1974


Harold R. Weinberg
*University of Kentucky College of Law, hweinber@uky.edu*

**Recommended Citation**

Handbook of the Law under the Uniform Commercial Code.


There. It's done. After considerable agonizing, I've completed a review of the Handbook of the Law under the Uniform Commercial Code by J. White and R. Summers [hereinafter cited as UCC Handbook]. The justification for the review is readily articulated: the UCC Handbook is a significant contribution to the already bountiful books, treatises and other secondary material dealing with the UCC,¹ and is worthy of the attention of anyone with even an occasional interest in commer-

---

¹ A working bibliography of the books, treatises and services dealing with the UCC would include, in addition to the UCC Handbook, the following:

**General**


(2) Bender's Uniform Commercial Code Service.


**Sales**—Article 2


(2) W. Hawkland, Sales & Bulk Sales (1958).

**Commercial Paper**—Article 3


**Bank Deposits and Collections**—Article 4


**Bulk Transfers**—Article 6

W. Hawkland, Sales & Bulk Sales (1958).

**Documents of Title**—Article 7

R. Braucher, Documents of Title (1958).

**Secured Transactions**—Article 9


(3) O. Spivack, Secured Transactions (1963).


Additional UCC related books along with law review articles and other materials, will be found in M. Ezer, Uniform Commercial Code Bibliography (1972) [hereinafter cited as Ezer Bibliography]. Most of the recent books designed to serve as a source of materials for a course dealing with the UCC, some of which make useful research tools, are reviewed in Donnelly, Book Review, 25 J. Legal Ed. 94 (1973). Not mentioned in the Donnelly review are R. Nordstrom & A. Clovis, Problems and Materials in Commercial Paper (1972) and J. Murray, Jr. & T. White, Problem Teaching Material on Commercial Transactions (1973). The UCC has its own reporter service which is designed to bring together all judicial interpretations of the Code. See UCC Rep. Serv.
cial law. The reasons why I hesitated are less easily stated.  

It is a truth seldom recognized by individuals who have not had a formal introduction to the perils of the law review book review, but the writing of such a review, or more accurately its publication, should be undertaken only with the greatest circumspection. Why this is so can be fully understood only after surveying the three standard themes, at least one of which is embodied in every law review book review.

The first of these themes is that of the “informative book review.” This type of review informs about the book being reviewed, providing information such as the background of the book’s author, a summary of the topics discussed, and so forth. The uninitiated’s reaction to the informative review is that it may be at best, well, informative, and at worst, a bore. However, the reality is that such reviews have suffered the ignominy of being stamped NSF (non-scholarly fluff) by some. Recognition of this fact has driven many reviewers to include another of the three basic themes with its own attendant hazards in their review.

The second basic theme of the law review book review is that found in the “critical book review.” The critical review often takes the author of the book to task, following the time-honored pattern: “The author states that (reader fill in the blank). Of course, this statement ignores the maxim \textit{factum clarum jus nebulosum}.” This type of criticism can result in one of two opposed reactions. It may make an enemy. Or, it may invoke a comment such as: “Brash young fellow that—but bright. Reminds me of myself 25 years ago.” Thus, the reviewer also takes his chances in writing a “critical book review.”

Finally, there is the “forum serving book review.” Its \textit{raison d’etre} is to serve as a point of departure for the views of the reviewer which may have only slight relationship to the book being reviewed. Examples are the review of the book dealing with prison reform in which the reviewer reminisces about the good old days in French Guiana, or the commercial law book re-

---


3. Translation: “the clearer the facts, the more muddled the law.” From \textit{Rex v. Haddock} as reported by A.P. Herbert in \textit{The Judicial Humorist} 71 (W. Prosser ed. 1952).
view in which the reviewer floats his own view of the floating lien, replete with 172 footnotes. Perhaps this technique is harmless, and sometimes may even be helpful. But the following criticism may not be totally unwarranted: "If his views are so important, why doesn't he put them where somebody who is interested in them is more likely to find them (and where somebody who isn't, won't)?"

So there you have them, the perils of the law review book review and the reasons for my agony. Undoubtedly, I've avoided none of them.

