale waiver by consumers will be allowed by agreement, but only can waive right to receive notice of disposition and notice of right to redeem.

11. No codification of dual status or mixed collateral rule for consumers (keep current law).

12. Comment to convey the following concept: “A low price {may} suggest that a court more carefully scrutinize all of the aspects of the sale, including the method, manner, time, place and terms to ensure that each aspect of the sale was commercially reasonable.” (To appear instead of comments that say price is not a term) [sic] This comment applies to both commercial and consumer transactions.

13. Change drafting as per Consumer Task Force suggestion in 9-403 and 9-404 so FTC holder rule is in effect even if the legend is not on the documents, and so the FTC provisions regarding existence and amount of affirmative recoveries are preserved. (Per creditors’ request, this would be clear that it applies only to transactions to which the FTC rule applies.)

14. Description of collateral: Remove comment that says “all jewelry” is OK. Comments to give no consumer examples.

15. BIOCOP. Either do not redefine in Article 9 or insert language in current Article 2 draft (this may be 2-505 and 2-824).

## APPENDIX II

Use this or not as you will—reject it, revise it, draw from it, make it your own. I will never claim responsibility.

## Deep Throat

## CONSUMER ADVOCATES SCORE HUGE VICTORY AT FEBRUARY 1998 ARTICLE 9 DRAFTING COMMITTEE MEETING

The Article 9 draft suffered mortal wounds at the recent Article 9 drafting committee meeting in Chicago. Even more astonishing, the damages were in part self-inflicted by consumer creditor representatives, who were outflanked by advocates for the interests of insolvent and defaulting consumers. The package-deal “compromise,” was presented to the drafting committee by its chair, William Burke. The deal would allow the creditor representatives who have participated in the drafting process to save face, while declaring victory, because it removes from the draft a number of provisions that the creditor representatives found objectionable. Having long complained about that [sic] the compromises worked out by the drafting committee in its deliberative process over several years were a “consumer goody bag,” these creditor representatives now have an opportunity to claim that they have turned the tide. It remains to be seen, however, whether the deal will hold up when it receives a broader review by creditor representatives who have not participated in the process and by those interested more generally in sound public policy and good legislation.

At the heart of the deal is the dismantling of the drafting committee’s efforts to address in Article 9 two prevailing problems under current law: (i) “transformation” versus “dual status” approaches for purchase money security interests, and (ii) “absolute bar” versus “rebuttable presumption” approaches for dealing with deficiency claims in the face of noncompliance with Part 5 of Article 9 (Part 6 in the draft). Under the draft on which the drafting committee had been settled for some time, the dual status rule was adopted for the PMSI issue and statutory alternatives were presented for the noncompliance issue--a legislature could opt for the absolute bar rule for consumer transactions or adopt the rebuttable presumption rule across the board for all transactions. The dealmakers claim that the compromise will leave current law where it is, with courts having the option to choose one approach or the other for the PMSI and noncompliance issues. However, by including in Article 9 a clear statement of the dual status and rebuttable presumption approaches for non-consumer transactions, the statute will reflect an inevitable negative implication that these approaches are unsuitable for consumer transactions. The likely result will be

increased litigation and an incentive for defaulting consumer advocates to press for transformation and absolute bar. The compromise deal is, moreover, directly in conflict with the 1992 recommendations of the Article 9 Study Committee, which called for a clear statutory treatment on both issues. After years of work, it is back to square one (at best!) on these important concerns.

In addition to worsening the sorry state of current law in consumer transactions for the PMSI and noncompliance issues, the deal would eliminate the statutory guidance for allocating payments in consumer PMSIs, remove the “bona fide error” defense to statutory damages for foreclosing a secured party’s noncompliance, and delete the cap on statutory damages in class actions based on such noncompliance. In exchange for these moves, the compromise would remove a debtor’s one-time reinstatement right for a payment default, delete the reciprocal attorney’s fees provision, and permit a somewhat more general description of how a deficiency or surplus was calculated in the new post-default notification.

Of course, the stated goal of the compromise was not saving face for the creditor representatives who had failed to “deliver.” Rather, Mr. Burke explained to the drafting committee that the deal would overcome vigorous opposition to the draft from all sides during the legislative process. Under the compromise, he observed, the creditor interests would actively support the draft and the defaulting consumer interests would not oppose it.

The compromise deal has other features, as well. All will see the light of day within a few weeks as the draft is prepared for the final meeting of the drafting committee in March.