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AN ANALYSIS OF JUDGE DOMENICK L. GABRIELLI'S UNIFORM COMMERCIAL CODE OPINIONS

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Laws are a dead letter, without courts to expound and define their true meaning and operation.

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Within its scope the Uniform Commercial Code is the principal law governing the relative rights of the parties to commercial transactions. Applying the Code, however, can be difficult for a variety of reasons. For example, the Code's scope is not always clear. Even when it clearly applies, it does not always neatly provide the answer. When it does provide the answer, it often does so impressionistically; and even when the answer is reasonably clear, it does not always seem sensible. As a result, much is left to be filled in by the courts. In his U.C.C. opinions Judge Gabrielli demonstrated that he was very good at analyzing commercial transactions. Indeed, he sometimes saw the problem more clearly than one or more of the parties, his colleagues, and the drafters of the Code; and, many of his opinions clarified important points of commercial practice. This Article focuses on Judge Gabrielli's contribution to the evolution of commercial law, rather than his judicial philosophy as such.¹

I. SALES

Martin v. Dierck Equipment Co.

Martin v. Dierck Equipment Co.,¹ in which Judge Gabrielli dissented, is perhaps a case where he saw the problem more clearly than

¹ The Article discusses Judge Gabrielli's most significant U.C.C. opinions. He also wrote opinions in four other U.C.C. cases not discussed in the text. For a brief description of these cases, see infra note 170.

¹ 43 N.Y.2d 583, 593, 374 N.E.2d 97, 102, 403 N.Y.S.2d 185, 190 (1978) (Gabrielli, J., dissenting in part).
a majority of his colleagues. The questions presented in Martin were whether plaintiff had a warranty action against defendants and, if so, whether the action had been timely filed. M manufactured a forklift in New York and sold it to D, M's New York distributor. D in turn sold the forklift to B in Virginia in 1967 and tendered delivery in New York. B's employee suffered personal injury in 1968 allegedly caused by a defect in the forklift. He brought an action in New York against M and D in 1971 seeking damages based on negligence and breach of warranty. The trial court held that plaintiff had a warranty cause of action against both M and D which accrued on tender of delivery in New York and which was timely under New York's four year statute of limitations for breach of warranty. The appellate division reversed and the court of appeals affirmed by a closely divided court.

The first question was whether plaintiff had a warranty action at all against the defendants. Under section 2-314 a merchant seller warrants to the buyer that the goods are merchantable, that among other things the goods are fit for the ordinary purposes for which such goods are used, unless the warranty is excluded or modified. Both M and D were merchant sellers who made the warranty to their respective buyers (M to D and D to B). Neither, however, had a contract with B's employee concerning the quality of the goods or anything else. Thus, the issue was whether despite a lack of privity of contract B's employee was nonetheless a third party beneficiary of M's warranty to D and D's warranty to B.

When the Code was originally enacted in New York effective September 27, 1964, the legislature adopted section 2-318, alternative A. That section provided that "[a] seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty." This language does not expressly extend either M's warranty to D, or D's warranty to B, to B's employees. However, effective September 1,
1975, after the decision of the trial court but before the decision of the appellate division, the legislature adopted the substance of section 2-318, alternative B.\textsuperscript{11} This section provides that S's warranty to B "whether express or implied extends to any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty."\textsuperscript{12} Under this language, one in the position of B's employee is made a third party beneficiary of both M's warranty to D and D's warranty to B.

The majority held that plaintiff had no warranty action against defendants.\textsuperscript{13} They reasoned, in essence, that section 2-318, alternative B did not apply as it was not in effect at the time of either tender or injury, and that section 2-318, alternative A did not apply because it did not purport on its face to make B's employee a third party beneficiary of either M's or D's warranty. The problem with this reasoning is that section 2-318, alternative A was not intended to be restrictive. The official comment to section 2-318 makes it clear that the section expressly makes certain persons who are not in "privity of contract" with the seller third party beneficiaries of whatever warranty a seller makes to its buyer.\textsuperscript{14} Beyond that, the section was intended to be "neutral," leaving to "the developing case law" whether seller's warranty extended beyond the statute.\textsuperscript{15} Thus, under section 2-318, alternative A, the court could have held that both M's warranty to D, and D's warranty to B, extended to B's employee despite a lack of privity of contract.

Judge Gabrielli thought that the court should have held that both M's and D's warranty extended to B's employee. He saw the legislature's adoption of section 2-318 and the court's adoption of "strict products liability"\textsuperscript{16} as evidence of a clear policy in New York favoring the expansion of the class of plaintiffs who may recover for personal injury caused by defective products even though not in privity of contract with the defendant. He thus thought it "incongruous" for the court to hold that the defendant's warranty did not extend to plaintiff, thus denying plaintiff's claim because he was not in privity with the defendants.

Furthermore, permitting plaintiff's action would not be too bur-
densome for the defendants. A seller may generally disclaim or modify the warranty it makes to its buyer, and may limit or modify the remedies available for breach; in addition, these limitations and modifications are effective against third party beneficiaries. However, if S nonetheless warranted that the goods were merchantable and plaintiff suffered personal injury because they were not, it is difficult to understand why the claim should be denied.

Assuming the plaintiff in Martin had a warranty claim, the second question presented was whether the action was timely filed. Section 2-725(1) provides that an action for breach of a sales contract must be commenced within four years after the cause of action has accrued; section 2-725(2) provides as a general rule that a breach of warranty accrues upon tender of delivery. Judge Gabrielli, applying section 2-725 “logically,” concluded that plaintiff’s action accrued in New York, the place of tender of delivery, and was timely under the section 2-725 four year statute of limitations.

The majority, however, concluded that even if plaintiff had a warranty claim, the cause of action accrued in Virginia, the place of injury, and was thus barred under the Virginia two year statute of limitations for personal injury actions. The majority reasoned in effect that the literal application of section 2-725 would reach the anomalous result that plaintiff’s action accrued prior to his injury. Section 2-725 creates as a general rule that an action for breach of warranty accrues upon tender of delivery and must be brought within four years thereafter. Thus, if plaintiff’s injury had occurred in the fifth year after tender of delivery, he would have no breach of warranty action against defendants. This, however, does not leave the plaintiff without a remedy as the majority seemed to think. As Judge Gabrielli notes, in such cases the plaintiff would still have an independent action for strict products liability which sounds in tort and accrues upon injury. Judge Gabrielli’s analysis seems more consistent with the language of the Code, but the majority remained unpersuaded.

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In re Marlene Industries

Schubtex, Inc. v. Allen Snyder, Inc.

The superficial question in *In re Marlene Industries* and *Schubtex, Inc. v. Allen Snyder, Inc.*, was whether the parties had agreed to arbitrate as a result of section 2-207. The important underlying question, however, was whether the Code overrules the common law rule that no party is bound to arbitrate unless it expressly agrees to do so. On this point, Judge Gabrielli may again have seen the problem more clearly than a majority of his colleagues.

Both *Marlene* and *Schubtex* arose in the context of the battle of the forms: the parties discuss the deal and then one or more standardized forms containing other terms pass between them. In *Marlene*, B orally placed an order to buy fabrics from S; at that time, neither party discussed any method of dispute resolution. Immediately thereafter B sent a purchase order which said nothing concerning arbitration. S responded with an acknowledgement form containing an arbitration clause and, when a dispute arose over payment, sought to enforce arbitration. Both the trial court and the appellate division held that B was required to arbitrate. On appeal, Judge Gabrielli, writing for a unanimous court, held that B was not required to arbitrate since, under section 2-207, the arbitration clause in S's acknowledgement did not become part of the parties' bargain in fact as expressed in the language of the forms.

Since S's acknowledgement form contained a term providing for arbitration which was not in B's purchase order, the threshold question under section 2-207 was whether there was a bargain in fact at all between the parties based on the forms. At common law, an acceptance which deviates from an offer is not effective as an acceptance, but is a counter offer. The Code in section 2-207(1) changes the analysis. Under this section, "[a] definite seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms." Thus, this section permits contract formation not-

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22 *In re Marlene Indus.*, 45 N.Y.2d at 330, 380 N.E.2d at 240, 408 N.Y.S.2d at 411.
withstanding "additional or different" terms in an acceptance, provided the purported acceptance is sent within a reasonable time, is not expressly made conditional on assent to the deviant terms, and is otherwise "definite and seasonable." The section also treats confirmations which deviate from the oral bargain in a similar manner; a written confirmation sent within a reasonable time operates as an "acceptance" even though it states terms additional to or different from those agreed upon, provided the "acceptance" is not expressly made conditional on assent to the deviant terms.

Applying section 2-207(1) to Marlene, there was a contract between the parties based on the forms notwithstanding the arbitration clause in S's acknowledgement form. Whether B's purchase order is viewed as an offer and S's acknowledgement an attempted acceptance, or whether the forms were in confirmation of a bargain previously made orally, S's acknowledgement form with the deviant arbitration clause mirrored B's purchase order on the important terms of price, color and delivery date; did not make "acceptance" expressly conditional on assent to arbitration; and was sent within a reasonable time.

