2001

The Jury-Trial Right in the UCC: On a Slippery Slope

Margaret L. Moses
Loyola University Chicago, School of Law, mmoses1@luc.edu

THE JURY-TRIAL RIGHT IN THE UCC: ON A SLIPPERY SLOPE

*Margaret L. Moses**

TABLE OF CONTENTS

UNIFORM Commercial Code ("UCC") drafters have attempted to reduce the role of juries in commercial cases by drafting provisions in the UCC that assign the court[1] to decide as a question

* Assistant Professor of Law, Loyola University Chicago School of Law. The author gratefully acknowledges the assistance of Dean Emeritus Albert Rosenthal and Professors Kenneth Kettering, Paul Shupack and Michael Zimmer. This research was supported by a grant from the Loyola University Chicago Internal Research Awards Program.

1. The term "judge" or "court" in this article will be used in the sense of determiner of law, rather than trier of fact in a non-jury trial. The reason is that the concerns discussed

of law certain matters which have traditionally been decided by the jury.[2] This article addresses the questions of whether the gradual erosion of the right to a jury trial in UCC cases should be continued or reversed, and whether or to what extent Article 1 should have a role in the process.

This article will first consider federal and state constitutional requirements of the right to a jury trial and their applicability to cases brought under the UCC. It will then examine specific UCC provisions where the drafters allocated to the court determination of matters that are typically decided by the jury. A brief examination will then be made of the reaction of some state bar committees, law revision commissions, and legislatures to the question of the constitutionality of such reallocation under state law. Next, the article will consider the constitutionality of the specific UCC provisions in light of traditional Seventh Amendment jurisprudence, as well as recent Supreme Court decisions regarding the scope of the Seventh Amendment guarantee.[3] It will then examine the policies favoring or opposing jury trials and will compare results of empirical studies of jury performance with beliefs and attitudes upon which various policy views are based. Finally, the question of whether Article 1 has a role with respect to this issue will be considered.

The article concludes that reallocation by the drafters of factual matters to the court is both constitutionally troubling and not justified on policy grounds. Such a practice has caused and will continue to cause states to adopt non-uniform versions of proposed laws, undercutting a fundamental purpose of the UCC, which is to promote uniform application of the law. This article also suggests that Article 1, which states the purposes and policies of the UCC, should help prevent the general erosion of the right to jury trial by affirming that this right under the UCC extends to all parties to the full extent of federal and state constitutional and statutory law and policy.

I. CONSTITUTIONAL REQUIREMENTS

A. THE SEVENTH AMENDMENT

Seventh Amendment jurisprudence developed by the Supreme Court in modern times makes clear that in cases arising under the UCC, parties will almost always have a jury-trial right in federal court.[4] Although the Seventh Amendment has not been applied to the states through the Due

relate to the proper allocation of an issue between judge and jury, and not between judge as trier of fact and judge as determiner of law.

2. *See, e.g.*, U.C.C. §§ 4A-202, 5-108(e) (2000).

3. The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law." U.S. CONST. amend. VII.

4. *See infra* note 13 and accompanying text.

Process Clause of the Fourteenth Amendment,[5] when a cause of action under the UCC is tried in federal court pursuant to diversity jurisdiction, or as a pendent state claim, the right to a jury trial is determined as a matter of federal law under the Seventh Amendment, even though the substantive law applicable to the cause of action is state law.[6] An examination of the Court's traditional Seventh Amendment jurisprudence as it has developed in the twentieth century makes clear that in most UCC cases, the parties will be entitled to a jury trial.[7] One strand of Seventh Amendment jurisprudence provides that the right to a jury trial is based upon an "historical test": if the action, or an analogous action, would have been brought at common law rather than in equity or admiralty in 1791, the time of the Seventh Amendment's ratification, then the right to jury trial will be preserved.[8] The Court has made clear that not only common law rights, but also statutory rights are protected by the Seventh Amendment guarantee "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."[9] Thus, if the rights protected by statute are analogous to rights that would have been enforceable in the courts of law, as opposed to the courts of equity or admiralty, there is a jury-trial right.[10] In determining whether a particular claim is analogous to one tried at common law in 1791, the Court uses a test formulated in *Tull v. United States*: "[f]irst, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature."[11] The Court has emphasized that of the two prongs of the

5. *See* Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974) ("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment.").

6. *See* Simler v. Conner, 372 U.S. 221, 222 (1963) (holding that "the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions."); Reiner v. New Jersey, 732 F. Supp. 530 (D.N.J. 1990) (stating that the plaintiff with a pendent state claim is entitled to a jury trial because the right to a jury in federal court is determined by federal law); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958) (holding that federal policy favoring jury decisions of disputed fact questions should not yield to contrary state rule).

7. This constitutional jurisprudence is comprised of four different strands: (1) the "historical" test; (2) the requirement that the substance of the jury trial right must be preserved; (3) the preservation of the jury trial when issues of law and equity are joined; and (4) the deference to a Congressional statutory scheme involving public rights. *See* Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183 (2000) (providing an in depth discussion of the Supreme Court's Seventh Amendment jurisprudence and the reasoning of *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996)).

8. *See* Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) ("The right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted.").

9. *Curtis*, 415 U.S. at 194 (holding that the Seventh Amendment applies not only to suits based on the common law, but also to statutory causes of action).

10. The Supreme Court articulated the basic task as one of determining "whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty." Tull v. United States, 481 U.S. 412, 417 (1987).

11. *Id.* at 417-18 (citations omitted).

historical test, the second prong, pertaining to remedy, is far more important that the first prong, which deals with the nature of the action.[12]

Under the historical test, UCC cases almost always have actual or close historical analogues at common law, as actions for damages or debt. Moreover, since the remedy sought in contracts and commercial cases is almost invariably money damages, UCC cases tend to be prototypical examples of an action at law, to which the Seventh Amendment applies.[13]

A second strand of the Court's Seventh Amendment jurisprudence concerns the scope of the requirement that the right to a jury trial must be "preserved." The Court has repeatedly held that what must be preserved is the substance of the jury-trial right, as opposed to mere matters of pleading or practice.[14] Throughout more than two hundred years of the Amendment's existence, the Supreme Court has interpreted the substance that must be preserved as the jury's fact-finding role in suits at common law.[15] Although a given UCC case, like any other litigated matter, may not be subject to a jury trial as the result of procedural devices such as summary judgment or judgment as a matter of law, or because the parties waived their jury-trial right, frequently, in litigation of UCC matters, disputed fact-specific issues arise which are exclusively within the province of the jury.

Thus, in a typical UCC case tried in federal court, the parties will have a jury-trial right. The jury's function in a federal court case has been well delineated by the Supreme Court. The jury finds facts, determines credibility, weighs contradictory evidence and draws inferences from the facts.[16] The Court has repeatedly emphasized that "[t]he Seventh

12. *See id.* at 421. "We reiterate our previously expressed view that characterizing the relief sought is '[m]ore important' than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial." *Id.* (citing *Curtis*, 415 U.S. at 196).

13. *See Curtis*, 415 U.S. at 196 ("More important, the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law.").

14. *See* Galloway v. United States, 319 U.S. 372 (1943); Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494 (1931); *Ex parte* Peterson, 253 U.S. 300, 309-12 (1920); Walker v. N.M. & S. Pac. R.R. Co., 165 U.S. 593 (1897).

15. *See Galloway*, 319 U.S. at 372; *Gasoline Prods.*, 283 U.S. at 494; *Ex parte* Peterson, 253 U.S. at 309-12; *Walker*, 165 U.S. at 593. Although the Court in *Galloway* did not articulate what it thought the fundamental elements of the jury trial were, it cited as authority *Gasoline Products*, *Ex parte Peterson*, and *Walker*, all of which defined as fundamental the jury's role as the finder of facts.

16. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The weight and credibility of a witness' testimony "belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function." Sartor v. Ark. Natural Gas Corp., 321 U.S. 620, 628 (1944) (quoting Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891)).

> It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. That conclusion,

Amendment . . . requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."[17]

The general rule, therefore, is that in cases where there is a jury, the jury's function is to decide questions of fact. The judge, on the other hand, will determine matters of law.[18] While the line between issues of law and issues of fact is not always clear, there are some generally accepted views as to the difference. Questions of fact tend to be very specific issues pertaining to the particular case at bar.[19] Questions of law tend to be "fact free general principles that are applicable to all, or at least to many disputes, and not simply to the one *sub judice*."[20] In sum, a question of law for the judge tends to be a general proposition, while a question of fact for the jury tends to involve a case-specific inquiry.[21] Even though the demarcation is not always a bright line, most judges, in most cases, tend to have a good sense of the difference between matters of fact and matters of law.

B. State Constitutional Requirements

In all but two states there is a constitutionally-based right to a civil jury trial. Louisiana and Colorado, which do not provide for the right by constitution, nonetheless provide the protection by statute and by court rule, respectively.[22] While in most states the scope of the civil jury trial parallels the federal right guaranteed by the Seventh Amendment, there are some differences. As in federal court, many states determine the right to a jury trial by an historical test, based on whether there was a right to a jury at common law at the time of adoption of the particular state consti-

---

> whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 35 (1944) (citations omitted).

17. *Walker*, 165 U.S. at 596. In addition, in *Byrd*, the Court noted that "[an] essential characteristic of [the federal] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command —of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." 356 U.S. at 537.

18. There are, of course, gray areas in the fact/law distinction, exceptions, and questions as to the extent to which any particular fact question is constitutionally mandated to be determined by a jury. *See* Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867 (1966).

19. *See* Markman v. Westview Instruments, Inc., 52 F.3d 967, 1009 (Fed. Cir. 1995) (Newman, J., dissenting), *aff'd*, 517 U.S. 370 (1996).

20. Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 995 n.3 (1986). Louis observes that the "classification of ultimate facts as questions of law amounts to a manipulation of the law-fact doctrine to take questions from the jury." *Id.* at 1028.

21. *See Markman*, 52 F.3d at 1009 (Newman, J., dissenting).

22. *See* COLO. R. CIV. PROC. 38; LA. CODE CIV. PROC. ANN. art. 1731.

tution, and whether legal or equitable relief is sought.[23] Because many states have amended their constitutions at various times, the specific time used by different state courts as a point of reference varies widely.[24]

While variations exist in state practice, nonetheless, the basic right to a jury trial is protected in all states. Commercial cases, in which money damages are the most common form of relief, will generally have a jury-trial right, unless that right has been waived, or unless there are no underlying disputed facts. State courts appear to take the same view as federal courts of the jury's function to find facts, weigh evidence, determine credibility, and draw proper inferences from disputed facts.[25]

When UCC drafters attempt to shift the traditional allocation of certain facts from jury to judge, they are testing the scope of both federal and state constitutional requirements, as well as the policy bases for the jury's role in the civil jury system. The next section of this article will consider the specific UCC provisions where the drafters allocated to the court matters of fact normally determined by juries.

II. SPECIFIC UCC PROVISIONS ALLOCATING DECISIONS TO THE COURT

To understand in context provisions in the UCC where the drafters chose to allocate matters to the judge rather than the jury, we will consider below three UCC sections: 4A-202(c), 5-108(e), and 1-201(10).[26] Sections 4A-202(c) and 5-108(e) are products of relatively recent revi-

23. New York courts, for example, look to common law actions tried to a jury before 1777, when the first New York constitution was ratified. *See In re* DES Mkt. Share Litig., 591 N.E.2d 226 (N.Y. 1992). New Jersey courts, on the other hand, generally refer to the right of jury trial as it existed at the time of the adoption of the 1947 constitution. *See* State v. Anderson, 603 A.2d 928, 936 (N.J. 1992).

24. *See Anderson*, 603 A.2d at 936. Another difference from federal practice is that some states maintain a distinction between law and chancery courts, and this has sometimes resulted in rules that differ from federal rules. In some states, for example, where legal and equitable issues both arise from the same fact situation, if the overall nature of the action is equitable, none of the claims will be tried to a jury. *See* Bruce D. Greenberg & Gary K. Wolinetz, *The Right to a Civil Jury Trial in New Jersey*, 47 RUTGERS L. REV. 1461, 1472 (1995); *see also*, Steiner v. Stein, 66 A.2d 719 (N.J. 1949). If an independent legal claim is tried with an equitable claim, it may be tried to a jury but only after the equitable claims have been resolved. *See* Greenberg & Wolinetz, *supra* note 24, at 1479. This differs from federal court practice, where legal claims are almost always tried first in order to preserve the jury trial right. *See* Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 510 (1959).

25. Lofy v. S. Pac. Co., 277 P.2d 423, 425 (Cal. Dist. Ct. App. 1954) (holding that a jury's role is to draw proper inferences when facts in dispute); Ney v. Yellow Cab Co., 117 N.E.2d 74, 80 (Ill. 1954) (jury question whether circumstances surrounding defendant's violation of statute may be proximate cause of damage that followed); Guzzi v. Jersey Cent. Power & Light Co., 90 A.2d 23, 26 (N.J. Super. Ct. App. Div. 1952) (jury question whether defendant's installation and maintenance of gas supply conformed to standard practice in industry).

26. While UCC Section 2-302 allocates to the court as a matter of law the decision as to whether a contract or a provision of it is unconscionable, this is not constitutionally troubling because the issue of unconscionability has always been considered an equitable issue. It has long been established that the right to a jury trial is preserved for actions at law, not equity.

sions where a reallocation occurred.[27] Section 1-201(10), on the other hand, has since the 1950s allocated the determination of "conspicuous" to the court for decision as a matter of law. Both the definition of conspicuousness, as well as the question of whether it should always be a matter for the court, are being reconsidered in the current revision process of Articles 1, 2, and 2A.

