

**MINUTES OF COMMISSION MEETING**  
**November 18, 1999**

Present at the meeting of the New Jersey Law Revision Commission held at 153 Halsey Street, 7<sup>th</sup> Floor, Newark, New Jersey were Commissioners Albert Burstein, Peter Buchsbaum, Vito Gagliardi, Jr., and Hugo Pfaltz, Jr. Grace Bertone attended on behalf of Commissioner Rayman Solomon.

Also attending were: Kristi Vaiden, Arthur Herrmann and Riva Kinstlick of Prudential; Richard Stokes of the Insurance Council of New Jersey; Carlyle Ring, Jr., of the National Conference of Commissioners on Uniform State Laws (NCCUSL); Barry Evenchick and Joseph M. Donegan, New Jersey Uniform Law Commissioners; Mary Kay Roberts of Riker, Danzig; Beth Byrne of ACLI; Dawn Shanahan of the Division of Consumer Affairs; and Sharon Harrington of Public Strategies on behalf of the motion picture industry.

Minutes

The Commission approved the Minutes of the October 14, 1999 meeting as submitted.

Uniform Computer Information Transaction Act (UCITA)

Chairman Burstein explained that the Commission has the statutory obligation to review NCCUSL products. After review of a proposed statute, the Commission makes its recommendation to the Legislature. The Commission's review of UCITA is unusual. The nature of the material is new and the comments submitted to the Commission are numerous. The Commission must closely examine the material and comments. Chairman Burstein then introduced Barry Evenchick.

Mr. Evenchick stated that New Jersey Uniform Law Commissioners Wanda Finnie and Joseph Donegan joined him in supporting UCITA. He argued that UCITA is an Act worthy of adopting in New Jersey and throughout the country. UCITA began eight years ago as Uniform Commercial Code Article 2B, intended to supplement the UCC, the joint product of NCCUSL and ALI. UCITA was originally intended to complement Article 2 on Sales. The Proposed Act is the product of intense deliberations that took place over several years and numerous meetings. After eight years of work, the ALU decided that it would not support the integration of UCITA into the UCC, claiming that UCITA still needed more revision. NCCUSL opted to treat Article 2B as a stand alone Act, thus its name was changed to UCITA. Mr. Evenchick stated that ALI does not oppose the Act but feels it needs more work. Mr. Evenchick stated that he was

told that if NCCUSL waits too long to act, the Federal government will step in and pre-empt.

Mr. Evenchick and Carlyle C. Ring, Jr., Chair of the UCITA drafting committee, met with Prudential representatives to discuss Prudential's opposition to the Act. A number of Attorneys General also oppose enactment of the proposed statute. Mr. Evenchick expressed the hope that diverse interest groups could reach agreement upon a mutually acceptable version of UCITA.

The Commission expressed concern over the intensity of opposition to UCITA. Mr. Evenchick stated that, in UCITA's case, absolute uniformity is not required among the states. There is some room for non-uniform amendments provided the product is not destroyed.

Chairman Burstein stated that, in an earlier project, the Standard Form Contract Act, the Commission had dealt with problems similar to those addressed in UCITA.

Mr. Ring then took the floor to explain UCITA's provisions to the Commission. He noted that New Jersey had modified UCC Article 5 without disturbing the essential scheme of the Act and without harming interstate commerce. Mr. Ring noted the explosion of electronic commerce and stated that either the federal or state government is going to regulate it. His preference is state regulation, because contract is the proper province of state law. He stated that Federal pre-emption of contract law works less well. Mr. Ring distributed a set of documents from a September 1999 conference on global commerce. He said that a uniform set of rules is necessary to govern e-commerce, that a big growth element of the economy is information and that the fundamental question is who will govern this area: Congress or the states.

Mr. Ring maintained that electronic contracting differs significantly from fact to fact contracting, and warrants special legislation. It is often unclear which state has jurisdiction and even whom a person is dealing with in a transaction. The law must answer these questions. He stated that the uniform law is a better approach than a federal one. He distributed a Q & A on UCITA and a summary of various provisions of the Act.

Mr. Ring acknowledged the variety of opinions in connection with UCITA. Laws written on a clean slate often encounter fierce conflicts among interest groups; common ground must be found. What makes e-commerce

different from other projects, except wire transfers where there was a special arrangement with the Federal Reserve Board, is that there is no legal model to follow. Without some uniform act, states will begin to enact laws independently and produce non-uniform legislation.