Assuming there was a bargain in fact between the parties based on the forms, the next question is what happened to the arbitration clause. Section 2-207(2) provides that "[t]he additional terms are to be construed as proposals for addition to the contract; between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received." Applying section 2-207(2)(b), Judge Gabrielli held that

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26 Id.
28 N.Y. U.C.C. § 2-207(2) (McKinney 1964). Note that § 2-207(1) permits contract formation notwithstanding "additional or different" terms, but § 2-207(2) only speaks of "additional" terms. What, then, happens to "different" terms? Comment 3 to section 2-207 suggests that different terms are treated the same as additional terms under subsection two. Thus, different terms are to be construed as proposals for additions to the contract, but as between merchants they become part of the contract unless one of the exceptions in § 2-207(2) applies. Id. § 2-207 comment 3.

Professor Summers, however, argues that different, as compared to additional, terms do not become part of the contract. He believes that comment 3 goes beyond the text of § 2-207 insofar as it applies to a confirmation of a prior agreement. In his view, "2-207(2)(c) would automatically eject the different term in an acceptance since 'notification of objection' would already have been given when the offeror included the contrary term initially." J. Witte & R. Summers, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 1-2, at 27 n.7 (2d ed. 1980).
the parties were merchants,\textsuperscript{29} that the arbitration clause was an additional term, and that the arbitration clause did not become part of the bargain because it would materially alter it. For this last proposition, Judge Gabrielli relied principally on the New York common law rule that no party is bound to arbitrate unless it expressly agrees to do so, since by agreeing to arbitrate a party waives many procedural and substantive legal rights.\textsuperscript{30}

Schubtex,\textsuperscript{31} in which Judge Gabrielli wrote a concurring opinion, presented similar facts.\textsuperscript{32} The trial court held that B had agreed to arbitrate, based on prior course of dealing between the parties.\textsuperscript{33} The appellate division unanimously affirmed without opinion.\textsuperscript{34} On appeal, all the judges agreed that based on Marlene the parties had not agreed to arbitrate as a result of section 2-207.\textsuperscript{35} The judges also held that the parties had not agreed to arbitrate based on prior course of dealing. However, the plurality opinion asserted that in a proper case an agreement to arbitrate might be implied from course of dealing or usage of trade despite the absence of an express agreement. Judge Gabrielli, joined by two judges, objected to this assertion on the ground that under the New York common law rule no party is bound to arbitrate unless it expressly agrees to do so.

The Code can be read as imposing arbitration on one who has not expressly agreed to it. "Contract" is defined in section 1-201(11) as "the total legal obligation which results from the parties' agreement as affected by the Code and any other applicable law."\textsuperscript{36} "Agreement" is defined in section 1-201(3) as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance."\textsuperscript{37} This seems to support the proposition that the parties may agree to arbitrate by implication from course of dealing or

\textsuperscript{29} See N.Y. U.C.C. § 2-104(1) (McKinney 1964).
\textsuperscript{32} B had orally ordered goods and S replied with a form providing for arbitration. The goods were shipped and when a dispute developed S demanded arbitration.
\textsuperscript{33} The purported course of dealing consisted of B orally ordering goods and S faithfully sending its "confirmation" form containing the arbitration clause.
\textsuperscript{35} Viewing S's confirmation form as either an acceptance or a confirmation, under 2-207(1) there was a bargain in fact as reflected in B's form despite the deviant arbitration clause in S's form; under 2-207(2), the arbitration clause did not become part of the bargain because it would materially alter it.
\textsuperscript{36} N.Y. U.C.C. § 1-201(11) (McKinney 1964).
\textsuperscript{37} Id. § 1-201(3) (emphasis added).
trade usage apart from an express agreement.

It is also possible to read section 2-207 as imposing arbitration on one who has not expressly agreed to it. This results from the fact that section 2-207 can be applied as a mechanical rule which often creates a contract on the terms of the party who "fires the first shot."\textsuperscript{38} Recall that in Marlene B's offer form was silent on arbitration but S's acceptance form provided for it; there was a bargain on B's terms and the arbitration clause did not become part of it. Arguably, a different result obtains under section 2-207 where B's offer form provides for arbitration, and S's acceptance form provides for "no arbitration," but otherwise mirrors B's offer in all other respects, does not make acceptance expressly conditional on assent to the "no arbitration" term and is sent within a reasonable time. Under section 2-207(1), S's acceptance form might be deemed an acceptance of B's terms (including the arbitration clause), despite the deviant "no arbitration" clause, thus forming a contract between the parties. Under section 2-207(2), it can be argued on at least two theories that the "no arbitration clause" did not become part of the contract. First, the "no arbitration" clause in S's acceptance was a term different than the arbitration clause in B's offer and that different terms—as compared with additional terms—never become part of the bargain.\textsuperscript{39} Or, second, different and additional terms are treated the same under section 2-207(2),\textsuperscript{40} and thus, regardless whether the "no arbitration" clause is viewed as an additional term or a different term, as between nonmerchants the clause is simply a proposal for an addition to the contract; between merchants it did not become part of the contract because a "no arbitration" clause would materially alter a term providing for arbitration. Thus, a contract would be formed on B's terms and S, who expressly said he would not arbitrate, might be held to have agreed to arbitrate.\textsuperscript{41}

Notwithstanding the foregoing, Judge Gabrielli's position was that in New York no party is bound to arbitrate unless it has expressly agreed to do so. His view finds support in cases which deny recovery of attorney's fees as incidental damages under article two. In a proper case, an aggrieved seller under section 2-710 and an aggrieved buyer under section 2-715 may recover incidental damages, i.e., reasonable


\textsuperscript{39} See supra note 28 and accompanying text.

\textsuperscript{40} Id.

\textsuperscript{41} Cf. J. White & R. Summers, supra note 28, § 1-2, at 27-30 (Professor Summers agrees with the conclusion in the text. Professor White, however, disagrees.).
expenses incurred as a result of the other party's breach. Arguably, attorney's fees are such incidental damages. Apart from the Code, however, there is a strong common law policy against awarding attorney's fees to the prevailing party in litigation. As a result, courts have been nearly unanimous in denying an award of attorney's fees under sections 2-710 and 2-715, principally on the ground that a statutory award of attorney's fees will generally not be implied; if the legislature wishes to overturn this strong common law rule by statute, it must do so explicitly. Judge Gabrielli's position as to arbitration is analogous. There is a strong common law policy against imposing arbitration on a party who has not expressly agreed to it, based on the fact that by agreeing to arbitrate a party waives many procedural and substantive legal rights. If the legislature wishes to overturn this strong common law rule, it must do so explicitly; there is nothing in sections 1-201(11), 1-201(3), or 2-207, or any other section of the Code which explicitly imposes arbitration on a party who has not expressly agreed to it. It remains to be seen if Judge Gabrielli's position prevails.

Equitable Lumber Corp. v. IPA Land Development Corp.

In Equitable Lumber Corp. v. IPA Land Development Corp., in which Judge Gabrielli wrote the court's unanimous opinion, he provided the framework for analyzing the enforceability of a promise to pay attorney's fees in a liquidated amount in a contract subject to article two. The case is also significant for Judge Gabrielli's analysis of section 2-718.

Equitable Lumber involved a provision in a contract for the sale of

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**Notes:**

42 See N.Y. U.C.C. § 2-710 comment 2 (McKinney 1964).


lumber between S, a lumber company, and B, a builder and developer. The provision required B to pay S's attorney's fees in the event of B's breach; it stated that in the event the case was turned over to S's attorney for collection, the amount of the fee would be 30%.

B failed to pay for goods delivered and S brought suit to recover the purchase price plus the attorney's fees stipulated in the contract. Upon S's motion for summary judgment, the trial court awarded S the unpaid price of goods delivered, but refused to enforce the provision designating 30% of the amount recovered as a reasonable fee. Instead, the trial court awarded S attorney's fees measured by the reasonable value of the services rendered, which, after a hearing, the court determined to be $450. Without elaboration, the appellate division raised the award to $750. S appealed to the court of appeals claiming that both courts had erred in disregarding the provision liquidating attorney's fees at 30%.

On appeal, Judge Gabrielli, unlike the courts below and the parties, recognized that article two applied to this sale of goods. Part seven of article two deals comprehensively with remedies for breach of contract, but does not expressly provide for the recovery of attorney fees. The general rule in this country is that the prevailing party in litigation is not entitled to recover attorney's fees. Apart from the Code, however, one party's agreement to reimburse another for counsel fees is generally enforceable. Judge Gabrielli held that an agreement to pay attorney's fees in a contract subject to article two is enforceable as a "Contractual Modification or Limitation of Remedy".

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44 Id. at 518-19, 344 N.E.2d at 393, 381 N.Y.S.2d at 461.
45 The court multiplied 10 hours by $45 per hour to arrive at this figure which is approximately 11% of the amount recovered. Id.
48 Under § 2-101, the short title of article two is "Uniform Commercial Code-Sales." The scope of article two, however, is both broader and narrower than "Sales." Article two applies to transactions in goods but not to all sales; "it does not apply to any transaction which, although in the form of an unconditional contract to sell or present sale, is intended to operate only as a security transaction nor does it impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers." N.Y. U.C.C. § 2-102 (McKinney 1964). In Equitable Lumber, however, article two clearly applied.
49 D. Dobbs, supra note 43, § 3-8, at 194.
50 Another exception to the general rule that attorney's fees are not recoverable is that they may be recovered where a statute so provides. Id. The courts are nearly unanimous in holding that the Code is not a statute which provides for the recovery of attorney's fees. See supra notes 42-44 and accompanying text.
under section 2-719(1)(a). That section permits the parties, by
agreement, to shape their own remedies by providing for ones in ad-
dition to, or in substitution for, those provided by the Code. How-
ever, Judge Gabrielli held that this general enforceability is subject
to two primary limitations.