A. SECTION 4A-202(C)

UCC Article 4A governs funds transfers, focusing primarily on electronic or "wire" transfers between business or financial institutions.[28] An important question among participants who deal in wire transfers is who will be liable if money suddenly disappears from an account by means of an unauthorized wire transfer. The "mysterious interloper" problem requires one party to bear the loss in a situation where there may be no way to determine which party was at fault.[29] To resolve this problem, the drafters of Article 4A provided that a bank would not be liable for an unauthorized payment order if it paid the order in good faith and in compliance with a commercially reasonable security procedure designed to prevent unauthorized payment orders.[30]

To understand this issue in context, assume the worst happens. A corporate bank account which contained 50 million dollars at 10:00 a.m., has a zero balance at 10:05 a.m., and the corporate account holder—the customer—who discovers this a few hours later, did not authorize the payment order. Who bears the loss? In a suit by the customer against the bank, the bank's defense is that it acted in compliance with a commercially reasonable security procedure. Assume there are no agreements between bank and customer as to any limitation of liability of the bank, or as to the effect of unauthorized payment orders paid by the bank. Thus, the case will turn on whether or not the security procedure used by the bank was commercially reasonable.[31] This specific question—

27. UCC Article 4A was approved in 1989, and UCC Article 5 in 1995.

28. *See* U.C.C. art. 4 (2000). According to the Prefatory Note to Article 4A, the value of wire transfer payments exceeds one trillion dollars per day.

29. *See* Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743, 762 (1993) (discussing the drafting committee's response to this problem).

30. UCC Section 4A-202(b) provides in pertinent part:

> If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer.

U.C.C. § 4A-202(b) (2000).

31. Even if the security procedure was reasonable, the customer could still prevail if it could *prove* that the order was not caused directly or indirectly by anyone who had ever been under its control or had obtained access to pertinent information from it as to the

whether a security procedure is commercially reasonable—was declared by the drafters to be a question of law for the court:

> Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated.[32]

Does the requirement that commercial reasonableness be decided as a question of law deny the customer a right to a jury trial? Assuming the case was brought in state court, the answer would turn on the protection given by the state constitution. If it were in federal court by reason of diversity (a New Jersey corporation using a bank in New York City, for example), or a pendant state claim, the Seventh Amendment would determine whether there is a jury-trial right.

In both cases, the courts would first use the historical test to determine whether this is the kind of claim that would have been heard in courts of law at the time of the adoption of the relevant constitution. While creative lawyering could suggest a number of possible causes of action, the most likely ones, such as breach of contract, breach of bailment, or conversion, all had a right to a jury trial in common law courts at the end of the eighteenth century when the Seventh Amendment and the earliest state constitutions were adopted.[33] In addition, the remedy sought by the customer—money damages—is also an important indicator that this is the kind of action that has a jury-trial right, because money damages were sought primarily in courts of law, not courts of equity.[34]

Having determined that this is the kind of action where there was a right to a jury trial, the courts would then need to determine whether the statutory provision allocating commercial reasonableness to the court to decide as a matter of law impinged upon the right to a jury trial. Since courts have repeatedly defined the substance of the jury trial right as being the preservation of the jury's fact-finding role, if there are disputed factual issues, it would appear that requiring these facts to be determined by the court as a matter of law would interfere with the jury-trial right.[35] The statute itself makes clear that the particular provision at issue here is heavily fact specific, so there may well be disputed facts. Section 4A-

---

security procedure. *See* U.C.C. § 4A-203. In most cases of this kind, such proof of a negative would be difficult if not impossible to establish. For purposes of this hypothetical, we will assume the customer is unable to establish this proof.

32. U.C.C. § 4A-202(c).

33. *See* Valley Steel Prods. Co. v. Darco, 147 B.R. 189, 191 (Bankr. E.D. Mo. 1992) ("The . . . counts alleging breach of contract, breach of bailment and conversion are the type of common law causes for which the Seventh Amendment preserves a party's right to a jury trial.") (citing Granfinanciera, S.A. v. Nordberg , 492 U.S. 33, 40-43 (1989)).

34. *See supra* notes 8-11, 13 and accompanying text.

35. If there were no disputed facts, the court could, of course, decide the issue of commercial reasonableness as a matter of law regardless of what the statute provided.

202(c) provides that what must be considered by the court in determining commercial reasonableness as a question of law are:

> the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and the security procedures in general use by customers and receiving banks similarly situated.[36]

These are specific factual issues. There is no "question of law" here in the sense of "fact free general principles applicable to all, or at least to many disputes, and not simply to the one *sub judice*."[37] Since a fact-specific inquiry is required, if any of the facts are disputed, they raise the kinds of questions that are typically within the province of the jury.

A comparison with other determinations of "commercial reasonableness" in the UCC demonstrates that generally, the jury resolves disputed questions. There are a number of cases under Article 9 interpreting "commercial reasonableness" of a sale by a secured party of collateral after a default by a debtor. These cases all send disputed fact questions to the jury.[38] It could possibly be argued that a "commercially reasonable" sale is more likely to create disputed factual issues than a "commercially reasonable" security procedure. Even if true, when there is a disputed factual issue as to what is a commercially reasonable security procedure, the issue should go to the jury, since normally the question of reasonableness is for the jury.[39]

In addition to the Article 9 cases on commercial reasonableness, UCC articles which define good faith as "honesty in fact and reasonable commercial standards of fair dealing," (which currently include all but Article 5 and Article 2 for non-merchants) treat the determination of reasonable

---

36. U.C.C. § 4A-202(c).

37. Louis, *supra* note 20, at 995 n.3; *see also supra* note 20 and accompanying text.

38. *See, e.g.*, Leasing Serv. Corp. v. River City Constr., Inc., 743 F.2d 871, 878 (11th Cir. 1984) ("Generally the issue of commercial reasonableness is a question for the jury.") (citing Henderson v. Hanson, 414 So.2d 971 (Ala. Civ. App. 1982)); *see also* FDIC v. Forte, 535 N.Y.S.2d 75 (N.Y. App. Div. 1988) ("Whether a sale was commercially unreasonable is, like other questions about 'reasonableness', a fact-intensive inquiry."); United States v. Conrad Publ'g Co., 589 F.2d 949, 954 (8th Cir. 1978) ("Whether a sale of collateral was conducted in a commercially reasonable manner is essentially a factual question."). Where there are no disputes as to material facts, however, the issue becomes a question of law. *See* Advanced Irrigation, Inc. v. First Nat'l Bank of Fargo, 366 N.W.2d 783, 786 (N.D. 1985) (determining commercial reasonableness as a matter of law is only appropriate "where all of the inferences support the conclusion that the sale was commercially reasonable. Questions of fact become questions of law when reasonable men can reach but one conclusion.").

39. Reasonableness is only for the court when the evidence is so clear that no reasonable person could determine the issue in any way but one. *See e.g.*, Amfac v. Waikiki Beachcomber Inv. Co., 839 P.2d 10 (Haw. 1992); *Advanced Irrigation*, 366 N.W.2d at 786 (determination of commercial reasonableness as a matter of law is only appropriate "where all of the inferences support the conclusion that the sale was commercially reasonable. Questions of fact become questions of law when reasonable men can reach but one conclusion.") (citing City of Hazelton v. Daugherty, 275 N.W.2d 624, 627 (N.D. 1979)).

commercial standards as a matter for the jury.[40] In *Kuwait Airway Corp. v. American Security Bank*, for example, the court ruled that "[c]ommercial reasonableness is a question of fact for the jury. It is not an issue to be decided as a matter of law."[41]

The official comment to Section 4A-202 (which is combined with Section 4A-203 and found following Section 4A-203) fails to discuss the constitutional implications of allocating to the court the kind of factual issues that in other parts of the UCC are considered to be matters for the jury. Nor is there any suggestion that jury determinations of commercial reasonableness under other sections of the UCC have created any significant problems. The official comment offers, however, two justifications for changing the allocation from jury to judge. First, it asserts that it is "appropriate" to make this issue a matter of law because "security procedures are likely to be standardized in the banking industry."[42] Second, it states, "a question of law standard leads to more predictability concerning the level of security that a bank must offer to its customers."[43] There is, however, no evidence or authority offered to support either statement.[44] Curiously, the assertion that security procedures are likely to be

40. *See* Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 370 n.6 (1980). Good faith is generally considered to be a question for the jury. *See id.*

41. 890 F.2d 456, 464 (D.C. Cir. 1989). The question was whether under Section 3-419(3) [now Section 3-420(c)] the depositary bank acted "in accordance with the reasonable commercial standards applicable to the business." *Id.* The court noted further that as a narrow exception, some courts had found "commercially unreasonable as a matter of law for a bank to take for deposit in an *individual* account a check made payable to a corporation, without first ascertaining the authority of the depositor/indorser." *Id.* (emphasis added) (referring to similar determinations cited in *American Machine Tool Distrib. Ass'n v. Nat'l Permanent Fed. Savs. & Loan Ass'n*, 464 A.2d 907, 913-15 (D.C. 1983)). According to the court, however, that "aside from this one fairly widely recognized exception, whether a bank acted in a commercially reasonable manner is usually a question of fact." *Kuwait Airways*, 890 F.2d at 464; *see also* Am. Title Ins. Co. v. Shawmut Bank of R.I., N.A., 812 F. Supp. 301 (D.R.I. 1993) ("[T]he question of whether a bank acted with commercial reasonableness is ordinarily a question of fact. . . . [T]he fact that a particular practice is common among banks does not establish that it is commercially reasonable.") (citations omitted). Whether the bank can establish under commercially reasonable standards it was not contributorily negligent under UCC Section 3-406 in failing to verify signatures on checks presented to it for payment is also a question for the trier of fact. *See* Buse v. Vanguard Group, No. Civ. A. 91-3560, 1996 WL 744899, at *11 (E.D. Pa. Dec. 23, 1996) (citing *Kuwait Airways*, 890 F.2d at 464 ("commercial reasonableness is a question of fact and 'is not an issue to be decided as a matter of law'")); Torino Constr. Corp. v. Ensign Fed. Credit Union, 908 P.2d 702, 705 (Nev. 1995) ("The determination of whether a party conformed to reasonable commercial standards is a question for the trier of fact.").

42. U.C.C. § 4A-203 cmt. 4, para. 2.

43. *Id.*

44. It is apparently not unusual for official comments to be based on the drafters' beliefs or hunches. A number of participants in the UCC drafting process have criticized the lack of empirical evidence to support many drafting decisions. James J. White, for example, the Reporter for Revised Article 5, noted the lack of empirical evidence underlying decisions made in connection with the Article 5 revision process. His concern was that "the debate over law is among lawyers, not scientists, and is almost completely devoid of reliable empirical data." James J. White, *The Influence of International Practice on the Revision of Article 5 of the UCC*, 16 NW. J. INT'L L. & BUS. 189, 213 (1995). Edward L. Rubin, the former chair of the American Bar Association subcommittee on revisions to Articles 3 and 4, has also decried the lack of empirical research by attorneys involved in

standardized appears to be undercut by the official comment itself, which suggests that security procedures in fact vary widely:

> The concept of what is commercially reasonable in a given case is flexible. Verification entails labor and equipment costs that can vary greatly depending upon the degree of security that is sought. A customer that transmits very large numbers of payment orders in very large amounts may desire and may reasonably expect to be provided with state-of-the-art procedures that provide maximum security. But the expense involved may make use of a state-of-the-art procedure infeasible for a customer that normally transmits payment orders infrequently or in relatively low amounts. Another variable is the type of receiving bank. It is reasonable to require large money center banks to make available state-of-the-art security procedures. On the other hand, the same requirement may not be reasonable for a small country bank . . . . The type of payment order is another variable.[45]

The standard must be "flexible" because there are so many possible variables. The high level of variables does not lend support to the justification offered in support of reallocating commercial reasonableness to the judge—that security procedures are likely to be standardized. Rather, it suggests an almost inevitable need for a "fact-specific inquiry," which is within the province of the jury, not the court.

The second justification given in the official comment—that a "question of law standard leads to more predictability"—is apparently a suggestion that judges render more predictable decisions than juries. There is, however, no evidence that judges are generally more predictable than juries.[46] On the other hand, the proffered justification may be based on the belief that since judges (sometimes) publish their decisions, the written record will provide a better basis than a jury verdict for predicting a bank's responsibility in other cases. Even this is far from certain, however, because of the great variability in possible situations and the fact-specific nature of the decision, as discussed in the official comment. The large potential number of variables will cause each decision to almost inevitably turn on a case-by-case analysis of specific facts. As a result, one decision may not be helpful to predict future decisions based on a different combination of variables. Thus, even if one were to disregard the possible constitutional violation, the justifications offered in the official comment do not make a persuasive case for taking questions of commercial reasonableness away from the jury.

Finally, the official comment states that although commercial reasonableness is to be decided as a question of law, a second question, "[w]hether the receiving bank complied with the procedure" is a question

---

the preparation of uniform laws. *See* Rubin, *supra* note 29, at 771-73 (pointing out that lawyers on the committee had no interest in empirical research, although pertinent information could have been obtained by fairly simple surveys in far less time than the fourteen years it took for the process of revision).