Chairman Burstein asked if the proposed Act was sufficiently flexible to adapt to new market practices. Mr. Ring said yes and no. General principles are flexible enough to adapt to unforeseen developments; examples are unconscionability, void against public policy, etc. That is why UCITA avoided the specific list of forbidden terms found in the Commission's Standard Form Contract Act. Chairman Burstein stated that terms like "unconscionability" fail to set adequate criteria. Mr. Ring responded that UCITA takes the common law approach to solve problems case by case.

Mr. Ring explained that UCITA provides only default rules and maintains freedom of contract. If parties have expressed agreement in contract, then contract governs and UCITA does not apply except in regard to a few non-variable rules. If a contract is silent on any term, then trade usage or course of dealing is used to fill the gap. Only if this step fails, do UCITA's default rules apply to the transaction. Criticism has been that gap filler rules fit well with some industries and practices but not with others. Mr. Ring's response was that parties are free to draft their own contracts. Scope was narrowed to deal with some concerns in this area. In some cases, two rules cover a single transaction; for example, in a transaction involving software and goods, UCITA may cover the software, while Article 2 covers the goods. There is an opt-out and opt-in provision for mixed transactions. Party may opt-in or opt-out of UCITA. There are restrictions: (1) one cannot vary UCITA's non-variable rules, such as consumer protection rules, and (2) in mass market transactions, term of opt-in or opt-out must be conspicuous.

Chairman Burstein asked: how would UCITA effect consumers? Mr. Ring stated that the question is not whether UCITA is taking away consumer rights but whether it gives enough. In UCITA, existing consumer rules control over the provisions of UCITA. Attorneys General overlooked 105(c), giving priority to state consumer protection law. Subsection 105(d) provides that if there are statutes that require a physical writing or signature, that statute is not over written by UCITA.

In response to criticisms of the rules on whether an electronic term is conspicuous, Mr. Ring stated that this subsection does not affect disclosure,

content or notice requirements. Mr. Ring has offered to get together with Attorneys General and to meet with the Director of the National Attorneys General Association, Sara Resnick.

Commissioner Pfaltz asked whether UCITA should be considered as a federal law. UCC works because generally courts interpret it consistently. But now e-commerce presents a legal question on a national if not international basis. To go back to each state to determine law for international trade is not useful.

Mr. Ring responded that there is a lot going on internationally with regard to law and e-commerce. But there are three views: American, European and Asian. Thus, it will take time to get groups to agree on a set of rules. Until the United States gets its act together, it cannot take a meaningful position in international discussion. States can take the lead and establish a US position. In Article 4A, NCCUSL agreed with the Federal Reserve to assure that the Act became national law. The same thing is true here. If UCITA cannot become uniform state law, it will impact development of federal law. Congressional process is such that Congress cannot devote enough time to develop an equally effective Act for e-commerce.

Kristi Vaiden of Prudential then took the floor. She negotiates contracts for Prudential. She said that UCITA will create work for users groups like Prudential. Under UCITA, the vendor perspective prevails unless contracts state otherwise. Prudential would need to hire more lawyers to negotiate with each of its 2,000 vendors and these burdens would lead to increased costs.

Ms. Vaiden was particularly opposed to electronic self-help. Mr. Ring replied that electronic self-help cannot be varied by agreement. It applies where licensee breaches agreement. Vendor turns on electronic switch that turns off software. Under Article 9, creditor can exercise self-help. However, under UCITA, for term to be effective, term must be negotiated, included in agreement and separately assented to by licensee. The licensee must identify a person to be given notice, place where notice is to be sent and manner in which it is to be communicated. Only then is the electronic self-help term valid. The vendor must give fifteen days' notice and explain the nature of the licensee's breach of the agreement. The licensee has time to negotiate with licensor. Either party can go to court to get an injunction. If the licensor exercises a right to self-help improperly, then any contract term excluding consequential damages is invalid. A failure to comply with a procedural step is a wrongful exercise of self-help. Only in extreme situations would a vendor exercise the self-help remedy.