The first limitation is that the term providing for attorney's fees
must not be unconscionable within the meaning of section 2-302.
That section permits a court to refuse to enforce any contract or
clause it finds as a matter of law to have been unconscionable at the
time it was made. "The basic test is whether, in light of the general
commercial background and the commercial needs of the particular
trade or case, the clauses involved are so one-sided as to be uncon-
scionable under the circumstances existing at the time of the making
of the contract." The purpose is "one of the prevention of oppression
and unfair surprise . . . and not of disturbance of allocation of
risks because of superior bargaining power." Although there was
some evidence in Equitable Lumber that the term at issue may have
been the product of surprise, Judge Gabrielli held that between
these sophisticated parties dealing at arms length, for the sale of
readily available goods, the term was not unconscionable. In a proper
case, however, such a term might be unenforceable for this reason.

The second limitation on the enforcement of an attorney's fees
term is that to the extent that the fee is liquidated the amount must
be reasonable in light of the elements in section 2-718(1). This sec-
section provides:

Damages for breach by either party may be liquidated in the agree-
ment but only at an amount which is reasonable in the light of the
anticipated or actual harm caused by the breach, the difficulties of
proof of loss, and the inconvenience or nonfeasibility of otherwise ob-
taining an adequate remedy. A term fixing unreasonably large liqui-
dated damages is void as a penalty.67

66 Id. § 2-302 comment 1 (emphasis added).
67 Id.
68 The amount of the fee was italicized, but we on the reverse side of the contract in a section
entitled "TERMS AND CONDITIONS." The front of the contract just above buyer's signature
line provided: "THE TERMS AND CONDITIONS SET FORTH ON THE REVERSE
HEREOF ARE EXPRESSLY MADE A PART OF THIS AGREEMENT." Equitable Lumber
Corp. v. IPA Land Dev. Corp., 38 N.Y.2d at 518 n.2, 344 N.E.2d at 393 n.2, 381 N.Y.S.2d at 461
n.2.
69 N.Y. U.C.C. § 2-718(1) (McKinney 1964). The reason a liquidated damage provision must
be reasonable in light of any elements, as compared with being enforceable merely because the
parties agreed to it, has its roots in the historical penchant of courts not to permit the default-
ing party to be punished for his breach. The principle is that a breaching party is required to
Before applying the section, Judge Gabrielli was faced with a number of interpretative problems. One issue which he did not discuss is whether attorney's fees are "damages" within the meaning of section 2-718(1). The answer, however, seems reasonably clear. Narrowly defined, damages in a contracts case is the compensation the law requires a breaching party to pay in lieu of performance. S's action on the underlying claim in this case was for the price under section 2-709(1), not for damages; S wanted B's performance, not compensation in lieu of performance, which might be more or less than the agreed exchange. The law, however, often uses the term damages in a broader sense than mere compensation in lieu of performance. For example, under article two, the seller who sues for the price may also recover what the Code terms "incidental damages," i.e., expenses reasonably incurred as a result of buyer's breach. When recoverable, attorney's fees are "damages" in the sense of "incidental damages."

Another interpretive difficulty with section 2-718(1) is the language in the first sentence which states that the amount of a liquidated damage clause must be reasonable in light of "the anticipated or actual harm caused by the breach." Does this mean that such a clause must be reasonable in light of both anticipated and actual harm, or that it must be reasonable in light of either anticipated or actual harm? For example, is a liquidated damage clause which is reasonable in light of anticipated harm enforceable even if not reasonable in light of actual harm? As the New York Law Revision Commission noted in 1955, "[t]he proper construction is doubtful and the Comments shed no light." Most commentators have concluded that the preferable construction of the language is that a liquidated damage clause must be reasonable in light of either the harm anticipated...
reasonable in light of actual harm might be held to be enforceable even if grossly disproportionate to the harm anticipated by the parties at the time of contracting. Also under this interpretation, taken literally, a clause reasonable in light of anticipated harm might be held enforceable even where the amount is grossly disproportionate to the actual injury as where there is no actual or only nominal loss. Under Judge Gabrielli’s dictum such clauses might be void as a penalty under the second sentence in section 2-718(1). Such clauses might also be unenforceable as failing of their essential purpose under section 2-719(2).

Based on Judge Gabrielli’s analysis of section 2-718(1), it was apparent that the trial court in Equitable Lumber had applied the wrong test. The trial court had refused to enforce the term liquidating attorney’s fees at 30% of the amount due on the ground that such a figure was unreasonable in light of the nature and extent of the services performed by S’s attorney. Under Judge Gabrielli’s interpretation of section 2-718(1), however, the threshold question is whether the fee is reasonable in light of either the anticipated or actual harm. The fee in the case might have been reasonable in light of the anticipated harm to S as of the time of contracting if 30% was the normal contingent fee charged by attorneys in collection cases. It might also have been reasonable in light of the actual harm suffered by S at the time of breach if S had, in fact, entered into a 30% contingent fee arrangement with its attorney. In the latter case, however, the clause might, nonetheless, be unenforceable under the second sentence of section 2-718(1) if the fee was unreasonably large when measured against the normal fee charged in collection cases. Thus, the order of the appellate division was reversed and the case remitted to the trial court for further findings.

73 Cf. 5 CORBIN ON CONTRACTS § 1063, at 174 (Supp. C. Kaufman 1980).
74 Cf. W. HAWKLAND, supra note 63, at 171.
75 More specifically, the trial court was ordered to resolve the following factual issues:
   (1) was a 30% fee reasonable in light of the damages to be anticipated by one in the plaintiff’s position, that is, was the fee reasonably related to the normal fee an attorney would charge for the collection of plaintiff’s claim; or, alternatively, (2) was the fee commensurate with the actual arrangement agreed upon by this plaintiff and its attorney? Even if the 30% fee did correspond to the actual arrangement between plaintiff and its attorney, the court on remand should determine whether the amount stipulated was unreasonably large or grossly disproportionate to the damages which the plaintiff was likely to suffer from breach in the event it did not rely on respondent’s agreement to pay its attorney’s fees. If the amount is found to be unreasonably large, then the provision is void as a penalty.

relevant harm may be enforceable even if the damages are easily and conveniently ascertainable. Perhaps the best rationalization for this result is that the three elements are to be balanced with the exact weight of each depending on the nature of the case. For example, the greater the difficulty of proof of loss, the greater the latitude allowed between the approximation of the loss in the liquidated damage clause and the anticipated or actual harm; the easier the damages are to ascertain, the less latitude allowed in the approximation. There are, however, other views as to the relative importance of the three elements.

A fourth interpretive problem involves the second sentence in section 2-718(1), providing that "[a] term fixing unreasonably large liquidated damages is void as a penalty." Exactly what criteria are to be used to determine whether a clause provides for unreasonably large liquidated damages? Judge Gabrielli held that in the context of this case the clause providing for a 30% fee might be unenforceable if it was unreasonably large when measured against the normal fee charged by attorneys in collection cases. This prevents a party from manipulating the amount of damages by entering into an exorbitant fee arrangement.

In dictum, Judge Gabrielli implied that a clause might be unreasonably large under this second sentence if the amount was "grossly disproportionate to the harm actually sustained, or likely to be sustained, by the non-breaching party." This suggests a possible limitation on the either/or interpretation of "anticipated or actual" harm in the first sentence. Under the either/or test taken literally, a clause

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69 See, e.g., Lee Oldsmobile, Inc. v. Kaiden, 32 Md. App. 556, 363 A.2d 270 (1976) (clause providing that an automobile dealer shall have the right to retain any cash deposit as liquidated damages upon B's default held unenforceable under § 2-718(1) even if the amount fixed was a reasonable forecast of the damages suffered since, at the time the contract was made, it was clear that the nature of any damages which would result from a possible future breach was such that they would be easily ascertainable); J. Calamari & J. Perillo, The Law of Contracts § 14-35, at 569 (1977) ("Prior to enactment of the Code [the latter two elements in the first sentence of 2-718(1)] ... were at best makeweights. It is hoped that this will continue to be the case"); W. Hawkland, supra note 63, at 171 ("The second criterion of reasonableness, difficulties of proof of loss, always has been recognized as a principal justification for the use of a liquidated damage clause. Without this justification, the clause fails of its central purpose, and, in this event, there is no reason to utilize it instead of the normal remedies for damages provided by law.").


The result in Equitable Lumber seems sensible. An agreement to pay attorney's fees in a liquidated amount in a contract involving transactions in goods subject to article two is enforceable under section 2-719(1)(a) if it is not unconscionable within the meaning of section 2-302 (not the product of oppression or unfair surprise) and the amount is reasonable in light of the elements in section 2-718(1) (the fee is reasonable in light of anticipated or actual harm and is not unreasonably large when judged against the fee typically charged in such cases).

II. BULK TRANSFERS

Adrian Tabin Corp. v. Climax Boutique, Inc.

Adrian Tabin Corp. v. Climax Boutique, Inc.\(^7\) is perhaps a case where Judge Gabrielli saw the problem more clearly than the Code drafters as well as a majority of the court. In this case, which involved the law of bulk transfers under article six, he dissented from the court's interpretation and application of section 6-104(3).

