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Abstract

This Note examines the origins, history, and current standing of federal common law in light of the U.S. Supreme Court's decision Eerie Railroad v. Tompkins. Furthermore, the Note will look to see the impact of state law and the Uniform Commercial Code in the creation of federal common law. Finally, the Note will analyze how the U.S. Supreme Court's decision, U.S. v. Kimbell Foods, Inc., impacts the use of the U.C.C. as federal law.

KEYWORDS: contracts, uniform commercial code

THE UNIFORM COMMERCIAL CODE AS FEDERAL LAW: *UNITED STATES v. KIMBELL FOODS, INC.*

I. Introduction

The federal common law was dealt a powerful blow by the United States Supreme Court in *Erie R.R. v. Tompkins.*[1] However, *Erie's* maxim that there is no federal common law[2] was not conclusive. The Court soon fashioned federal common law rules in selected situations,[3] namely in cases involving the exercise of a constitutional power.[4] It is logical that the Uniform Commercial Code (U.C.C. or the Code) should provide a major source of federal common law[5] in commercial cases.[6] Forty-nine states, the District of Columbia, and the Virgin Islands have enacted the Code.[7] The U.C.C. has been described as convenient, uniform, and complete,[8] all desirable characteristics of a federal common law.[9] As logical as

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1. 304 U.S. 64 (1938). *Erie* overruled Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), which promoted the application of a uniform common law in the federal courts. Heckman, *Uniform Commercial Law in the Nineteenth Century Courts: The Decline and Abuse of the* Swift *Doctrine*, 27 EMORY L.J. 45 (1978). *Erie* stated that "[t]here is no federal general common law," 304 U.S. at 78, thereby making state law the applicable rule. *Id.* However, as will be shown, federal common law may still be appropriate in selected cases. *See* text accompanying notes 11-26 *infra.*

2. 304 U.S. at 78.

3. *See, e.g.*, Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (rights in interstate streams); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (commercial paper); United States v. Standard Oil Co. of Cal., 332 U.S. 301 (1947) (tort liability).

4. 318 U.S. at 366. This may be rephrased as a "federal source." *See* note 25 *infra* and accompanying text. Every federal statute or program is an exercise of a constitutional power.

5. Federal common law may be defined as "a body of decisional law developed by the federal courts untrammeled by state decisions." O'Brien v. Western Union Tel. Co., 113 F.2d 539 (1st Cir. 1940). "Untrammeled" may be too harsh a term. It is better said that state court decisions are not conclusive. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

6. T. QUINN, UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST 3-170 (1978).

7. 1 UNIFORM LAWS ANN. 1 (West 1977). *See also* Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 10 (1967) [hereinafter cited as Schnader]. Louisiana, the one jurisdiction not to have fully enacted the Code, has recently enacted Articles 1, 3, 4, and 5. LA. REV. STAT. ANN. § 10 (West 1977).

8. Llewellyn, *Problems of Codifying Security Law*, 13 L. & CONTEMP. PROB. 687 (1948). It also describes the Code as simple, accessible, fair, and clear. *Id.*

9. Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943); New York, N.H. & H.R. Co. v. Reconstruction Fin. Corp., 180 F.2d 241, 244 (2d Cir. 1950).

it may be for the federal courts to utilize the U.C.C., this has not always been the practice. Recently, the United States Supreme Court in *United States v. Kimbell Foods, Inc.*[10] formulated clear standards which will permit the broad application of the Code as federal law.

This Note will first discuss the recent history of the federal common law and the role that state law and the U.C.C. have had in its formulation. This Note then will examine *Kimbell's* effect on the application of the Code as federal law.

