The Uniform Commercial Code Meets the Seventh Amendment: The Demise of Jnry Trials Under Article 5?

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This Article will examine the right to a jury trial in a letter of credit case, and whether revised section 5-108(e) of the Uniform Commercial Code ("U.C.C.")[1] violates that right. It will consider the historical use of jury trials in letter of credit cases, and will examine the constitutional implications of revised section 5-108(e), both with respect to the Seventh Amendment and state constitutional law.

The policies and goals underlying revised section 5-108(e) will be considered, as well as the drafters' proffered justifications for assigning to the court in this subsection questions of fact normally decided by juries. The Article concludes that revised section 5-108(e) unconstitutionally abridges the jury's role both in deciding disputed factual issues and in drawing inferences from the evidence. It also concludes that even assuming no constitutional defect, the proposed revision will not promote the stated goals of efficiency, predictability, speed, and uniformity.

In revising Article 5 of the U.C.C., the drafters' stated intent was to promote more consistent outcomes and speedier resolution of disputes in letter of credit litigation.[2] As a means of accomplishing these goals, they delegated to the court fact questions which historically were determined by a jury. Revised section 5-108, entitled "Issuer's Rights and Obligations," provides in subsection (e): "An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. *Determination of the issuer's observance of the standard practice is a matter of interpretation for the court.* The court shall offer the parties a reasonable opportunity to present evidence of the standard practice."[3] The second sentence of this subsection is carefully crafted to take an ordinary fact question (whether the issuing bank observed standard practice) and, by virtue of legislation, make it a matter of law for the court. Moreover, the official comment makes clear that the drafters intended another question—what is standard practice—also for the court. According to the official comment, the court is expected both to "identify" and to determine as a matter of law the

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1. The 1995 Official Text with Comments for Revised Article 5 of the Uniform Commercial Code was released by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") on October 4, 1995.

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

3. U.C.C. § 5-108(e) (revised 1995) (emphasis added). The provision imposes a duty upon issuers to observe standard banking practice. A breach of that duty could result in liability to the beneficiary of the letter of credit, the applicant of the letter of credit (the issuer's customer), or the confirming or negotiating bank.

"nature and scope" of standard practice.[4] Having the court rather than the jury make these determinations is justified, in the drafters' view, as a means of accomplishing their goals of consistency and efficiency, because "[g]ranting the court authority to make these decisions will also encourage the salutary practice of courts' granting summary judgment in circumstances where there are no significant factual disputes."[5] "[S]peedier resolution of disputes"[6] will result if material issues of fact can be eliminated by relabeling them issues of law, making it easier for a court to grant summary judgment.

I. JURY TRIALS IN LETTER OF CREDIT CASES

While the parties in letter of credit cases frequently waive the right to a jury trial,[7] and while, increasingly, letter of credit issues are decided on summary judgment, thereby avoiding any trial, there has never been any serious question that the right to a jury trial exists for letter of credit claims.[8] The normal array of post-trial motions and appeals relating to jury verdicts has been reviewed by appellate courts without any question that jury trial rights exist in letter of credit cases.[9] The fundamental right to a jury trial has been consistently protected by the U.S. Supreme Court, which has generally viewed any curtailment with

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4. The official comment states:

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

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

5. *Id.*

6. *Id.*

7. *See, e.g.*, Tosco Corp. v. FDIC, 723 F.2d 1242, 1244 (6th Cir. 1983) ("The parties waived a jury trial and entered into lengthy stipulations."); Grouf v. State Nat'l Bank, 76 F.2d 726 (8th Cir. 1935) (Parties waived jury trial.).

8. See, for example, Lamborn v. National Bank of Commerce, 276 U.S. 469 (1928), in which Justice Brandeis discusses a letter of credit case "tried twice before a jury." *Id.* at 471.

9. *See* Murphy v. FDIC, 38 F.3d 1490 (9th Cir. 1994) (upholding jury verdict in favor of beneficiary, and requiring FDIC to pay letters of credit issued by failed bank); Schmueser v. Burkburnett Bank, 937 F.2d 1025 (5th Cir. 1991) (upholding jury verdict finding bank breached its duty of good faith and fair dealing); Emery-Waterhouse Co. v. Rhode Island Hosp. Trust Nat'l Bank, 757 F.2d 399 (1st Cir. 1985) (upholding jury verdict and court's award of actual and punitive damages); Savarin Corp. v. National Bank, 447 F.2d 727 (2d Cir. 1971) (upholding jury verdict as to compensatory damages, reversing as to exemplary damages); Pacific Fin. Corp. v. Central Bank & Trust Co., 296 F.2d 68 (5th Cir. 1961) (upholding jury verdict in favor of bank on compliance issue); Caloric Stove Corp. v. Chemical Bank & Trust Co., 205 F.2d 492 (2d Cir. 1953) (upholding jury verdict in favor of beneficiary); Second Nat'l Bank v. Lash Corp., 299 F. 371 (3d Cir. 1924) (upholding jury verdict in favor of beneficiary); Northwestern Bank v. NCF Fin. Corp., 365 S.E.2d 14, 20 (N.C. Ct. App. 1988) (upholding jury verdict in favor of bank beneficiary against finance company issuer).

disfavor.[10] State courts as well, have expressed strong support for the guarantee of a civil jury trial.[11] Thus, the assignment to a judge of questions that have always been decided by the trier of fact, either the jury or the bench, indicates an abrogation of rights which historically have been preserved by both state and federal constitutional law.[12]

II. THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

The Seventh Amendment will only be implicated when a letter of credit issue is tried in federal court.[13] Since the Seventh Amendment has never been applied to the states through the Due Process Clause of the Fourteenth Amendment,[14] its provisions are not applicable in state court proceedings. When a letter of credit case is tried in federal court pursuant to diversity jurisdiction, however, a plaintiff's right to a jury trial is determined as a matter of federal law under the Seventh Amendment, even though the substantive law applicable to the case is state law.[15] Since letters of credit, by their very nature, involve parties which are frequently dealing with one another across vast distances, a substantial portion of letter of credit litigation in this country ends up in federal court by reason of diversity. Thus, federal law should be examined to determine if application in

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10. The Court has described the right to trial by jury as "a great constitutional right," and stated that "it is only in exceptional cases and for specified causes that a party may be deprived of it." Grand Chute v. Winegar, 82 U.S. 373, 375 (1872). More recently, Chief Justice Rehnquist has stated that, "[t]he right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 388 (1979) (Rehnquist, J., dissenting).

11. Looney v. Superior Court, 20 Cal. Rptr. 2d 182, 191 n.18 (Ct. App. 1993) (stating that the right to a jury trial has always been regarded as sacred and has been jealously guarded by courts); Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 159 (Ala. 1991) (stating that the constitution forbids state from burdening, disturbing, or tampering with right to jury trial); Williams v. Coppola, 549 A.2d 1092, 1093 (Conn. Super. Ct. 1986) (stating that the right to trial by jury in civil case is firmly enshrined in state constitution); Waggener v. Seever Sys., Inc., 664 P.2d 813, 817 (Kan. 1983) (stating that the right of trial by jury is a substantial and valuable right and that the law favors trial by jury and the right should be carefully guarded against infringement).

12. Jacob v. New York City, 315 U.S. 752, 753 (1943) ("The right of jary trial in civil cases at common law . . . should be jealously guarded by the courts."); Lyon v. Mutual Benefit Health & Accident Ass'n, 305 U.S. 484, 492 (1939) ("It is essential that the right of trial by jury be scrupulously safeguarded . . . ."); *Williams*, 549 A.2d at 1093 (stating that the right to trial by jury in a civil case is firmly enshrined in state constitution).

13. State constitutional rights may be implicated when the matter is litigated in state court, however. *See infra* part III.

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

15. Simler v. Conner, 372 U.S. 221, 222 (1962) ("[T]he right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions."); Reiner v. New Jersey, 732 F. Supp. 530 (D.N.J. 1990) (stating that the plaintiff with a pendent state claim is entitled to a jury trial because the right to a jury in federal court is determined by federal law).

federal court of revised section 5-108(e) would violate the Seventh Amendment. The constitutional law of the states must also be examined to determine if those state law guarantees to a civil jury trial are violated by revised section 5-108(e).

