# A Complaint about Payment Law Under the U.C.C.: What You See is Often Not What You Get

Gregory E. Maggs
*George Washington University Law School*, gmaggs@law.gwu.edu

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# A COMPLAINT ABOUT PAYMENT LAW UNDER THE U.C.C.: WHAT YOU SEE IS OFTEN NOT WHAT YOU GET

Gregory E. Maggs*

In this Essay, Professor Maggs observes that many provisions of U.C.C. Articles 3, 4, 4A, and 5 are misleading. Although the provisions express certain rules, these rules often actually do not apply because the parties have waived them, because the parties have no practical way to enforce them, or because they are predicated on unrealistic assumptions. Professor Maggs laments that this discrepancy between what the U.C.C. says and reality may have deceived the state legislatures that voted to enact the U.C.C., that it may impose costs on businesses and consumers, and that it clearly hinders the education of lawyers and law students. He suggests that the U.C.C. would be improved if it stated more candidly and accurately the rules that actually apply in real transactions.

## I. Introduction

Sellers of goods frequently comfort wary potential buyers by assuring them that "what you see is what you get." In other words, there will be no surprises. If a carton label shows a picture of twelve widgets, the buyer can expect to find the same number of widgets inside the carton. If a can of paint displays a beige stripe, the can will contain beige paint of the same color. Indeed, commercial law generally holds sellers to this uncontroversial standard.[1]

So what is my lament about the Uniform Commercial Code (U.C.C.)?[2] It is that what you see in Articles 3, 4, 4A, and 5 of the U.C.C.-the articles

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[1] See U.C.C. § 2-313(1)(b)-(1)(c) (2004) (saying that any "description of the goods" and any "sample or model" which is "made part of the basis of the bargain creates an express warranty that the goods shall conform to [the description or sample or model.]").

[2] This essay is part of a symposium, called "Commercial Calamities: What I Hate Most About Commercial Law," which took place at the American Association of Comparative Law's annual meeting on January 7, 2006 in Washington, D.C.

concerning payments of money and related topics-is often not what you get in real life.[3] On the contrary, many of the rules in these articles are, in a sense, imaginary; they are not the rules that govern normal commercial transactions. Indeed, as the examples below will show, often the very opposite rules are applicable.

***202** This feature of the U.C.C. is annoying for several reasons. First, as this Essay will explain in more depth, when make-believe rules appear in a model code like the U.C.C., they work a kind of fraud on the legislatures that are asked to enact them. They convey a false image of what the model law really will accomplish. Second, the unrealistic rules in the U.C.C. impose a variety of costs on consumers and businesses that engage in commercial transactions. They require parties to expend considerable effort to contract out of and otherwise to work around legislation that famously was supposed "to simplify, clarify and modernize the law governing commercial transactions."[4] Third, and perhaps most annoyingly, the inclusion of inapposite rules in the U.C.C. hinders legal education. It gives unwary law students and lawyers trying to pick up the governing principles a very inaccurate summary of the actual law.

## II. Examples

The following short list of examples illustrates various different ways in which what you see in Articles 3, 4, 4A, and 5 is not what you get in real life.

Example #1: Businesses and consumers issue billions of promissory notes every year. In theory, U.C.C. Article 3 contains the rules that govern these important negotiable instruments. Certainly that is what state legislatures thought when they enacted Article 3. The first substantive provision of Article 3, after all, promises that "[t]his Article applies to negotiable instruments,"[5] and the Official Comment extols this statement as a "provision affirmatively stating [the Article's] scope."[6] But in reality, the rules in Article 3 often are not the rules that govern negotiable instrument transactions.

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[3] Other articles of the U.C.C. also may share this problem; this essay just addresses provisions with which I am most familiar.

[4] U.C.C. § 1-102(2)(a) (2002).

[5] U.C.C. § 3-102(a) (2004).

[6] Id. § 3-102 cmt. 1.

Section 3-118, for instance, is (or rather appears to be) a comprehensive statute of limitations.[7] The section purports to specify all of the time limits for suing to enforce checks, notes, and other negotiable instruments. The Official Comment says that the "purpose of Section 3-118 is to define the time within which an action to enforce an obligation, duty, or right arising under Article 3 must be commenced."[8]

Section 3-118(a) says that an action to enforce a note "payable at a definite time must be commenced within six years after the due ***203** date . . . stated in the note."[9] This straightforward language offers assurance that if a borrower obtained a $100,000 loan from a bank and signed a note promising to repay the money on January 1, 2006, the bank could not enforce the note in a lawsuit after January 1, 2012 (that is, more than six years later).