45. U.C.C. §§ 4A-202 to -203 cmt. 4, para. 1.

46. *See infra* notes 173-74 and accompanying text.

of fact.[47] This second question—whether the bank did what it was supposed to do and complied with the pertinent standard it was required to meet—has typically been found to be within the jury's province,[48] and the drafters in this case took a position consistent with that traditional view of the jury's role. As we will next see, however, the drafters of revised Article 5 went one step further and mandated that the bank's conduct, *and* whether it met the standard, should be determined by the court as a matter of law.

B. SECTION 5-108(E)

The revised version of Article 5 of the UCC, which deals with letters of credit, has been adopted by a majority of the states.[49] Section 5-108 concerns the issuing bank's rights and obligations. Subsection (e) provides that "[a]n issuer shall observe standard practice of financial institutions that regularly issue letters of credit. *Determination of the issuer's observance of the standard practice is a matter of interpretation for the court.* The court shall offer the parties a reasonable opportunity to present evidence of the standard practice."[50]

In the critical second sentence, the drafters allocated to the court an issue that the official comment to Section 4A-202 declared to be a matter for the jury—whether the bank complied with the relevant standard. The question of whether a defendant met a particular standard has traditionally been a question for the jury, in both state and federal court.[51] Thus, by changing the allocation from jury to judge, the provision appears to

47. U.C.C. §§ 4A-202 to -203 cmt. 4, para. 2.

48. O'Neill v. Gray, 30 F.2d 776, 780 (2d Cir. 1929) (whether attorney conducted litigation in reasonably skillful manner was a jury question); City of Philadelphia v. Welsbach St. Lighting Co. of Am., 218 F. 721, 729 (3d Cir. 1915) (holding that since "the contract required tests to be made by any method sanctioned by standard practice," it was proper for trial court to submit to jury question of whether method followed was the one contemplated by the contract); Pac. Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 277 N.W. 226, 228 (Minn. 1937) (noting that the care required in performance of contractual duty is question for the jury); Passarello v. Lexington Ins. Co., 740 F. Supp. 933, 936 (D. Conn. 1990) (noting that a question of fact exists whether insurance broker complied with its duty of care in obtaining insurance requested by plaintiff); Guzzi v. Jersey Cent. Power & Light Co., 90 A.2d 23, 26 (N.J. Super. Ct. App. Div. 1952) (holding that the question of whether the defendant's installation and maintenance of gas supply to plaintiff's home conformed to standard practice in industry is question for the jury); Fund of Funds Ltd. v. Arthur Andersen & Co., 545 F. Supp. 1314, 1357, 1364 (S.D.N.Y. 1982) (holding that whether auditors' conduct was breach of obligation to client under GAAS and GAAP and whether it was a breach of engagement letter in failure to disclose irregularities were questions of fact for the jury). Courts have sometimes reserved to themselves the application of law to the facts in cases involving probable cause, such as malicious prosecution cases and false imprisonment cases. *See* Weiner, *supra* note 18, at 1910-18.

49. For an up-to-date list of state adoptions of Revised Article 5, see website of the National Conference of Commissioners of Uniform State Laws at http://www.nccusl.org.

50. U.C.C. § 5-108(e) (emphasis added). For an in-depth discussion of Section 5-108(e), see Margaret L. Moses, *The Uniform Commercial Code Meets the Seventh Amendment: The Demise of Jury Trials Under Article 5?*, 72 IND. L.J. 681 (1997).

51. *See supra* notes 16, 25 and accompanying text; *infra* note 65 and accompanying text.

impinge upon the jury-trial right, at least in cases where disputed material facts are at issue.

The nature and scope of what has been allocated to the judge in the second sentence of Section 5-108(e) must be analyzed in terms of the three sub-questions which it encompasses: (1) what is the standard that the bank must meet?; (2) what was the bank's conduct?; and (3) did the bank's conduct meet the standard? The drafters appear to have intended each of these sub-questions to be determined by the judge.

With regard to the standard in the first question, on its face, Section 5-108(e) does not necessarily require the court to determine the standard. It simply says that the court must determine if the bank *complied* with the standard. The official comment, however, leaves no doubt about the drafters' intent. It provides unequivocally that identifying and determining the nature and scope of the standard are matters for the court, not the jury.[52] Having a court determine a standard practice is not constitutionally troubling if the standard is a written one, embodied for example in a code or a set of rules, since judges have traditionally had the task of interpreting written documents.[53] Certain standard practices with respect to letters of credit, for example, are found in written form in the Uniform Customs and Practices for Documentary Credits ("UCP 500").[54] The problem, however, is that other standard practices are not written. The official comment makes this clear:

> The standard practice referred to in subsection (e) includes (i) international practice set forth in or referenced by the Uniform Customs and Practice, (ii) other practice rules published by associations of financial institutions, and (iii) local and regional practice. It is possible that standard practice will vary from one place to another. Where there are conflicting practices, the parties should indicate which practice governs their rights.[55]

---

52. The official comment for section 5-108(e) provides in pertinent part:

> Identifying and determining compliance with standard practice are matters of interpretation for the court, not for the jury. As with similar rules in Sections 4A-202(c) and 2-302, it is hoped that there will be more consistency in the outcomes and speedier resolution of disputes if the responsibility for determining *the nature and scope of standard practice is granted to the court, not to a jury*. Granting the court authority to make these decisions will also encourage the salutary practice of courts' granting summary judgment in circumstances where there are no significant factual disputes.

U.C.C. § 5-108(e) cmt. 1, para. 5 (emphasis added).

53. This stems from the system of pleading at common law. The terms of a contractual condition were required to go into the plea. Objections to the plea were demurrers, which raised an issue of law, requiring the court to deal with problems of interpretation. *See* A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 103 (1975). It has also been suggested that from the time of the eighteenth century, interpreting written documents has been allocated to the court largely because most jurors were illiterate. *See* Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 75 (1980); *see also* Weiner, *supra* note 18, at 1932.

54. The UCP 500, although not law, governs most letters of credit by virtue of a standard clause to this effect in the body of each letter of credit. *See Uniform Customs and Practices for Documentary Credits* (ICC Publication 500) (1993).

55. U.C.C. § 5-108(e) cmt. 8, para. 1.

According to the comment, in addition to being unwritten, standard practices may vary from one place to another, be in conflict, and yet, apparently, still be "standard." When such practices vary and conflict, it seems likely that disputed factual questions, which are appropriate for resolution by the jury, will arise.

A standard practice is essentially a trade usage, and when the practice is not embodied in a written trade code, it must be determined by establishing what the trade usage is in this respect. According to UCC Section 1-205, "*[t]he existence and scope of such a [trade] usage are to be proved as facts.*"[56] The official comment to Section 5-108(e), by asserting that determining the nature and scope of standard practice is always for the judge, appears in conflict with Section 1-205(2), which makes clear that the decision is only for the judge when the practice is written, but that otherwise it is to be proven as fact. This means that the jury must determine the disputed facts. Since official comments are not law, Section 1-205(2) clearly trumps the official comment to Section 5-108(e). Thus, if a bank were to assert that a particular practice was a standard practice in the industry, but the particular practice was not embodied in the UCP 500 or other written form, a court should follow Section 1-205(2) and require the scope and usage of the practice to be proved as facts, sending any disputed fact issues to the jury.

The second question underlying the determination of the bank's observance of standard practice is: what was the actual conduct of the bank? Determining what the bank did, that is, what steps it actually took, is clearly a matter of fact. If the action or conduct of the bank were so clear that no disputed facts would arise, no jury participation would be required. On the other hand, a bank's conduct could easily raise disputed fact issues. In *Bombay Industries v. Bank of New York*, for example, an issue was whether the bank had refused, in a timely manner, the documents presented by the beneficiary under the letter of credit.[57] The parties had waived a jury, but the court decided as a question of fact after a bench trial the issue of the timeliness of the bank's refusal of documents.[58] Thus, although Section 5-108(e) appears to require the judge to determine as a matter of law what the bank's conduct was in order to decide if its conduct accorded with standard practice, when this determination resolves a disputed factual question, in a jury case it should be

56. U.C.C. § 1-205(2) (emphasis added).

> A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

Id.

57. *See* No. 103064/95, 1997 WL 860671, *1 (N.Y. App. Div. May 21, 1997).

58. *See id.* It was determined that the bank had not properly refused the documents and had therefore wrongfully dishonored the letter of credit. *See id.*

determined by the jury.[59]

The final sub-question, concerning whether the bank's conduct complied with the standard practice, requires a decision maker, whether judge or jury, to make an evaluation of the facts in terms of their legal consequences. A duty to meet a particular standard may be imposed by statute, by contract, by common law or by trade usage. Whether that duty has been met or not is generally considered a fact question for the jury.[60] In a letter of credit case, the liability of a bank may turn upon whether its conduct came within the standard practice of the industry. Thus, the duty, while imposed by statute, is defined by trade usage. Since "determining the issuer's observance of the standard practice" depends upon determining three subsidiary issues—the standard practice, the bank's conduct, and whether the bank's conduct was consistent with the standard practice—a traditional analysis would require the jury to determine what the trade usage was (*i.e.* standard practice), resolve any factual disputes, draw appropriate inferences, and make the final decision as to the issuer's liability by determining if its conduct complied with the standard practice. Without apparent consideration of possible constitutional limitations, the drafters of Revised Article 5 drafted a statute that allocated all of these tasks to the court.

59. National Conference of Commissioners of Uniform State Laws ("NCCUSL") officials and members of the drafting committee have appeared to concede that determining the bank's conduct is a proper issue for the jury, even though this is not apparent from the face of the statute. *See infra* note 76; *see also*, James E. Byrne, *Revised UCC Section 5-108(e): A Constitutional Nudge to Courts*, 29 UCC L.J. 419, 423 (1997) ("If this issue [how long it took the bank to give notice] is in dispute, and there is contradictory evidence, the question is one of fact and within the scope of the right to trial by jury.").

60. O'Neill v. Gray, 30 F.2d 776, 780 (2d Cir. 1929) (deciding jury question whether attorney conducted litigation in reasonably skillful manner); City of Philadelphia v. Welsbach St. Lighting Co. of Am., 218 F. 721, 729-30 (3d Cir. 1915) (holding that because contract required test to be made by any method sanctioned by standard practice, it was proper for trial court to submit to jury question of whether method followed was the one contemplated by contract, and also whether tests made upon the device employed were pursuant to method sanctioned by standard practice); Fund of Funds Ltd. v. Arthur Andersen & Co., 545 F. Supp. 1314, 1357, 1364 (S.D.N.Y. 1982) (holding that whether auditor's conduct was breach of obligation to client under GAAS and GAAP, and whether it was breach of engagement letter to fail to disclose irregularities, were questions of fact for jury); Soc'y of Mt. Carmel v. Fox, 335 N.E.2d 588, 590 (Ill. App. Ct. 1975) (arguing defendant's alleged negligence "is a question of fact to be determined by application of professional standards and practices existing at the time the building was designed"); Pac. Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 277 N.W. 226, 228 (Minn. 1937) (holding care required in performance of contractual duty is question for jury); Guzzi v. Jersey Cent. Power & Lighting Co., 90 A.2d 23, 26 (N.J. Super. Ct. App. Div. 1952) (explaining question of whether defendant's installation and maintenance of gas supply to plaintiff's home conformed to standard practice in industry is question for jury). Courts have sometimes reserved to themselves the application of law to facts in cases involving probable cause, such as malicious prosecution cases and false imprisonment cases. *See* Weiner, *supra* note 18, at 1910-18. There is also a minority view expressed in certain North Carolina cases, which appears to give the trial judge authorization to pass upon the reasonableness of a party's conduct. These cases can also be explained, however, by the court's belief that only one inference could reasonably be drawn from the evidence. *See id.* at 1886-87.

C. SECTION 1-201(10)

Section 1-201(10), which contains the definition of "*conspicuous,*" provides that "[w]hether a term or clause is 'conspicuous' or not is for decision by the court."[61] Allocating to the court the determination of whether a term or clause is conspicuous is *not* constitutionally troubling if the task is consistent with a function the court has performed since the eighteenth century—interpreting written documents.[62] A close look at the task of determining if a term is conspicuous, however, suggests that the judge is not performing the function of interpretation. Interpretation consists of determining the meaning of a term or clause within its context, or of determining the legal effect of the term.[63] Determining whether a term or clause is conspicuous, however, does not involve interpreting its meaning or construing its legal effect. Rather, the question to be decided is whether a reasonable person reading the language ought to have noticed the particular term.[64] If reasonable persons could differ, the matter is for the jury.[65]

For the last few years, revisions of Articles 1, 2, and 2A, have all considered various definitions of conspicuous.[66] Since Article 1 has a function of harmonizing the other UCC articles, the Revised Article 1 drafters decided to await the decision of the other drafting committees and then either adopt a consistent definition, or perhaps move the defini-

---

61. U.C.C. § 1-201(10) (2000). This section provides as follows:
"Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

Id.

62. *See supra* note 53.

63. Sometimes "interpretation" is used in the same sense as "construction." Where defined differently, the difference is generally stated to be that construction is the process of determining legal effect, while interpretation is the process of determining the meaning of words used. *See e.g.*, Hornick v. Owners Ins. Co., 511 N.W.2d 370, 371 (Iowa 1993); RESTATEMENT (SECOND) OF CONTRACTS § 200 cmt. c (1981).