II. An Overview of Federal Commercial Common Law

The federal common law, after its near demise in *Erie*,[11] was revived in *Clearfield Trust Co. v. United States.*[12] This case, decided prior to the enactment of the Code, involved a check drawn on the United States Treasurer to the order of Clair Barner.[13] The check was mailed to Barner but never was received by him. Barner promptly reported this to the proper government authorities. Meanwhile, the check was obtained by an unknown party who, forging Barner's name, cashed the check at a J. C. Penny department store. The department store deposited the check in its account at Clearfield Trust which presented the check for payment at the Federal Reserve Bank of Philadelphia. The check was paid in due course. More than fourteen months later, the federal government demanded reimbursement from Clearfield on its prior endorsement guaranty because of the forgery.[14] Clearfield Trust argued that under *Erie* state law applied. Under the applicable state law, the government was precluded by laches from recovering payment.[15] The Supreme Court refused to follow the *Erie* doctrine and held that federal, not state, law applied.[16] The Court held that federal law controls where the issues arise from the exercise of a constitutional power.[17] In this case, the check drawn on the United

10. 440 U.S. 715 (1979).

11. *See* notes 1 & 2 *supra* and accompanying text; Heckman, *Uniform Commercial Law in the Nineteenth Century Courts: The Decline and Abuse of the* Swift *Doctrine*, 27 EMORY L.J. 45, 67 (1978).

12. 318 U.S. 363 (1943).

13. *Id.* at 364.

14. *Id.* at 364-65.

15. *Id.* at 366.

16. *Id.*

17. *Id. See also* note 4 *supra.*

States Treasurer was issued under a federal program authorized by statute. Therefore, federal law controlled. In determining federal law,[18] the Court noted that it could select state law.[19] Due to the desire for uniformity, the Court, however, decided that state law would be inappropriate as the content of federal law.[20] Instead, the Court looked to "the federal law merchant, developed for about a century under the regime of *Swift v. Tyson*" for fashioning a federal common law rule.[21] Under this rule, the drawee (the government) recovers when the presenting bank (Clearfield Trust) receives payment for a forged check.[22] For laches to apply the defendant must show that the drawee's delay caused the damage

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18. Of course, the Court must first abide by any rules set by Congress on the matter, before it may formulate federal common law rules. 318 U.S. at 367; United States v. Guaranty Trust Co., 293 U.S. 340 (1934).

19. 318 U.S. at 367.

20. *Id.* The Court noted that

> reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.

Id. In subsequent decisions, the Supreme Court has interpreted this statement as a desire for uniformity. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979); United States v. Little Lake Misere Land Co., 412 U.S. 580, 607 (1972); United States v. Yazell, 382 U.S. 341, 354 (1966). For criticism of this interpretation, see Note, *Federal Contract Common Law and Article 2 of the Uniform Commercial Code: A Working Relationship*, 20 B.C. L. REV. 680, 684-85 n.34 (1979). In any case, the *Clearfield* Court did not articulate specific reasons for a uniform federal rule. The case only expressed a fear of "exceptional uncertainty." Moreover, the Court did not explain how "exceptional uncertainty" would affect government commercial paper. *Compare Clearfield*, 318 U.S. at 367 *with Kimbell*, 440 U.S. at 729-33.

21. 318 U.S. at 367. It is interesting to note that this represents a choice of "general commercial law rather than a choice of a federal rule designed to protect a federal right." *Id.* Lower federal courts have expressed a contrary view: that the *Clearfield* Court was actually protecting a federal right. United States v. Philadelphia Nat'l Bank, 304 F. Supp. 955, 956 (E.D. Pa. 1969); United States v. Bank of Am. Nat'l Trust & Savings Ass'n, 288 F. Supp. 343, 347 (N.D. Cal. 1968), *aff'd*, 438 F.2d 1213 (9th Cir.), *cert. denied*, 404 U.S. 864 (1971). Although *Kimbell* recognized an interest in protecting a federal objective as a basis for applying a federal common law rule, they distinguished it from uniformity and rejected it in the factual context presented to it. *See* notes 73-76 *infra*.

22. 318 U.S. at 368. The theory behind this rule is "that he who presents a check for payment warrants that he has title to it and the right to receive payment. If he has acquired the check through a forged endorsement, the warranty is breached at the time the check is cashed." *Id.* (footnote omitted).

at issue.[23] The defense of laches was rejected as Clearfield provided no such showing.[24]

In effect, *Clearfield* set forth a two-tier test to determine the applicability of state law.[25] On the first level, the source of the litigation is examined; that is, whether the exercise of a constitutional power is at issue. Federal law will apply if the source is federal. State law will apply if the source is not federally oriented. If federal law applies, a court proceeds to the second tier to determine the content of that law. At this stage a court may determine the content of federal law by either selecting state law or formulating federal common law. The Court, however, did not establish any standards for choosing state law as federal law. It merely held that the adoption of a federal common law rule was necessitated by the need for uniformity.[26]