The Seventh Amendment of the United States Constitution provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."[16] The thrust of the Amendment is to preserve the right to a jury trial where the claim at issue corresponds to one triable by a jury under English common law in 1791, when the Bill of Rights was ratified.[17] At common law, jury trials were provided for actions to ascertain legal rights, but not for claims falling into the equity or admiralty jurisdiction of the courts.[18]

It is well-settled, however, that the jury right reaches beyond common law forms of action recognized in 1791.[19] It also extends to statutory actions created by Congress subsequent to 1791, if those actions are analogous to common law actions in eighteenth-century law courts. As early as 1830, Justice Story stated:

> By *common law* [the Framers of the Seventh Amendment] meant . . . not merely suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . . In a just sense the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.[20]

Thus, the Supreme Court noted in *Curtis v. Loether* that the applicability of the Seventh Amendment to statute based rights was "a matter too obvious to be doubted,"[21] but if there had been any doubt prior to *Curtis*, it had now been dispelled.[22] The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand if the statute creates legal rights and remedies enforceable in an action for damages in the ordinary courts of law.[23]

It is thus clear that Seventh Amendment protections can reach a claim for money damages based not only on common law, but also on statutory law.

In *Tull v. United States*,[24] the Supreme Court developed a two-pronged analysis for deciding whether a particular case was within the ambit of the Seventh Amendment. To determine whether an action is more similar to cases that were

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16. U.S. CONST. amend. VII. A comprehensive history of the Seventh Amendment can be found in Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966) and Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

17. Tull v. United States, 481 U.S. 412, 417 (1987).

18. Parsons v. Bedford, 28 U.S. 433 (1830).

19. Curtis v. Loether, 415 U.S. 189, 193 (1974).

20. *Id.* (citing *Parsons*, 28 U.S. at 447) (emphasis in *Parsons*, ellipsis in *Curtis*).

21. *Id.* at 193 (citing the court of appeals decision below, Rogers v. Loether, 467 F.2d 1110, 1114 (7th Cir. 1972)).

22. *Id.* at 194.

23. *Id.*

24. 481 U.S. 412 (1987).

tried in courts of law than to suits tried in equity or admiralty, the Court must first examine the nature of the action, and second, the remedy sought. The nature of the action is determined by comparing it to eighteenth-century actions brought in the courts of England prior to the merger of the courts of law and equity.[25] If the action resembles a legal right brought in these early law courts, then the next step is to examine the remedy plaintiff seeks, in order to determine whether the remedy sought is legal or equitable in nature.[26]

With respect to both prongs of this inquiry, the letter of credit action is a legal action par excellence for which a jury trial is guaranteed by the Seventh Amendment. It is for this reason, perhaps, that the right to a jury trial in a letter of credit case has never been directly challenged. The use of letters of credit and bills of exchange has been traced back to cuneiform tablets in Egypt, clay tablets in Babylon, Phoenician merchants, and trade in ancient Greece.[27] Along with payment instruments and commercial usages constituting the law merchant, letters of credit came to be governed by the common law in England. The basis for treating letter of credit cases as involving common law legal rights had been established by the end of the seventeenth century, when it became clear that the earlier separation of the law merchant into its own merchant courts was ending, and the two systems were inevitably drawing together.[28] In the eighteenth century, under two renowned common law judges, Lord Holt and Lord Mansfield, the law merchant came to be integrated fully into the common law of England.[29] Thus, in 1791, when the Seventh Amendment was adopted in the United States, "suits at common law" included claims with respect to mercantile issues such as letters of credit growing out of the law merchant.[30]

The second prong of the Supreme Court's analysis in *Tull* is whether the remedy sought is one at law or one in equity. The Court noted that examining the nature of the relief sought is even more important to determining a jury trial right

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25. *Id.* (citing, *e.g.*, Pernell v. Southall Realty, 416 U.S. 363, 378 (1974); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477 (1962)).

26. *Id.* at 417-18 (citing, *e.g.*, *Curtis*, 415 U.S. at 196; Ross v. Bernhard, 396 U.S. 531 (1970)).

27. Rufus J. Trimble, *The Law Merchant and the Letter of Credit*, 61 HARV. L. REV. 981, 984 (1948). For a discussion of early use of bills of exchange and letters of credit, see JOHN F. DOLAN, LETTERS OF CREDIT ¶ 3.02 (rev. ed. 1996).

28. Miss L. Stuart Sutherland, The Law Merchant in England in the Seventeenth and Eighteenth Centuries, *in* 16 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY 149, 173-74 (1934).

29. Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIAMI L. REV. 351, 356 (1983). Compare J.H. Baker, *The Law Merchant and the Common Law Before 1700*, 38 CAMBRIDGE L.J. 295 (1979), for a persuasively presented thesis that the law merchant differed from the common law mainly from the perspective of procedure and proof, and that once the forms of action and methods of proof became more flexible at common law, there was no further need for separate merchant courts. Baker concludes that rather than any distinct corpus of law, the "law merchant," at least by the seventeenth century, had become a figure of speech for that branch of ordinary English law which happened to govern merchants' affairs.

30. Sutherland, *supra* note 28, at 173-76; *see also* Boris Kozolchyk, *The Legal Nature of the Irrevocable Commercial Letter of Credit*, 14 AM. J. COMP. L. 395 (1965) (tracing letter of credit practice from the twelfth century).

than attempting to find an analogous common law cause of action, because comparing 200 year old analogues with modern claims can often result in an "abstruse historical" search.[31]

Focusing on the nature of the remedy sought in letter of credit actions gives an obvious result. Actions on letter of credit issues virtually always seek money damages,[32] and "[d]amages are and have always been a form of legal relief available in a court of law."[33] Thus, in a letter of credit case tried to a jury, if a federal judge took upon himself to decide a material issue of fact with respect to a legal claim,[34] that would abridge a plaintiff's Seventh Amendment right to a jury trial on that issue.[35] The Seventh Amendment mandates that "enjoyment of the right of trial by jury not be obstructed, and that the ultimate determination of issues of fact by the jury not be interfered with."[36] The Amendment's guarantee to preserve the right of a jury trial "requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."[37]

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31. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989) ("The second stage [remedy stage] of this analysis is more important than the first [historical stage].") (citations omitted); Curtis v. Loether, 415 U.S. 193, 196 (1964); *Ross*, 396 U.S. at 531.

32. The major exception is actions to enjoin payment of a letter of credit. Like any other injunction action, these are actions in equity which are never decided by a jury.

33. Reiner v. New Jersey, 732 F. Supp. 530, 532-33 (D.N.J. 1990); *see Curtis*, 415 U.S. at 196 ("More important, the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law.").

34. Even if a letter of credit case contains both legal and equitable claims, the right to a jury trial is guaranteed for the legal claims. The Supreme Court made this clear in *Curtis*:

> If the action is properly viewed as one for damages only, our conclusion that this is a legal claim obviously requires a jury trial on demand. And if this legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as "incidental" to the equitable relief sought.

Curtis, 415 U.S. at 195-96 n.1 (citing Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470-73 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959)).

35. While it is clear that the right to a jury trial is available to parties in a letter of credit case, before any matter can be tried to a jury, there must first be a material issue of fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The standards for granting summary judgment do not differ depending on whether the action would be tried to a jury or tried to a judge. Whether the matter is by nature legal or equitable, the right to a trial, either jury or non-jury, only exists if there are genuine issues of material fact to be decided. That question is generally decided on motion to the court prior to trial. If the court decides that no genuine disputed questions of fact exist, there is no right to a trial. If there is no right to a trial, a priori, there is no right to a trial by jury.

In deciding a summary judgment motion, a judge's function is "not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Thus, a judge must make the initial decision as a matter of law as to whether there is sufficient evidence of a material, disputed fact to justify permitting the parties to proceed to trial. If not, she can decide the motion, and the case, on the papers and oral argument.

36. *Ex parte* Peterson, 253 U.S. 300, 310 (1920).

37. Walker v. New Mexico, 165 U.S. 593, 596 (1897).

III. THE STATE CONSTITUTIONAL RIGHT TO A JURY TRIAL

With regard to letter of credit litigation in state courts, an examination of the law pertaining to jury trials in all fifty states is beyond the scope of this Article. It is worth noting, however, that all states provide some form of right to a civil jury trial.[38] The only states which do not provide a constitutional right to a civil jury trial are Louisiana[39] and Colorado.[40] Louisiana statutes do provide this protection,[41] with certain exceptions.[42] Louisiana case law provides that the jury trial right is fundamental, favored by law, and not to be denied in the absence of specific authority for its denial.[43] In Colorado, the right to a jury trial is regulated by Rule 38 of the Colorado Rules of Civil Procedure promulgated by the supreme court under its constitutional rule making power.[44]

The earliest state constitutions, which predated the Federal Bill of Rights, included provisions for civil jury trials.[45] American colonists considered the right to a jury to be a critical protection against the power of the judiciary. Reacting to their experiences under autocratic British judges, the earliest Americans insisted upon a civil jury trial right as a bulwark against tyranny and corruption.[46]

In most states today, the scope of the right to a civil jury trial parallels the federal right guaranteed by the Seventh Amendment. State courts generally follow the federal approach of first determining whether a similar or analogous issue was tried to a jury at common law at the time of adoption of the state constitution, and of then determining if legal or equitable relief is sought.[47]

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38. *See* J. KENDALL FEW, IN DEFENSE OF TRIAL BY JURY 469-76 (1993).