Article six is principally designed to deal with the merchant who, owing debts, sells out his stock in trade to anyone for any price, pockets the proceeds, and absconds leaving his creditors unpaid.\(^7\) Prior to the Code, two types of bulk transfer laws developed to protect creditors (C). Some states, such as New York, required the buyer of the business (B) to notify C of the transfer.\(^7\) The theory was that with advanced notice S's creditors could investigate the sale and take whatever action was necessary and possible.\(^9\) Other states, such as Pennsylvania, provided additional protection by requiring B to apply the consideration for the transfer to pay S's debts.\(^8\)

Despite a stated purpose of making uniform the bulk sales laws of the states that adopt article six,\(^9\) the drafters took no position on the merits of the New York and Pennsylvania approaches. Under sections 6-104 and 6-105, a bulk transfer is "ineffective" against creditors unless: B requires S to furnish a list of existing creditors; the parties prepare a schedule of the property to be transferred; the list


\(^{7b}\) N.Y. U.C.C. § 6-101 comments 2(b) & 4 (McKinney 1964).

\(^{7c}\) Id. comment 4.

\(^{7d}\) Id. See generally Hawkland, Remedies of Bulk Transfer Creditors Where There Has Been Compliance with Article 6, 74 Com. L.J. 257 (1969).

\(^{8a}\) N.Y. U.C.C. § 6-101 comment 4 (McKinney 1964).

\(^{8b}\) Id. comment 1.
by the parties at the time of contracting, or the harm actually resulting at the time of the breach. In *Equitable Lumber*, Judge Gabrielli adopted this either/or interpretation and held the the focal point of the language is the anticipated or actual harm to the injured party caused by the breach.

A third interpretive difficulty relates to the function of the latter two elements in the first sentence of section 2-718(1). Recall that the language provides ".damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of [1] the anticipated or actual harm caused by the breach, [2] the difficulties of proof of loss, and [3] the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy." Does this mean that in order for a liquidated damage clause to be enforceable it must be reasonable in light of any one of the three elements, or some combination of them, or does it mean that it must be reasonable in light of each one of the elements? For example, under the latter view, it might be argued that a term liquidating attorney's fees is not enforceable under section 2-718(1) since the amount can be easily and conveniently established. Judge Gabrielli's only reference to this problem is his statement:

At the time of contracting the attorney's fees were arguably incapable of estimation. The amount required for attorney's fees would vary with the nature of the defaulting party's breach. For instance, a greater amount would be charged in the event that litigation was necessitated as opposed to settlement; and additional charges might be required for possible appellate procedures.

At common law, one of the elements often stated as a requirement for the enforcement of liquidated damage clauses is that damages caused by the breach must be difficult to ascertain; but this element has seldom been determinative, at least where the clause was otherwise reasonable in light of the relevant harm. Judge Gabrielli's failure to engage in a detailed analysis of the latter two elements in section 2-718 seems to indicate that, at least in New York, they will be applied as at common law. Thus, a clause reasonable in light of the

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Footnotes:

44 38 N.Y.2d at 520-23, 344 N.E.2d at 394-96, 381 N.Y.S.2d at 462-64. There may, however, be certain limitations on the literal application of the either/or interpretation. See infra text accompanying notes 72-73.


46 See *Sweet, Liquidated Damages in California*, 60 CALIF. L. REV. 84, 111 (1972).

47 *Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d at 523, 344 N.E.2d at 394, 381 N.Y.S.2d at 464.

48 See C. MCCORMICK, supra note 57, § 148; Crowley, supra note 63, at 60-61.
and schedule are preserved for inspection and copying by S's creditors or are filed in a designated public office,\textsuperscript{82} and, at least ten days before he takes possession of the goods or pays for them, B gives notice of the transfer to the creditors on the list and to others known to hold or assert claims against S. Under optional section 6-106, which adopts the Pennsylvania approach, B is also required to assure that the consideration for the transfer “is applied so far as necessary to pay those debts of [S] which are either shown on the list furnished by [S] . . . or filed in writing in [a] place stated in the notice . . . within thirty days after the mailing of such notice.”\textsuperscript{83} Thirty-one jurisdictions, including New York, have not adopted optional section 6-106.\textsuperscript{84}

In Adrian Tabin,\textsuperscript{85} B purchased S's dress shop. In place of a “creditors list,” S supplied B with an affidavit declaring that it had “no creditors.” In fact, S owed C for dresses. Later, learning of the transfer, C brought an action to have the sale declared ineffective because of B's failure to notify C. The question was whether B could rely on S's affidavit of “no creditors.” New York’s original bulk sales statute required B to notify “each of the seller's creditors of whom the purchaser has knowledge, or can with the exercise of reasonable diligence acquire knowledge.”\textsuperscript{86} Subsequently, the “reasonable diligence” requirement was omitted,\textsuperscript{87} but case law continued to require B to make “careful inquiry” to discover S's undisclosed creditors.\textsuperscript{88} Prior to the consummation of the sale, B’s attorney made a lien search and made inquiry of S’s attorney as to whether there were any creditors, but the trial court held that this was not enough; B was required to examine S’s books or to make inquiry as to the source of the goods involved in the sale.\textsuperscript{89} Since B failed to make a “careful inquiry,” the transfer was ineffective against C. A closely divided appellate division reversed.\textsuperscript{90} That court held that under section 6-104(3), unless B has knowledge of S's creditors, it may rely on S's affidavit of no creditors, and that the precode cases requiring careful inquiry were no longer applicable. The court of appeals affirmed.

\textsuperscript{82} In New York, the designated office is the Department of State.
\textsuperscript{83} U.C.C. § 6-106 (1978) (optional section).
\textsuperscript{84} State Correlation Tables, U.C.C. Rep. Serv. (Callaghan 1982).
\textsuperscript{85} 34 N.Y.2d at 212, 313 N.E.2d at 66-67, 356 N.Y.S.2d at 608.
\textsuperscript{86} Act of April 11, 1902, ch. 528, 1902 N.Y. Laws 1249 (emphasis added).
\textsuperscript{88} See, e.g., Klein v. Schwartz, 128 N.Y.S.2d 177 (Sup. Ct. 1953).
\textsuperscript{89} Adrian Tabin Corp. v. Climax Boutique, Inc., 34 N.Y.2d at 212, 313 N.E.2d at 67, 356 N.Y.S.2d at 607.
\textsuperscript{90} A.D.2d 146, 338 N.Y.S.2d 59 (1972).
For the majority, the case was easy. Taking the Code literally, the transfer was not ineffective against C. The essence of C's argument was that the sale was ineffective because B did not give it notice of the transfer. However, sections 6-105 and 6-107(3) only require B to give notice to "all the persons shown on the list of creditors furnished by [S] . . . and to all other persons who are known to [B] to hold or assert claims against [S]." The parties stipulated that B did not know of C's existence and C's name did not appear on the list of creditors. B could rely on the affidavit of no creditors because of section 6-104(3) which provides: "Responsibility for the completeness and accuracy of the list of creditors rests on [S], and the transfer is not rendered ineffective by errors or omissions therein unless [B] is shown to have had knowledge." Knowledge is defined in section 1-201(25) as "actual knowledge." Since B was not shown to have had actual knowledge of any errors or omissions, it could rely on S's affidavit; as to the precode "judicial gloss" requiring careful inquiry, it "has not been carried over" by the Code. Thus, B was not required to give notice to C. The remedy for an inaccurate list is a criminal action against S for false swearing.

The majority did not think the result too harsh. A requirement of careful inquiry might restrain the free alienation of property. Hence, the drafters could decide to protect B because "the desirability of allowing transfers to go forward outweighs the value of protecting the omitted creditor." Further, C is not entirely without a remedy as bulk transfers are subject to the law of fraudulent conveyances and preferences. In any event, if more protection is needed or desired for S's creditors, the legislature can act by adopting optional section 6-106.

Judge Gabrielli, joined by one judge, dissented. In his view, the precode case law requiring careful inquiry survived the adoption of section 6-104(3). This was necessary to avoid the result reached by the majority's literal application of the section. Judge Gabrielli saw that section 6-104(3), taken literally, is inconsistent with the underlying purpose of article six, which is to protect C from S, who may sell his business and abscond without paying his debts. In New York, and

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94 N.Y. U.C.C. §§ 6-105, 6-107(3) (McKinney 1964).
92 Id. § 6-104(3).
91 Id. § 1-201(25).
90 See id. § 6-104 comment 3.
89 Adrian Tabin Corp. v. Climax Boutique, Inc., 34 N.Y.2d at 214, 313 N.E.2d at 68, 356 N.Y.S.2d at 608 (quoting Hogan, The Highways and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code, 48 COLUM. L. REV. 1, 37 (1948)).
other states which have not adopted optional section 6-106, the protection afforded is that C is to be given notice of the transfer. Under sections 6-105 and 6-107(3) however, B is only required to give notice “to all persons shown on the list of creditors” and “to all other persons who are known to [B] to hold or assert claims against [S].” Under section 6-104(3), as interpreted and applied by the court, the responsibility for the completeness and accuracy of the list is placed on S, the very person whose propensity for fraud gave rise to bulk transfer laws. The consequences of permitting B to rely on S’s list may not be too onerous in states which have adopted optional section 6-106. In those states, B may be required to pay C’s claim if filed within thirty days of the transfer; this gives creditors omitted from the list time to learn of the sale. Assuming, however, that B has no knowledge of C, the effect of sections 6-104(3), 6-105 and 6-107(3) in states, such as New York, which have not adopted optional section 6-106, is to permit S to irrevocably cut off C’s rights against B at the time of transfer simply by omitting him from the list; if B has no knowledge of C, the transfer is not ineffective for failure to notify C since B, relying on S’s list, is not required to notify C. To permit S to determine whether C is given notice is counterproductive of the express purpose of protecting C from S.