Federal common law was applied again in a check-cashing situation by the Court two years after *Clearfield* in *National Metropolitan Bank v. United States.*[27] This case involved the cashing of forged checks by a government clerk who originally obtained them from the government by forging vouchers. The government, upon discovery of the fraud, demanded repayment from the defendant bank. The bank refused, contending that the government's own negligence in not properly supervising the disbursement of the checks caused the loss, thereby relieving the bank of liability.[28] The fact that *Metropolitan* and *Clearfield* both dealt with government commercial paper compelled the Court to follow *Clearfield.*[29] The Court held that federal common law[30] controlled and denied the defendant bank's defense.[31] While the Court did not present its analysis as such, by relying upon *Clearfield*[32] the Court followed the

23. *Id.* at 369-70.
24. *Id.*
25. *See id.* at 366-67.
26. *Id. See also* note 20 *supra.*
27. 323 U.S. 454 (1945).
28. *Id.* at 454-55.
29. *Id.* at 457.
30. *Id.* at 456. The Court referred to this as the "general federal rule." Specifically, this federal common law rule holds that "negligence of a drawer-drawee in failing to discover fraud prior to a guaranty of the genuineness of prior endorsements does not absolve the guarantor from liability in cases where the prior endorsements have been forged." *Id.* at 459.
31. *Id.* at 457-58.
32. *Id.* at 456.

suggested two-tier test.

The U.C.C., formally introduced eight years after *Metropolitan*,[33] conflicts with the holding of that case. The Code states that any unauthorized signature is wholly inoperative, unless ratified.[34] Such a ratification may be found from conduct.[35] Application of the Code would have changed the result in *Metropolitan*. The Code renders an unauthorized endorsement effective in some embezzlement type situations of which *Metropolitan* would appear to be one.[36]

The adoption of the U.C.C. by most states[37] did not change the federal courts' position on applying state commercial law. An example of this is *United States v. Bank of America National Trust and Savings Association*.[38] In this case, two members of the United States Navy prepared six treasury checks payable to a former shipmate while working in their ship's disbursing office. The checks

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33. *Metropolitan* was decided in 1945. *See* note 26 *supra*. The U.C.C. was introduced formally in 1953. Schnader, *supra* note 7, at 8.

34. U.C.C. § 3-404 provides:

> (1) Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value.
>
> (2) Any unauthorized signature may be ratified for all purposes of this Article. Such ratification does not of itself affect any rights of the person ratifying against the actual signer.

35. U.C.C. § 3-404, Comment 3 states in pertinent part:

> A forged signature may at least be adopted; and the word "ratified" is used in order to make it clear that the adoption is retroactive, and that it may be found from conduct as well as from express statements. Thus it may be found from the retention of benefits received in the transaction with knowledge of the unauthorized signature; and although the forger is not an agent, the ratification is governed by the same rules and principles as if he were.
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> This provision makes ratification effective only for the purposes of this Article. The unauthorized signature becomes valid so far as its effect as a signature is concerned. The ratification relieves the actual signer from liability on the signature. It does not of itself relieve him from liability to the person whose name is signed. It does not in any way affect the criminal law. No policy of the criminal law requires that the person whose name is forged shall not assume liability to others on the instrument; but he cannot affect the rights of the state. While the ratification may be taken into account with other relevant facts in determining punishment, it does not relieve the signer of criminal liability.

36. U.C.C. § 3-405(1)(c) states that "an indorsement by any person in the name of a named payee is effective if 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."