39. Duplantis v. United States Fidelity & Guar. Ins. Corp., 342 So. 2d 1142, 1143 (La. Ct. App. 1977).

40. Kaitz v. District Court, 650 P.2d 553, 554 (Colo. 1982) ("In Colorado, there is no constitutional right to a trial by jury in a civil action.") (citation omitted); Setchell v. Dellacroce, 454 P.2d 804 (Colo. 1969) (noting that trial by jury in civil action not a matter of constitutional right).

41. *See* LA. CODE CIV. PROC. ANN. art. 1731 (West 1990).

42. No suit against a state agency, for example, may be tried by a jury in Louisiana. *See id.* art. 1732.

43. *Duplantis*, 342 So. 2d at 1143.

44. *Setchell*, 454 P.2d at 806. The right to a jury trial in a civil case in Colorado is derived from the COLORADO RULES OF CIVIL PROCEDURE 38, which provides in pertinent part: "Upon the filing of a demand, . . . including in actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due on contract, or as damages for breach of contract, or for injuries to persons or property, *all issues of fact shall be tried by a jury*." COLO. R. CIV. P. 38 (emphasis added); *see Kaitz*, 650 P.2d at 554.

45. The first protection of civil juries is found in Section 29 of the Massachusetts Body of Liberties, 1641. 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 75 (1971). Civil juries were first constitutionally guaranteed in 1776 in Section 11 of the Virginia Declaration of Rights. *Id.* at 235.

46. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337-56 (1979) (Rehnquist, J., dissenting).

47. *See* Bruce D. Greenberg & Gary K. Wolinetz, *The Right to a Civil Jury Trial in New Jersey*, 47 RUTGERS L. REV. 1461 n.224 (1995).

A minority of states have maintained a distinction between law and chancery courts, and that structural difference has created some minor differences in the law governing a jury trial right.[48] As an example, in the 1947 Constitution of the State of New Jersey, separate courts of law and chancery merged into two divisions of the superior court. Despite concurrent jurisdiction to provide both legal and equitable relief, the two divisions continue to hear different cases based on the historic separation of law and equity.[49] There are virtually no jury trials in the Chancery Division.[50]

Drawing the distinction among cases to be heard by the two different types of courts has produced some rules that differ from the mainstream. In a case where legal and equitable issues arise out of the same controversy, if the overall nature of the action is equitable, none of the claims will be tried to a jury.[51] If an independent legal claim is tried with an equitable claim, it may be tried to a jury, but only after the equitable claims have been resolved.[52]

While some variations obviously exist between state and federal practice as well as among the various states with respect to jury trials,[53] the fact remains that the jury trial right has constitutional protection in almost all states. The right to a jury trial in a letter of credit case, which is clearly guaranteed in federal court, is also protected in all states. The minor variation in state practices does not significantly affect the basic right to a jury in a letter of credit case. Thus, the

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48. *See, e.g.*, Colclasure v. Kansas City Life Ins. Co., 720 S.W.2d 916, 918 (Ark. 1986); Miller v. District Court, 388 P.2d 763 (Colo. 1964); Hiatt v. Yergin, 284 N.E.2d 834, 841-50 (Ind. Ct. App. 1972), *overruled on other grounds*, Erdman v. White, 411 N.E.2d 653 (Ind. Ct. App. 1980); First Nat'l Bank v. Clark, 602 P.2d 1299, 1302-03 (Kan. 1979); First Nat'l Bank v. Middleton, 480 So. 2d 1153, 1156 (Miss. 1985); Linville v. Wilson, 628 S.W.2d 422, 425 (Mo. Ct. App. 1982).

49. This separation has been enforced by rules promulgated by the New Jersey Supreme Court. *See* N.J. CT. R. 1:6-4 (filing rules in Chancery and in Law); N.J. CT. R. 1:6-5(b) (procedures for filing briefs in Chancery and in Law); N.J. CT. R. 4:3-1 (describing Chancery Division and Law Division and motions to transfer from one to the other); N.J. CT. R. 4:25-1 (pretrial conferences mandatory in Chancery, discretionary in Law); *see also* Greenberg & Wolinetz, *supra* note 47, at 1466-69.

50. Greenberg & Wolinetz, *supra* note 47, at 1468.

51. Steiner v. Stein, 66 A.2d 719 (1949); *see* Greenberg & Wolinetz, *supra* note 47, at 1489. In contrast, in federal court, legal issues intertwined with equitable issues will nonetheless be tried to a jury. *See supra* note 34.

52. Greenberg & Wolinetz, *supra* note 47, at 1479. This differs from federal court practice, where legal claims are almost inevitably tried first. In *Beacon Theatres*, the Supreme Court stated as follows:

> [T]he trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial.

Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959) (citation omitted).

53. New Jersey has determined that jury trials are not available under New Jersey antitrust laws. Greenberg & Wolinetz, *supra* note 47, at 1488; *see* N.J. STAT. ANN. §§ 56:9-1 to 9-18 (West 1989). On the other hand, New Jersey has refused to adopt a "complexity exception" to a jury trial right. Greenberg & Wolinetz, *supra* note 47, at 1498.

analysis of whether revised section 5-108(e) unconstitutionally restricts the right to a jury trial will not differ with respect to federal or state court, except as to Louisiana, where the right is based on statute and common law, and Colorado, where the right is regulated by the Colorado Rules of Civil Procedure.[54]

IV. APPLYING THE JURY TRIAL RIGHT IN LETTER OF CREDIT CASES

Historically, letter of credit cases have almost always been actions at law rather than equity.[55] Those letter of credit cases which seek money damages and which involve material questions of fact give rise to a right in the parties to trial by jury. It is in this context that revised section 5-108(e) should be examined to determine whether, by abridging jury trial rights, the provision, either by its terms, or as interpreted in the official comment,[56] violates state and federal constitutional law.

The critical sentence in revised section 5-108(e) states, "Determination of the issuer's observance of the standard practice is a matter of interpretation for the court."[57] There are, in fact, three separate questions raised by this sentence, each of which must be analyzed in accordance with historical and jurisprudential precedent. First, is it the function of the court or the jury to determine what is standard practice? Second, is it the function of the court or the jury to characterize the bank's conduct? Third, is it the function of the court or the jury to determine if the bank's conduct complied with standard practice? Based on the language of revised section 5-108(e), and the official comment, the answer to these three questions would appear to be that all three functions always belong to the court, and never to the jury. An analysis based on the constitutional jury right, however, suggests that the answer to each of these questions is much more complex: the same question may sometimes be a matter for the court, and at other times will involve a material question of fact for the jury. What makes revised section 5-108(e) unconstitutional is that it takes away from the trial judge his constitutionally based obligation to determine whether a particular issue is a disputed fact question for the jury.

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54. *See supra* notes 41, 44.

55. The exception is when an applicant seeks to enjoin payment under the letter of credit. *See supra* note 32.

56. Official comments to U.C.C. provisions are, of course, not law. They serve at best as a kind of super legislative history. *See* Neil B. Cohen & Barry L. Zaretsky, *Drafting Commercial Law for the New Millennium: Will the Current Process Suffice?*, 26 LOY. L.A. L. REV. 551, 556 (1993). Nonetheless, courts tend to give the official comments deference, and often afford them great weight. It is important to remember, however, that while legislatures enact the text of the U.C.C. into law, they do not enact the official comments. *See* Laurens Walker, *Writings on the Margin of American Law: Committee Notes, Comments, and Commentary*, 29 GA. L. REV. 993, 1013 (1995).

57. U.C.C. § 5-108(e) (revised 1995).

A. Determining What Is Standard Practice

Article 5 in its revised form sets the standard that issuers of letters of credit must follow in determining whether to honor a letter of credit. Revised section 5-108(e) requires issuers to "observe standard practice of financial institutions that regularly issue letters of credit."[58] The statutory language itself does not clearly state whether, in a litigated matter, it is a court or jury function to define standard practice. It is clear from the official comment, however, that the drafters intended this determination to be made by the court. This comment states as follows:

> *Identifying* and determining compliance with *standard practice* are matters of interpretation for the court, not for the jury. . . . [I]t is hoped that there will be more consistency in the outcomes and speedier resolution of disputes if *the responsibility for determining the nature and scope of standard practice is granted to the court, not to a jury.*[59]

Thus, according to the official comment, the court is expected both to identify standard practice and to determine its nature and scope.[60] This is at odds with the general rule already established in the U.C.C. as to the proper function of the judge and the jury. In the rules of general application in Article 1, subsection 1-205(2) declares that the jury determines the nature and scope of a trade usage or practice.[61]

> A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. *The existence and scope of such a usage are to be proved as facts.* If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.[62]

Since subsection 1-205(2) clearly provides that the existence and scope of a trade usage are issues to be proved as facts, the sentence from the official comment to revised section 5-108(e) asserting to the contrary that it is *for the court* to identify and determine the nature and scope of standard letter of credit practice directly conflicts with subsection 1-205(2). Which should a court heed? While the "General Provisions" of Article 1 apply as a general rule to the other articles of the U.C.C., they may be superseded by specific provisions of another

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58. U.C.C. § 5-108(e) (revised 1995).