64. The definition in the present version of Article 1 says that a term is conspicuous "when it is so written that a reasonable person against whom it is to operate ought to have noticed it." U.C.C. § 1-201(10); *see also* U.C.C. art. 2 (Tentative Draft December 1999) (where Reporter's note describes the general test of conspicuous as whether "a reasonable person ought to have noticed").

65. *See* McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 356 (1991) ("If reasonable persons, applying the proper legal standard, could differ as to whether the employer was a 'member of a crew,' it is a question for the jury."); *see also* Grandchamp v. United Air Lines, Inc., 854 F.2d 381, 383 (10th Cir. 1988) (holding that a trial court's decision whether to send issue to jury is based on whether reasonable persons could differ); Smitley v. Cigna Corp., 640 F. Supp. 397, 400 (D. Kan. 1986) ("It is generally recognized that it is the jury's function to apply the reasonable person standard to a given fact situation . . . ."). On the other hand, if a term were so clearly conspicuous (or so clearly *not* conspicuous) that no reasonable person could decide otherwise, the judge should determine conspicuousness as a matter of law.

66. Changes were considered necessary to make clear what "conspicuous" means in an electronic context.

tion from those articles to Article 1. Thus, it is useful to look at the definitions in various proposed revisions of Articles 1, 2, and 2A to see whether "conspicuous" is likely to continue to be allocated to the court for decision.

In Revised Article 2, the drafters did not initially require the court to determine conspicuousness.[67] In the March 1997 draft, in a comment, the Article 2 drafters recognized that, in some instances, it would be more appropriate for a jury to resolve the question of conspicuousness.[68] The comment states, "[u]nlike 1-201(10), the definition does not state that the decision on conspicuous is for a court as a matter of law. Depending on the circumstances, the decision is for the trier of fact."[69]

The current drafts of Articles 2 and 2A, however, include a provision allocating conspicuousness to the court for decision.[70] As for the most recent version of Revised Article 1, the November 2000 draft indicated that the definition of conspicuous in Article 1 would be deferred until the completion of the drafting process for Articles 2 and 2A, presumably either to incorporate a consistent definition, or simply to move the definition agreed upon in Articles 2 and 2A from those articles to Article 1.[71] It appears likely, therefore, that the Revised Article 1 drafters will simply accept the definition agreed upon by the drafting committees of Articles 2 and 2A and will allocate conspicuousness to the court for decision.

Nothing in any of the comments or notes indicates why the drafters of Revised Article 2 changed their previously expressed view that the decision as to whether a term was conspicuous was sometimes more appropriate for a jury. Nor have any policy reasons been given for allocating this decision exclusively to the court as a matter of law. Other than the statement by the Article 2 drafters in the March 1997 draft that, depending on the circumstances, the decision on conspicuousness is for the trier of fact, no discussion of this issue is found in the notes or comments of Revised Articles 1, 2, or 2A. There is simply no focus on the jury-trial right or whether this allocation to the court impinges on the right.

---

67. *See* U.C.C. § 2-102(a)(7) March 1997 Draft. Drafts of UCC articles can be found at http://www.law.upenn.edu/bll/ulc/ulc.htm.

68. In the March 21, 1997 draft, Section 2-102(a)(7) provided as follows:

> "Conspicuous", with reference to a term, means so displayed or presented that a reasonable person against whom it is to operate would likely have noticed it or, in the case of an electronic message intended to evoke a response without the need for review by an individual, in a form that would enable the recipient or the recipient's computer to take it into account or react to it without review of the message by an individual. **[The last sentence in the July, 1996 draft was deleted. Compare 1-201(10), 2B-102(6).]**

U.C.C. § 2-102(a)(7), March 1997 draft, *available at* http://www.law.upenn.edu/bll/ulc/ucc2/397art2.htm.

69. *See* U.C.C. § 2-102(a)(7), comment following March 1997 draft of revised Article 2 *available at* http://www.law.upenn.edu/bll/ulc/ucc2/397art2.htm.

70. *See* U.C.C. § 2-102(10) November 2000 draft, *available at* http://www.law.upenn.edu/bll/ulc/ucc2/ucc20600.htm; and U.C.C. § 2A-102(a)(8), November 2000 draft of Article 2A, *available at* http://www.law.upenn.edu/bll/ucl/ucc2a/2a1100.htm.

71. U.C.C. art. 1 (Annual Meeting Draft 2000), *available at* http://www.law.upenn.edu/bll/ulc/ulc.htm.

It may be that the drafters of Revised Articles 2 and 2A went back to the original position of Section 1-201(10) in order to minimize controversy, in light of the level of controversy generated to date over other revisions in Article 2.[72] It may be that some reasonable rationale exists for exclusively allocating to the court the determination of conspicuousness. But no such rationale has been articulated, and the only mention of the issue suggested that an exclusive allocation to the court is inappropriate.

Having considered three specific provisions in the UCC that allocate matters to the court for decision, we now turn to a consideration of the constitutionality of such an allocation by various state law revision commissions, state bar committees, and state legislatures.

III. STATE RESPONSES TO UCC ALLOCATIONS TO THE COURT

One of the important goals of the sponsoring organizations and drafting committees of the Uniform Commercial Code and other uniform laws is that the laws be adopted and that they be adopted uniformly. A number of states, however, have adopted non-uniform laws precisely because of concern that the allocation to the court of factual matters for decision violates the state constitutional right to a jury trial. The first state to adopt a non-uniform version of Section 5-108(e) was New Jersey.[73] New Jersey's Law Revision Commission ("New Jersey Commission") had found that the second sentence of Section 5-108(e) as written appeared to violate New Jersey's Constitution.[74] That sentence provides that "[d]etermination of the issuer's observance of the standard practice is a matter of interpretation for the court."[75] The New Jersey Commission found that "[e]valuating whether a bank meets a standard practice is clearly a fact question . . . that require[s] jury determination. Since section 5-108(e) assigns an ordinary fact question to the court, it abridges the constitutional right of jury trial."[76] The New Jersey Commission thus rec-

72. In July 1999, NCCUSL, one of the two sponsoring organizations of the Uniform Commercial Code, did not approve the draft of Revised Article 2, which had already been approved by the other sponsoring organization—the American Law Institute ("ALI")—the previous May. The two Article 2 reporters resigned, and the drafting committee for Article 2 was reconstituted. *See* Joint Press Release of ALI and NCCUSL, dated August 18, 1999, *available at* http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

73. *See* N.J. STAT. ANN. § 12A:5-108 (West Supp. 2000). Section 4A-202(c) was passed by states without any focus on the constitutionality of giving a traditional issue like commercial reasonableness to the court to decide. This was no doubt in part due to the general deference of state legislators to the expertise of the UCC drafters. It was perhaps this lack of focus on the issue in Article 4A that persuaded the drafters of Article 5 they could go even farther in terms of reducing the jury's role.

74. *See* New Jersey Law Revision Commission, *Final Report, Uniform Commercial Code, Revised Article 5-Letters of Credit*, June 1996, on file with the author and *available at* http://www.lawrev.state.nj.us [hereinafter New Jersey Report].

75. U.C.C. § 5-108(e).

76. New Jersey Report, *supra* note 74, at 6. There is also a reference in the New Jersey Report to testimony of Fred Miller, Executive Director of the NCCUSL, who testified at hearings in New Jersey that the provision should be read so that the determination of the

ommended, and the Legislature ultimately adopted, a non-uniform version of the second sentence, which deleted the words "issuer's observance of." This left the sentence to read as follows: "Determination of the standard practice is a matter of interpretation for the court."[77] While this sentence no longer requires the court to determine whether the issuer observed the standard practice, it is still somewhat troubling. The court's determination of standard practice based on a written trade code, such as the UCP 500, does not raise constitutional issues because of the long tradition of courts interpreting written documents.[78] But some "standard practices" may not be written.[79] To the extent that there was a disputed issue about what constituted a non-written "standard practice," it would appear to be within the province of the jury to evaluate the credibility of the witnesses, weigh the evidence, and resolve the factual question.

Section 5-108(e) was also considered and analyzed by a Subcommittee of the Corporation, Banking and Business Law Section of the Pennsylvania Bar Association (the "Pennsylvania Committee"). The Pennsylvania Committee concurred with the New Jersey Commission, stating that "the Official Text as written could be read to permit the court to adjudicate whether the issuer actually complied with standard practices, and . . . there is a serious question whether the statute, if so read, would abrogate the constitutional right to a jury trial."[80] The Pennsylvania Committee thus proposed to adopt the same wording as recommended by the New Jersey Commission.[81]

The New York State Law Revision Commission ("New York Commission") went further than New Jersey and Pennsylvania. It first noted that allocating to the court the determination of whether an issuer observed the standard practice raised "a substantial question as to whether section 5-108(e) is in accord with the constitutional right to a jury trial guaranteed by both state and federal constitutions."[82] It further questioned whether, even if the provision passed constitutional muster, there was

---

conduct of the bank would still be a jury question. The New Jersey Commission nonetheless felt that any ambiguity in the statute was best resolved by adopting a clear, non-uniform version. *See id.* at 6-7.

77. *See id.* at 7.

78. *See supra* note 53.

79. *See* U.C.C. § 5-108(e) cmt. 8 (noting that standard practice may be local or regional, and may "vary from one place to another").

80. Report on the Pennsylvania Uniform Commercial Code Modernization Act of 1998, Bill No. ___, Prepared by the Uniform Commercial Code, Article 5, Subcommittee (The "Pennsylvania Committee") of the Corporation, Banking and Business Law Section of the Pennsylvania Bar Association, on file with the author.

81. According to the NCCUSL website, Pennsylvania has not yet adopted Revised Article 5, but the bill was introduced in 2000 and 2001 legislative sessions. *See* The National Conference of Commissioners on Uniform State Laws, *Introductions & Adoptions of Uniform Acts, at* http://www.nccusl.org/uniformact_factsheets/uniformacts-fs-ucca5htm (last visited Mar. 27, 2001). However, after New York adopted a non-uniform version that deleted the last two sentences of Section 5-108(e), the Pennsylvania Committee decided to follow New York instead of New Jersey in this regard.

82. The New York State Law Revision Commission Report on the Proposed Revised Article 5—Letters of Credit—of the Uniform Commercial Code [hereinafter the "New York Report"], on file with author, at 59. The New York Report also took note that,

sufficient rationale "to justify a departure from the well-settled New York statutory and common law policy favoring jury determination of disputed factual issues."[83] The New York Report then analyzed both the New York constitutional right to a jury trial and the New York statutory right—existing since 1876—to a jury trial with respect to factual issues in a lawsuit in which monetary damages are sought. It concluded that "both the New York Constitution and statutory law would seem to require a jury trial in letter of credit cases revolving around whether or not the issuer observed the standard practice."[84] The report found that "[t]he second sentence of Section 5-108(e) seemingly infringes impermissibly on the right to a jury determination of [the underlying] factual questions"[85] and concluded that the statute "on its face seems to deviate from well-settled constitutional, statutory and common law policy."[86] Unlike the New Jersey Commission and the Pennsylvania Committee, which approved the allocation to the court of the determination of standard practice, the New York Commission recognized that "[s]ometimes identifying the standard practice is a question of law, but sometimes it is a question of fact."[87] The New York Commission then recommended to the New York Legislature that it adopt a non-uniform version of Section 5-108(e), which would delete both the second and third sentences of the section, leaving only the first sentence: "An issuer shall observe standard practice of financial institutions that regularly issue letters of credit."[88] The New York Report concluded that such a change "reflect[s] sound and fundamental constitutional, common law and statutory New York policy, serv[ing] only to strengthen Article 5."[89]

"[r]emarkably, the official comment [to Revised Article 5] fails completely to address the possible constitutional issue raised by this provision." *Id.*

83. *Id.* at 60.

84. *Id.* at 63.

85. *Id.* at 63.

86. *Id.* at 67.

87. *Id.* at 64. The Report further noted in this regard,

> According to the Official Comment, standard practice may be a local or regional practice, §5-108(e), cmt. 8, thus involving a factual question as to the unwritten practices of local or regional banks. *Cf.* U.C.C. § 1-205(2) (stating that the existence and scope of a usage of trade are to be proved as facts). It is difficult to understand why determining what local banks do in a given situation, and whether that is standard practice, is a question of law for the court rather than a question of fact for the jury. As a result, restricting the standard practice issues to the court may well contravene the well-settled New York rule that resolution of disputed issues of material fact is ordinarily the province of the jury.

New York Report, *supra* note 82, at 66.

88. *Id.* at 72.

89. *Id.* at 73. The New York legislature followed the recommendation of the New York Commission to delete the last two sentences of 5-108(e). The governor signed the bill on September 20, 2000. *See* New York Legislature, *available at* http://leginfo.state.ny.us:82/nysleg/menugetf.cgi (search for bill number S08095). After New York adopted this non-uniform version of Section 5-108(e), the Pennsylvania Committee recommended tracking the New York version of this provision. In Pennsylvania Senate Bill 330, introduced in the 2001 legislative session, the last two sentences of Section 5-108(e) have been deleted, so

In addition to New York and New Jersey, two other states have adopted non-uniform versions of Section 5-108(e). Alabama adopted the version of Section 5-108(e) recommended by the New York Commission, eliminating the last two sentences of the provision,[90] and Wyoming omitted the second sentence.[91] Thus, a number of states apparently found that the statute deviated from their state's constitutional and/or statutory law and policy. Certainly, when NCCUSL and the ALI propose statutes which raise constitutionally troubling issues, the likelihood of non-uniform adoption increases, defeating the stated goal of encouraging uniformity. Moreover, the constitutional issue will probably be raised through litigation in many states where the uniform version was adopted, unnecessarily increasing the costs of a plaintiff seeking to preserve the jury trial right guaranteed by both state and federal constitutions. This raises a serious question, which will be discussed in Part VI of this article—whether allocation of matters between judge and jury is perhaps *not* the kind of issue that should be decided by UCC drafting committees, whose expertise is not in constitutional law nor in trial practice.[92]

Constitutional protection of the jury trial issue would, of course, not be determined by state law if a UCC case were brought in federal court. In that instance, the court would look to the Seventh Amendment to see if a state statutory provision violated the federal constitutional guarantee of a jury-trial right.