37. Schnader, *supra* note 7, at 10.

38. 438 F.2d 1213 (9th Cir.), *cert. denied*, 404 U.S. 864 (1971).

were forged and cashed by them at the defendant bank which eventually received payment from the government. The government, upon discovery of the fraud, attempted to recover its payments from the bank.[39] The Court of Appeals for the Ninth Circuit noted that application of the Code[40] would favor the bank.[41] However, the court felt bound by *stare decisis* to apply the federal common law rule as defined in *Metropolitan* and held the bank liable.[42]

Although this position has been followed by other federal courts,[43] such practice has not been without exceptions. In *In re Humboldt Fir, Inc.*,[44] the special relationship between the federal government and the Indian population was found to be sufficient as a source under the first tier to bring a breach of contract action brought by an Indian tribe under the scope of federal law.[45] In deciding upon the applicable federal rule, the district court recognized the U.C.C. as a major source of "general contract law"[46] and applied the Code.[47] Although the court did not explicitly utilize the second tier of the *Clearfield* test in its analysis, a careful reading of the case shows that the U.C.C. was applied as a matter of federal common law, not as the state law component of federal law.[48]

In contrast to utilizing the federal common law as federal law, the courts may adopt state law as federal law at the second tier of the previously suggested test. As noted above,[49] the Supreme Court

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39. *Id.* at 1213.

40. U.C.C. § 3-405(1)(c); *see* note 36 *supra.*

41. 438 F.2d at 1213.

42. *Id.* at 1214.

43. *See* Bank of Am. Nat'l Trust & Savings Ass'n v. United States, 552 F.2d 302 (9th Cir. 1977); United States v. City Nat'l Bank & Trust Co., 491 F.2d 851 (8th Cir. 1974); United States v. Philadelphia Nat'l Bank, 304 F. Supp. 955 (E.D. Pa. 1969).

44. 426 F. Supp. 292 (N.D. Cal. 1977).

45. *Id.* at 295-96.

46. *Id.* at 296-97; *see also* United States v. Wegematic Corp., 360 F.2d 674 (2d Cir. 1966) (the U.C.C. as a source for the "federal" law of sales).

47. 426 F. Supp. at 297-98. The court recognized statutes existed dealing with the use of Indian timber (the subject of the litigation), but these statutes were of little significance in the court's analysis. *Id.*

48. The practical distinction between the application of the U.C.C. as federal common law and the state law component of federal law has been summarized as "instability." Federal common law is subject to the discretion of the federal courts and state law remains within the reach of localities subject to change by state legislatures. Note, *Federal Contract Common Law and Article 2 of the Uniform Commercial Code: A Working Relationship,* 20 B.C. L. REV. 680, 686 (1979).

49. *See* text accompanying note 19 *supra.*

has stated that in deciding on a "choice of the applicable federal rule we have occasionally selected state law."[50] The courts have been inconsistent, however, in deciding when to apply state law as the federal rule.[51] An interesting forum for this conflict is in the area of Farmers Home Administration[52] (FHA) mortgage liens. In such cases, interest and liens are created by the government's lending of money. These interests and liens may be affected by subsequent events, many of which are covered by the Code.[53] In cases brought under the FHA, two circuits[54] have adopted state law as federal law, while five circuits[55] have applied a federal common law rule. Of the five that have applied federal common law, one expressly made the Code the basis of such a rule.[56] Moreover, it is doubtful that application of the Code would have changed the results in the four cases which applied a federal common law rule.[57]

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50. Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943); Royal Indem. Co. v. United States, 313 U.S. 289 (1940); *see also* text accompanying notes 18-20 *supra*.

51. *Compare* United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973); United States v. Yazell, 382 U.S. 341 (1966); *and* United States v. Standard Oil Co. of Cal., 332 U.S. 301 (1947) *with* Southern Pacific Transp. Co. v. United States, 462 F. Supp. 1193 (E.D. Cal. 1978); United States v. Hext, 444 F.2d 807 (5th Cir. 1971); United States v. National Bank of Commerce in New Orleans, 438 F.2d 809 (5th Cir. 1971); *and* Guldager v. United States, 204 F.2d 487 (6th Cir. 1953).

52. The statute authorizes federal financial assistance for farmers who are "unable to obtain sufficient credit elsewhere to finance their actual needs at reasonable rates and terms . . . ." Consolidated Farmers Home Administration Act of 1961, Pub. L. No. 87-128, § 302, 75 Stat. 307, as amended, Act of 1970, Pub. L. No. 91-620, § 2, 84 Stat. 1862; Act of 1978, Pub. L. No. 95-334, § 101, 92 Stat. 420 (codified at 7 U.S.C.A. § 1922 (West 1973 & Supp. 1979)). In 1972, the name of the statute was changed to the "Consolidated Farm and Rural Development Act." *See* Rural Development Act of 1972, Pub. L. No. 92-419, § 101, 86 Stat. 657.