But often, maybe more often that not, the reality is otherwise when borrowers issue notes payable at a definite time. Banks commonly require borrowers to sign the notes "under seal"; they do this simply by preprinting the word "seal" next to the borrower's signature line on their standard promissory note form.[10] This one word makes a big difference. Section 3-118(a) does not say anything about seals.[11] Instead, most jurisdictions have a different statute, outside of the U.C.C., that applies to any obligations (including notes) made under seal. In the District of Columbia, for instance, the period of limitations for a contract made under seal is twelve years.[12] Thus, for many makers of notes payable at a definite time, what

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[7] Id. § 3-118.

[8] Id. § 3-118 cmt. 1.

[9] Id. § 3-118(a).

[10] See, e.g., Freddie Mac, Form 3200: Multistate Fixed Rate Note, at 3, http://www.freddiemac.com/sell/single/uniform/pdf/3200.pdf [hereinafter Freddie Mac Standard Mortgage Note] (including the word "seal" in the signature line of the standard note form used for home mortgages throughout the country); Sallie Mae, LAWLOANS Private Loan Application and Promissory Note, at 3, http://www.salliemae.com/NR/rdonlyres/67E74685-4A3D-4C9D-8CBB-C008977A4D55/6651/LS_SLMAInternational_completeapplications_interact.pdf [hereinafter Sallie Mae Standard Law School Student Loan Note] (including the word "seal" in the signature line of the standard note form used for law school student loans throughout the country); Beal Bank v. Lucks, 791 A.2d 752, 757 (Del. Ch. 2000) (including the word "seal" on the signature lines of another typical note).

[11] See U.C.C. § 3-118(a) (2004) (addressing the statute of limitations without ever mentioning seals or their effect on the period of limitations).

[12] See D.C. Code Ann. § 12-301(6) (LexisNexis 2001).

they see in § 3-118(a)-a six year period of limitations-is not at all what they actually get.[13]

Example #2: Every student of commercial law learns that a bank ordinarily cannot charge a customer's account for a check that is not properly payable.[14] This rule means that if a bank pays a check that contains a forged drawer's signature or forged indorsement, the customer typically will not bear the loss. That is why checks are generally a safe form of payment.

But suppose that a bank accidentally pays a forged check and improperly charges the customer's account. Section 4-406(f) says that if the customer ***204** wants to recover the money, the customer has one year to report the unauthorized payment to the bank.[15] In most instances, one year should be plenty of time for the customer to examine the bank statement and report improper payments. But it turns out that few, if any, bank customers actually have a full year because bank agreements almost always shorten the period that the customer has from one year to a much shorter deadline, such as sixty days or even fewer.[16] The one year period, therefore, is all but imaginary.

Is reducing the reporting period good or bad? It is hard to say. On one hand, a shorter period can impose a burden on customers if they do not have enough time to review their statements. On the other hand, a shorter period may save the bank liability, keeping the costs of banking down for those customers who do examine their statements promptly. The point here, though, is not that one period is better than the other. The point is that what you see in the U.C.C. is not what you get in reality. While the U.C.C. says that the period is one year, in almost all instances it actually is substantially less than one year.

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[13] See, e.g., Milford Fertilizer Co. v. Hopkins, 807 A.2d 580, 583-84 (Del. Super. Ct. 2002) (extending the period of limitation for note containing the word "SEAL" to twenty years, not the six years specified in section 3-118(a)).

[14] See U.C.C. § 4-401(a) (2004) (permitting a bank to charge a customer's accounts only for checks that are "properly payable," meaning authorized by the customer).

[15] See id. § 4-406(f) (providing that a "customer who does not within one year after the statement or items are made available to the customer . . . discover and report the customer's unauthorized signature . . . is precluded from asserting against the bank the unauthorized signature").

[16] See, e.g., Borowski v. Firstar Bank Milwaukee, 579 N.W.2d 247, 252-53 (Wis. Ct. App. 1998) (upholding reduction in time from one year to fourteen days).