Commissioner Pfaltz found that Prudential's letter contained only minor criticisms of the Act. For example, if fifteen days is not enough notice, Prudential should negotiate longer period of time. Commissioner Pfaltz stated that he found the default provision fair. Ms. Vaiden stated that the fifteen day notice period was insufficient.

Mr. Cannel remarked that most contracts are not negotiated including mass market contracts that are not consumer contracts. According to Mr. Ring, based on dollar volume, and perhaps numbers alone, the majority of e-commerce contracts are negotiated contracts, not mass market contracts. In mass market contracts, markets over time produce best terms. This is especially true for e-commerce and Internet. Customer has better opportunity to comparative shop; can enter specifications and ask which vendor has best price or terms. In negotiated contracts, large company licensees may be able to impose terms on a licensor. Many licensors are small businesses or independent entrepreneurs; not all licensors are Microsoft-like firms.

Chairman Burstein asked whether UCITA disregards copyright law. Mr. Ring stated that most intellectual property law (copyright and patent) is federal law and it preempts UCITA. However, the concern is that inherent rights under federal law might be given away by contract. If the federal law preempts, this cannot be done. UCITA has a provision voiding any term that is against public policy. Nothing in UCITA displaces law of trade secrets and competition. As to whether intellectual property law should be spelled out more in UCITA, advocates exist for each side. Mr. Ring stated that delineation of rules of fair use was beyond the scope of the project.

Mr. Cannel asked if UCITA allowed contract provisions barring re-sales. Mr. Ring stated that this issue is thorny. A license for a book on the Internet can be given away to the whole world. This differs from print book sale. As to re-sale of items such as a single copy of an operating system, Mr. Ring stated that he would get back to the Commission on this issue. Mr. Ring stated that UCITA does not prohibit transfer of license. In mass market contracts, a term prohibiting transfer must be conspicuous.

Chairman Burstein stated that the nature of this meeting was to gather information. Now the Commission has context in which to examine the law. Mr. Ring stated that NCCUSL's final action on UCITA took place at its August 1999 meeting. However, that final action did not result in the real final product.

Subsequent to the NCCUSL vote, the style committee edits the product and the reporters complete the writing of the Official Comments. Those processes are now nearing completion. The act will be final as of Monday and does contain some changes. A Second Revised Draft should be out in 10 days on the NCCUSL web site. But this second draft is not final.

Sharon Harrington identified herself as representing the motion picture industry. Mr. Ring stated that discussion continue with motion picture and other industries. These discussions may result in different terms. Mr. Ring stated he would have a better idea in three weeks whether these on-going discussions would result in changes.

Ms. Vaiden of Prudential asked about waiving defects; and how UCITA keeps consumers from losing warranties. Mr. Ring stated that inspection of goods follows Article 2 rule. If a customer has an opportunity to inspect, the customer is bound. The same provision should work with software. Express warranties cannot be waived. Implied warranties (merchantability, fitness, etc.) under goods can be disclaimed if the waiver is conspicuous. Similarly, with notice, a vendor can disclaim implied warranty for software. One change made by UCITA is that disclaimer language must be clearer than that required by Article 2.

Commissioner Buchsbaum raised the issue of choice of law. Mr. Ring stated that choice of law is more critical in international than national transactions. In domestic transactions, consumer protection law cannot be waived. If there is a New Jersey purchaser and a Washington vendor, then New Jersey consumer protection applies, even if Washington law applies by contract term. In domestic transactions, parties are likely to choose state that has relationship to parties or transaction. However parties may choose unrelated law, like that of Delaware, if corporate law is important to them.

As to choice of forum, reporters have received vigorous arguments regarding this provision. Under common law, contract term regarding forum generally is enforceable. UCITA reflects existing law. Mr. Ring stated that on the international level, choice of forum is an important and legitimate consideration. For a small entrepreneur, choice of forum also may be a significant business risk.

A question was posed by a Prudential representative as to who bears risk of infringement in global market. Mr. Ring stated that he would respond by letter.

Chairman Burstein asked what other states are doing. Mr. Ring stated that several states have mentioned adopting UCITA in 2000 but normally there are no enactments in the first year; the process takes a couple of years. Mr. Ring's best guess is that maybe a couple of states may adopt it.

Chairman Burstein held over the other items on the agenda and concluded the meeting.

#### Miscellaneous

The next Commission meeting is scheduled for December 16, 1999.