Judge Gabrielli also saw that the majority’s interpretation and application of section 6-104(3) permits B “to completely ignore the realities of the business world” and “to cavalierly brush aside any inquiry as to the status of the seller’s business debts.” Under section 6-104(3), the responsibility for the completeness and accuracy of the creditors list rests on S and the transfer is not rendered ineffective by errors or omissions unless B is shown to have actual knowledge. The majority’s interpretation of the section suggests that B may rely on S’s affidavit of no creditors unless it has actual knowledge of some specific creditor. In Judge Gabrielli’s view, a going business must have some outstanding debts, if only rent and utilities; thus an affidavit of no creditors, itself, gives B knowledge that the “list” is false. For Judge Gabrielli, to permit B to rely on an affidavit of no creditors is to formulate “an absurdity” into legal doctrine.

To avoid the result reached by the majority, Judge Gabrielli would interpret section 6-104(3) along with the precode case law to require

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**Notes:**

67 See Hawkland, supra note 79, at 362.
69 Adrian Tabin Corp. v. Climax Boutique, Inc., 34 N.Y.2d at 221, 313 N.E.2d at 72, 356 N.Y.S.2d at 615 (Gabrielli, J., dissenting).
69 Id.
B to verify the list through his own investigation—at the very least an inspection of S’s books together with a search for liens—so as to give him a basis to acquire actual knowledge of any errors or omissions, “and a reckless disregard to what might be uncovered by an investigation is tantamount to knowledge within the meaning of the statute.” For Judge Gabrielli, “this [was] not a substitute of constructive knowledge for actual knowledge but a recognition that willful or reckless avoidance of knowledge should be and is the equivalent of knowledge.”

The American Bar Association Uniform Commercial Code Committee’s Subcommittee on the Revision of Article Six agrees with Judge Gabrielli on the underlying issue. It has recommended that section 6-104(3) be amended to require B to make reasonable inquiry concerning S’s creditors including an examination of S’s books. The proposed amendment provides:

Responsibility for the completeness and accuracy of the list of creditors rests on the transferor, and the transfer is not rendered ineffective by errors or omissions therein unless the fact of such errors or omissions is known or disclosed to or reasonably discoverable by the transferee. Such fact is known to or disclosed to or reasonably discoverable by the transferee if, prior to the giving of notice provided in Section 6-105, it is revealed by the transferor’s regular bookkeeping records, its existence is known or in any way made known to the transferee, or it would be discovered by his reasonable inquiry concerning the transferor’s creditors.

The Committee’s comment accompanying the proposed changes states:

New section 6-104(3) rejects the approach taken by the New York Court of Appeals in Adrian Tabin Corp. v. Climax Boutique, Inc. . . . and adopts the position that transferee is responsible for the incompleteness or inaccuracy of the list of creditors where the fact of such errors or omissions is known, disclosed to, or reasonably discoverable by him. This change is designed to head off a number of non-uniform amendments that are threatened as a reaction to the Adrian Tabin case, and, on the merits, the requirements that the transferee make reasonable inquiries concerning the transferor’s creditors and examine the books of the transferor seem fair and not unduly burdensome.
III. Checks

Federal Insurance Co. v. Groveland State Bank

Underpinning & Foundation Constructors, Inc. v. Chase Manhattan Bank, N.A.

In *Federal Insurance Co. v. Groveland State Bank*¹⁰⁴ and *Underpinning & Foundation Constructors, Inc. v. Chase Manhattan Bank, N.A.*,¹⁰⁶ Judge Gabrielli considered important questions concerning the relative rights of a drawer from whom checks are stolen and a depository bank which takes the checks from the thief. In *Underpinning*,¹⁰⁶ the drawer alleged that one of its employees, who had authority to prepare checks for the drawer’s signature, prepared one million dollars in checks payable to the order of fictitious payees—persons he intended to have no interest in the instruments. He obtained the necessary drawer’s signature, indorsed the checks in the name of the named payees by stamps containing restrictive indorsements and either cashed them or deposited them in his own or confederates’ accounts, at various depository banks. The depository banks presented the checks to the drawee which paid and charged the drawer’s account. Upon discovering the scheme, the drawer sought to recover its loss from those depository banks which had taken the checks and dealt with them inconsistently with the restrictive indorsements. One defendant, which had taken ten checks aggregating close to half a million dollars, moved to dismiss for failure to state a claim. Its theory was that the drawer may never sue a depository bank, but rather is limited to whatever action it has against its own bank, the drawee. The trial court denied the motion and the appellate division affirmed.¹⁰⁷ On appeal, Judge Gabrielli, writing for a unanimous court, held that the drawer states a cause of action against a depository bank if the allegations in its complaint indicate that the checks are properly payable from the drawer’s account and the depository bank has acted in such a way as to make it liable to the drawer for the loss.

The Code is silent on whether the drawer from whom checks are stolen may sue a depository bank which takes from the thief, and the cases are divided. Section 3-419(1)(c) provides that “[a]n instrument

¹⁰⁶ Id.
is converted when it is paid on a forged indorsement,"108 but the section does not identify who may bring an action against whom.109 The cases which deny the drawer an action against a depository bank generally give two reasons for doing so. First, as a matter of theory, the drawer has no "valuable rights" in such checks on which to base a cause of action since it does not have "the right of a payee or subsequent holder to present them to the drawee for payment, the value of its rights [being] limited to the physical paper on which they [are] written."110 Second, as a matter of policy, the drawee which pays checks over forged necessary indorsements may have certain defenses based on the drawer's negligence which, as a practical matter, may be difficult for a depository bank to raise.111 For example, as against the drawee, the drawer under section 4-406 must exercise reasonable care and promptness to examine its bank statements and checks after they have been sent by the drawee to discover its unauthorized signature or any alteration. The drawee, however, is in the best position to know when the statement and cancelled checks were sent and to know or find out about the drawer's business procedures; thus, if the drawer is permitted to bring suit against a depository bank, it puts the bank at a disadvantage in proving the defense of negligence.112

On the other hand, other cases have permitted the drawer to bring a direct action against a depository bank, principally as a matter of judicial economy.113 As a general rule, the drawee takes the loss as against the drawer if it pays a check over a forged indorsement;114 but the drawee in such cases may recover from the person it paid, including a depository bank.115 Thus, if the drawer sues the depository bank directly, a circuit of action is avoided.

Judge Gabrielli began his analysis of the problem by distinguishing between cases where, as between the drawer and the drawee, the stolen checks are properly payable from the drawer's account and those cases where they are not. The drawee may only charge against its

111 Id.
112 Id.
114 See infra notes 116-17 and accompanying text.
115 See N.Y. U.C.C. §§ 3-417(1)(a), 4-207(1)(a) (McKinney 1964).
customer's account checks which are properly payable,\(^\text{116}\) and, generally, the named payee's indorsement is necessary to make checks properly payable.\(^\text{117}\) Thus, where a thief steals checks from the drawer drawn to the order of named payees, forges the payees' indorsements, and cashes the checks at a depository bank, as between the drawer and the drawee, the loss typically falls on the drawee if it pays the checks upon presentment. Such checks are ordinarily not properly payable without the payees' indorsements, and the drawer has a cause of action against the drawee to recover the charges made against its account.

Although checks paid over unauthorized indorsements are generally not properly payable, there are a number of exceptions to the general rule. One of these is the fictitious payee rule, which is codified in section 3-405(1)(b) and (1)(c).\(^\text{118}\) Under this rule, where an employee supplies the drawer with the name of the payee intending the latter to have no interest in the instrument, an indorsement by any person in the name of the payee is effective. Apart from the fictitious payee rule, the loss in Underpinning would ordinarily fall on the drawer; the checks were not properly payable from the drawer's account without the payees' necessary indorsements, and a thief signing the payees' names is generally not sufficient for this purpose. Under the fictitious payee rule, however, the loss falls on the drawer; since an employee of the drawer supplied the payees' names intending them to have no interest in the instruments, indorsements in the name of the named payees by any person, including the thief, are effective to make the checks properly payable from the drawer's account. The stated rationale for the rule is that the drawer in such cases is in a better position to prevent the loss by reasonable care in the selection and supervision of his employees or, if not, he is at least in a better position to cover the loss by insurance and that the cost of such insurance is properly an expense of the drawer rather than of a holder or the drawee.\(^\text{119}\)

Judge Gabrielli reasoned that it is arguable that the drawer has no action against a depository bank where the checks are not properly

\(^{116}\) Id. § 4-401.


\(^{118}\) The Code provides:

An indorsement by any person in the name of a named payee is effective if . . . (b) a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or (c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

N.Y. U.C.C. § 3-405(1)(b)-(c) (McKinney 1964).

\(^{119}\) Id. § 3-405 comment 4.
payable. In such cases the drawee has in effect paid its own money; thus, the depository bank has literally not converted nor "had and received" any money of the drawer. Also arguably, the drawer has insufficient interest or loss to base a cause of action against the depository bank on conversion of the physical paper upon which the checks were drawn. Judge Gabrielli reasoned, however, that a different result might obtain in cases where the drawer takes the loss because the checks, albeit stolen, are nonetheless properly payable. Here the drawer has a property interest in the money the depository bank receives from the drawee since it comes from the drawer's account. Thus, Judge Gabrielli held that in such cases the drawer may sue a depository bank to recover the money, provided it also alleges facts which support the bank's liability. As for the argument that the drawer should not be permitted to bring suit against the depository bank because it puts the bank at a disadvantage in proving the drawer's negligence, Judge Gabrielli concluded that this fact is simply not sufficient to shield the bank in cases where its liability is otherwise established.