53. *See generally* U.C.C. art. 9.

54. *See* United States v. Chappell Livestock Auction, Inc., 523 F.2d 840, 841-42 (8th Cir. 1975); United States v. Union Livestock Sales Co., 298 F.2d 755, 758 (4th Cir. 1962); United States v. Kramel, 234 F.2d 577, 580-81 (8th Cir. 1956). While the U.C.C. was not applicable in these decisions, the use of state law in these decisions indicates that the U.C.C. will be applicable in other appropriate FHA mortgage cases.

55. United States v. Hext, 444 F.2d 804, 808 (5th Cir. 1971); Cassidy Comm'n Co. v. United States, 387 F.2d 875, 878-79 (10th Cir. 1967); United States, v. Carson, 372 F.2d 429, 432 (6th Cir. 1967); United States v. Sommerville, 324 F.2d 712, 716-17 (3d Cir. 1963); United States v. Matthews, 244 F.2d 626, 628 (9th Cir. 1957).

56. United States v. Hext, 444 F.2d 804, 810-14 (5th Cir. 1971).

57. *Id.* at 811. The federal common law rule applied in these cases states "that an auctioneer is liable for conversion to the holder of a security interest in property which he has sold even if unaware of the existence of the security interest . . . ." United States v. Carson, 372 F.2d 429, 435 (6th Cir. 1967); *see also* Cassidy Comm'n Co. v. United States, 387 F.2d 875, 878-80 (10th Cir. 1967); United States v. Sommerville, 324 F.2d 712, 717 (3d Cir. 1963);

The importance of these cases is diminished, however, by the Supreme Court decision in *United States v. Kimbell Foods, Inc.*,[58] wherein the Court offered concrete standards for the suggested two-tier test.

III. *United States v. Kimbell Foods, Inc.*—Concrete Standards

The conflict over which law should be applied in FHA mortgage cases reached the Supreme Court in *United States v. Kimbell Foods, Inc.*[59] In this case, the question presented was whether a federal contractual security interest was superior to a subsequent repairman's lien.[60] The answer to this question hinged on which law applied, state or federal, and the content of the applicable law.[61] Stating that the source of the litigation was the rights of the United States arising from a nationwide federal program, the Court held that federal law controlled.[62] This was basically an application of the first level of the two-tier test. In proceeding to the second level to determine the content of federal law, the Court emphasized that federal common law need not be fashioned by the courts.[63] In-

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United States v. Matthews, 244 F.2d 626, 633 (9th Cir. 1957). This rule is consistent with U.C.C. § 9-306(2) which states that "[e]xcept where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections by a debtor."

58. 440 U.S. 715 (1979).

59. *Id. Kimbell* is a consolidation of two cases, Kimbell Foods, Inc. v Republic Nat'l Bank, 557 F.2d 491 (5th Cir. 1977) and United States v. Crittenden, 563 F.2d 678 (5th Cir. 1977). *Kimbell Foods, Inc. v. Republic Nat'l Bank* dealt with a Small Business Administration loan, while *Crittenden* dealt with an FHA loan. Due to the similarity in issues, the Court was able to resolve the two cases in one decision. Future references will be made to the latter case.

60. 440 U.S. at 723. Between 1970 and 1972, Ralph Bridges obtained several loans from the FHA. The FHA obtained a security interest in the borrower's crops and farm equipment as collateral for the loan. The FHA attempted to perfect its interest by filing the appropriate financing statements. Subsequently, the respondent repaired the borrower's tractor several times. Respondent, upon the failure of the borrower to pay his repair bills, retained the tractor and obtained a lien under Georgia law. The questions presented were the validity of the interests obtained and the priority of the competing claims. *Id.* at 723-25.

61. *Id.* at 718.

62. *Id.* at 726-27.