IV. SEVENTH AMENDMENT ANALYSIS OF UCC ALLOCATIONS TO THE COURT

Given the constitutionally troubling aspects of the three UCC provisions discussed above, what is likely to happen in federal court if the right to a jury trial is asserted in connection with one of the issues which the UCC has designated as a matter for the court? Does the Seventh Amendment require the judge to disregard the provision and send issues designated for the court to the jury in order to preserve the guarantee of a jury-trial right? A number of United States Supreme Court decisions shed light on that question. In *Byrd v. Blue Ridge Rural Electric Cooper-*

---

that the provision is identical to the version adopted in New York. Pennsylvania SB 330 is available at http://www.legis.state.pa.us/WU01/LI/BI/BT/2001/0/SB0330P0654.HTM.

90. *See* ALA. CODE § 7-5-108(e) (1997). In the "Alabama Comment," which follows the Official Comment to Alabama Code section 7-5-108(e), the following explanation is given, "Alabama elected not to adopt the last two sentences of uniform Section 7-5-108(e), which would reserve matters of standard practice to determination by the court. Determination of standard practice is a matter of fact to be pled and proved." ALA. CODE § 7-5-108 cmt. (1997).

91. *See* WYO. STAT. ANN. § 34.1-5-108(e) (Michie 1999).

92. The New York Commission noted with some degree of surprise and puzzlement that the drafters never addressed constitutional issues in their commentary. "Remarkably, the official comment fails completely to address the possible constitutional issue raised by this provision [5-108(e)]." New York Report, *supra* note 82, at 59. And further, "Curiously, there is nary a word even about the Seventh Amendment in the uniform commentary. See UCC § 5-108, official comment." *Id.* at 70 n.31.

ative, Inc.,[93] the question was whether judge or jury would decide the issue of whether an employer was immune from suit by the employee of a subcontractor under the state Workman's Compensation Act.[94] The South Carolina Supreme Court had ruled in a prior case that immunity under the statute was an issue for the court.[95] In *Byrd*, which was brought in federal court on diversity grounds, the Supreme Court held that there was a jury trial right on this issue in federal court.

The Court first considered whether *Erie Railroad Co. v. Tompkins*[96] would require the Court to defer to the state practice. One factor the Court found persuasive was that the decisions relied upon by the South Carolina Supreme Court "furnish[ed] no reason for selecting the judge rather than the jury."[97] The Supreme Court found that the state rule was "merely a form and mode of enforcing" not "intended to be bound up with the definition of the rights and obligations of the parties."[98] It was therefore not analogous to the reverse federal-state situation in *Dice v. Akron, Canton & Youngstown Railroad Co.*,[99] where the Supreme Court had found the right to jury trial was so substantial a part of the Federal Employers' Liability Act ("FELA"), that the Ohio court could not apply its rule that a particular question was for the judge rather than the jury.[100] In *Byrd*, which involved a federal court considering a judge-made state rule, the Supreme Court found the state rule did not enjoy the same level of deference as the federal jury-trial right in FELA cases, because there was no indication that the judge-made rule was a substantial part of the statute.

Of course, a state statute allocating a decision to the court, such as Section 4A-202(c), might be more persuasive to a federal court than a judge-made rule of decision, as in *Byrd*. On the other hand, the drafters of the UCC provisions examined earlier provided no discussion of the constitutional issues. Moreover, they provided rather perfunctory justifications in two provisions—Sections 4A-202(c) and 5-108(e)—and so far have given no reasons for the allocation to the court to determine "conspicuous." The reasons asserted in the official comments to Sections 5-108(e) and 4A-202(c) are the drafters' beliefs that: (1) judge based deci-

93. 356 U.S. 525 (1958).

94. *See id.* at 539-40. The South Carolina Industrial Commission administers the Workman's Compensation Act. On judicial review of the Commission's actions, the question of whether the claim is within the Commission's jurisdiction is determined as a matter of law by the court. When a case is initially brought in court, rather than before the Commission, immunity under the Workman's Compensation Act can be asserted by a defendant as an affirmative defense. In *Adams v. Davison-Paxon Co.*, 96 S.E.2d 566 (S.C. 1957), the South Carolina Supreme Court held that the judge rather than the jury should decide whether the defendant was a statutory employer and thus whether the defense was sustained.

95. Adams v. Davison-Paxson Co., 96 S.E.2d 566 (S.C. 1957).

96. 304 U.S. 64 (1938).

97. *Byrd*, 356 U.S. at 536.

98. *Id.*

99. 342 U.S. 359 (1952).

100. *See Byrd*, 356 U.S. at 536.

sions will be more consistent and speedier;[101] (2) allocation to the judge will encourage summary judgments;[102] (3) "security procedures are likely to be standardized in the banking industry;"[103] and (4) a "question of law standard leads to more predictability."[104] These reasons, which are essentially unverified hunches, suggest that the allocation is "merely a form and mode of enforcing," not "a substantial part of the cause of action,"[105] and not "intended to be bound up with the definition of the rights and obligations of the parties."[106] As such, a federal court might refuse to enforce a provision allocating a decision to the judge on the ground that the allocation was not a substantial part of the cause of action.

An even stronger reason for not enforcing the allocation is the federal policy in favor of jury trials. The Court in *Byrd* looked at the question of whether the federal system should defer to state rules in order to avoid a different outcome because the federal forum applied its own rule.[107] It found, however, that even if the outcome might be affected, that was not the only consideration.

The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. The policy of uniform enforcement of state-created rights and obligations cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury.[108]

The Court then concluded that the federal court should not follow the state rule because of the "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts."[109] It noted that "in light of the influence of the Seventh Amendment, the function assigned to the jury 'is an essential factor in the process for which the Federal Constitution provides.'"[110] The Court also concluded that it was not so clear that a different outcome would result from the fact that the jury would decide the issue. It stated that "the likelihood of a different result [was not] so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome."[111] Thus, in *Byrd*, the Court did not hesitate to

101. U.C.C. § 5-108(e) cmt. 1, para. 5 (2000).
102. *See id.*
103. U.C.C. § 4A-203 cmt. 4, para.2 (2000).
104. *Id.*
105. *Byrd*, 356 U.S. at 536.
106. *Id.*
107. *See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945).
108. *Byrd*, 356 U.S. at 537-38 (citations omitted).
109. *Id.* at 538.
110. *Id.* at 539 (citing Herron v. S. Pac. Co., 283 U.S. 91, 95 (1931)).
111. *Id.* at 540.

override an established state practice regarding the judge-jury allocation in order to send disputed factual issues to the jury.

In a more recent case, *Feltner v. Columbia Pictures Television, Inc.*,[112] the Supreme Court overrode a federal statute that allocated a matter to the court rather than to the jury. Feltner had been found liable for copyright law violation when his television stations continued to show certain programs after Columbia Pictures revoked his license to show them. Columbia then opted, as permitted by statute, to seek statutory damages rather than actual damages.[113] The statute provided that statutory damages would consist of an amount per infringement of between $500 and $20,000 as "the court deems just."[114] The district court's decision denying Feltner's request for a jury trial and awarding statutory damages of $8,800,000 was affirmed by the Ninth Circuit Court of Appeals. In reversing and remanding for a jury trial on the issue of amount of statutory damages, the Supreme Court held that a jury trial was required under the Seventh Amendment.[115] The Court also emphasized historical evidence that "the consistent practice at common law was for juries to award damages."[116] *Feltner* thus demonstrates that the Court will not uphold a federal statutory provision that departs from the traditional allocation to the jury.

Thus, the Court in *Byrd* overrode a state practice of allocating a specific issue to the court and, in *Feltner,* struck down a provision of a federal statute requiring a court to determine damages. However, the Court took a less traditional view of the jury trial right in *Markman v. Westview Instruments, Inc.*[117] In *Markman*, the Supreme Court decided that interpreting the terms of art in a patent case, including any underlying disputed facts, was exclusively a matter for the court.[118] The result was one that was strongly sought by most of the judges of the Federal Circuit, and appears to be in part based upon the Court's deference to that circuit's specific expertise in the patent area as well as its need to administer an appellate system that can promote uniformity nationwide.[119]

Some proponents of reducing the jury's role in UCC cases might view *Markman* as support for reallocating issues to the court. As will be discussed below, however, analysis of *Markman* suggests that application of

112. 523 U.S. 340 (1998).
113. *See* 17 U.S.C. § 504 (1994).
114. *Feltner*, 523 U.S. at 340.
115. Columbia's position had been that the damages were equitable, and therefore there was no jury-trial right. The Supreme Court, however, looked at historical evidence which showed that in the eighteenth century in England and in this country, copyright suits for monetary damages were tried in courts of law, and thus, before juries. *Id.* at 341. The Court distinguished *Tull v. United States*, 481 U.S. 412 (1987), where civil penalties claimed by the government under the Clean Water Act were determined by the court. The Court noted that no evidence was presented in *Tull* that juries historically had determined the amount of civil penalties a party must pay the government. *See Feltner*, 523 U.S. at 340.
116. *Feltner*, 523 U.S. at 353.
117. 517 U.S. 370 (1996).
118. *See id.* at 390.
119. For a fuller discussion of this point, see Moses, *supra* note 7, at 212-17, 231-37.

the Seventh Amendment guarantee in private contract actions would be viewed by the Court quite differently from the application of the guarantee in the context of determining terms of art in a patent case.

Markman was a patent infringement case. The issue in *Markman* was whether Westview had violated Markman's patent with respect to a dry-cleaning system that tracked the progress of clothing through the dry-cleaning process.[120] A jury found infringement, but the district court granted Westview judgment as a matter of law.[121]

The question on appeal was whether judge or jury should construe the terms of art within the patent's claim. Claim construction has traditionally been considered a matter of law for the court because it involves the interpretation of written documents.[122] But patent claim construction can be complex, particularly since the claims are not written for the public, but for those skilled in the particular art. Frequently, expert testimony is required to explain technological usages and meanings of terms within the claim. The disputes involving the meaning of these underlying terms of art have traditionally been decided by a jury.[123] Markman argued that the District Court erred by substituting its construction of the disputed claim for the one the jury had presumably given it. In affirming the District Court, the Federal Circuit held that the interpretation of claim terms was "the exclusive province of the court."[124]

In affirming the Federal Circuit, the Supreme Court employed a novel analysis of the Seventh Amendment's requirements. Initially, the analysis was consistent with traditional jurisprudence. Justice Souter referred to the historical test, asking whether the cause of action was tried at law at the time of the founding or was analogous to one that was.[125] Justice Souter, however, omitted any reference to the second prong of the historical test, which is whether the remedy sought is money damages.[126] In an infringement case, money damages are generally sought. Thus, under a traditional analysis, it would be clear that the case had a jury-trial right and that all disputed material factual issues would go to the jury. In *Markman*, however, after acknowledging that an infringement case has a

120. *See Markman*, 517 U.S. at 370.

121. *See id.* at 375. Ultimately the *Markman* case turned on the meaning of the term "inventory", which the District Court believed encompassed "both cash inventory and the actual physical inventory of clothing." *Id.* It found that Westview's system did not infringe Markman's patent because the Westview system could not track articles of clothing throughout the cleaning process and generate reports about their status and location, and therefore did not have the "means to maintain an inventory total." *Id.* Westview's system merely recorded an inventory of receivables by tracking invoices and transaction totals.

122. *See supra* note 53.

123. Markman v. Westview Instruments, Inc., 52 F.3d 967, 991 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996); *see also*, A.H. WALKER, TEXTBOOK ON THE PATENT LAWS OF THE UNITED STATES OF AMERICA § 536 (4th ed. 1904) ("[W]here the question of infringement depends on the construction of the patent, and that construction depends upon a doubtful question in the prior art, the latter question of infringement should also be left for the jury to decide.").

124. *Markman*, 517 U.S. at 376 (citing *Markman*, 52 F.3d at 967).

125. *See id.*

126. *See supra* notes 8-11 and accompanying text.

jury trial right, Justice Souter asserted a *different* second prong: "whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791."[127] This formulation runs counter to Supreme Court jurisprudence concerning the substance of the jury-trial right. Prior to *Markman*, the Court did not extract a subsidiary issue from within a cause of action and determine whether it alone had a jury-trial right.[128]

The Court's traditional jurisprudence has been one of approving changes to various aspects of the civil jury trial so long as the substance of the right is maintained. The Court has emphasized that the Seventh Amendment is *not* intended "to perpetuate in changeless form the *minutiae* of trial practice as it existed in the English courts in 1791."[129] Rather, what is critical is that such practices do "not curtail the function of the jury to decide questions of fact."[130] Justice Souter's analysis sounds as though it fits within the Court's traditional Seventh Amendment jurisprudence, since it uses the words "preserved the substance of the common law right." But his test turns the traditional analysis on its head by declaring that the substance to be preserved is *only what existed in 1791.* Instead of following the traditional position that practices can be freely changed, so long as the jury's fact-finding role is preserved, Justice Souter's approach requires each subsidiary issue to have been decided by a jury in 1791, or it is not part of the substance of the Seventh Amendment guarantee. In other words, instead of adapting jury practices to modern times while preserving the substance of the jury-trial right, Justice Souter has asserted that 1791 practices will determine if sending a particular subsidiary issue to the jury was part of that substance. If this approach were generally followed, it could greatly restrict the right to a jury trial. There are, however, a number of limiting factors set forth in *Markman*, which suggest that this approach will not be widely used.

