

CORE CONCEPTS OF
COMMERCIAL LAW:
PAST, PRESENT
AND FUTURE
CASES AND MATERIALS

John F. Dolan
Bruce A. Markell
Lawrence Ponoroff

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CORE CONCEPTS OF COMMERCIAL LAW: PAST, PRESENT AND FUTURE

CASES AND MATERIALS

By

John F. Dolan

*Distinguished Professor of Law
Wayne State University Law School*

Bruce A. Markell

*Doris S. and Theodore B. Lee Professor of Law
William S. Boyd School of Law
University of Nevada, Las Vegas*

Lawrence Ponoroff

*Dean and Mitchell Franklin Professor of Law
Tulane Law School*

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Preface

Objectives

This casebook introduces you to commercial law and provides you a modicum of Uniform Commercial Code learning.

Please note that we are not trying to turn you into commercial lawyers or even to make you proficient in the UCC. We don't do that because we can't.

The Code is an artifact of commercial law, a product of a process that antedates the UCC by hundreds of years and that enjoys a rich vitality outside the UCC. Thus we list learning the technical detail as a secondary objective, because we view developing an affinity and appreciation for the breadth and dynamism of commercial law as more important to you as lawyers.

We recognize that most of you will not become "UCC lawyers," but virtually all of you will need to be literate in commercial law. And becoming literate in commercial law is what we mean when we say that our first objective is to introduce you to commercial law.

Much of the text in this book emphasizes principles, rather than the rules of commercial law. The reality is that the rules change from one revision of the Code to the next; they may differ from state to state; and, in point of fact, many of the rules are unremarkable and can even be rather arcane. The basic principles, on the other hand, stay just about the same. They embody the important commercial policies the rules are intended to serve and, thus, they facilitate an understanding of the rules of commercial law as those rules may exist from time to time and place to place. In short, to teach only the rules would give you a false sense and a static understanding of what commercial law is all about and what makes it exciting to us.

We also think that law teachers should treat second and third year law students that study commercial law as graduate students who are sophisticated enough to familiarize themselves somewhat with the literature of the field. That familiarity serves not to advance a quest to become commercial law experts but to advance your education in commercial law as a dynamic enterprise in which scholars play a role. Most practicing lawyers have little time for scholarship; and if you do not see scholarship in law school as an enterprise that plays the energizing, criticizing, and moderating roles we think it plays, you may never see it, and may conclude, as many lawyers do, that we scholars largely waste our time when we write.

We don't try to teach commercial law without teaching any rules. This book is full of them (perhaps more than you would like), and many of your teachers will supplement the text with other rules that are the subject of contemporary controversy or misunderstanding. Learning about Code rules

is, furthermore, instructive. This book engages in that instruction because it advances understanding of commercial law principles. Exercises in rule analysis is not the objective of the study, however. We make no attempt here to cover the Code exhaustively or even to cover some of the articles exhaustively. We have picked through the Code and emphasized some of the rules because we think those rules help you understand the core concepts, hence, the title of the book.

Scope

There is not much Sales here and not much Leasing or Securities and only a little Bankruptcy. Most of the study deals with the UCC. The study of Article 9 and Articles 3 and 5 here covers the bulk of commercial law learning that you should have for the level of literacy that we strive to give you. Those articles are the emphasis of this book. But, we cover other sources of commercial law: Articles 4, 4A, and 7; the Bankruptcy Code; the Uniform Customs and Practice for Documentary Credits; and the UNCITRAL Convention on Independent Bank Guarantees and Stand-by Letters of Credit among others.

In all events, however, we are not striving to give you anything more than an introduction to commercial law, and we use these sources as illustrations of that law in operation.

Revision of Article 9

On July 1, 2001, Revised Article 9 became effective in all 50 states. Given the transition rules, however, the text of former Article 9 will remain relevant for several years, and thus the study of secured lending for the practicing lawyer has become much more complex. For students, however, we believe that our approach, teaching basics rather than a lot of rules, reduces that problem to a manageable level. While the rules are changing in Revised Article 9, the basics remain pretty much the same; and basics are what we strive to teach here.

In this revision of Dolan and Ponoroff's 1998 casebook, *Basic Concepts in Commercial Law*, when we refer to a section contained in Article 9 of the UCC, we refer to the 2001 version of Article 9 (*i.e.*, Revised Article 9) which has been enacted in all 50 states. However, in cases and other materials referring to provisions of pre-revised Article 9, we have retained the original citation and then provided in brackets the parallel cite under the new statute prefaced by the abbreviation "Rev."

With respect to other UCC articles, we cite to the version current as of 2003. As this book goes to press, however, Article 1 has been revised (but adopted by only a few states) and the revisions to Article 2 and 2A are final, but the text and the comments have not yet been released to the states for adoption. Accordingly, we have tried to append "Rev." to any citation of these new articles. Finally, as a last resort, when not clear from the context, we have attempted to indicate in editorial footnotes those opinions that cite versions of the UCC other than the current official version.

Style

In reproducing opinions, statutes, articles, and other textual material, we have deleted most footnotes, have renumbered those we did not delete, and have noted ellipses with asterisks for long deletions, and with a series of periods for short deletions. We have started renumbering all footnotes with each case or source. When the authors have used footnotes, we have so indicated that fact with asterisks instead of numbers. We have also deleted textual citations and italics in opinions and articles without any notation.

Acknowledgments

There are many who deserve our thanks in connection with this effort. We are particularly grateful to colleagues who permitted us to excerpt their work. We acknowledge them at the places in the text where those excerpts appear. We also thank West for permission to use many of the chapters of Dolan's and Ponoroff's casebook, *Basic Concepts in Commercial Law*, as the basis for the chapters you have before you.

Dolan would also like to thank, for grants and other financial support, Dean Joan Mahoney, and to thank Ponoroff and Markell for their good-natured collaboration – Ponoroff especially who has a great sense of humor for a Dean. Ponoroff would like to thank his students and colleagues at Tulane Law School for their support and encouragement. He would also like to thank (he thinks) Dolan for drawing him into this project. While it is yet to be seen how the law school community will receive this work, the collaboration has already been a rewarding personal and professional experience. Markell would like to thank Dolan and Ponoroff for thinking of him for this revised version of their earlier casebook. He would also like to acknowledge the research support from the William S. Boyd School of Law, and the able and cheerful research assistance of Jin Kim.

Finally, we produced this text in camera ready form (don't blame West for the typographical mistakes; blame Markell).

JFD
Detroit, Michigan

BAM
Las Vegas, Nevada

LP
New Orleans, Louisiana

January, 2004

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