63. *Id.* at 727-28. Specifically, the Court noted that "[c]ontroversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules." *Id.*

stead, state law may be utilized in specified circumstances. The Court held that federal common law would be applicable where federal programs "by their nature are and must be uniform in character throughout the Nation"[64] or where program objectives would be frustrated by the use of state law.[65] State law would apply when neither of the above situations is present.[66] Finally, a court must consider whether the application of the federal rule would disrupt commercial relationships predicated on state law.[67] Thus, for the first time, the Court formulated concrete standards in implementing the second tier of the test. These standards provided for the application of state commercial law and, therefore, the U.C.C.

In *Kimbell*, the government argued that effective administration of its nationwide lending programs demanded uniform rules of law.[68] The Court rejected the government's contention because the FHA operations were adapted to state law.[69] In rejecting the federal government's claim for the necessity of uniformity, the court minimized the importance of uniformity as a practical basis for the application of federal common law. Too often in the past the Court has acquiesced in the application of federal common law simply on the basis of uniformity for uniformity's sake.[70] By its holding, the *Kimbell* Court rejected the talisman of uniformity[71] which has existed since its creation in *Clearfield*.[72] In short, if the requirements

64. *Id.* at 728, quoting United States v. Yazell, 382 U.S. 341, 354 (1966).

65. 440 U.S. at 728.

66. *Id.*

67. *Id.* at 728-29.

68. *Id.* at 729-33.

69. *Id.* at 730-31. The FHA also dealt with prospective debtors on an individualized basis. *Id.* at 732-33.

70. Indeed, this rationale has always been suspect. A careful reading of *Clearfield* reveals that the Court presented no real reasons in favor of a uniform common law rule. Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943); *see* note 20 *supra*. *See also* United States v. Standard Oil Co. of Cal., 332 U.S. 301, 310 (1947); Royal Indem. Co. v. United States, 313 U.S. 289, 297-98 (1941) (Black, J., dissenting); Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U. CHI. L. REV. 823, 839 (1976).

71. Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U. CHI. L. REV. at 853-55.

72. Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943); *see* note 20 *supra; see also* United States v. Standard Oil Co. of Cal., 332 U.S. 301, 311 (1947) (matters which are merely "appropriate for uniform national treatment"); United States v. Hext, 444 F.2d 804, 808 (5th Cir. 1971) ("the vagaries to which the FHA loan program might be subjected if state law were to control"); United States v. Sommerville, 324 F.2d 712, 716 (3d Cir. 1963) (fearing administrative difficulties).

of a complex federal lending program do not necessitate uniformity, it seems unlikely that such a need will be found in many other situations.

The Court also rejected the government's contention that the application of state law would conflict with program objectives; that is, the ability of the government to recover disbursed funds.[73] The Court noted that the main objective of the FHA is not to collect on its outstanding loans, but to assist needy individuals by supplying loans.[74] Federal common law will be applied only when the overriding objectives of a federal program are frustrated.[75] The Court's scrutiny of the government's arguments is indicative of this conclusion.[76] Thus, the application of protective federal common law will be limited.

Finally, the Court found that application of a federal common law rule would upset commercial expectations.[77] This finding was unnecessary as the Court's analysis had already indicated that the application of state law was appropriate.[78] The Court implied, however, that a balancing of interests would take place in suitable circumstances; that is, the disruption of state interests would be weighed against the interests in a federal common law.[79] Such balancing is only a suggested procedure. Future decisions will provide a conclusive answer. The Court concluded that a federal common law rule was not necessary to protect the government's policies and adopted state law as the appropriate federal rule.[80] This includes, as in most jurisdictions, the U.C.C.[81]

In sum, the *Kimbell* Court set forth specific standards[82] for the

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73. 440 U.S. at 733-38.

74. *Id.* at 735.

75. *But see* United States v. Philadelphia Nat'l Bank, 304 F. Supp. 955, 956 (E.D. Pa. 1969); United States v. Bank of Am. Nat'l Trust and Savings Ass'n, 288 F. Supp. 343, 347 (N.D. Cal. 1968), *aff'd*, 438 F.2d 1213 (9th Cir.), *cert. denied*, 404 U.S. 864 (1971).

76. 440 U.S. at 733-38.

77. *Id.* at 739.