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

60. Although official comments tend to be given great weight by the courts, not all commentators believe they should be entitled to deference. Professor Walker asserts that courts should give little, if any, weight to such marginal writings, because they are so vulnerable to pressure from special interests. *See* Walker, *supra* notc 56, at 1032. But see Donald J. Rapson, *Deficiencies and Ambiguities in Lessors' Remedies Under Article 2A: Using Official Comments to Cure Problems in the Statute*, 39 ALA. L. REV. 875 (1988), for a discussion of the useful role of official comments to U.C.C. Article 2A.

61. The drafters properly considered standard practice to be a usage of trade, and noted that a practice may be overridden by agreement or course of dealing, citing U.C.C. § 1-205(4). U.C.C. § 5-108(e) cmt. 8 (revised 1995).

62. U.C.C. § 1-205(2) (1996) (emphasis added).

article. They are generally not, however, superseded by official comments to another article, since official comments are not law.[63] Thus, it would appear that revised section 5-108(e) should be interpreted in a way that is consistent with subsection 1-205(2), rather than consistent with the official comment.

Assuming, however, that the black letter law of revised section 5-108(e) is read as requiring the court to determine standard practice, the question then is whether the requirements of section 1-205(2) that the existence and scope of usage are to be proved as facts are constitutionally mandated, or whether these requirements can be trumped by Article 5. Is it constitutionally required that the determination of some forms of standard practice must be put before the trier of fact?[64] It appears that there are at least some occasions when determining standard practice should, as a constitutional matter, be a question for the jury. To understand when a constitutional requirement may surface, it is necessary to understand (1) what is generally meant by "question of law" and "question of fact," (2) what is meant by "standard practice" in the letter of credit context, (3) how a written trade usage incorporated into a trade code is properly interpreted, and (4) how a trade usage not incorporated in a trade code or not in writing is properly interpreted.

1. Questions of Fact and Questions of Law

The various denominations of matters as "questions of law" and "questions of fact" are not always clear or consistent. One commentator has noted, "[B]y and large the terms 'law' and 'fact' are merely short terms for the respective functions of judge and jury."[65] In other words, to some extent, whatever is decided by the judge in a jury trial is denominated a question of law, and whatever is decided by the jury is denominated a question of fact. In some cases, tradition has assigned issues to judge or to jury not based on actual "law" or "fact." Judges at English common law, for example, were expected to interpret written documents as a matter of law.[66] Where such interpretation involves ascertaining the parties' intent, however, this determination is actually a question

63. *See supra* notes 56, 60.

64. Subsection 1-205(2) also provides that, "[i]f it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court." U.C.C. § 1-205(2) (1996). As will be discussed *infra* part IV.A.2., however, letter of credit practice is not uniformly contained in any written code. The judge's role in interpreting "the writing" will be discussed *infra* part IV.A.3.

65. LEON GREEN, JUDGE AND JURY 279 (1930); *see also* 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 554 (1960).

66. Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 75-76 (1980).

of fact.[67] In the seventeenth and eighteenth centuries, however, this responsibility was given to judges because at that time, English juries were largely illiterate.[68]

There are, however, generally accepted views as to the difference between questions of law and questions of fact. A question of law involves principles potentially applicable to many civil cases.[69] It is capable of being predicated in advance, and awaits proof of the facts necessary for its application.[70] Questions of law tend to be "fact-free general principles that are applicable to all, or at least to many disputes, and not simply to the one *sub judice*."[71] In sum, a question of law for the court is a general proposition, while a question of fact for the jury is a case-specific inquiry.[72]

2. Standard Practice

In considering whether standard practice should be determined as a matter of fact or a matter of law, it is important to consider its meaning within the letter of credit context. Revised section 5-108(e) appears to be primarily, but not exclusively, applicable to issues of documentary compliance. The section is entitled "Issuer's Rights and Obligations," and deals with the issuer's rights and responsibilities once documents have been presented under a letter of credit. In section 5-108(i), however, the code also deals with the issuer's reimbursement rights, its right to take documents free of claims of the beneficiary or presenter, its preclusion from asserting a right of recourse on a draft under sections 3-414 and 4-415, and its preclusion from restitution of money paid by mistake. The broad statement in revised section 5-108(e)—"An issuer shall observe standard practice of financial institutions that regularly issue letters of credit"—does not

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67. An inquiry into the parties' states of mind at a particular point of time is obviously factual. A minority of courts have adopted this view in deciding that the jury should interpret certain contracts where the parties' intent is at issue. In *Arledge v. Gulf Oil Corp.*, 571 F.2d 1388, 1389 (5th Cir. 1978), the court vacated a judgment and remanded for a new trial because the judge rather than the jury had interpreted the contract. "[T]he question of contract interpretation is one for the jury in a jury-tried case." *Id. See* Gillespie v. Travelers Ins. Co., 486 F.2d 281, 283 (9th Cir. 1973) ("The interpretation of the meaning of words used in a contract is normally . . . decided by the trier of fact rather than the court."). In *Dobson v. Masonite Corp.*, 359 F.2d 921, 923 (5th Cir. 1966), the court found that the jury should determine the meaning of the contract even though there was no dispute regarding its existence or its terms. It further noted, "[i]n drawing the ultimate conclusion as to the meaning of the parties, we believe the jury was fulfilling its traditional function as the finder of the facts." *Id.*

68. Devlin, *supra* note 66, at 75; *see also* Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1932 (1966).

69. Weiner, *supra* note 68, at 1869.

70. Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 112 (1923-24).

71. Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 994 n.3 (1986) (citation omitted). Louis observes that the "classification of ultimate facts as questions of law amounts to a manipulation of the law-fact doctrine to take questions from the jury." *Id.* at 1028.

72. Markman v. Westview Instruments, Inc., 52 F.3d 967, 1009 (Fed. Cir. 1995) (Newman, J., dissenting), *aff'd*, 116 S. Ct. 1384 (1996).

appear to be limited to documentary compliance issues and those set forth in section 5-108(i). Rather, the standard also appears to apply with respect to the way an issuer would, for example, deal with issues of transfer, assignment, waiver, or reimbursement of a paying bank. It would make no sense for an issuer to have to observe the standard practice of financial institutions that regularly issue letters of credit with respect to documentary compliance issues, and not have to observe that same standard with respect to transfers of letters of credit or other letter of credit issues which affect issuer liability.

Official comment 8 to revised section 5-108(e), which defines standard practice with respect to letters of credit, does not in any way suggest that standard practice is limited to the standard practice with respect to documentary compliance:

> The standard practice referred to in subsection (e) includes (i) international practice set forth in or referenced by the Uniform Customs and Practice, (ii) other practice rules published by associations of financial institutions, and (iii) local and regional practice. It is possible that standard practice will vary from one place to another. Where there are conflicting practices, the parties should indicate which practice governs their rights. A practice may be overridden by agreement or course of dealing. See Section 1-205(4).[73]

This broad definition of "standard practice," which appears to refer to whatever practices an issuer engages in with respect to letters of credit, is also striking for its observation that *letter of credit practice is not standard.* As noted above, it may vary from place to place, and there may be conflicting practices. The practice may be written or oral. There has been considerable effort in recent years to try to compile a written record of various banking practices in different regions and in different countries.[74] Such a record could provide some evidence that a standard practice existed with respect to a particular issue. What is important to note, however, is that since a "standard practice" can be a peculiar local or regional practice, the determination of its existence and scope will not necessarily involve broad principles applicable to many different matters. It may frequently require a case-specific, factual inquiry.

While subsection 1-205(2) makes clear that the existence and scope of a trade usage are to be proved as facts, it also provides that "[i]f it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court."[75] The Uniform Customs and Practices for Documentary Credits ("UCP"), undoubtedly qualifies as such a trade code.[76] It is a codification of banking practices with respect to letters of credit. By their terms, most letters of credit are subject to the UCP. While the UCP contains some standard banking practices, it clearly does not contain all of

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73. U.C.C. § 5-108(e) cmt. 8 (revised 1995).