Example #3: The properly payable rule discussed in Example #2 immediately above has several exceptions. A customer, for instance, may be "precluded" (that is, estopped) from asserting that a signature on a check is forged-and thus that a check is not properly payable-if the customer's negligence contributed to the making of the forgery,[17] if the customer's delay in reporting the forgery caused certain kinds of losses,[18] or if the forgery was committed by someone whom the customer had entrusted with responsibility for handling the check.[19]

But Article 3 limits-or, rather, appears to limit-these exceptions in an important way. With respect to each of the three exceptions just mentioned, Article 3 specifies that if the bank failed to exercise ordinary care in paying the checks, then the customer will not bear all of the loss; instead, the bank and the customer will share the loss according to their respective fault.[20] ***205** These limitations guarantee, or at least purport to guarantee, that a bank will not be able to charge customers' accounts for the full amount of unauthorized checks when the bank itself has acted negligently. But in reality, despite what Article 3 appears to promise, these limitations will almost never result in the imposition of liability on banks.

Consider this common example: A bank pays a check containing a forged drawer's signature and charges the customer's account. The customer asserts that the bank cannot charge the customer's account because the forgery made the check unauthorized and therefore not properly payable.[21] The bank responds that the customer should be precluded from asserting that the check is not properly payable because the customer's negligence substantially contributed to the making of the forgery.[22] Perhaps the customer negligently left blank checks out where others could take them. If the customer in fact was negligent, the customer will bear the loss.

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[17] U.C.C. § 3-406(a) (2004).

[18] U.C.C. § 4-406(d) (2002).

[19] U.C.C. § 3-405(b) (2004).

[20] Id. § 3-406(b):

> [I]f the person asserting the preclusion fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss, the loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss.

Id.; see also id. §§ 4-406(e), 3-405(b) (similar).

[21] See id. § 4-401(a).

[22] See id. § 3-406(a).

Here is where the limitations come in. The bank will have to share the loss if the customer can prove that the bank was also negligent in paying the check.[23] So how could the bank be negligent in paying a check? Usually when a bank pays a forged check, it has not examined the drawer's signature on the check.[24] As an economic matter, banks cannot look at the signatures on all of the checks that they pay; the process just takes too much time and effort.[25] So instead banks generally adopt policies under which they selectively examine only a percentage of the checks that they pay.[26] For instance, they may decide to verify the drawer's signature on all checks over $10,000 and one percent of checks under $10,000.[27] A customer, however, ***206** might assert that a bank's failure to look at the signature on a particular forged check was negligent.

When is a bank's policy on examining signatures on a check negligent? Section 3-103(a)(9) contains a specific rule on this point, a rule that affects all of the limitations on the exceptions to the properly payable rule. The section says:

> In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if . . . the bank's procedures do not vary unreasonably from general banking usage not disapproved by this Article or Article 4.[28] I n other words, to prove that a bank failed to exercise ordinary care in

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[23] See id. § 3-406(b).

[24] See William D. Warren & Steven D. Walt, Commercial Law 826 (6th ed. 2004).

[25] See id. (explaining that the labor costs and the low rate of detecting errors make sight review of checks "not cost effective").

[26] See id. (reporting that banks have "abandoned sight review except for checks that [meet] certain risk criteria, the principal one being the amount of the check").

[27] For example, in Rhode Island Hospital Trust National Bank v. Zapata Corp., 848 F.2d 291, 294 (1st Cir. 1988) (Breyer, J.), the policy was as follows:

> The Bank examines all signatures on checks for more than $1,000. It examines signatures on checks between $100 and $1,000 . . . if it has reason to suspect a problem, e.g., if a customer has warned it of a possible forgery or if the check was drawn on an account with insufficient funds. It examines the signatures of a randomly chosen one percent of all other checks between $100 and $1,000. But, it does not examine the signatures on other checks between $100 and $1,000.

Id.

[28] U.C.C. § 3-103(a)(9) (2004).

not examining a check, a customer would have to show that the bank's policies on examining the drawer's signature varied unreasonably from the policies of other banks ("general banking usage").

That sounds simple enough. But what section 3-103(a)(9) does not mention is that obtaining the proof necessary for this section to apply is all but impossible. A customer generally cannot discover the policies followed by other banks because those policies are tightly held trade secrets.[29] Any bank would run huge risks in revealing which checks it examines and which checks it does not; a criminal who discovered the policies could devise forgery schemes to defeat them. Customers therefore typically have no feasible way to show that their bank's "procedures . . . vary unreasonably from general banking usage." In other words, when you look at the limitations on the exceptions to the properly payable rule, what you see is not actually what you get.