A unique mix of elements appeared to influence the Supreme Court's decision. The Federal Circuit, by an eight-person majority, had made clear what it wanted in *Markman*—de novo review of all constructions of patent claims—which it could *not* have if juries or judges in bench trials decided underlying terms of art as questions of fact.[131] De novo review, in which the appellate court owes no deference to any previous decision-

127. *Markman*, 517 U.S. at 376.

128. The sole previous use of this language was in *Tull*, but there it referred to whether the jury should determine a civil penalty, not to a subsidiary issue within a cause of action. And the *Tull* decision to take the damage issue away from the jury was criticized recently by the Court in its decision in *Feltner*. In that case, the Court distinguished the *Tull* decision on damages. *Feltner*, 523 U.S. at 355. The Court said the decision was "arguably dicta," *id.* at 354 n.8, and that it was "in tension" with other Supreme Court cases. *Id.* at 355 n.9.

129. Dimick v. Schiedt, 293 U.S. 474, 490 (1934) (Stone, J., dissenting).

130. *Id.* at 491.

131. The standard of review for a trial judge's finding of fact is clear error; for a jury's finding, it is substantial evidence to support the verdict. *See* Markman v. Westview Instruments, Inc., 52 F.3d 967, 991 (Fed Cir. 1995) (Mayer, J., concurring), *aff'd*, 517 U.S. 370, 391 (1996).

maker, is the standard of review for questions of law. If patent claims could be construed exclusively as a matter of law, then the Federal Circuit would have complete power of de novo review over the construction of claims of a particular patent decided by any court in the country without any deference to jury or trial judge as a fact finder. Since the same patent can be infringed in different ways or by different parties, having de novo review of the construction of all patent claims in the country should, in the view of the Federal Circuit, lead to a more consistent and uniform construction of patent claims. The Supreme Court showed apparent deference to the Federal Circuit in affirming its decision.[132] The Court was particularly concerned with the need to ensure uniformity in the treatment of patents.[133] It found that "the importance of uniformity in the treatment of a given patent as an independent reason to allocate all issues of construction to the court."[134] It also stated "the limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public."[135] If such limits were not known, then "a 'zone of uncertainty . . . would discourage invention' . . . and 'the public [would] be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights.'"[136] Finally, the Supreme Court noted that when Congress created the Federal Circuit Court of Appeals, a major purpose was to increase uniformity, in order to "strengthen the United States patent system in such a way as to foster technological growth and industrial innovation."[137] All of these reasons suggest that the impetus for the Court's decision in *Markman* was a con-

132. For an in-depth discussion of the Supreme Court's deference to the Federal Circuit's technical and administrative expertise in managing the patent system, see David Silverstein, *Patents, Science and Innovation: Historical Linkages and Implications for Global Technological Competitiveness*, 17 RUTGERS COMPUTER & TECH L.J. 261, 310 (1991) ("An overburdened Supreme Court, routinely refusing to review patent cases, made it inevitable that the [Federal Circuit] would wield far more power than many supporters of this change had anticipated. For all practical purposes, the [Federal Circuit] has become the 'court of last resort' in patent cases, and its holdings the 'law of the land.'") and Thomas K. Landry, *Certainty and Discretion in Patent Law: The On Sale Bar, the Doctrine of Equivalents, and Judicial Power in the Federal Circuit*, 67 S. CAL. L. REV. 1151, 1153 n.8 (1994) (stating that until recently the Supreme Court was loath to hear patent cases unless the cases focused upon issues other than patent doctrine).

133. The Supreme Court did not rely upon the reasoning of the Federal Circuit in reaching its decision. For example, it did not adopt, or even refer to the Federal Circuit's position that one of the reasons that underlying facts in a patent claim should be determined by the court was that a patent was more like a statute than a contract. *See Markman*, 52 F.3d at 985-87. Also, the Supreme Court did not refer to a line of cases that the majority of circuit judges claimed supported its position that claims construction was exclusively for the court. *See id.* at 977. The existence of such a line of cases was strongly disputed by the concurring and dissenting judges. *See id.* at 989-90 n.2, 1017-25. *See generally*, Moses, *supra* note 7, at 220-23, 237 n.375.

134. *Markman*, 517 U.S. at 390.

135. *Id.*

136. *See id.* (citing Gen. Elec. Co. v. Wabash Appliance Corp., 304 U.S. 364, 369 (1938); United Carbon Co. v. Binney & Smith Co., 317 U.S. 228, 236 (1942); Merrill v. Yeomans, 94 U.S. 568 (1876)).

137. *Markman*, 517 U.S. at 390.

viction that the Federal Circuit must have de novo review of the construction of patent claims in order to accomplish the important goal of having each patent claim always construed in the same way everywhere in the United States.

The Court's stated policy reasons for allocating factual issues to the court in *Markman* are thus similar to those undergirding another strand of its traditional jurisprudence—that of finding the Seventh Amendment inapplicable to federal statutory schemes involving public rights.[138] Although this strand of the court's jurisprudence has dealt only with non-Article III courts, and *Markman* was decided by an Article III court, the similarities are nonetheless quite apparent. In *Markman*, the Court considered both the heavily federally regulated area of patent law,[139] and the "public" nature of each patent in deciding that disputed factual issues underlying the construction of claims of a particular patent are not subject to Seventh Amendment protection. These particular elements—the high degree of federal regulation, the rights of the public to know the extent of protection accorded a given patent, and the need for uniformity of patent claims construction at the national level to promote the nation's growth and innovation—are not present in most Seventh Amendment cases, and certainly not in UCC cases. UCC cases are far more likely to involve private rights than public rights. They generally do not involve a high degree of federal regulation. There is no need for an appellate court to have de novo review, because unlike the patent area, there is no particular public interest that would be harmed by different factual findings made in different commercial cases. Moreover, UCC cases on appeal are not heard by a single federal appellate court like the Federal Circuit, but rather by many different federal and state appellate courts. It is unlikely that even if uniformity of factual interpretations were considered important, it would be achieved when decisions are made in such a multiplicity of jurisdictions. Thus, none of the reasons that appear to have informed the Court's decision in *Markman* seem applicable to UCC cases.

A further indication that *Markman* is a narrow exception to the Court's traditional Seventh Amendment jurisprudence is the unanimity of the decision. The different justices have tended to write passionate dissents whenever they believed that Seventh Amendment protection was being either contracted or expanded.[140] In *Markman*, however, no justice dis-

138. For a fuller discussion of this strand of Seventh Amendment jurisprudence, see Moses, *supra* note 7, at 212-17, 231-37.

139. Patent law has a number of unique federally-imposed features. It is entirely federal, and all patent appeals are heard by one circuit court, the Federal Circuit Court of Appeals. In addition, all patent attorneys and patent agents who practice before the United States Patent and Trademark Office ("PTO") must pass an examination and be registered with the PTO. *See* 35 U.S.C. § 31 (1994); 37 C.F.R. §§ 10.1-.170 (1999).

140. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979) (Rehnquist, J., dissenting) (dissenting from the majority holding that use of offensive collateral estoppel did not violate petitioners' Seventh Amendment right to a jury trial); Colgrove v. Battin, 413 U.S. 149, 166 (1973) (Marshall & Stewart, JJ, dissenting) (rejecting the majority view upholding a six person jury in a civil case); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511 (1959) (Harlan, Whittaker, & Stewart, JJ., dissenting) (protesting the Court's holding that

sented or even concurred separately. This suggests that no one on the Court viewed *Markman* as making any significant change in the Court's traditional Seventh Amendment jurisprudence.

Markman itself contains express language limiting its application to the particular situation in the case. The Court observed, "[w]e need not in any event consider here whether our conclusion that the Seventh Amendment does not require terms of art in patent claims to be submitted to the jury supports a similar result in other types of cases."[141] The Court further stated that it was *not* deciding, "the extent to which the Seventh Amendment can be said to have crystallized a law/fact distinction . . . or whether post-1791 precedent classifying an issue as one of fact would trigger the protections of the Seventh Amendment if (unlike this case) there were no more specific reason for decision."[142] The Court here appears to indicate that it is *not* saying that a precedent, which arose after 1791, and which sent factual issues to the jury, was not protected by the Seventh Amendment. It seems unlikely that the Court in future cases would generally limit Seventh Amendment protection to law/fact distinctions made in 1791, in light of its consistent prior jurisprudence holding that the substance of the Seventh Amendment must be preserved, not the forms and practices which existed in 1791.[143] Such a limitation seems particularly unlikely in light of the Court's repeated and consistent emphasis on the importance of the jury's fact-finding role.[144]

Supreme Court cases decided after *Markman* appear to confirm that any change in Seventh Amendment jurisprudence caused by the *Markman* decision did not have major significance outside of the narrow area of patent claim construction.[145] In *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, a patent infringement case involving the doctrine of equivalents, one question was whether judge or jury should apply the

---

the Seventh Amendment required a jury trial for legal rights tried with equitable rights); Galloway v. United States, 319 U.S. 372, 396 (1943) (Black, Douglas, & Murphy, JJ., dissenting) (objecting to the majority's sanctioning the expanded use of directed verdict).

141. *Markman*, 517 U.S. at 383-84 n.9.

142. *Id.* at 384 n.10 (citations omitted).

143. *See Galloway*, 319 U.S. at 390-91. The Court stated:

> The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were "the rules of the common law" then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries.

Id.

144. The Seventh Amendment "requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative." Walker v. N.M. & S. Pac. R.R. Co., 165 U.S. 593, 596 (1897).

145. *See e.g.*, City of Monterey v. Del Monte Dunes, 119 S. Ct. 1624 (1999); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998); Warner-Jenkinson Co., v. Hilton Davis Chem. Co., 520 U.S. 17 (1997).

doctrine of equivalents.[146] The Federal Circuit, en banc, had held this was a question of fact to be determined by the jury.[147] The Supreme Court, while declaring that it did not have to decide this issue in order to resolve the question before the Court, nonetheless acknowledged that there was "ample support in [its] prior cases to support the Federal Circuit's holding."[148] The Court concluded, "[n]othing in our recent decision in *Markman v. Westview Instruments, Inc.*, necessitates a different result than that reached by the Federal Circuit."[149] This suggests that although the Court found the Seventh Amendment did not protect the jury trial right with respect to determining disputed terms of art in a patent claim, it still views patent infringement issues—particularly the doctrine of equivalents—as within the province of the jury.[150]

The Court also followed a traditional Seventh Amendment analysis in *Feltner v. Columbia Pictures Television, Inc.*[151] in holding that a provision of the Copyright Act of 1976[152] violated the right to a jury trial. It applied the historical test in a manner consistent with the first strand of traditional Seventh Amendment jurisprudence, looking at both the nature of the action *and* the remedy sought, to determine if there was a jury-trial right. The decision was also consistent with the second strand, which emphasizes the importance of the jury's fact-finding role. The *Feltner* Court held that the determination of damages is a factual question "peculiarly within the province of the jury."[153] Thus, making no reference to the *Markman* case, the Court in *Feltner* followed a traditional Seventh Amendment analysis to find unconstitutional a provision of a federal statute that impinged upon the jury's province of fact finding.

In *City of Monterey v. Del Monte Dunes*, the Supreme Court affirmed lower court decisions that issues were properly sent to the jury in an inverse condemnation action.[154] Del Monte Dunes owned beachfront property, which it had not been able to develop because the City of Monterey kept changing the requirements for approval. Del Monte ultimately sued the city under 42 U.S.C. § 1983, alleging, *inter alia*, a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and an uncompensated and therefore unconstitutional regulatory

146. *See Warner-Jenkinson*, 520 U.S. at 21. The doctrine of equivalents permits a finding of infringement even in the absence of literal infringement "if there is 'equivalence' between the elements of the accused product or process and the claimed elements of the patented invention." *Id.*

147. *See* Hilton Davis Chem. Co. v. Warner-Jenkinson Co., 62 F.3d 1512, 1520 (Fed. Cir. 1995) (en banc) (per curiam), *rev'd*, 520 U.S.17 (1997).

148. *Warner-Jenkinson*, 520 U.S. at 38.

149. *Id.* (citation omitted).

150. The court did leave open, however, the possibility that it might reach a different conclusion if the issue were squarely presented to it. *See id.* at 39.

151. 523 U.S. 340 (1998).

152. 17 U.S.C. §§ 101-1101 (1994).

153. *Feltner*, 523 U.S. at 353 (quoting Dimick v. Schiedt, 293 U.S. 474, 486 (1935)).