74. *See A Conversation with Kozolchyk re UCP Article 13(a) & the ICC's National Banking Practices Initiative,* LETTER OF CREDIT UPDATE (Government Information Services), Nov. 1995, at 32 (discussing efforts of the USCIB to compile standard practices among banks in the United States., Mexico, and Canada).

75. U.C.C. § 1-205(2) (1996).

76. *See generally* INTERNATIONAL CHAMBER OF COMMERCE, UCP 500: ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1993).

them.[77] The general rule, therefore, would be that for standard practices which are embodied in the UCP, the interpretation of such practices would be for the court. There are, of course, exceptions to and variations upon this general rule, and they will be discussed below.

3. Interpreting the Writing

What does it mean for the court to "interpret the writing," when the standard practice at issue is in the UCP? Today, a generally accepted doctrine is that construction or interpretation of the provisions of a written document is a matter of law for the judge, unless extrinsic evidence is needed.[78] The United States Supreme Court has described this doctrine as follows:

> When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. Then extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed, or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises, and the peculiar meaning of words, or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact. Where the controversy over the writing arises in a case which is being tried before a jury, the decision of the question of fact is left to the jury, with instructions from the court as to how the document shall be construed, if the jury finds that the alleged peculiar meaning or usage is established.[79]

The Court makes clear that when a written document is interpreted by a court, and extrinsic evidence is needed to understand trade usage pertinent to that interpretation, any disputed factual issue must be determined by the jury. The court then gives any necessary instructions to the jury so that it can properly apply the law to the facts to construe the written document.

While "construction" and "interpretation" have sometimes been loosely used as interchangeable terms, a distinction between the concepts has been recognized. "Construction" of a written instrument generally means determining its legal effect, while "interpretation" generally means ascertaining the meaning of the words used.[80] In almost all situations, however, courts have held that the

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77. *See* U.C.C. § 5-108(e) cmt. 8 (revised 1995); *infra* note 132.

78. CORBIN, *supra* note 65, § 554; 4 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 616 (Walter H.E. Jaeger ed., 3d ed. 1961). *But cf. supra* note 67 (describing Fifth and Ninth Circuit views of contract construction as a matter of fact for the jury).

79. Great N. Ry. Co. v. Merchants' Elevator Co., 259 U.S. 285, 291-92 (1922) (citations omitted).

80. *See, e.g.*, Hornick v. Owners Ins. Co., 511 N.W.2d 370, 371 (Iowa 1993) ("Construction of an insurance policy—the process of determining its legal effect—is a question of law for the court. Interpretation—the process of determining the meaning of words used—is also a question of law for the court unless it depends on extrinsic evidence or a choice among reasonable inferences to be drawn.") (citing A.Y. McDonald Indus. v. INA, 475 N.W.2d 607, 618 (Iowa 1991)); RESTATEMENT (SECOND) OF CONTRACTS § 200 cmt. e (1979).

determination of the underlying facts necessary to permit construction or interpretation, if disputed, are matters for the jury.[81]

a. The *Markman* Exception

The only situation in which underlying disputed facts are considered to be a matter exclusively for the court is in the construction of a patent claim. In *Markman v. Westview Instruments, Inc.*,[82] the U.S. Supreme Court found no clear authority under the "historical test" (i.e., what the practice was in England in 1791) for jury interpretation of disputed terms of art with respect to a patent claim.[83] The Court noted that "prior to 1790 nothing in the nature of a claim had appeared in either British patent practice or in that of the American states."[84] The closest eighteenth-century analogue of a modern claim, according to the Court, was the specification, that is, a description of the invention "'in such full, clear, concise and exact terms as to enable any person skilled in the art . . . to make and use the same.'"[85] The Court found as to the specification, however, that "the mere smattering of patent cases that we have from this period shows no established jury practice sufficient to support an argument by analogy that today's construction of a claim should be a guaranteed jury issue."[86]

Having found no authoritative support for a jury trial on the issue of disputed terms in a claim construction in 1791, the Court then looked to precedent. Finding "no clear answers" with respect to patent cases, it then turned to

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81. Keyser v. Kemper, 146 A. 275, 277 (Md. 1929):

> It is true that ordinarily the interpretation or construction of a written instrument is for the court; but when the written instrument on its face is so ambiguous as to necessitate the production of evidence outside of the instrument in order to determine the true intention and real contract between the parties, and where this evidence is conflicting, it presents a mixed question of law and fact, and should be submitted to the jury for their determination, under proper instructions from the court.

Id.; Canadian Nat. Ry. Co. v. George M. Jones Co., 27 F.2d 240, 243 (6th Cir. 1928) ("Although the construction of written instruments is one for the court, where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character, taken in connection with other facts and circumstances, it is one which is properly referred to a jury.") (quoting Rankin v. Fidelity Ins. Trust Co., 189 U.S. 242, 252-53 (1903)).

82. 116 S. Ct. 1384, 1387 (1996) (holding that "the construction of a patent, including terms of art within its claim, is exclusively within the province of the court").

83. The Court noted that the word "claim" has a peculiar meaning in patent law which, "particularly poin[ts] out and distinctly clai[ms] the subject matter which the applicant regards as his invention." *Id.* at 1388 (quoting 35 U.S.C. § 112). "A claim covers and secures a process, a machine, a manufacture, a composition of matter, or a design, but never the function or result of either, nor the scientific explanation of their operation." *Id.* (quoting 6 ERNEST BAINBRIDGE LIPSCOMB III, WALKER ON PATENTS 315-16 (3d ed. 1987).

84. *Id.* at 1390 (citing Lutz, *Evolution of the Claims of U.S. Patents*, 20 J. PAT. OFF. SOC. 134 (1938)). The Court also noted that claim practice did not achieve statutory recognition until the passage of the Act of 1836, and inclusion of a claim did not become a statutory requirement until 1870. *Id.* (citation omitted).

85. *Id.* at 1391, 1387-88 (quoting 35 U.S.C. § 112 (omission in original)).

86. *Id.* at 1391.

"functional considerations."[87] The Court cited its earlier decision in *Miller v. Fenton*,[88] that when an issue "falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[89] The Court then determined that "judges, not juries, are the better suited to find the acquired meaning of patent terms."[90]

In reaching this conclusion, the Court weighed heavily the specialized training needed and the highly technical nature of the patent, including the "special doctrines relating to the proper form and scope of claims that have been developed by the courts and the Patent Office."[91] A critical consideration was the judge's trained ability to evaluate testimony in relation to the overall structure of the patent, and to ascertain whether an expert's proposed definition fully comported with the specification and claims so as to preserve the patent's internal coherence.[92]

Finally, the Court considered "uniformity in the treatment of a given patent as an independent reason to allocate all issues of construction to the court."[93] It was highly significant to the Court that the limits of a patent must be known "for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public."[94] Otherwise, "[t]he public [would] be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights."[95] The Court noted that the desire for this kind of uniformity related to the construction of patents was a motivation for Congress to create the Court of Appeals for the Federal Circuit as an exclusive appellate court for patent cases.[96]

In affirming the Federal Circuit's en banc decision that construction of patent claims was a matter exclusively for the court,[97] the Supreme Court made quite clear that its decision was limited to the unique field of patents, and that part of its reasoning was based upon the unique role of the specialized appellate court set up to deal with them. The Court very specifically noted that it was not deciding any broad principle of construction of written documents outside of the

87. *Id.* at 1395.
88. 474 U.S. 104, 114 (1985).
89. *Markman*, 116 S. Ct. at 1395.
90. *Id.*
91. *Id.* (quoting William Redin Woodward, *Definiteness and Particularity in Patent Claims*, 46 MICH. L. REV. 755, 765 (1948)).
92. *Id.*
93. *Id.* at 1396.
94. *Id.* (quoting General Elec. Co. v. Wabash Appliance Corp., 304 U.S. 364, 369 (1938)).
95. *Id.* at 1393 n.9 (quoting Merrill v. Yeomans, 94 U.S. 568, 573 (1877)).
96. *Id.* (quoting H.R. REP. NO. 97-312, at 20-23 (1981)).
97. Markman v. Westview Instruments, Inc., 52 F.3d 967, 979 (Fed. Cir. 1995).

patent area.[98] It appears, therefore, that *Markman* is an exception to the normal construction of written documents, limited to patents.[99]

While some might try to argue for a more general application of *Markman*, it would be difficult to find a situation which had very many similarities to the patent field. Patent law is exclusively federal law, created pursuant to the U.S. Constitution's grant of power to Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[100] Lawyers who practice in the field need to pass a separate, intensive bar examination to establish they have the expertise and competence to practice patent law. No other field has both a separate bar examination and a separate appellate court to deal with its complexities.