Under Judge Gabrielli's theory, the drawer in Underpinning had a property interest in the money since the allegations in its complaint indicated that the checks were properly payable under the fictitious payee rule. The next question was whether the drawer had alleged facts sufficient to support the depository banks' liability to the drawer. Judge Gabrielli held that the allegation that the thief had restrictively indorsed the checks in the name of the named payees and that the depository banks had dealt with the checks inconsistently with the restrictive indorsements was sufficient for this purpose.

A restrictive indorsement such as "for deposit only" requires a depository bank to deposit checks to the account of the named indorser; 12 allegedly, the depository banks in Underpinning cashed the checks or deposited them to the thief's account or those of his confederates rather than to the account of the named payees. As a result of section 3-206(3), a depository bank cannot be a holder in due course as to checks which it deals with inconsistently with a restrictive indorsement. 131 Under section 3-306(a), "[u]nless he has the rights of a holder in due course any person takes the instruments subject to all valid claims to it on the part of any person." 122 In addi-

120 Id. § 3-206(3).
122 N.Y. U.C.C. § 3-306(a) (McKinney 1964).
tion, section 3-419(3), which purports to shield depository banks from suits in certain circumstances, is "[s]ubject to the provisions . . . concerning restrictive indorsements." Thus, the banks took the checks subject to the drawer’s claim to the proceeds. As Judge Gabrielli emphasized, this result is consistent with the policy of having the loss ultimately placed on the person in the best position to prevent it. If the banks had refused to cash the checks or to deposit them to the thief’s or his confederates’ accounts, the loss might have been avoided. In any event, banks can hardly complain if they are required to comply with the Code requirements concerning restrictive indorsements.

Federal Insurance, which preceded Underpinning, presented analogous facts. In that case, Lincoln Rochester Trust Co. was both the drawer and drawee of stolen checks. Its employee, who had authority to supply the payee’s name on trust department checks, caused Lincoln to draw on itself more than three hundred thousand dollars in checks payable to the order of a depository bank where the employee had opened an account. He stole the checks, deposited or had them deposited to his account, withdrew the funds and absconded. The depository bank indorsed the checks and presented them to Lincoln as drawee, which paid. Upon discovery of the scheme, Lincoln’s insurer compensated for the loss and as subrogee brought an action to recover from the depository bank. The trial court denied each party’s motion for summary judgment. The appellate division unanimously reversed, holding that plaintiff’s motion for summary judgment should have been granted. Its theory was that a depository bank which receives checks drawn to its order from a person whose name appears nowhere on the instruments is obligated to retain the funds subject to the drawer’s direction, absent some showing that the depositor is entitled to the checks or their proceeds. Since the depository bank disbursed the funds to the thief, its liability was established and none of its alleged affirmative defenses was sufficient to defeat the claim. The court of appeals reversed, six to one, holding that summary judgment should not have

\[123 \text{ Id. § 3-419(3).} \]

\[124 \text{ See id. § 3-306 comment 2 (“All valid claims to it on the part of any person includes not only claims of legal title, but all liens, equities, or other claims of right against the instrument or its proceeds.” (emphasis added)).} \]

\[125 37 \text{ N.Y.2d} 252, 333 \text{ N.E.2d} 334, 372 \text{ N.Y.S.2d} 18 (1975).} \]

\[126 46 \text{ N.Y.2d} 459, 386 \text{ N.E.2d} 1319, 414 \text{ N.Y.S.2d} 298 (1979).} \]

\[127 37 \text{ N.Y.2d} at 257, 333 \text{ N.E.2d} at 336, 372 \text{ N.Y.S.2d} at 21.} \]

\[128 44 \text{ A.D.2d} 182, 364 \text{ N.Y.S.2d} 220 (1974).} \]
been granted. Writing for the court, Judge Gabrielli agreed that the depository bank's liability was established by its "negligence" in disbursing the money without inquiry of the thief, whose name did not appear on the checks, as to his authority to act for the drawer, but held that the bank could defeat plaintiff's claim by raising and proving Lincoln's failure to exercise reasonable care after the thefts had occurred as an affirmative defense.

Based on the theory later articulated in Underpinning, Lincoln as drawer had a potential action against the depository bank. The checks were properly payable. There were no unauthorized signatures; Lincoln ordered itself to pay the checks to the order of the depository bank and this is exactly what it did. Thus, Lincoln as drawer had a sufficient property interest in the money received by the depository bank to bring an action against the bank, provided it pleaded facts sufficient to support liability.

Federal Insurance is particularly significant for the proposition that the depository bank's liability was established by its "negligence." Under the Code, taken literally, the depository bank took the checks free from Lincoln's claim even if it was "negligent." Under section 3-305, a holder in due course takes instruments free from "all claims to it on the part of any person." Under section 3-302, a holder in due course is a holder, including a payee, who takes instruments for value, in good faith, and without notice that they are overdue or have been dishonored or of any defense against or claim to them on the part of any person. The depository bank in Federal Insurance arguably met the requirements of a holder in due course. It was a holder of the checks since it was in possession of instruments drawn to its order; it gave value by permitting the thief to withdraw the funds; and Judge Gabrielli held that "the contention that [the depository bank] took the checks in bad faith and with notice of a defense or claim against them is without substance."
Note that holder in due course status does not depend on the bank's acting in accordance with reasonable commercial standards. The drafters of article three originally incorporated such a requirement in the definition of good faith in the 1952 official text, but the requirement was deleted in 1956, at least partly in response to criticisms of the requirement made at hearings of the New York Law Revision Commission. The underlying policy objection amounts to this: a relatively low standard of conduct for holder in due course status is necessary to ensure the free transferability of commercial paper; requiring purchasers of instruments to observe reasonable commercial standards increases their exposure to claims and defenses of prior parties and, in the end, this might discourage the taking of checks and other negotiable instruments.

Notwithstanding the foregoing, Judge Gabrielli held that the bank's liability was established by its negligence. Although this result appears to exceed the terms of the statute, it does seem sensible. Indeed, one might argue that a requirement that banks exercise reasonable commercial standards is something that the public has every right to expect and is entitled to, notwithstanding its difficulty, inconvenience and expense; and the inevitable occasional losses through failure to exercise reasonable commercial standards should be borne by banks as a cost of doing business. The argument that the free transferability of checks would be much impeded if the banking community is required to conduct themselves in accordance with reasonable commercial standards is doubtful (this does not seem to have been the result of Federal Insurance). Where the loss might have been avoided had the bank observed such standards, it seems appropriate that it should bear the loss. In any event, Federal Insurance and Underpinning stand for the proposition that, in order to take free from claims and defenses, a depository bank must act consistently with restrictive indorsements and it must not disburse the employees benefit held, nonetheless, to be a holder in due course).

137 FERM ED. ED. U.C.C. 1956 RECOMMENDATIONS 102 (1956).
138 J. WHITE & R. SUMMERS, supra note 28, § 14-6, at 563.
140 Cf. N.Y. U.C.C. § 4-403 comment 2 (McKinney 1964). Note also that the § 3-419(3) shield does not protect a depository bank which fails to act in accordance with reasonable commercial standards.
proceeds of checks drawn to its order without inquiry as to the person's authority to act for the drawer. This does not seem too much to expect from banks.

Judge Gabrielli's opinion in *Federal Insurance* is also significant for establishing the depository bank's right to raise the drawer's "negligence" after the fact of theft as an affirmative defense. Under section 4-406, as against the drawee, the drawer must exercise reasonable care and promptness to examine its bank statements and checks to discover its unauthorized signature or any alteration. *Federal Insurance*, in effect, makes the depository bank a third party beneficiary of the drawee's rights under this section. Judge Gabrielli's opinion goes beyond the terms of section 4-406, however, by permitting the depository bank to also raise as an affirmative defense the drawer's failure to exercise reasonable care to discover the thefts themselves after they have gone on for some time, not just to discover its unauthorized signature or any alterations.

Judge Jones, the lone dissenter in both cases, objected to permitting the depository bank to raise the drawer's negligent failure to examine its monthly statements and checks. He thought that this exceeded the proper bounds of judicial, as compared with legislative, innovation and that such a rule creates uncertainty by making allocation of loss dependent on provable facts, in an area where predictability and certainty are of great practical importance. Although Judge Gabrielli did not address these points as such, his position perhaps is that section 4-406 is not the exclusive statement of the drawer's obligations concerning the use of reasonable care after a theft occurs. Once the depository banks' liability is established, it is sensible to permit the bank to raise the drawer's negligence after the theft as an affirmative defense. This is a logical extension of the principle of placing the loss on the person in the best position to prevent it, and is permissible under section 1-103, which permits courts to apply supplementary principles of law.

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141 The section caption of § 4-406 is "Customer's Duty to Discover and Report Unauthorized Signature or Alteration." N.Y. U.C.C. § 4-406 (McKinney 1964) (emphasis added). Section captions are part of the Act, Id., § 1-109.