Example #4: A borrower who takes out a loan typically signs a note promising to repay the money.[30] The borrower knows that when the loan becomes due, the holder of the note will want payment. But before paying ***207** the note, the borrower may want assurance that the payment is going to the correct person and that the borrower will receive credit for any sums handed over. The borrower may properly worry that the person demanding payment is not entitled to payment because he or she already has negotiated the note to someone else who will later demand the money. Obviously, no borrower wants to pay a note twice.

The U.C.C. takes borrowers' concerns into account in section 3-501. This section defines a demand for payment of a note as a "presentment."[31] It then says that "the person making presentment" (i.e., the creditor demanding that the borrower repay the note) must: "(i) exhibit the instrument, (ii) give reasonable identification . . . and (iii) sign a receipt on the instrument for any payment made or surrender the instrument if full payment is made."[32] These three important requirements ensure-or, rather,

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[29] See, e.g., Story Rd. Flea Mkt., Inc. v. Wells Fargo Bank, 50 Cal. Rptr. 2d 524, 529, 530 (Cal. Ct. App. 1996) (concluding that the customer had not shown that the bank was negligent even though the customer "submitted evidence which purported to establish that there is no industry standard for check processing systems because they are proprietary and each bank keeps its system secret").

[30] See § 3-104(e) (2004) (defining a "note" as a "promise"); id. § 3-103(a)(9) (defining a "promise" as "a written undertaking to pay money signed by the person undertaking to pay").

[31] Id. § 3-501(a).

[32] Id. § 3-501(b)(2).

purport to ensure-that the borrower is paying someone who is in possession of the note and that the borrower will not have to pay the note again to someone else.

There is only one problem with this section: it's a fantasy. Every month millions of homeowners make payments on the notes that they signed when they borrowed money to buy their houses. Millions of college graduates similarly make payments on their student loan notes. And millions of drivers and boaters pay down the notes that they signed when they borrowed money to purchase automobiles or vessels. Yet, based on my own familiarity with commercial practices, I suspect that none of these borrowers sees the notes that they are paying. There is no "exhibition" of the instruments as section 3-501 requires. There is no showing of identification. In some cases, in my experience, there is no signing of a receipt for payment. Instead, each month, the borrowers simply mail a check to an address that they have been given.

This reality, which is completely contrary to the statute, has a simple explanation. Banks and other lenders would find the requirements of section 3-501 far too burdensome given the multitudes of borrowers located all over the country. So almost all mortgage notes, student loan notes, and auto/boat loan notes waive "presentment." They simply dispense with the requirements stated above.[33]

This waiver of presentment probably makes good economic sense. Both banks and borrowers may save money by eliminating the costly step of presentment. Although borrowers lose some protection against fraudulent demands for payment, the actual incidence of such fraud probably is not very ***208** great. But whether waiver of presentment is a good idea or not, it is a reality. And the rights that you see in section 3-501 are not what you actually get.

Example #5: Section 3-305(b) is said to express one of the most important rules governing negotiable instruments.[34] The section concerns the rights of a "holder in due course"-that is, someone who has acquired a

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[33] See, e.g., Freddie Mac Standard Mortgage Note, supra note 10, § 9, at 2; (waiving presentment in the standard home mortgage note used throughout the country); Sallie Mae Standard Law School Student Loan Note, supra note 10, § M.5, at 11 (waiving presentment in the standard law school student loan note used throughout the country).

[34] See Warren & Walt, supra note 24, at 596 (describing the holder in due course rule stated in § 3-305(b) as the "most dramatic aspect" of the law governing negotiable instruments).

negotiable instrument in good faith, for value, without notice of any defenses.[35] The section says that a holder in due course takes the negotiable instrument free from defenses and claims in recoupment that the maker of the instrument could have asserted against the assignee of an ordinary contract.[36]

Here is a typical illustration. Suppose that a general contractor buys a bulldozer from an equipment supplier on credit. The general contractor promises to pay the purchase price by signing a promissory note. The equipment supplier, needing cash to purchase additional inventory, then sells the note to a bank. If the bank is a holder in due course-that is, if the bank takes the note in good faith and without notice of claims and defenses-the bank will not be subject to any ordinary contract defenses to payment that the general contractor would have. For instance, the general contractor could not assert the defense of failure of the consideration even if the equipment supplier never delivered the bulldozer. The general contractor would have to pay the bank and would only have recourse against the supplier.