154. 526 U.S. 687 (1999).

taking.[155] A jury verdict in favor of Del Monte on the takings claim was affirmed by the Ninth Circuit.[156] One of the questions before the Supreme Court was whether issues of liability were properly submitted to the jury on the takings claim. The analysis of the majority, although using some of the language of the *Markman* decision, in fact adopted a traditional jurisprudential approach. Unlike the *Markman* formula, which did not include the remedy prong of the historical test, Justice Kennedy applied both prongs—the nature of the action and the remedy sought—to see if such an action or its analogue would have had a jury-trial right at common law in 1791. He concluded that this was an action at law. With respect to the second prong of the *Markman* test—whether the particular trial decision must fall to the jury in order to preserve the substance of the common law right as it existed in 1791—Justice Kennedy reframed the question as "whether the particular issues of liability were proper for determination by the jury."[157] He then determined that if the issue is of the kind that is proper for jury resolution, then it must go to the jury to preserve the jury-trial right. This formulation is much closer to traditional Seventh Amendment jurisprudence, where the Court has held that the jury's fact-finding role must be preserved as the substance of the jury-trial right. Ultimately, the majority held that the issues were fact-based, and properly submitted to the jury. Thus, the analysis in *Del Monte* suggests that the Court has not abandoned its traditional Seventh Amendment jurisprudence with respect to the importance of sending factual issues in actions at law to the jury.[158]

The *Markman* case, as noted above, is inconsistent with much of traditional Seventh Amendment jurisprudence. It appears highly unlikely, however, that the Court would apply a *Markman* analysis in a UCC case brought in federal court to take facts away from the jury because the rights involved in commercial and contract cases are clearly private rights, which have had a long tradition at common law as actions at law for money damages, entitled to a trial by jury.

V. POLICY CONSIDERATIONS

Even if one were to believe that the specific allocations to the court in the UCC do not violate the constitutional right to a jury trial, one must

155. *See id.* at 698. The Fifth Amendment provides that private property shall not be taken for public use without just compensation. *See* U.S. CONST. amend. V. The Takings Clause of the Fifth Amendment has been applied to the states as part of the meaning of the Due Process Clause of the Fourteenth Amendment. *See id.* amend. XIV, §1. Therefore, an uncompensated takings claim is brought under the Fourteenth Amendment Due Process Clause.

156. *See Del Monte*, 526 U.S. at 699.

157. *Id.* at 718.

158. The dissenters concluded there was no right to a jury trial because in their view an inverse condemnation action was not significantly different from a direct condemnation action. They referred to law that found no right to a jury trial in a direct condemnation action, even though it was characterized as an action at law. *See Del Monte*, 526 U.S. at 733 (O'Connor, Souter, Ginsburg, & Breyer, JJ., dissenting).

nonetheless consider whether policy considerations support the gradual erosion of the jury in UCC cases. Rhetoric favoring and opposing the civil jury has been and continues to be deliberately developed by groups who favor specific political agendas. The best organized, according to Stephen Daniels and Joanne Martin, authors of *Civil Juries and the Politics of Reform*, are the conservative organizations and the advocacy-oriented corporate foundations and think tanks which would like to limit or eliminate the civil jury.[159] In recent times, many businesses have expressed hostility toward juries,[160] asserting that juries have attitudes that are anti-business,[161] and that they tend to decide cases against the defendant with the deepest pockets.[162] The rhetoric against juries is designed to develop attitudes and policies that favor reducing the juries' role.[163] The sections below will review the anti-jury rhetoric, and will consider the gap between this rhetoric and empirically-based studies of jury performance.

A. RHETORIC ON REDUCING ROLE OF THE JURIES

A reason typically offered for reducing the role of juries is that in certain areas, juries do not do as good a job as judges. Assertions are made that judges are more capable of correctly deciding complicated or technical issues and are more likely to render decisions that are predictable, consistent, and efficient. Viewed from this perspective, juries are seen as unpredictable,[164] less likely to understand complex issues,[165] less sympathetic to large business interests,[166] and more likely to make awards

159. STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 246 (1995). The authors specifically refer to the work of the Manhattan Institute, the John M. Olin Foundation, and the Monsanto Foundation.

160. John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOTIATION L. REV. 1, 51 (1998).

161. *See id.* at 34-35.

162. In a *Business Week* survey of senior corporate executives, a main reason given by them as to why litigation and civil justice costs were so high was "the knowledge that major corporate defendants and their insurance companies have deep pockets." Mark N. Vamos, *The Verdict from the Corner Office*, BUS. WK., Apr. 13, 1992, at 66, *cited in* Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 329 (1998) [hereinafter Hans, *Illusions*].

163. In an article in the ABA Journal on the anti-jury movement, Mark Curriden asserted, "The movement against juries has been so successful that even many conservative legal scholars now fear an erosion in the moral authority of the American jury system and the constitutional right to have conflicts decided by juries." Mark Curriden, *Putting the Squeeze on Juries*, A.B.A. J., Aug. 2000, at 53.

164. *See* Valerie P. Hans, *Attitudes Toward the Civil Jury: A Crisis of Confidence*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 268-69 (Robert E. Litan ed., 1993) (many business executives believe civil juries are unpredictable) [hereinafter Hans, *Attitudes*]; James E. Byrne, *Revised UCC Section 5-108(e): A Constitutional Nudge to Courts*, 29 UCC L.J. 419 (1997) ("The involvement of juries has only exacerbated the widely held perception that the system is arbitrary and unable to produce sound principled results.").

165. *See* Jonathan D. Casper, *Restructuring the Traditional Civil Jury: The Effects of Changes in Composition and Procedures*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 416-19 (Robert E. Litan ed., 1993) (discussing criticisms of the traditional jury).

166. Sandra Stern, *Revised Article 5 Brings Uniformity, Predictability to Letters of Credit*, 143 NEW JERSEY L.J., Feb. 26, 1996, at 803.

based on the deep pocket of the defendant.[167] Jury trials are also criticized as an inefficient use of judicial resources, because of the additional time added to a trial for jury selection and deliberation, as well as for side bar conferences and resolving evidentiary disputes.[168] It has also been suggested that when decisions as to factual issues are allocated to judges to determine as a matter of law, more cases will be decided on summary judgment, creating greater efficiency in the court system.[169]

B. Empirical Data on Jury Performance

Aside from possible constitutional objections, a major objection to reducing the jury's role and thereby expanding the role of the judge is that in large measure, criticisms of the jury's performance are not supported by empirical studies of jury performance. These studies show that in general, juries perform quite competently.[170] With respect to a jury's handling of technical or complex issues, a number of studies have concluded that juries handle complex issues well, and that there is no reason to believe that judges fare better in the face of complexity than jurors.[171]

---

167. *See* Lande, *supra* note 160, at 34-35; *see also* Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 LAW & CONTEMP. PROBS. 269 (1989) (for an account of the role of the insurance industry in blaming the civil justice system, and particularly juries, for the lack of affordable insurance, in order to divert attention away from a solution justifying substantially greater industry regulation).

168. *See* Casper, *supra* note 165, at 417. Proponents of the jury assert that the anti-jury movement is motivated by powerful interests groups, which cannot control the jury process. Arthur Bryant, executive director of Trial Lawyers for Public Justice, put it this way, "Money talks in Congress. Money talks with the executive and regulatory branches. But money has no influence on juries. . . . You can't lobby juries or buy their votes, and that scares a lot of powerful people who want the control." Curriden, *supra* note 163, at 54.

169. Paragraph 5 of official comment 1 to 5-108(e) provides in pertinent part:

> [I]t is hoped that there will be more consistency in the outcomes and speedier resolution of disputes if the responsibility for determining the nature and scope of standard practice is granted to the court, not to a jury. Granting the court authority to make these decisions will also encourage the salutary practice of courts' granting summary judgment in circumstances where there are no significant factual disputes.

U.C.C. § 5-108(e) cmt.1, para.5 (revised 1995).

170. *See* Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 234 (Robert E. Litan ed., 1993); Mark Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1109 (1996) ("[S]erious students of the jury are virtually unanimous in their high regard for the jury as a decision-maker. . . . [R]esearchers concur that jurors on the whole are conscientious, that they collectively understand and recall the evidence as well as judges, and that they decide factual issues on the basis of the evidence presented."); Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992). For other discussions of jury competence, see Daniels, *supra* note 167, at 269; VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY (1986); Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 SUFFOLK U. L. REV. 1205 (1994); Christy A. Visher, *Juror Decision Making: The Importance of Evidence*, 11 LAW & HUM. BEHAV. 1 (1987); and Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751 (1999).

171. *See* Lempert, *supra* note 170, at 234. John Guinther, in his book, *The Jury in America*, noted that a research study published by the Federal Judicial Center in 1981,

There is little if any empirical evidence to suggest that decisions made by judges are superior to those made by juries.[172] Moreover, there are no studies showing that judges render decisions that are more predictable or consistent than those of juries,[173] and there are studies suggesting the opposite.[174]

A recent article noted that lack of predictability is a problem with arbitrators and judges, as well as with jurors. Businesses that have chosen arbitration in order to avoid a jury trial have sometimes been surprised by the result.

> Many businesses have been knee-deep in an arbitration hearing only to come to the startling and frightening realization that the unpredictability of 12 jurors has been replaced by the unpredictability of one individual. Perhaps even more significant, business combatants came to realize that even well trained professional arbitrators are not completely immune to the emotion, sympathy or prejudice often found in lay jurors. This is because disputes often come down to questions of credibility rather than "business realities." As a result,

---

which had been designed to assay the abilities of juries in complicated cases, concluded that:

> Judges and lawyers were uniformly complimentary of the diligence of the juries. With slightly less consensus, they also affirmed the validity of the juries' deliberative processes . . . . Almost without exception, respondents who acknowledged the existence of difficult issues in their jury trials also mentioned explicitly that *the jury had made the correct decision or that the jury had no difficulty applying the legal standards to the facts.*

JOHN GUINTHER, THE JURY IN AMERICA 213 (1988) (emphasis in original).

172. In their article, *Trial by Jury or Judge: Transcending Empiricism*, *supra* note 170, at 1151-53, Kevin M. Clermont and Theodore Eisenberg note that the most important determinant of a verdict is not whether the case is decided by a judge or a jury, but rather the strength of the evidence. They cite research which supports the view of juries as good factfinders, not overly generous on awards, and able to handle complex cases. With respect to a comparison between the performance of judges and juries they state:

> [T]he evidence, such as it is, consistently supports a view of the jury as generally unbiased and competent, or at least so compared to a judge. . . . Related research indeed suggests that a jury could even outperform a judge, because the judge is also human and groups typically outperform individuals by virtue of superiority in such tasks as recall of facts and correction of errors.

Clermont & Eisenberg, *supra* note 170, at 1151-53 (citing ROBERT J. MACCOUN, GETTING INSIDE THE BLACK BOX: TOWARD A BETTER UNDERSTANDING OF CIVIL JURY BEHAVIOR 22-23 (1987)).

173. *See* Lempert, *supra* note 170, at 217.

> In short, we have no reliable empirical basis for saying that litigants are more likely in judge than in jury trials to receive decisions based on a rational evaluation of the evidence. . . . Both judges and jurors are human. As factfinders in complex cases, judges and juries are probably more like each other than they are different in dealing with the problems they confront.

Id.

174. For example, a study of the magistrates of New York City conducted by Charles Haines showed that in cases of disorderly conduct, one judge discharged 18 percent of the defendants, another 54 percent, and another discharged only one defendant in 566 cases. *See* Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96, 105 (1923). Haines found that "the magistrates differed to an amazing degree in their treatment of similar classes of cases" and concluded that "justice is a personal thing, reflecting the temperament, the personality, the education, environment, and personal traits of the magistrates." *Id.*

> all dispute resolvers—whether judge, jury or arbitrator—base their decisions in part on their own internal criteria, subject to influence, sympathy and prejudice.[175]

As the article noted, judges as well as arbitrators make decisions that may be heavily influenced by their personal world view, and therefore may not be predictable.

Moreover, there is empirical evidence that appears to contradict the conventional belief that judges are far superior to jurors in being able to disregard information that is considered to be too prejudicial to be admitted in evidence. An important function of judges is to prevent such potentially biasing evidence from reaching jurors, who are considered more susceptible to bias than judges. Judges themselves, because of their training and education, are expected to be able to disregard such information. A study by Stephan Landsman and Richard F. Rakos provided empirical evidence that judges and jurors appeared to be similarly influenced by exposure to potentially biasing material.[176] The study noted that while judges and jurors both shared the belief that judges had a superior capacity to remain unbiased, in fact, judges and jurors may not be very different in their reactions to potentially biasing information.[177] This study suggests that the unexamined opinion that decisions by jurors are more likely to be biased than decisions by courts is simply not supported by the empirical research that exists, and more research should be done in this area, given the impact this assumption has on the way we organize our civil justice system.

The effect of restricting the right to a jury trial is to impose a limitation on the parties' choice. Not surprisingly, studies have shown that lawyers choose the fact-finder they believe gives them the best chance of winning.[178] In one study of eleven lawyers in protracted cases that could be tried before either judge or jury, the lawyers explained their choices almost solely in terms of the judge's reputation. Where the judge was reputed to be incompetent or biased, the lawyers opted for a jury. Where a judge was chosen over a jury, the most important reasons listed were the competence and fairness of the judge. One attorney specifically noted that he looked on jury trials as "buffers against incompetent judges."[179] *Requiring* a case to be decided by the judge eliminates the possibility of choosing this buffer.

---

175. Jeff Tillotson, *Debunking Arbitration Myths*, 147 NEW JERSEY L.J., Mar. 3, 1997, at 1015.

176. *See* Stephen Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113, 125 (1994).