The UCC Handbook was published late in 1972; alas, too late to be of assistance to the unfortunates who constituted my first class in Commercial Law. However, their successors have roaringly acclaimed the book, and justifiably so. Generally speaking, the book is comprehensive, highly analytic yet readable, often practically oriented, and punctuated by flashes of humor. Its usefulness is further enhanced in that the authors have generally set out the full text of the UCC provision which is being analyzed in the book's text, or at worst in its footnotes. Perhaps its only flaw, when viewed on this general level, is the book's failure to include an index by UCC sections, something which I personally missed quite often before I became more familiar with its contents. Except for the last, these comments demonstrate the worth of this book to the UCC novice. However, it will also prove to be of considerable value to those who are further along in their understanding of the Code, largely because the authors' goals of identifying and treating the real questions and analyzing and taking positions on important, unresolved issues have been realized.4

The first major subdivision of the UCC Handbook contains an introduction to the UCC. Included is information concerning the Code's precursors, history and draftsmen, and a short bibliography of secondary material dealing with various aspects of the UCC. Probably more useful to the student and practitioner of commercial law, however, is the attention paid to the UCC's mesh with other "commercial" bodies of statutory and common law, the UCC's emphasis on freedom of contract and the book's evaluation of the usefulness of case law, the Official Comments, prior Official Texts and other materials as aids in interpretation and construction of the Code. Practitioners in particular will find the authors' appraisal of the persu-

The next major subdivision of the *UCC Handbook* begins the book's coverage of Article Two on sales. This material is typical of the *UCC Handbook*'s blend of perspective, scholarly analysis, practical considerations and occasional humor. Illustrative of this blend is the book's treatment of UCC section 2-207.

The purpose of that section, as the authors point out, was to reverse the common law or "ribbon matching" approach to contract formation under which an acceptance which varied the terms of the offer was not an acceptance but rather a counter offer. The authors point out that the reason that section 2-207 is so troublesome is that it can also be called upon to decide the terms of a sales contract at various stages of the commercial transaction subsequent to the exchange of contract forms containing conflicting terms, and therefore must be used to deal with a variety of combinations of oral and written communications. After analyzing seven "real life" situations to which section 2-207 must apply, the authors' conclusion is not only amusingly put, but serves to highlight a harsh reality which is recognized but not sufficiently emphasized in much of the existing literature concerning the "battle of the forms":

If [the client] must have the term but cannot strike a bargain for it, his only answer may be to raise his price, buy insurance, or as a last resort, have a couple of extra martinis every evening and capitalize his corporation more thinly than he otherwise would.

Among the strongest aspects of the *UCC Handbook*'s treatment of sales is its analysis of the buyer's and seller's remedies.

---


6. That the battle of the forms, as fought under the rules of engagement provided for by the Uniform Commercial Code section 2-207, has been a popular topic is illustrated by the fact that the Ezer Bibliography lists 24 law review articles, notes and case notes dealing with it. See Ezer Bibliography, *supra* note 1, at 258-60. This topic can be a source of sustenance for any practitioner with a heroic view of office practice:

To be the winner in the battle of the forms, one needs the same thoughtful planning, superior "artillery" and trained manpower that makes for success in military encounters. Indeed, a bit of luck helps too. The attorney must view himself as a military commander marshalling all of his forces as part of a consummate strategy aimed at outwitting his opponents. The prize is a contract of sale containing all of the terms of sale the victorious attorney could ever wish for.


8. Although the *UCC Handbook*'s treatment of remedies is among
The discussion of the remedies available to a buyer for nonaccepted goods\(^9\) is typical of the authors' approach to these remedies generally. Here the authors take pains to indicate how the UCC remedies differ from those of the pre-Code law. For example, they discuss how UCC section 2-713 altered the pre-Code method of fixing the time at which market price is measured when a buyer wishes to set damages as the difference between the market price and the contract price.\(^{10}\) However, the authors also indicate when the pre-Code law remains operative, such as in the case of determining when there has been an anticipatory repudiation. Moreover, the material on the buyer's remedies is attentive to potentially troublesome questions such as what expenses are contemplated as "expenses saved in consequence of the seller's breach,"\(^{11}\) or can a buyer who has covered still fix damages as the difference between the contract price and the market price when they would result in a recovery greater than that which would be realized through a cover price-contract price differential.\(^{12}\)