One of the reasons it is unlikely that the principles of *Markman* would be applied outside of the patent area is that the rationales simply would not work. With patent law, the Court's interpretation of the Seventh Amendment will apply uniformly to patent cases because patent law is strictly a federal issue. With respect to the jury trial right in other areas, however, whether a judge or jury will decide a particular issue may depend on the date of adoption of the governing state constitution, and could therefore produce a result different from a result based on the Supreme Court's interpretation of the Seventh Amendment.

The historical test with respect to the Seventh Amendment examines the state of common law in England in 1791. Many state constitutions were adopted much later. They generally look to the common law that was in effect at the time of adoption of their state constitution. In California, for example, the right of trial by jury is the right as it existed at common law at the time the California Constitution of 1849 was adopted.[101] The California courts, in determining whether a jury trial right exists as to a particular matter, must "ascertain what was the rule of the English common law upon this subject in 1850."[102] In New Jersey, the Supreme Court has permitted reliance on the right to a jury trial as it existed in 1947, when the most recent New Jersey Constitution was adopted.[103]

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98. "We need not in any event consider here whether our conclusion that the Seventh Amendment does not require terms of art in patent claims to be submitted to the jury supports a similar result in other types of cases." *Markman*, 116 S. Ct. at 1393 n.9. The Court also noted in the next footnote, in rather convoluted language, that it was also *not* deciding "the extent to which the Seventh Amendment can be said to have crystallized a law/fact distinction or whether post-1791 precedent classifying an issue as one of fact would trigger the protections of the Seventh Amendment if (unlike this case) there were no more specific reason for decision." *Id.* at 1393 n.10 (citation omitted). The specific reasons the Court gave for its decision were the need for uniform interpretation of a given patent, and the need for specially trained judges to construe highly technical patent claims. *Id.* at 1395, 1396.

99. *See* Editorial, 144 N.J. L.J. 558 (1996) ("Patent law is exclusively under federal control, so that *Markman* will have limited effect.").

100. U.S. CONST., art. 1, § 8, cl. 8.

101. People v. One 1941 Chevrolet Coupe, 231 P.2d 832, 835 (Cal. 1951).

102. *Id.*

103. *In re* LiVolsi, 428 A.2d 1268, 1273 (N.J. 1981) (Article 1, paragraph 9 of the New Jersey Constitution of 1947 "guarantees a jury trial only to the extent the right existed at the time of the adoption of the 1947 Constitution.").

Quite obviously, the right to a jury trial, at least as to certain particulars, may differ in 1791, 1850, and 1947. No justification based on increasing "uniformity"[104] can be made for taking a fact issue from the jury when constitutionally mandated treatment of that right in state and federal court can never be uniform, since the constitutional underpinnings of the right are not uniform. Thus, broadening the application of *Markman* by applying it outside of the patent area to take an issue away from the jury could not increase "uniformity,"[105] since many state constitutions will still mandate that all factual disputes, particularly those involving underlying extrinsic evidence, should go to the jury.

Moreover, the Court was particularly concerned that a "given" patent receive uniform treatment. A patent could be infringed several times by different parties. It must be construed uniformly, to avoid a "zone of uncertainty" which would discourage invention.[106] A letter of credit, on the other hand, would probably need construction only once, since generally it would deal with only one transaction, or at most, with a series of transactions between the same parties. Thus, uniformity of treatment of a given letter of credit could not justify taking a fact question from the jury.

The Court also used a "functional" analysis[107] to determine that in the highly technical and specialized area of patents, judges are better suited than juries to find the acquired meaning of patent terms.[108] According to the Court, judges, by having "a trained ability to evaluate the testimony in relation to the overall structure of the patent," are in a "better position to ascertain whether an expert's proposed definition fully comports with the specification and claims and so will preserve the patent's internal coherence."[109]

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104. Whether in fact judges render more uniform decisions than juries in any particular area does not appear to have been the basis of any significant empirical study, and may simply reflect a belief held by some, or may indicate a bias against juries.

105. It is problematic in any event whether judges render "uniform" decisions. *See infra* notes 180-81 and accompanying text.

106. Markman v. Westview Instruments, Inc., 116 S. Ct. 1384, 1396 (1996).

107. The Court refers to a "functional consideration" as the basis to be used for deciding, when it is not clear whether a particular issue is law or fact, and therefore whether it should be determined by judge or jury, which is the sounder means of administering justice. *Id.* at 1395.

108. *Id.* This view was severely criticized in an editorial in the *New Jersey Law Journal*, which stated:

> Heretofore, appointment as a federal judge represented an acknowledgement of one's legal acumen (among other, possibly more desirable, attributes). The U.S. Supreme Court has now declared, in Markman v. Westview Instruments, Inc., [116 S.Ct. 1389 (1996)] that elevation to the federal bench constitutes recognition of the appointee's scientific, technical and engineering expertise as well. . . .
>
> What makes judges, in the mind of the Supreme Court, "better suited to find the acquired meaning of patent terms?" Did judges, unlike most mortals who comprise the jury pool, continue their scientific studies beyond high school? Did they sign up for an array of engineering courses in law school?

Editorial, *supra* note 99.

109. *Markman*, 116 S. Ct. at 1395.

The Court's reasoning is specifically oriented to the patent area, and unlikely to be applied elsewhere. Particularly with respect to letters of credit, it is not necessary for a judge to have highly technical specialized training to determine underlying factual issues.[110] The factual issues in letters of credit, when they exist, tend to be straightforward. One of the reasons banks have insisted upon "strict compliance"—that is, the rule that the beneficiary must present documents which comply strictly with the requirements of the letter of credit—is so the employees who check documents do not have to make complicated or ministerial decisions. Banks stress that they can keep costs down by having a bright-line rule on strict compliance so that clerical-level employees can function as document checkers. These employees simply compare the documents with the letter of credit: if the documents match the description, the bank pays under the letter of credit; if there is no match, the bank is not obligated to pay.[111] While in the imperfect world of commerce, different kinds of issues can and do arise, the facts underlying letter of credit cases do not even approach the level of complexity of the average patent. There is no published case where a judge has declared that the factual issues presented by a letter of credit case were too complex for a jury. Nor is this author aware of any commentator having identified a specific letter of credit case as containing facts too complicated to be fairly decided by a jury. There is no study showing that juries do not perform their task adequately in letter of credit cases. There is no indication that jury verdicts in letter of credit cases are disproportionately set aside, or that their verdicts are in any way inferior to or more inconsistent than decisions made by judges. In short, there is no reason to restrict jury trials in letter of credit cases. Certainly an expansion of the *Markman* rationale, on the bases of "uniformity" and "specialized training of judges" would not be justified in the letter of credit area.

b. Precedent in Letter of Credit Cases for Construing Written Instruments

Revised section 5-108(e) requires an issuer to "observe the standard practice of financial institutions that regularly issue letters of credit." If the "standard practice" is set forth in the UCP, it may be necessary to interpret the meaning of the particular UCP provision. In interpreting the UCP, the court is not interpreting law, but rather a codification of custom and usage.[112] A judge's

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110. A trier of fact may need additional information on industry practices to understand what the pertinent customs and practices are, but does not need specialized training to understand or apply the information which can be provided by those knowledgeable in the actual practices.

111. *See* Laudisi v. American Exch. Nat'l Bank, 146 N.E. 347, 350 (N.Y. 1924); Gerald T. McLaughlin & Neil B. Cohen, *The Independence Principle*, N.Y.L.J., Feb. 14, 1992, at 3.

112. In *Sempione v. Provident Bank*, 75 F.3d 951, 954 (4th Cir. 1996), the Fourth Circuit stated:

> The UCP is not law. Nor does it have the force of law. As its name implies, the UCP is a code or compilation of the usage of trade pertaining to letters of credit. It stands "as a record of normal expectations." Its use and interpretation are governed by [U.C.C. §] 1-205(2), which provides: "The existence and scope of [the] usage [of trade] are to be proved as facts." If the usage is "embodied in a

interpretation of a trade usage, however, should be closely linked to the actual practice in the industry in question—here, the banking community.[113] There may frequently be, therefore, the need for extrinsic evidence to explain the practice.[114] The drafters clearly anticipated such a situation in the third and final sentence to revised section 5-108(e): "The court shall offer the parties a reasonable opportunity to present evidence of the standard practice." When the court is "interpreting the meaning" of a written document such as the UCP, and needs extrinsic evidence to understand a particular practice in its commercial context, the question then becomes whether this extrinsic evidence will be presented to the court as a matter of law, or to the jury as a matter of fact.[115]

The general rule with respect to the interpretation of written documents is that when extrinsic evidence is necessary, it presents a question of fact for the jury if it raises a material, disputed fact.[116] According to courts and commentators, interpretation of written documents is for the court only (1) when the terms are so clear that only one reasonable interpretation is available, or (2) when the terms are subject to either of two reasonable interpretations but no extrinsic evidence is presented.[117] There is, of course, another situation where extrinsic evidence may be presented, and yet not require a jury to interpret the meaning. That may occur when the extrinsic evidence is unambiguous and raises no disputed fact

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written trade code or similar writing the interpretation of the writing is for the court."