177. *See id.* The authors suggest that while more research is needed to confirm this outcome, if confirmed, "it would draw into question the law's insistence on treating judges and jurors in radically different ways. . . ." *Id.* They conclude that "the civil justice system has come to rely on a behavioral assumption about judges that deserves far closer scrutiny than it has, as yet, received." *Id.* at 126.

178. *See* Lempert, *supra* note 170, at 218-19.

179. *Id.*

In terms of the quality of jury decision-making, commentators have noted that the most significant observer of the jury is the judge, who has the greatest opportunity to observe the civil jury in action. Surveys of judges' attitudes toward civil juries show virtually unanimous support for the institution.[180]

Thus, arguments against using juries in commercial cases based on competence or predictability do not appear to be supported by reliable evidence. Rather, they appear to reflect the beliefs of economically powerful business groups which think juries are less likely than judges to decide in their favor.[181] Even this belief is not supported by empirical data. In an analysis of data from a study of Arizona jury reform, Valerie P. Hans found that "civil jurors are largely supportive of the aims of American business and extremely concerned about the potential negative effects on business corporations of excessive litigation."[182] She concluded that there was no evidence that juries were predisposed against business defendants, or that judges would have decided the cases very differently.[183] Judges who evaluated the cases were satisfied with jury outcomes and expressed little surprise at jury decisions.[184]

In sum, empirical evidence does not support a generally negative view of juries. Nor does it support the view that judges are less biased, or are superior decision makers.[185] The policy reasons for not reducing the role of juries are twofold: first, on the whole juries perform competently, and second, when a statute designates specific issues to be determined by the judge, this eliminates the possibility for the parties to choose between a bench and a jury trial. Having the choice of a jury can be an important means of dealing with the limitations of a particular judge, and preserving the parties' sense of the fairness of the process. The fact that judges themselves, on the whole, generally agree with jury verdicts, even in business cases, suggests that there is no strong policy reason to take juries out of commercial cases.

VI. THE ROLE OF ARTICLE 1

Given the fact that recent UCC provisions as drafted contain certain constitutionally troubling provisions, is there a role for Article 1 with respect to this issue? Entitled "General Provisions", Article 1 sets forth rules of construction, policies, general definitions, and principles of inter-

180. *See* Hans, *Attitudes*, *supra* note 164, at 261-65. Hans concludes as follows: "Judges report that, in general, they agree with jury verdicts and strongly support the civil jury's soundness as an institution." *Id.* at 275.

181. *See* George McGunnigle, *Representing the Corporate Defendant in the Courtroom: Reflections of a Veteran Advocate*, *in* VIEWS FROM THE COURTROOM 1, 3-4 (1993).

182. Hans, *Illusions*, *supra* note 162, at 327-28, 341-43.

183. *See id.*; *see also* Milo Geyelin, *Study Suggests Jurors are not Anti-Business*, WALL ST. J., Apr. 20, 1992, at B1 (jurors mistakenly perceived to be anti-corporate).

184. *See* Hans, *Illusions*, *supra* note 162, at 341.

185. Many a lawyer has experienced the tyranny of an idiosyncratic judge. This author was before one judge whom her opposing counsel characterized as "like a porcupine. He flips his tail and everyone gets hurt."

pretation. A traditional purpose of Article 1 has been to provide a means of harmonizing other provisions in the UCC. Article 1 sets out, for example, definitions that are common to all articles, unless trumped by more specific provisions within each article. It also provides that provisions of the UCC may be varied by agreement unless otherwise provided in the Act, except that parties may not disclaim obligations of good faith, diligence, reasonableness, and care prescribed by the Act.[186]

Article 1 sets forth the general policies that are to be applied in both interpreting and performing under the UCC. The Article is to be liberally construed in order to promote its underlying purposes and policies.[187] Those are defined in Section 1-102 as: "(1) to simplify, clarify and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and (3) to make uniform the law among the various jurisdictions."[188] Additionally, there are policies that remedies should be liberally construed to make parties whole,[189] that "[e]very contract or duty . . . imposes an obligation of good faith,"[190] that interpretation of contracts must be informed by trade usage and evidence of the commercial context.[191] These policies are considered applicable to all articles of the UCC.

Should Article 1, in addition, contain any stated policy concerning the importance of interpreting the provisions of the UCC consistent with the constitutional guarantee of a jury trial?[192] In answering this question, it is useful to look at the different constitutional perspectives of those who favor expanding the role of judges in fact-finding, and thereby restricting the jury-trial right, and those in favor of not expanding the role of judges, but rather following the traditional allocation of issues between judge and jury.

A. Constitutional Perspective in Favor of Expanding Judge's Role

Proponents of expanding the judge's role, and thereby limiting the role of juries, take the position that a statutory provision assigning certain factual issues to the court is probably not a constitutional violation; but even if the provision might be unconstitutional, it should nonetheless be incorporated in the legislation and resolved by private litigation through the

186. U.C.C. § 1-102(3) (2000).
187. *Id.* § 1-102(1).
188. *Id.* § 1-102(2)(a)-(c).
189. *Id.* § 1-106(1).
190. *Id.* § 1-203.
191. *Id.* § 1-205.
192. I first set out to answer the question whether certain factual issues can or should be assigned to the judge rather than the jury. This question served as the subject for a report prepared in collaboration with David V. Snyder for a Working Group discussion in the ABA Subcommittee on Article 1, in 1997. The ABA Subcommittee on Article 1 provides input to the Article 1 drafting committee.

courts.[193] Proponents also believe that drafters of UCC provisions should push to the limit to avoid jury trials. For example, with respect to Section 5-108(e), one of the proponents has stated,

> [W]hat Section 5-108(e) provides is guidance to the court that it should reserve such questions [such as whether a party satisfied a standard] to itself to the outer limit of the constitutional trial by jury. What those limits are is, of course, within the court's judgment and the role of the jury beyond those outer limits is inviolate and is not and cannot be touched by this provision.

One would have thought that this conclusion would have been forthcoming in any event under general principles of statutory interpretation by which any ambiguity with regard to the constitutionality of a statute is resolved in favor of the constitutional construction.[194]

Thus, this view seems to be that the drafters should push the envelope as far as possible, and not worry if they cross the line because either: (1) individual litigants will bring suits to uphold the constitution; or (2) courts will either disregard the statute or construe it narrowly to be constitutional given the particular court's understanding of what the constitution requires; or (3) no one will raise the issue, and there will be fewer jury trials.

B. Constitutional Perspective in Favor of Traditional Allocation

It seems clear that UCC drafters should not and do not wish to propose uniform laws which are unconstitutional. The policy question is whether it is prudent to push to the limits, and even beyond, in the hope that the allocation to the court will either go unchallenged, or if challenged, that the provision will be construed by a court so as to avoid a determination of unconstitutionality.

1. Placing the Burden on Individual Litigants

Opponents of the "push to the outer limits" position would assert that drafting laws of questionable constitutional validity does not seem appropriate for groups such as ALI and NCCUSL. Since the purpose is to create uniform laws, presenting laws that appear to invite constitutional challenge would not appear to promote either uniformity or confidence in the process. Further, putting the burden on an individual to challenge constitutionality, rather than choosing a course that is clearly constitutional, can also undermine confidence in the process. Members of the drafting committee tend to come from economically powerful groups. Proposing questionably constitutional laws and justifying them by saying that they can be challenged by individuals, ignores the reality that many

193. *See* discussion in Margaret L. Moses, *The Uniform Commercial Code Meets the Seventh Amendment: The Demise of Jury Trials Under Article 5?*, 72 IND. L.J., 681, 717 n.191 (1997).

194. Byrne, *supra* note 164, at 426.

individuals who will be disadvantaged by the lack of a jury trial will not have the resources to launch a constitutional challenge.

2. Relying on the Courts Not to Enforce the Statute

Even if it were agreed that "pushing to the outer limits" is a good policy based on the reasons provided by the proponents, it may not be a good policy for other reasons. First, in each state, under each state constitution, allocating fact-finding to a judge would create a litigable issue, which in itself is undesirable, and which also could tend to result in non-uniform law. Second, if the statute itself is either ambiguous or unconstitutional, so that each judge must come up with his or her own reading of the statute, the purpose of uniform laws again appears to be undercut. Third, pushing the envelope to this extent may undercut the credibility of the drafters as experts whose competence is so highly regarded that their proposals should be passed without change.

3. Is This an Appropriate Issue for Decision by the Drafters of Uniform Laws?

Even assuming *arguendo* that allocating a particular factual issue to a judge could pass constitutional muster, the policy decision involved does not seem to be one best made by uniform commercial law experts. First, their expertise is generally not in this area, since they are commercial lawyers, not litigators. Second, in making this determination, they appear to have little access to or concern for obtaining pertinent factual and empirical information about juries, judges, and their respective competencies and constitutional roles.[195] Third, this kind of sensitive policy decision should perhaps be better initiated at the legislative level, rather than by uniform law commissioners.

VII. CONCLUSION

In sum, the policy choice is whether it is better to draft laws that are clearly within constitutional requirements and do not change the traditional allocation of factual issues to the jury, or whether reasons opposed to jury decision-making justify pushing the envelope to the "outer limit," and perhaps beyond, in order to reduce the role of juries in UCC cases. Since that choice has already been made in several instances in favor of pushing to the outer limits or beyond, it is now pertinent to consider whether it would be appropriate for Article 1 to include among the general policies for interpreting the UCC a statement of policy or purpose with respect to the right of a jury trial. A proposal was made in the American Bar Association Subcommittee on Article 1 to include the following language as a new provision: "No provision of this Act prohibits the court from determining that an issue is an issue of fact and not of law in accordance with the legal or constitutional right of a party to a trial by

195. *See* Rubin, *supra* note 29, at 762.

jury with respect to the issue."[196] The proposed official comment accompanying the text stated that although the purpose of provisions such as Sections 1-201, 4A-202(c), and 5-108(e) is to articulate a policy that favors judicial resolution of the specified issue, nonetheless,

> a court may determine that a party is entitled to a jury trial on an issue as a matter of right under the Seventh Amendment, or under the constitution of the applicable state jurisdiction, even though the literal application of a provision of the Code might state that the issue is for the court to decide.[197]

Ultimately, the Subcommittee voted to recommend to the Article 1 drafting committee that a comment be added to Revised Article 1, Section 103 (existing Article 1, Section 102) which would "preserv[e] a party's right to trial by jury of an issue of fact consistent with any constitutional right of the party despite provisions containing contrary language in the Act."[198]

This comment would perhaps serve a clarifying purpose, encouraging judges to follow their understanding of the proper role of the jury as finder of fact. The language is also consistent with the position of those who believe it to be appropriate to push to the outer limits in drafting laws that take issues from the jury, and who want individual judges to find a way to interpret such laws as constitutional, even if it means sometimes giving issues to the jury when the statute says the issue is for the court. To include in Article 1 a policy statement that courts really should act in a constitutional way, despite the express language of the UCC, raises two important questions. First, is pushing the envelope with respect to restricting the jury's role in UCC cases now the agreed-upon policy for the whole UCC? It is submitted that such a policy would be premature, if not wrongheaded, in light of existing empirical evidence supporting the competence of the jury, and the parties' need for choice. Before such a policy is adopted, more discussion and research is needed concerning the actual role played by the jury in commercial cases. Second, do drafters of commercial laws have the necessary expertise to make sensitive policy decisions, such as shifting allocations from jury to judge, and to understand fully the consequences of such decisions? It is one thing for the various state legislatures to defer to individuals of renowned expertise in commercial law for the purpose of adopting uniform commercial laws, but quite another to adopt provisions of law which do not reflect that expertise, and which appear to have been made without adequate information, study, or justification. The continuing credibility of such drafting groups is at risk when provisions they draft, which are not within the realm of their expertise in commercial law, are deemed to be

196. Proposal by Subcommittee member Paul Turner contained in fax from the chair of the ABA Subcommittee on Article 1, Sarah Jenkins, to members of Subcommittee, dated February 4, 1999, on file with author and with Subcommittee on Article 1.

197. *Id.*

198. Fax reporting action taken at Subcommittee's March 2000 meeting, from Sarah Howard Jenkins, Chair, ABA Subcommittee on UCC Article 1, to Professor Neil B. Cohen, Reporter, Revised Article 1 Drafting Committee, on file with author and with Subcommittee on Article 1.

unconstitutional, or at best constitutionally troubling, by law revisions commissions, state committees, and commentators who have studied them.

Since Article 1 sets forth the policies for the entire UCC, until such time as there is a better informed consensus on the role of juries, perhaps Article 1 should incorporate a policy statement based on currently available empirical evidence, as to the value of the parties' choice of a jury, and the value of not undermining in letter or in spirit the rights granted by our federal and state constitutions. Such a provision could be added, for example, in Part II, "General Definitions and Principles of Interpretation," to this effect: "The jury trial right under this Act extends to all parties to the full extent of federal or state constitutional and statutory law or policy."

With respect to UCC provisions which currently raise constitutional questions, it would be quite simple to move the definition of "conspicuousness" to Article 1, delete the sentence providing that conspicuousness should be decided by the court, and provide a comment similar to the one in the March 1997 draft of Article 2—that depending upon the circumstances, the decision is for the trier of fact. As to Sections 4A-202(c) and 5-108(e), the most sensible approach in this author's view would be to amend the provisions so that they permit the traditional allocation of factual issues to the jury, and legal issues to the judge. This would avoid unnecessary constitutional challenges and would promote uniform application of the law, thereby accomplishing one of the express underlying purposes and policies of the Act.