There are a few ways in which the material on sales falls short. For example, it contains no discussion of UCC section 2-403 which protects certain buyers of goods from the claims of certain owners and necessitates an understanding of the entrustment and voidable title concepts, the latter of which generally causes problems for the uninitiated.\(^{13}\) Also, there is no discussion of the best available in any of the UCC books or treatises, the researcher with a Code remedies problem should be aware that there are a substantial number of law review articles dealing with this topic. See Ezekiel Bibliography, supra note 1, at 289-93. One of the best is Peters, Remedies for Breach of Contract Relating to the Sale of Goods under the Uniform Commercial Code: A Roadmap for Article Two, 73 Yale L.J. 199 (1963). See UCC Handbook, supra note 4, §§ 6-1 to 6-5, at 167-91. See UCC Handbook, supra note 4, § 6-4, at 163-84 dealing with Uniform Commercial Code § 2-713.

\(^{11}\) Expenses saved must be credited against the buyer's recovery when his damages are fixed as the differential between market or cover price and contract price. Uniform Commercial Code §§ 2-712(2), 2-713(1).

\(^{12}\) See UCC Handbook, supra note 4, § 6-4, at 190-91. A buyer covers by making in good faith and without unreasonable delay any reasonable purchase or a contract to purchase goods in substitution for those due from the seller. Uniform Commercial Code § 2-712(1).

\(^{13}\) The authors did include in their material dealing with Article Seven a section discussing the relationship of Uniform Commercial Code section 2-403 with Uniform Commercial Code section 9-307 which insulates certain buyers of goods from the assertion of security interest in the goods purchased; but there is little discussion of the substance of Uniform Commercial Code section 2-403. See UCC Handbook, supra
UCC section 2-210 which deals with delegation of performance and the assignment of rights relating to sales contracts and was designed to clarify certain aspects of the pre-Code law.14 These criticisms, however, are minor and do not affect the overall excellence of the sales material.

The third major subdivision of the UCC Handbook deals with UCC Articles Three and Four on commercial paper and bank deposits and collection. Practitioners will be well served by this subdivision since its strengths are akin to the strengths of the material on sales. The criticisms which have been directed against these chapters, that the UCC Handbook pays insufficient attention to the statutory changes in connection with consumer paper and holder-in-due-course status,15 and that the book does not deal adequately with the problem of the definition of holder,16 have not prevented these critics from being quite favorably disposed toward the book generally and to the commercial paper and bank deposit and collection material in particular. Although I share these attitudes, there is a somewhat more fundamental criticism of the UCC Handbook's treatment of commercial paper which also is relevant to its treatment of other related matters.

In their treatment of commercial paper, the authors of the UCC Handbook recognize that a negotiable instrument is a "peculiar animal,"17 and that to be negotiable it must meet certain prerequisites. They also recognize that a "holder in due course is...nothing more than a highly refined species of bona fide purchaser."18 Yet, the authors do not formally introduce the fundamental tension, which surfaces in several other places in

———

18. Id. § 14-1, at 456.
the Code, between the equities of the rightful owner and the equities of the good faith purchaser. Nor do they highlight the types of factors which have resulted in the latter outweighing the former in some cases but not in others.\textsuperscript{19} Formally introducing or reintroducing this tension in connection with commercial paper would help the reader avoid getting bogged down in the specific statutory requirements for an instrument to be negotiable,\textsuperscript{20} for a transfer to be a negotiation\textsuperscript{21} and for a transferee to be a holder in due course.\textsuperscript{22} It would also help the reader to understand the special rights of the holder in due course,\textsuperscript{23} and to better understand some of the purposes which these requirements serve. Moreover, if the introduction was made at the earliest appropriate time in the text, it would help to relate and reconcile such at-first-sight diverse matters as the entrustment and voidable title doctrines embodied in UCC section 2-403\textsuperscript{24} which are relevant to the questions of the negotiability of goods;\textsuperscript{25} the negotiability of documents of title and the fact that certain holders of documents of title by due negotiation can get better rights to the goods represented by the documents than if they became transferees of the goods directly;\textsuperscript{26} and the