But section 3-305(b) really is a half-truth. In saying that a holder in due course takes an instrument free from defenses, the section conveys the idea that the assignees of promises to pay money who are not holders in due course of negotiable instruments take their assignments subject to ordinary contract defenses. Sometimes that is true.[37] Yet very often the reality is different. A great many commercial contracts requiring one party to pay money-such as a contract for the purchase or lease of property-contain

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[35] See U.C.C. § 3-302(a) (2004) (defining holder in due course).

[36] Section 3-305(b) says: "The right of a holder in due course to enforce the obligation of a party to pay the instrument is . . . not subject to defenses of the obligor stated in subsection (a)(2) or claims in recoupment . . . against a person other than the holder." Id. § 3-305(b). The defenses stated in subsection (a)(2) are any defenses "that would be available . . . under a simple contract." Id. § 3-305(a)(2).

[37] See Restatement (Second) of the Law of Contracts § 336(1) (1981).

> By an assignment the assignee acquires a right against the obligor only to the extent that the obligor is under a duty to the assignor; and if the right of the assignor would be voidable by the obligor or unenforceable against him if no assignment had been made, the right of the assignee is subject to the infirmity.

Id.

so-***209** called "cut off" clauses.[38] These clauses say that the party agreeing to pay money will not assert defenses against the assignee of the right to payment. These clauses achieve essentially the same result as the holder in due course doctrine, without requiring all of the formalities of negotiable instruments. But again anyone just looking at the text of Article 3, without knowing about the common alternative of cut off clauses, would get the wrong idea about what the U.C.C. accomplishes.[39]

Example #6: Sometimes a bank customer who has written a check subsequently discovers a reason that the payee should not receive the money. For example, a homeowner may write a check to a roofer to pay for repairs and then learn that the roofer did not actually complete the work. In this situation, a customer typically will want to stop payment on the check.

Section 4-403 purports to give a customer the right to stop payment on any check, so long as the customer describes the check with reasonable certainty and gives the bank sufficient time to act on the customer's stop payment order.[40] But that is not the reality. All or nearly all banks require their customers to pay them a fee to stop-payment on checks, often more than $25 per check.[41] If a customer went into a bank and requested that the bank stop payment on a check but refused to pay the stop payment fee, the bank would ignore the request. Thus, the customer does really not a have right to stop payment. Instead, the customer merely has an opportunity to pay to stop payment, just as a customer has an opportunity to pay to see a movie or to pay to put gasoline in a car.

Banks can charge customers for stopping payment because customers routinely agree to the charge in the contract that they sign when they open

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[38] See Gregory E. Maggs, The Holder in Due Course Doctrine as a Default Rule, 32 Ga. L. Rev. 783, 798-800 (1997-1998) (discussing cut off clauses in depth).

[39] The drafters of U.C.C. Article 5 attempted to prevent a similar misconception regarding letters of credit. They added the following sentence in section 5-103(b): "The statement of a rule in this article does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified, in this article." U.C.C. § 5-103(b) (2004). Thus, readers of Article 5 should not conclude that rules applicable to letters of credit are inapplicable to other kinds of payment devices.

[40] U.C.C. § 4-403(a) (2004).

[41] In 2006-2007, the average price that a consumer would pay to stop payment on a check was $28.67. See Phoenix-Hecht, The Blue Book of Bank Prices 2005-2006: Executive Summary 5, available at http://www.. com/treasuryresources/ PDF/BBExecSumm.pdf (last visited Jan. 27, 2007).

an account.[42] Maybe the charge makes good economic sense because it keeps ***210** the cost of banking down for everyone. Or maybe it does not. But section 4-403 should not say that the customers have a right to stop payment. That is make-believe. Even more ridiculous is the Official Comment to section 4-403, which fantastically says that "stopping payment . . . is a service which depositors expect and are entitled to receive from banks notwithstanding its difficulty, inconvenience and expense."[43]

Example #7: Another example of a disconnection between what the U.C.C. says and actual practice also appears in the rules in section 4-403 on stopping payment on checks. Suppose that a customer dutifully pays a bank $25 to stop payment on a $1000 check, but the bank wrongfully fails to act on the stop-payment order. Section 4-403(c) indicates that the customer may recover from the bank in damages by showing a "loss resulting from the payment of an item contrary to a stop-payment order."[44]