78. The Court had found no need for fashioning a federal common law rule. *See* text accompanying notes 68-76 *supra*.

79. 440 U.S. at 740. The Court specifically noted that "formulating special rules to govern the priority of the federal consensual liens in issue here would be justified if necessary to vindicate important national interests." *Id.*

80. *Id.*

81. Kimbell Foods, Inc. v. Republic Nat'l Bank, 557 F.2d 491, 497 (5th Cir. 1977), *aff'd sub nom.* United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979).

82. *See* text accompanying notes 64-67 *supra*.

two-tier test which permits the adoption of state law as federal law.[83] Furthermore, the Court added substance to the test it had utilized by closely scrutinizing the federal government's arguments for the application of uniform federal rules.[84] It is this close scrutiny by the Court that is indicative of the impact of *Kimbell.* The FHA program at issue in *Kimbell* is the type of program that would seem to require federal common law rules. FHA lending programs are nationwide, involving as much as two hundred million dollars and one hundred twenty thousand individual loans.[85] The Court, however, in clear detail rejected all of the government's arguments.[86] Thus, it seems doubtful that federal common law would be applied in any dispute involving a federal program. While one must defer to future decisions for a conclusive answer, *Kimbell* indicates a strong preference for state law rather than federal common law.[87]

IV. Conclusion

The implications of *Kimbell* on the future application of the code as federal law are both clear and ambiguous. The Court is clearly opening the door for the application of the Code by adopting state law as federal law.[88] This is an application of the Code as the state law component of the federal law.[89] The Court's decision in *Kimbell* allowed it to avoid the issue of when and how the U.C.C. could be applied as federal common law.[90] However, by providing concrete standards to define the appropriatenes of state law as federal law in the second tier of the two-tier test, the Court set forth two situations where the use of federal common law was preferable.[91] A careful examination of these two situations is indicative of

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83. 440 U.S. at 718.

84. *See* text accompanying notes 68-76 *supra.*

85. *Proposed Amendments to the Consolidated Farm and Rural Development Act: Hearings on H.R. 2127 and 2130 Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture,* 94th Cong., 1st Sess. 3 (1975).

86. 440 U.S. at 729-40. *See also* text accompanying notes 68-76 *supra.*

87. Indeed, this is reminiscent of *Erie* which encouraged the application of state law rather than federal common law. *See* note 1 *supra.*

88. 440 U.S. at 727-29.

89. *Id.*

90. *Kimbell* applied state law to the issues in question. It did not utilize federal common law, thereby avoiding the question of the federal common law's content.

91. 440 U.S. at 727-29. *See* notes 64 & 65 *supra* and accompanying text.

the role that the U.C.C. will play in shaping federal common law. While, as suggested above,[92] the future viability of the federal common law is in doubt, this Note would be incomplete without a final discussion of the federal common law.

One situation appropriate for the application of a federal rule is where state law frustrates a federal program's objectives.[93] Here, it is unlikely that the Code will constitute a basis of the federal common law. Because the court is presumably concerned with protecting the program at issue, the Code, as state law, is probably the source of the frustration in question. Simply stated, if the federal government is going to court to call for the application of a special rule, it is precisely because state law (and therefore, the U.C.C.) is conflicting with the program's objectives.

The second situation is more appropriate for the application of the Code as federal common law. Here, federal common law rules are to be applied when the federal program by its nature is and must be uniform in character throughout the nation.[94] In fashioning a proper federal rule,[95] the court must determine a source that is at least fair and convenient.[96] The advantages of the Code in fulfilling this role have been recited in numerous articles.[97] It is the most convenient[98] and accepted commercial law of our time.[99] Congressional adoption of the Code should not be a prerequisite to its use as a source of the federal common law.[100] For example, the decisions which utilized law in contrast to the Code[101] were not based

92. *See* text accompanying notes 68-76, 87 *supra*.

93. 440 U.S. at 728.

94. *Id.*, quoting United States v. Yazell, 382 U.S. 341, 354 (1966).

95. While the use of the Code may compromise the federal government at times this is of no concern as the situation at hand is not one of frustrating a program's objectives. *See* text accompanying note 93 *supra*.