\textsuperscript{19} See note 26 infra and accompanying text. See generally Gilmore, The Commercial Doctrine of Good Faith Purchase, 63 Yale L.J. 1057 (1954).
\textsuperscript{20} Uniform Commercial Code § 3-104.
\textsuperscript{21} Uniform Commercial Code § 3-202.
\textsuperscript{22} Uniform Commercial Code §§ 1-201(20), 3-302.
\textsuperscript{23} Uniform Commercial Code § 3-305.
\textsuperscript{24} See note 19 supra and accompanying text.
\textsuperscript{25} See Note, The Owner's Intent and the Negotiability of Chattels: A Critique of Section 2-403 of the Uniform Commercial Code, 72 Yale L.J. 1205 (1963).
\textsuperscript{26} This possibility results from the following analysis. If a thief steals goods from the rightful owner the thief and any transferee through the thief, even if a good faith purchaser for value, can get only a void (i.e., no) title and the rightful owner can replevy the goods. This is the result under Anglo-American jurisprudence which, except for the British doctrine of market overt, favors the rightful owner over a good faith purchaser from a thief, and which is not changed by the UCC. See Uniform Commercial Code §§ 1-103, 2-403(1). See generally Warren, Cutting Off Claims of Ownership under the Uniform Commercial Code, 30 U. Chi. L. Rev. 469, 470 (1963). The result would be the same if the goods are entrusted to an agent who has a grant of authority from the owner to store them but who exceeds his authority and sells them unless the agent is a merchant who deals in goods of that kind and the purchaser is a buyer in the ordinary course of business. See Uniform Commercial Code §§ 1-103, 2-403(2) (3); S. Williston, Sales § 313, at 313–14 (2d ed. 1948). Now adding a negotiable document to the picture, if a thief bails stolen goods and takes back a negotiable document of title which he negotiates to a holder who purchased it in good faith, without notice of any claim to it, for value,
reasons why some purchasers of goods can defeat the holder of a prior perfected security interest in the same goods while other purchasers cannot. The authors have not really ignored this tension, as it is at least alluded to in the material on commercial paper and in their analysis of Article Seven, and they may have relied on its very basic nature as a justification for not formally discussing it. But its fundamental and unifying nature would have justified a formal presentation.

The next two major subdivisions of the UCC Handbook cover letters of credit (Article Five), bulk transfers (Article Six), and documents of title (Article Seven). The treatment of these topics is up to the book's general level of excellence—particularly so the treatment of the use of documents of title in sales financing and the important relationship between Article Seven and Article Nine on secured transactions.

Coverage of Article Nine on secured transactions comprises the final subdivision of the UCC Handbook. As they have done throughout the book, the authors discuss the "bread and butter issues" raised by this Article. However, they do not limit their discussion to issues which have generated substantial litigation and scholarly comment, such as the question of whether a lease is intended as a security interest. The authors discuss questions which are no less important but which have received no or much less authoritative attention elsewhere. Examples of this are their treatments of whether the debtor's actual or intended use controls the classification of collateral and of whether a creditor who has not complied with Article Nine in foreclosing on his security interest can be denied a deficiency judgment. The UCC

and in the regular course of business, the rightful owner can reclaim the goods from the holder even though he is a holder by due negotiation just as if they had never come to be represented by a negotiable document. Uniform Commercial Code §§ 7-501(4), -502, -503(1). But, if the goods were entrusted to an agent with authority from the owner to store the goods in return for a negotiable document but who exceeds his authority and after obtaining the document negotiates it to a holder by due negotiation, the holder prevails. Uniform Commercial Code §§ 7-502, -503(1)(a).

27. The authors of the UCC Handbook do discuss the relationship of this provision to Uniform Commercial Code section 2-403. See note 13 supra.


29. The book does not deal with Article Eight on investment securities.

30. The Ezer Bibliography contains several entries dealing with the lease vs. security interest question. See Ezer Bibliography, supra note 1, at 408-09.
Handbook also raises and provides some analysis of questions which are troublesome but which arise only infrequently—for example, whether a security interest in a mortgagee's rights under the mortgage and mortgage note are within the scope of Article Nine. Another important strength of the Article Nine materials is their attention to the commercial setting to which provisions were intended to apply and around which they were designed. For example, there is a detailed discussion of the commercial settings and applications of UCC sections 9-304 (4) and (5) which provide for temporary automatic perfection of a security interest without filing or the taking of possession of the collateral. An additional strength of the materials is their recognition of and attention to important personal property security matters which are controlled by extra-UCC commercial law. An example of the important kinds of issues which the Code drafters left to the common law is the question of when possession becomes sufficient to perfect a possessory security interest.