142 Judge Gabrielli's opinion in *Federal Insurance* also extended the requirement of acting in accordance with reasonable commercial standards to Lincoln as drawee. In that case, this permitted the depository bank to raise Lincoln's conduct in paying the checks as part of its affirmative defense. Requiring the drawee to act in accordance with reasonable commercial standards is arguably of particular significance in cases involving fictitious payees and imposters under § 3-405. For example, take the case where an employee with authority to supply the drawer with
IV. LETTERS OF CREDIT

United Bank Ltd. v. Cambridge Sporting Goods Corp.

Judge Gabrielli also wrote the court's unanimous decision in United Bank Ltd. v. Cambridge Sporting Goods Corp., which clarified points concerning the duty, under article five, of an issuer of a letter of credit to honor drafts drawn under the credit. Seller (S), in Pakistan, and buyer (B), in New York, entered into a contract for the manufacture and sale of boxing gloves. To facilitate payment, the transaction was structured as a documentary sale. S was to be paid by S's bank in Pakistan. S's bank expected to be paid by B's bank in New York pursuant to a letter of credit, an engagement by B's bank to honor S's draft for the price upon compliance with the conditions specified in the credit. B's bank was to receive reimbursement from B.

After the credit was issued, S informed B it could not perform within the contract time and requested an extension. B advised S and S's bank that the contract was cancelled, but S nonetheless shipped goods to B. Prior to the credit's expiration date, S's bank presented to B's bank S's draft for one-half of the price drawn to the order of S's Bank; a draft for the balance of the price was presented after the credit had expired. When the goods arrived they were "old, unpadded, ripped and mildewed gloves" rather than the newly manufactured ones called for in the contract. B sued S and had a sheriff levy on the proceeds of the draft in the hands of B's bank; S's bank then sued B to recover the proceeds, arguing it had a superior interest. The question of who was entitled to the proceeds of the draft as the payee's name supplies the name of a fictitious payee, steals the check, forges the payee's indorsement and cashes it at a collecting bank; the collecting bank presents to the drawee which pays and charges the drawer's account. As a result of the fictitious payee rule, an employee's endorsement in the name of the named payee is "effective" to make the check properly payable from the drawer's account if it otherwise is properly payable. See supra text accompanying notes 118-19. Arguably, under Federal Insurance, to be otherwise properly payable the drawee is required to act in the accordance with reasonable commercial standards. However, the court held in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Chemical Bank, 57 N.Y.2d 439, 442 N.E.2d 1256, 456 N.Y.S.2d 742 (1982), that "a drawee bank's mere failure to use ordinary care in the handling of a check whose forgery has brought it within the embrace of section 3-405 will not subject it to liability." Id. at 447, 442 N.E.2d at 1256, 456 N.Y.S. at 746 (citations omitted). For a general discussion of the role of negligence in § 3-405 cases, see Comment, The Effect of Bank Misconduct on the Operation of Padded Payroll Preclusion of U.C.C. § 3-405, 27 U.C.L.A. L. Rev. 147 (1979); Comment, The Role of Negligence in Section 3-405 of the Uniform Commercial Code: Owensboro National Bank v. Crip, 69 Ky. L.J. 143 (1980-81).


144 Id. at 256, 360 N.E.2d at 946, 392 N.Y.S.2d at 268.
between B and S’s bank turned on whether B’s bank, the issuer of the credit, had a duty to honor the drafts.

Under section 5-114(1), “[a]n issuer must honor a draft . . . which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary.” This codifies the principle that a bank’s engagement to honor drafts which comply with the letter of credit is independent of the underlying contract for sale. Thus, as a general rule, the issuer of a letter of credit must honor the drafts despite its customer’s complaint that the goods do not conform to the contract. This protects persons who rely on the bank’s engagement to pay; moreover, it is not overly hard on the bank as the bank is entitled to reimbursement from its customer.

Section 5-114(2), however, contains exceptions to the general rule. Under this section, the issuer may dishonor drafts drawn under the credit against one who is not a holder in due course when there is “fraud in the transaction.” The first issue in United Bank was whether there had been “fraud in the transaction.” The term is undefined and its exact dimensions are unclear. Part of the difficulty is in distinguishing between disputes which are merely a difference of opinion as to the quality of the goods and those which rise to the level of “fraud in the transaction.” Both the trial court and the appellate division thought that there was insufficient evidence of fraud to justify dishonor of the drafts. The court of appeals unanimously reversed.

Although undefined, the term “fraud in the transaction” is thought to be at least a codification of the precode case Sztejn v. Henry Schroder Banking Corp. In Sztejn, the underlying contract provided for the sale of “bristles.” Upon arrival the goods turned out to be “cowhair, other worthless material and rubbish.” The court recognized that a letter of credit is independent of the underlying contract of sale, but held that the issuer of a credit might refuse pay-

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146 See id. § 5-114 comment 1.
147 See id.
148 See id. § 5-114 comment 2.
149 Id. § 5-114(2).
ment in cases where it receives notice of the seller's intentional fraud prior to acceptance or payment of the drafts. In such cases "the principle of the independence of the bank's obligation under the letter of credit should not be extended to protect the unscrupulous seller." The shipment of "cowhair, other worthless material and rubbish," as compared with the "bristles" called for in the contract, was not a mere breach of warranty regarding the quality of the goods; it amounted to intentional fraud.

Relying on Sztejn, Judge Gabrielli held that "fraud in the transaction" at least encompasses cases where S ships "essentially worthless merchandise." In this case, the "old, unpadded, ripped and mildewed gloves" shipped by S were essentially worthless when measured against the newly manufactured ones called for in the contract. Thus, there had been "fraud in the transaction" within the meaning of section 5-114(2).

Even when an exception such as "fraud in the transaction" is established, the issuer must nonetheless honor drafts drawn on the credit against a holder in due course. The second issue in United Bank was which party had the burden of proof as to whether S's bank was a holder in due course. Although section 5-114(2) refers to section 3-302, which sets out the elements for holder in due course status, it does not deal with the question of burden of proof. Section 3-307, however, sets out pleading and practice rules concerning the establishment of holder in due course status as to negotiable instruments in general. Under that section, "[w]hen the signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense; [a]fter it is shown that a defense exists, a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course." Judge Gabrielli held that the pleading and practice rules in section 3-307 would be applied in cases where a presenter of a

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138 Id. at 722, 31 N.Y.S.2d at 634.
139 United Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d at 257, 260-61, 360 N.E.2d at 947, 949, 392 N.Y.S.2d at 269, 271. As to the meaning of the term in other contexts, Judge Gabrielli noted that "the drafters of section 5-114, in their attempt to codify the Sztejn case and in utilizing the term 'fraud in the transaction,' have eschewed a dogmatic approach and adopted a flexible standard to be applied as the circumstances of a particular situation mandate." Id. at 260, 360 N.E.2d at 948, 392 N.Y.S.2d at 271.
140 For a general discussion of fraud in letter of credit cases, see Symons, Letters of Credit: Fraud, Good Faith and the Basis for Injunctive Relief, 54 Tul. L. Rev. 338 (1980).
141 N.Y. U.C.C. § 5-114(2) comment 2 (McKinney 1964).
142 Id. § 3-307(2) to (3).
draft, drawn under a letter of credit, claims holder in due course status. Applying the section, he held that since the "defense" of "fraud in the transaction" had been established, S's bank, the presenter of the draft, had the burden of establishing its holder in due course status. Since S's bank failed to meet this burden, its petition for recovery of the proceeds of the draft was dismissed.

V. WAREHOUSE RECEIPTS

I.C.C. Metals Inc. v. Municipal Warehouse Co.

Judge Gabrielli also wrote the court's majority opinion in I.C.C. Metals, Inc. v. Municipal Warehouse Co.,186 which clarified the liability of a warehouse for unexplained loss under article seven. O, a metals trader, deposited $100,000 worth of goods with W, a commercial warehouse, and received three warehouse receipts. Each receipt purported to limit W's liability to fifty dollars in the event of "damage" to the goods, unless O made a written request for increased liability and paid increased storage charges. When W failed to return the goods upon proper demand, O brought a conversion action to recover for their value. W defended on the ground that the goods had been stolen without its fault and, in any event, the total liability under the three receipts was one hundred fifty dollars. The trial court granted O's motion for summary judgment and the appellate division unanimously affirmed.187 The court of appeals affirmed six to one.

Under section 7-403, a warehouse must deliver the bailed goods to a person entitled under the document who makes proper demand for their return; if it fails to deliver, it is liable for breach of its obligation to deliver, unless it establishes a lawful excuse. By arguing that the goods had been stolen without its fault, W tried to establish the section 7-403(1)(b) excuse of "damage to or delay, loss or destruction of the goods for which the bailee is not liable."188 Goods are often lost while in the warehouse's possession by, for example, some act of nature, of some third party, or of the warehouse itself. A warehouse, however, is not an insurer of goods. Under section 7-204(1), it "is liable for damage for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man

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188 N.Y. U.C.C. § 7-403(1)(b) (McKinney 1964).
would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care." In addition, the warehouse is strictly liable if it does some act which amounts to a conversion of the goods (exercise of unlawful dominion and control over them). For example, misdelivery is conversion; the warehouse is strictly liable for damages for nondelivery to a person entitled under the document if it delivers the goods to the wrong person even if it exercises reasonable care in making the misdelivery. On the other hand, if the goods are not converted by the warehouse, but are lost by fire or theft by some third party, despite the exercise of reasonable care, the warehouse is not liable in damages for nondelivery.