Id. (quoting HENRY HARTFIELD, LETTERS OF CREDIT 3-4 (1979)).

113. *Id.* at 955 ("[T]he meaning of the UCP and the usage of the trade can be proved by any person qualified to address the subjeet, including an expert witness."); *see also id.* at 960 ("In interpreting the UCP, courts must strive to ascertain the actual banking practice that the Customs embody.").

114. An editorial comment in LETTER OF CREDIT UPDATE, Feb. 1996, at 6, puts it more strongly: "It is not to be expected that a judge will be able to interpret standard banking practice embodied in the UCP or other rules without expert assistance."

115. Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303, 1304 (1942), observed that a controlling distinction between law and fact is whether evidence is needed, for a question of fact usually calls for proof, whereas matters of law are established not by evidentiary showing but by intellectual abstraction.

116. *Sempione*, 75 F.3d at 959; World-Wide Rights Partnership v. Combe, Inc., 955 F.2d 242, 245 (4th Cir. 1992); United States v. Taylor, 293 F.2d 717, 722 (5th Cir. 1961) (holding that since extrinsic evidence is necessary but not harmonious, it was error *not* to leave interpretation to jury.); Floyd v. Ring Constr. Corp., 165 F.2d 125, 129 (8th Cir. 1948); Western Petroleum Co. v. Tidal Gasoline Co., 284 F. 82, 85 (7th Cir. 1922); Deerhurst Estates v. Meadow Homes, Inc., 165 A.2d 543, 553 (N.J. Super. App. Div. 1960) ("While the construction of the terms of a contract may be a question for the court to decide, where the meaning is unclear and depends upon disputed extraneous testimony, interpretation should be left to the determination of the finder of fact.") (citations omitted); Broadway Maintenance Corp. v. City of New York, 241 N.Y.S.2d 116, 119 (N.Y. App. Div. 1963) (holding that since interpretation required the weighing of extrinsic evidence, it was improper to grant summary judgment.); Calderoni v. Berger, 50 A.2d 332 (Pa. 1947).

117. CORBIN, *supra* note 65, § 554; WILLISTON, *supra* note 78, § 616; *see also* Parsons v. Bristol Dev. Co., 402 P.2d 839, 842 (Cal. 1965) (Traynor, C.J.) ("It is . . . solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence.").

issues.[118] Where no extrinsic evidence is presented, or where it is presented but raises no disputed material issue of fact, partial summary judgment or summary judgment may be appropriate.[119]

The Fourth Circuit recently considered extrinsic evidence in a letter of credit case. In *Sempione v. Provident Bank*,[120] Rock Solid Investments, Inc. ("RSI"), had obtained a standby letter of credit from Provident Bank of Maryland to secure a loan from Suriel Finance, N.V. ("Suriel"). The letter of credit, in the amount of $750,000, was to provide security for annual interest payments on the loan, and was to be automatically renewable for seven years. Manufacturer's Hanover Trust Company confirmed the letter of credit for one year. The beneficiary, Suriel, borrowed from Banca del Sempione the funds it needed to lend to RSI. Suriel transferred to Banca del Sempione its rights as beneficiary. The letter of credit stated that it was for $750,000 "to be automatically renewed annually" for seven years.

Banca del Sempione sought, and believed it had received, clarification from Provident through Suriel that the renewal was unconditionally automatic and did not depend upon recollateralization of amounts drawn down or upon any other condition. This clarification came in a series of letters from an officer of Provident Bank, Samuel Henry. When RSI could not meet its interest payments, the letter of credit was drawn upon in several drafts. The last draft, which would have exceeded $750,000, was refused by Manufacturer's at Provident's direction.[121]

On Banca del Sempione's claims for wrongful dishonor, breach, and anticipatory breach, the lower court granted summary judgment for Provident, holding that Banca del Sempione lacked standing because the transfer did not transfer all rights under the letter of credit, but only the right to draw up to $750,000.[122] The district court also found that Henry's letters did not constitute

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118. Hickey v. A.E. Staley Mfg., 995 F.2d 1385, 1389 (7th Cir. 1993); *World-Wide Rights*, 955 F.2d at 245; Jaftex Corp. v. Aetna Cas. & Sur. Co., 617 F.2d 1062, 1063 (4th Cir. 1980).

119. Even if the judge considers a written instrument to be "plain and unambiguous on its face," extrinsic evidence may be admissible when it is relevant to prove a meaning to which the language of the instrument is susceptible. CORBIN, *supra* note 65, § 555, at 232-33 ("It is not necessary that words should be unusual words or words that are 'ambiguous on their face' in order to admit evidence of special usage."); *see also World-Wide Rights*, 955 F.2d at 245 ("If resort to extrinsic evidence leaves genuine issues of fact respecting a written document's proper interpretation, then the interpretation must be left to the trier of fact."); Board of Trade v. Swiss Credit Bank, 597 F.2d 146, 149 (9th Cir. 1979) (reversing summary judgment because of triable issue of fact as to meaning intended by parties for the phrase "full set clean on board bills of lading"); Nicoll v. Pittsvein Coal Co., 269 F. 968, 972 (2d Cir. 1920) ("[T]here is no doubt at all that ambiguity in phrase is not necessary to let in evidence of usage."); Stock & Grove, Inc. v. City of Juneau, 403 P.2d 171 (Alaska 1965) (Trial court dismissal reversed and remanded for proof of custom. Defendant's contention that proof of custom could come in only where there was ambiguity was rejected.). Moreover, where different inferences may be drawn, summary judgment is inappropriate.

120. 75 F.3d at 951.

121. *Id.* at 957.

122. Banca del Sempione v. Suriel Fin. N.V., 852 F. Supp. 417 (D. Md. 1994), *rev'd sub nom* Sempione v. Provident Bank, 75 F.3d 951 (4th Cir. 1996).

amendments to the letter of credit, because the parties did not intend them to be amendments.[123] It noted further that since UCP Article 10(d) provides that a letter of credit cannot be amended without the agreement of the issuing bank, the confirming bank, and the beneficiary, there was no valid amendment because the confirming bank, Manufacturer's, had not agreed to the amendment.[124]

The Fourth Circuit reversed, noting that summary judgment was inappropriate when "[a]n ambiguous contract . . . cannot be resolved by credible, unambiguous extrinsic evidence. . . ."[125] It concluded that issues concerning "the nature and effect of Henry's letters (whether or not they amended the letter of credit) must be submitted in a full evidentiary proceeding to the trier of fact—in this case the jury, unless the jury demand is waived."[126]

The Fourth Circuit noted that application of these principles of interpretation has been illustrated in the context of letters of credit. In *Banque Paribas v. Hamilton Industries International, Inc.*,[127] for example, the court reversed summary judgment in a letter of credit case based on "the simple principle that a contract dispute cannot be resolved on summary judgment when the meaning of the contract depends on the interpretation of ambiguous documents and can be illuminated by oral testimony."[128] The Fourth Circuit also cited with approval *Timber Falling Consultants, Inc. v. General Bank*,[129] where the district court held that summary judgment was inappropriate because the facts supported two inconsistent but reasonable constructions of the letter of credit.[130]

While the court in *Sempione* held that the letter of credit must be interpreted by a trier of fact since its terms were ambiguous, it interpreted the UCP as a matter of law. It did so by deciding that no material disputed question of fact existed. Although the court considered extrinsic evidence, including the testimony of an expert witness, it found that the case relied upon by the district court and the opposing party was not contrary to the position taken by the expert.

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123. *Id.* at 432-33.

124. *Id.* at 431-32.

125. *Sempione*, 75 F.3d at 959 (citing *World-Wide Rights*, 955 F.2d at 245). While a letter of credit is probably *not* a contract for all intents and purposes (for example, no consideration is required for it to be binding on the issuer, Pillans v. Van Mierop, 97 Eng. Rep. 1035 (K.B. 1765); U.C.C. § 5-105 (revised 1995)), courts typically consider it a contract for interpretation purposes. *See also, e.g.*, Timber Falling Consultants, Inc. v. General Bank, 751 F. Supp. 179 (D. Or. 1990) ("A letter of credit is also a contract, and therefore questions regarding the meaning of a provision in a letter of credit are to be 'resolved by resorting to standard maxims of contractual construction.'") (quoting Exxon Co. v. Banque de Paris et des Pays-Bas, 889 F.2d 674, 678 (5th Cir. 1989)).

126. *Sempione*, 75 F.3d at 964.

127. 767 F.2d 380 (7th Cir. 1985).