How would a customer suffer a loss from a payment contrary to a stop-payment order? In this hypothetical, until the customer learns what the bank has done, and demands the bank re-credit the account, the customer may believe that the account balance is $1000 greater than what the bank believes the balance to be. Accordingly, the customer might write checks that the bank will refuse to pay for insufficient funds. The customer's bounced checks may subject the customer to late fees, returned check fees, and other losses. But not to worry, section 4-403(c) promises-or, rather, purports to promise-that the customer's recovery "may include damages for dishonor of subsequent items."[45]

But of course the reality is different. Regardless of what section 4-403(c) says, customers generally cannot recover from their banks when their banks fail to stop payment on checks. The reason is that banks typically ask customers to sign a form when they want to stop payment.[46]

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[42] See U.C.C. § 4-103(a) (2004) (permitting parties, by agreement, to change the effect of the provisions of Article 4, so long as they do not disclaim their duties to act in good faith and to exercise ordinary care).

[43] Id. § 4-403 cmt. 1.

[44] Id. § 4-403(c).

[45] Id.

[46] See, e.g., EverBank, Stop Payment Form, http://service-center.everbank.com/documents/eb_stop_payment0701.asp (last visited Jan. 27, 2007) ("Financial Institution is not liable to You if it pays the identified check or transfer if Financial Institution acted in good faith or exercised ordinary care."); Bank of North Dakota, Stop Payment Request/Verification, http://www.banknd.com/ro/pdf/18492_2006 (last visited Jan. 5, 2007) ("BND shall be bound only to exercise good faith and

This form almost inevitably waives the bank's liability for disregarding a stop-payment order.[47] So again what you see in section 4-403 is not what you get in reality.

***211** Example #8: On the subject of half-truths, perhaps the most misleading one appears in section 5-103(a). This provision specifies the scope of Article 5 as follows: "This article applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit."[48] But the reality is different. Well more than ninety percent of letters of credit issued in the United States, in both domestic and international transactions, contain a legend saying that they are governed not by U.C.C. Article 5, but instead by a set of standard terms privately promulgated by the International Chamber of Commerce.[49] Yet, looking just at section 5-103(a), you would not get that idea.

## III. Assessment

The examples described above illustrate how what you see in the U.C.C. is often not what you actually get. Some rules do not apply because the parties routinely waive them by contract. Other rules create rights that parties have little practical way to enforce. Still other rules are misleading half-truths.

A separate question, though, is why a discrepancy between the U.C.C. and reality is something to complain about. The answer is somewhat complicated.

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ordinary care in the observation of this order.").

[47] True, under the U.C.C., a bank cannot legally waive its duty to exercise ordinary care or act in good faith. See U.C.C. § 4-403 cmt. 7. But a bank could cause damages by failing to stop payment even without being negligent or acting in bad faith. For example, suppose a bank customer is defrauded into issuing a check for $1000 to a thief. After discovering the fraud, the customer tries to stop the thief from getting cash for the check by issuing a timely stop-payment order to the bank. But the bank fails to stop payment because the bank's computers fail through no fault of the bank. As a result, the thief is able to cash the check and obtain the money. The bank charges the customer's account $1000. In this case, the customer has suffered $1000 in damages even though the bank was not negligent and did not act in bad faith. An agreement like the ones cited in the previous footnote would place this loss on the customer rather than the bank.

[48] U.C.C. § 5-103(a) (2004).

[49] See David V. Snyder, Private Lawmaking, 64 Ohio St. L.J. 371, 391 & n.71 (2003).

The problem is not that the U.C.C. allows parties to alter its rules by contract.[50] On the contrary, that is almost always a good thing. Statutory rules that can be changed or waived give parties freedom. A bank and its customer, for example, may agree that the customer can stop payment on checks without charge or they may decide that the customer must pay a fee to stop payment. Given freedom to choose, the parties will presumably choose the options that make the most economic sense for them.

***212** The problem with Articles 3, 4, 4A, and 5 also is not that the discrepancy between the U.C.C. and the real world creates confusion among parties engaged in payment transactions. Most parties to commercial transactions, whether they are businesses or consumers, have never read the U.C.C. They do not even know what the U.C.C. is or where to find it. So even if the U.C.C. expresses unrealistic rules, these rules cannot mislead them.