It is difficult to criticize the UCC Handbook's treatment of Article Nine, a fact testified to by the little criticism it has received from the other reviewers.31 Ideally, it might have paid a bit more attention to the revision of Article Nine which was published in final form in the Spring of 197232 and which to date has been enacted in at least seven jurisdictions33 (thus undermining the UCC Handbook's authors' prediction that "it is highly unlikely to be adopted anywhere very soon"34). Also, it might

---


32. AMERICAN LAW INSTITUTE, NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: 1972 OFFICIAL TEXT AND COMMENTS OF ARTICLE 9 SECURED TRANSACTIONS. A comprehensive treatment of the revised Article Nine, the reasons for the revision, its drafting history, and references to the other secondary literature which the revisions have generated are contained in Coogan, The New UCC Article 9, 86 Harv. L. Rev. 477 (1973).

33. The jurisdictions are Arkansas, Illinois, Nevada, North Dakota, Oregon, Texas and Virginia. See CCH SECURED TRANSACTIONS GUIDE ¶ 650A.

34. UCC HANDBOOK, supra note 4, § 22-1, at 754 n.1.
have contained a discussion of the shifting judicial and legislative attitudes which shaped the pre-Article Nine law of personal property security.\textsuperscript{35} They are at least as significant and of as much interest today as the mechanics of the independent security devices which were shaped by these pre-UCC attitudes and which are cataloged and briefly discussed in the \textit{UCC Handbook}. However, the authors did devote space to many of the more important specific Article Nine revisions, particularly in the area of priorities and fixtures, and (I hope none of my students read this) it is possible to practice competently under Article Nine most of the time while being only vaguely or not at all aware of what came before it. Moreover, if one must consult the past for guidance, such information is available elsewhere.\textsuperscript{36}

Although it is obviously impossible to write a book on the UCC which will be all things to all commercial law students, practitioners and teachers, the authors have provided the first two groups with a highly versatile and valuable source of information and analysis, all in a nicely portable and reasonably affordable single volume. As to the latter group, the \textit{UCC Handbook} may render a significant additional service. First, after having now twice faced the problem of designing a four hour course in commercial law which is supposed to cover the entire UCC, once with the \textit{UCC Handbook} available and once before it became available, I have found that portions of the \textit{UCC Handbook} can be assigned either as the sole or a supplemental source of basic information, thus freeing up class time. For example, the matter of sales contract formation, particularly if this topic is introduced in the first year contracts course, can be largely covered in this manner. Furthermore, the availability of the \textit{UCC Handbook} enhances the possibilities for teaching commercial law through the problem method since it provides the link between a problem and the Code which enables a student to resolve the problem with a minimum of unnecessary frustration.\textsuperscript{37} These dimensions of the \textit{UCC Handbook}, I be-

\textsuperscript{35} An example is the slow-to-die attitude that a nonpossessory security interest is fraudulent and therefore void against other creditors of the debtor. See G. Gilmore, \textit{Security Interests in Personal Property} \$ 2.1, at 24–26 (1965).

\textsuperscript{36} The first eight chapters of G. Gilmore, \textit{Security Interests in Personal Property} (1965) deal with the law of personal property security prior to enactment of the UCC.

\textsuperscript{37} On the use of a text in teaching law through the problem method, see Gellhorn, \textit{The Second and Third Years of Law Study}, 17 \textit{J. Legal Ed.}, 11–12 (1964). A recently published set of problem teaching materials makes good advantage of the \textit{UCC Handbook}'s potential
lieve, will generate considerable enthusiasm for the UCC Handbook in commercial law teachers as well.

HAROLD R. WEINBERG*

as a source of collateral reading which can be used in teaching commercial law through the problem method. See J. Murray & T. White, PROBLEM TEACHING MATERIAL ON COMMERCIAL TRANSACTIONS (1973).

*Assistant Professor of Law, University of Kentucky Law School.