96. Clearfield Trust Co. v. United States, 318 U.S. 363, 367-70 (1943).

97. Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367 (1957); Schnader, *The New Commercial Code: Modernizing our Uniform Code Acts*, 36 A.B.A.J. 179 (1950); Witherspoon, *Why A New Commercial Code?*, 54 COM. L.J. 291 (1949). *See also* note 98 *infra* and accompanying text.

98. Llewellyn, *Problems of Codifying Security Law*, 13 L. & CONTEMP. PROB. 687 (1948).

99. Schnader, *supra* note 7, at 10.

100. *But see* Bank of Am. Nat'l Trust & Savings Ass'n v. United States, 552 F.2d 302, 303 n.1 (9th Cir. 1977).

101. *See, e.g.*, United States v. Bank of Am. Nat'l Trust & Savings, 438 F.2d 1213 (9th Cir.), *cert. denied*, 404 U.S. 864 (1971); United States v. Philadelphia Nat'l Bank, 304 F. Supp. 955 (E.D. Pa. 1969).

upon any Congressional directive but the federal common law "developed for almost a century under *Swift v. Tyson.*"[102] The common law is a changing thing[103] affected by many factors, one of which should be the U.C.C. Indeed, this is the purpose of the Code—to change the structure and substance of commercial law.[104] In addition, the federal courts have utilized the Negotiable Instruments Law, a predecessor of the Code, as a source of the federal common law despite the absence of congressional enactment.[105] Furthermore, the federal courts occasionally have utilized the Code as a basis of the federal common law.[106] Finally, uniformity, the interest being fulfilled in this instance, would be enhanced by the utilization of the law which has been adopted in nearly every United States jurisdiction.

The status of the U.C.C. as federal common law is a confusing one. The Code was introduced to provide this nation with a uniform body of commercial law. With one exception, every state has fully enacted it. One of the original purposes of the federal common law was to promote such uniformity.[107] While the future viability of

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102. Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943).

103. Curtis v. Loether, 415 U.S. 189, 195-96 n.10 (1974). The Court likened an action to redress racial discrimination as a common law tort for the purpose of bringing this modern-day action under the scope of the seventh amendment, enacted in 1791. *Id.* at 191-96. United States v. Standard Oil Co. of Cal., 332 U.S. 301, 313 (1947) (discussing the "basic premise of the law's capacity for growth").

104. Llewellyn, *Why a Commercial Code,* 22 TENN. L. REV. 779 (1953) (address delivered at the 1952 convention of the Tennessee Bar Association). This has been highly effective. *See* note 7 *supra* and accompanying text.

105. New York, N.H. & H.R. Corp. v. Reconstruction Fin. Corp., 180 F.2d 241 (2d Cir. 1950) (describing the Negotiable Instruments Law as "a source of federal law . . . more complete and more certain . . . ." *Id.* at 244); Washington Loan and Trust Co. v. United States, 134 F.2d 59 (D.C. Cir. 1943), which used the Negotiable Instruments Law to support the rule that a forged signature is inoperative. *Id.* at 61. Indeed, the *Clearfield* Court utilized the Negotiable Instruments Law on a question of law. While this aspect of the law was superfluous (the question was whether a previous endorsement added to a drawee's rights; while it did, this was unnecessary to the government's case), the inclination of the Court to draw on a state-enacted uniform law indicates that the Court would support the use of the Code as federal common law. 318 U.S. at 368 n.3.

106. *See, e.g., In re* Humboldt, Inc., 426 F. Supp. 292 (N.D. Cal. 1977); United States v. Hext, 444 F.2d 804 (5th Cir. 1971). *See also* United States v. Crittenden, 563 F.2d 678 (5th Cir. 1977), *remanded sub nom.* United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979). Here the court utilized the Model U.C.C. rather than incorporate the state version. This may be appropriate when the court finds discrepancies in the individual state versions of the Code.

107. Heckman, *Uniform Commercial Law in the Nineteenth Century Courts: The Decline and Abuse of the Swift Doctrine,* 27 EMORY L.J. 45 (1978).

federal common law is in doubt, such uniformity still remains as an interest. This interest would be complemented by the federal courts' acceptance of the Code as a basis of the federal common law.

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