In fact, in an ironic manner, unrealistic provisions in the U.C.C. theoretically could reduce confusion in commercial transactions. When the U.C.C. contains a rule at odds with usual business practices, parties to commercial transactions typically waive the rule by contract, often in a form contract drafted by a lawyer who knows exactly what the U.C.C. says. A provision in a contract, even a preprinted form contract, is likely to provide more notice to the parties of commercial transactions than a provision in a statute. While almost no bank customers read the U.C.C., at least some of them take a look at their bank account agreements.

A better argument for why the discrepancy between what the U.C.C. says and reality is a problem is that the fanciful rules in the U.C.C. may have worked a fraud on state legislatures. This argument rests on the recognition that state legislators themselves did not write the U.C.C. Instead, they were presented with its text (both the original version and the many subsequent amendments and revisions over the years) and then asked to enact it.[51] They may have believed they were voting for legislation that

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[50] See U.C.C. § 1-302(a)-(b) (2004) (saying that the "effect of provisions of [the Uniform Commercial Code] may be varied by agreement," with exception that the "obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement").

[51] The American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) have drafted the U.C.C. and its revisions and amendments as model legislation. They present this model legislation to the state legislatures for enactment into law. For more about how this process has worked, see Gregory E. Maggs, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U. Colo. L. Rev. 541, 545-52 (2000).

gave bank customers a right to stop payment on checks, that governed letters of credit, that required banks to share certain losses with their customers, and so forth. But as the various examples in the previous Part have shown, that really is not the case.

An additional objection to the practice of including make-believe rules in the U.C.C. is that these rules ultimately impose a costly legal burden. Attorneys drafting contracts for commercial transactions must learn what the U.C.C.'s rules say and then figure out how to square these rules with reality. An attorney's clients initially bear this expense. But if the clients are businesses, they subsequently may pass some of it on to their customers. Ultimately, the rules are likely to make commerce more expensive for everyone.

Finally, the fanciful rules are a problem because they have a negative impact on legal education. Many law students never realize that much of what the U.C.C. says does not apply in actual transactions. Other law ***213** students do learn the truth, but that effort takes time that they might have used more profitably in learning something else. Maybe this aspect of the problem is not very significant to the overall economy. But it deserves mention because I suspect that it personally affects, and annoys, many of the law teachers writing in this symposium.

## IV. How to Make the U.C.C. Better

So what should the U.C.C. say? The answer is simple: It should tell the truth. For example, rather than the make-believe rules on stopping payment now found in section 4-403, the U.C.C. ought to simply say: "The circumstances under which the customer may order the payor bank to stop payment on a check is determined by the customer's agreement with the payor bank." That statement would capture reality. It would tell state legislatures, attorneys, banks, customers, and law students exactly what the governing principle really is. And it would make the task of drafting bank account agreements more straightforward because there would be no contrary default rules to waive.

The drafters of Article 4A on fund transfers adopted this approach in an important provision on remedies. The provision addresses the damages that are recoverable if a bank breaches an agreement with respect to the execution of a payment order, and the breach results in the delay or noncompletion of a funds transfer. In such a case, the sender of the payment order-usually someone who needs to get money to someone else in a hurry-may suffer consequential damages. But are these damages recoverable? Section 4A-305(c) simply, and truthfully, says that "consequential damages . . . are recoverable to the extent provided in an express written agreement [with] the receiving bank."[52] The drafters could not have been more honest (unless, of course, they dropped a footnote saying that no bank will ever enter into an express written agreement obligating them to pay consequential damages).

## V. Conclusion

The U.C.C., overall, is a fine example of legislation. It has unified and clarified much of the commercial law of the United States. It has served the United States for over fifty years, and almost surely will remain largely intact for many years to come. This Essay has complained about one of the U.C.C.'s shortcomings. In many places, especially in the articles governing payment law, the U.C.C. just does not capture reality. On the contrary, it contains rules at odds with common commercial practices. This fault probably does not directly mislead parties to commercial transactions ***214** because most of them do not read the statute. But it may have misled the legislatures that voted for the U.C.C. It may make commercial transactions more expensive by increasing the amount of work that attorneys must perform. And it may burden legal education.

Fortunately, the problem has a solution that is easy to articulate and probably not difficult to put into practice. The U.C.C. should contain the rules that parties actually want to use to save them the trouble of changing them by contract. It should not raise false hopes by including rules that give parties rights that they realistically cannot enforce. And it should tell the whole truth, avoiding misleading half-truths. In short, what you see in the U.C.C. should be what you get.

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[52]U.C.C. § 4A-305(c) (2004).