In *I.C.C. Metals*, Judge Gabrielli held that to establish the section 7-403(1)(b) excuse of loss for which it is not liable the warehouse must come forward and establish "what actually happened to the goods." Judge Gabrielli saw this as being a "practical necessity." Since the property is lost while in its possession, the warehouse is in the best, if not the only, position to explain the loss. He was quite insistent that to meet the burden "the explanation proffered by the warehouse . . . must be supported by sufficient evidence and cannot be merely the product of speculation and conjecture; . . . the warehouse is required to show not merely what might conceivably have happened to the goods, but rather what actually happened to the goods." Judge Gabrielli held that W's evidence was insufficient to

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181 Id. § 7-204(1).
183 Seventeen jurisdictions, including New York, have adopted additional language in § 7-403(1)(b). State Correlation Tables, U.C.C. REP. SERV. (CALLAGHAN 1992). The New York version provides that: "The bailee must deliver the goods to a person entitled under the document . . . unless and to the extent that the bailee establishes . . . damages to or delay, loss or destruction of the goods for which the bailee is not liable, but the burden of establishing negligence in such cases is on the person entitled under the document." N.Y. U.C.C. § 7-403(1)(b) (McKinney 1964) (emphasis added). This language is designed to conform § 7-403(1)(b) to the rule in states, such as New York, which place the ultimate burden of persuasion as to the warehouse's liability on the person entitled to the goods. Under this rule, once the warehouse has met its burden of production, the person entitled to the goods has the burden of persuading the trier of fact that the loss was caused by a reason for which the warehouse is liable, namely by negligence or conversion. If the person entitled to the goods fails to meet this burden, then the warehouse is not liable for nondelivery. In *I.C.C. Metals*, however, W failed to meet its burden of production.
184 50 N.Y.2d at 664 n.3, 409 N.E.2d at 853 n.3, 431 N.Y.S.2d at 377 n.3 (emphasis added).
185 Id. (emphasis added).
support its explanation that the goods had been stolen without its fault. "Viewed most favorably to [W, its] evidence would indicate at most that theft by a third party was one possible explanation; [W]... proved only that theft was possible, and presented no proof of an actual theft." Since W did not meet the burden of establishing what actually happened to the goods, it failed to establish a lawful excuse and was liable for breach of its obligation to deliver.

The next question in I.C.C. Metals was the amount of damages. O sued for the value of the goods, one hundred thousand dollars, but W argued that, under the limitation of liability in the warehouse receipts, its total liability for nondelivery was one hundred fifty dollars. Judge Gabrielli held that not only is a warehouse liable for damages for nondelivery if it fails to establish what actually happened to the goods, but also its limitation of liability clause is ineffective. Under section 7-204(2) a warehouse may limit its liability for damages caused by its own negligence provided the bailor is given reasonable time to make a written request for increased liability and to pay increased storage charges, but "[n]o such limitation is effective with respect to the warehouseman's liability for conversion to his own use." Thus, Judge Gabrielli reasoned that if the warehouse fails to establish what actually happened to the goods, it is just as reasonable to assume that the loss was caused by an act for which the limitation is ineffective (viz, conversion) as it is to assume that it was caused by an act for which the limitation is effective (viz, negligence). Further, to give effectiveness to a limitation of liability where it fails to establish what actually happened to the goods might give the warehouse every incentive to convert the goods. The warehouse is in the best position to know what actually happened, and "[c]ertainly a warehouse may reasonably be required to keep track of goods entrusted to it and to supply an accurate explanation of any loss to the bailor." As a result, a warehouse which fails to establish what actually happened to the goods is liable for their full value as damages for nondelivery notwithstanding a clause limiting its liability.

166 Id. (emphasis added).
167 N.Y. U.C.C. § 7-204(2) (McKinney 1964).
168 50 N.Y.2d at 668, 409 N.E.2d 855, 431 N.Y.S.2d at 379.
169 Judge Jasen, the lone dissenter, thought all of this was too hard on the warehouse. For him, requiring the warehouse to establish what actually happened to the goods was "an onerous burden." Id. at 671 n.4, 409 N.E.2d at 857 n.4, 431 N.Y.S.2d at 381 n.4. He agreed that the warehouse was liable if it failed to explain the loss, but he would give effectiveness to the limitation of liability unless the person entitled to the goods proved that the loss was caused by an act for which the limitation of liability is ineffective, namely conversion. He thought this was fair since O paid a storage fee commensurate with W's limited liability; if O wanted greater
VII. Summary

Judge Gabrielli was a good commercial judge. He handled the complexities of commercial law with skill and expertise. In general, he wrote clearly, engaged in analytical thought and tried to reach sensible results; and, many of his opinions made a substantial contribution to the evolution of the law governing commercial transactions.

Most of Judge Gabrielli's commercial opinions were written for unanimous, or nearly unanimous, courts. In Equitable Lumber v. IPA Land Development Corp., he provided the framework for analysis on the question whether an agreement to pay liquidated attorney's fees is enforceable under article two: such a term is enforceable under section 2-719(1)(a) if not unconscionable under section 2-302 (not the product of oppression or unfair surprise) and the amount is reasonable in light of the elements in section 2-718(1) (the fee is reasonable in light of anticipated or actual harm and is not unreasonably large when judged against the fee typically charged in such cases). The case is also significant as one of the few judicial attempts to interpret and apply section 2-718(1).

Judge Gabrielli's opinions in Federal Insurance Co. v. Groveland Bank and Underpinning & Foundation Constructors, Inc. v. Chase Manhattan Bank establish the right of the drawer from whom checks are stolen to bring an action against a depository bank which takes from the thief where the allegations in the drawer's complaint indicate that the checks are properly payable from the drawer's account.

liability it was its responsibility to make written demand for such liability and pay increased storage fees. Id. at 669-72, 409 N.E.2d at 866-88, 431 N.Y.S.2d at 380-82. Is it an answer to Judge Jason that few bailors understand that it is their responsibility to make written demand for increased liability? It does not seem that the bailor in ICC Metals understood this.

In addition to the cases discussed in the text, Judge Gabrielli also wrote opinions in four other U.C.C. cases. In Tonelli v. Chase Manhattan Bank, 41 N.Y.2d 667, 363 N.E.2d 554, 394 N.Y.S.2d 856 (1977), Judge Gabrielli, writing for a unanimous court, clarified two points concerning the law of checks. First, a drawee bank which exchanges a cashier's check for its customer's certified check has paid its customer's check. Second, a drawee bank which pays a check not properly payable may avoid liability if the proceeds reach the intended payee and are applied for the purpose the drawer intended. In Sunshine v. Bankers Trust, 34 N.Y.2d 404, 416, 314 N.E.2d 860, 877, 358 N.Y.S.2d 113, 123 (1974) (Gabrielli, J., concurring), he wrote a brief concurring opinion to emphasize that a bank's right of subrogation under § 4-407 is not to be employed or interpreted in its restrictive, common law sense.

Judge Gabrielli also wrote two brief unanimous opinions involving secured transactions under article nine. In WDM v. United Credit Corp., 47 N.Y.2d 50, 389 N.E.2d 1099, 416 N.Y.S.2d 579 (1979), he held that a proforma letter of assignment sent pursuant to § 9-502 is not defamatory. In Public Loan v. Hyde, 47 N.Y.2d 122, 390 N.E.2d 1182, 417 N.Y.S.2d 236 (1978), he held that a description of a security interest which is ineffective under article nine violates the Federal Truth in Lending Act.
and the depository bank has acted in such a way as to make it liable to the drawer for the loss. In addition, the bank's liability is established if it deals inconsistently with checks bearing restrictive indorsements, disburses the proceeds of checks drawn to its order without inquiry as to the persons authority to act for the drawer, or is otherwise "negligent." The bank, however, may raise the drawer's "negligence" occurring after the fact of theft as an affirmative defense. This includes not only negligent failure to examine its statement and checks, a but also negligent failure to discover the thefts after they have gone on for some time.

In United Bank Ltd. v. Cambridge Sporting Goods Corp., Judge Gabrielli held that the term "fraud in the transaction" in section 5-114(2) encompasses cases where the seller ships essentially worthless merchandise, and that the pleading and practice rules in section 3-307 are to be applied in cases where a presenter of drafts drawn under a letter of credit claims holder in due course status. In I.C.C. Metals v. Municipal Warehouse, he held that a warehouse which fails to return the bailed goods upon proper demand is liable for their full value as damages for nondelivery notwithstanding a clause limiting its liability, if it fails to establish what actually happened to the goods.

Sometimes Judge Gabrielli dissented from the court's majority view. His position that the plaintiff in Martin v. Dierck Equipment Co. had a warranty action under section 2-318, which was timely brought under section 2-725, seems more consistent with the language of the Code than the contrary view taken by the majority. His analysis of section 6-104(3) in Adrian Tabin Corp. v. Climax Boutique, Inc. seems to have prompted the American Bar Association Uniform Commercial Code Committee's Subcommittee on the Revision of Article Six to recommend that the section be amended to require the transferee of a bulk transfer to make reasonable inquiry concerning the transferor's creditors, including examining the transferor's books. Finally, Judge Gabrielli's position in In re Marlene Industries and Schubtex, Inc. v. Allen Snyder, Inc. was that the Code does not overrule the common law rule that no party is bound to arbitrate unless it expressly agrees to do so. It remains to be seen whether his view will prevail.