128. *Id.* at 383. The Second Circuit also holds that "[t]he same general principles [of construction] which apply to other contracts in writing govern letters of credit." Venizelos, S.A. v. Chase Manhattan Bank, 425 F.2d 461, 465-66 (2d Cir. 1970).

129. 751 F. Supp. 179 (D. Or. 1990).

130. *Sempione*, 75 F.3d at 959.

That meant there was no disputed material issue of fact that would require the issue to go to the jury.[131]

Thus, the existence and scope of any standard practice which is contained in a written trade code, such as the UCP, is a matter for the court if the extrinsic evidence needed to understand it in the commercial context is unambiguous and does not raise disputed material issues of fact. If it is disputed and creates material issues of fact, or if different inferences can be drawn from it, the evidence is for the jury.[132]

Interpreting the meaning of a usage of trade will almost inevitably involve factual issues. Establishing that a practice is a usage of trade is dependant on facts: What acts and circumstances tend to establish this particular practice as a trade usage? Facts must be examined to determine the scope of the practice, and whether the practice has the "regularity of observance . . . as to justify an expectation that it will be observed with respect to the transaction in question."[133] The necessary inquiry is heavily fact specific both as to the actual practice itself, and as to its relevance to the specific transaction.[134] If any of these facts are material, and disputed, then they cannot be determined by the court as a matter of law.

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131. *Id.* at 960. The Fourth Circuit also reversed the lower court's grant of summary judgment on the issues of negligent misrepresentation and fraud, holding these issues must be submitted to a jury, unless the jury demand is waived. *Id.* at 964.

132. For any matter to go to a jury, the factual question must be material and disputed. *Ex Parte* Peterson, 253 U.S. 300, 310 (1920) (explaining that no one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined). In letter of credit compliance cases, there will frequently be no disputed questions of fact, and the parties will often make cross motions for summary judgment. Where the particular question at issue is a practice set forth in a written trade code such as the UCP, for example, there might be no dispute as to its nature or scope. The parties might stipulate that it was a standard practice. In addition, a judge could determine, for example, with respect to a particular unambiguous provision in the UCP, that it is so generally used in the banking community that no reasonable jury could conclude that the particular practice was not standard practice.

133. U.C.C. § 1-205(2) (1989).

134. Curiously, it has been asserted that all extrinsic evidence is for the court as a matter of law, even where such evidence may raise disputed issues of fact. *See, e.g.*, comment in LETTER OF CREDIT UPDATE, Feb. 1996, at 6:

> The revision also encourages courts to hear from authorities on such questions of interpretation and implicitly provides the assurance that resort to such expert opinion and its possible divergence does not give rise to an issue of fact appropriate for the jury but merely one of interpretation as in situations where there are two or more possible interpretations available.

This view does not appear to have any support in the applicable law governing interpretation of written instruments, which is based on the constitutional requirement that factual issues be determined by juries. The statement that the revision "implicitly" supports a view that juries will not deeide questions of fact appears to refer to the official comment, which asserts, in conflict with U.C.C. § 1-205, that courts are empowered to identify and determine the nature and scope of standard practice. *See supra* text accompanying notes 60-64.

4. Interpreting Practices Not in Writing, or Not in a Trade Code

Under U.C.C. section 1-205(2), the existence and scope of any standard practice that is *not* contained in a written trade code is a matter for the jury, if a material, disputed question of fact is at issue. Many practices of banks in dealing with letters of credit are not contained in the UCP, and in fact are not contained in any written form. If contained in written form, they may not be widely distributed or adhered to.[135] The official comment refers to two forms of "standard practice" other than the UCP: (1) rules published by associations of financial institutions, and (2) local and regional practice.[136]

Following subsection 1-205(2), the jury would determine whether any pertinent practice embodied in these published rules and local and regional practices had "such regularity of observance . . . as to justify an expectation that it [would] be observed with respect to the transaction in question."[137] The jury could consider questions such as whether the published rules were widely distributed, distributed to the particular bank in question, generally used in the banking community, generally used during the particular time period in question, and generally used by the particular bank in question for all of its transactions and for this particular transaction. With respect to the local and regional practice, the jury should similarly consider how widespread the practices were, and under what circumstances and how frequently they were used. All of these factual questions would be relevant to the jury's determination of whether the particular practice was a "standard practice" with respect to the case at bar. With respect to interpreting the meaning of any writing in connection with the practice, only if the trier of fact first determined that the practice was a usage of trade as defined in section 1-205(2), and determined that it was embodied in a "trade code," would the interpretation of its meaning be a matter for the court. If, however, there was evidence of ambiguity in the meaniug of the rules, or evidence that the rules were interpreted differently by different banks, so that a material, disputed question of fact arose, the meaning of the rules in the particular case would be a question for the trier of fact.

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135. One of the problems with using "standard practice" of banks as the standard against which bank conduct will be measured, is that other than the UCP, which obviously does not contain all bank practices, there are few written sources describing banking practices. *See* Boris Kozolchyk, *Strict Compliance and the Reasonable Document Checker*, 56 BROOKLYN L. REV. 45, 75 (1990); *see also A Conversation with Kozolchyk re UCP Article 13(a) & the ICC's National Banking Practices Initiative*, *supra* note 74 (discussing efforts by the United States Council on International Banking to identify standards for examination of documents). Identifying and determining standard practice needs the assistance of testimony by witnesses. In our adversarial system, it is not unusual for there to be conflicting evidence as to the proper standard (or trade usage) against which conduct is to be measured. To decide the issue, conflicting evidence must be weighed, demeanor evaluated, and credibility of witnesses determined. These are all classic functions of the jury.

136. U.C.C. § 5-108(e) cmt. 8 (revised 1995).

137. U.C.C. § 1-205(2) (1989).

Thus, whether a written banking practice constituted a standard practice would be a matter for the jury, unless it were so generally accepted in the particular industry as a standard practice that there could be no reasonable factual question on this issue. Even so, as with the interpretation of the UCP, underlying disputed questions arising from the extrinsic evidence would present questions for the jury. If the practice is not in writing, or in writing but not a "usage of trade," or not in a "trade code or similar writing,"[138] then it is clearly for the jury to determine the existence and scope of the practice.

B. Determining the Conduct of the Issuer

The central role of the civil jury is well established in American state and federal practice. It is for the jury to determine the ultimate issues of fact between the parties. Its function extends to two kinds of questions: (1) what happened, that is, "what the parties did and what the circumstances were and (2) the evaluation of these facts in terms of their legal consequences."[139] Moreover, mental as well as physical events can present questions for the jury. What a person intended, thought, or believed, as well as what she did, may present disputed issues of fact. Juries weigh evidence and determine credibility.[140] Juries are also charged with drawing inferences from what a person said, and from what other evidence may show that he did. These inferences constitute fact finding.[141]

Most letter of credit cases, which for the last forty years have been decided without the benefit of revised section 5-108(e), have been decided on summary

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138. *Id.*

139. FLEMING JAMES, JR., CIVIL PROCEDURE 267 (1965); *see also* Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) ("[I]ssues of fact are to be determined by the jury, under appropriate instructions by the court.").

140. The Supreme Court has stated:

> [The weight and credibility of a witness's testimony] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practieal knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function.

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 628 (1944) (quoting Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891)).

> It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. That conelusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

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

141. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 72-74 (1944).

judgment motions. Trials are rather unusual. Jury trials are even more rare. This is because in cases of documentary compliance, the facts are frequently not in dispute. Nonetheless, over the whole range of letter of credit cases, factual disputes do arise. It is the role of the trier of fact in those instances, either the jury, or the judge if the parties have waived a jury, to determine the ultimate facts by weighing the evidence, evaluating demeanor, determining the credibility of witness testimony, and drawing the appropriate inferences.

C. Determining Whether the Issuer's Conduct Complied With Standard Practice

The court decides questions of law which involve broad principles affecting many civil cases, and the jury determines factually the existence and scope of a trade usage or practice, resolves disputed questions of fact as to what actually happened, and draws inferences based on evidence in the record. But who determines whether conduct, which the jury found as a fact, is within the accepted parameters of a particular trade usage or standard practice? In other words, who determines whether the actual conduct met or failed to meet the standard? Who applies the law to the facts?

Revised Article 5 would give this role to the judge: "Determination of the issuer's observance of the standard practice is a matter of interpretation for the court."[142] The prevailing view of the courts, however, is that this is an issue for the jury. As noted above, the evaluation or appraisal of the facts in terms of their legal consequences falls within the jury's province.[143] In negligence cases, for example, even when the facts at issue are undisputed, it is for the jury, rather than the judge, to determine whether negligence should be inferred from defendants' conduct.[144] When specific conduct is measured against a standard, it has historically been considered a question of fact for the jury. A duty to meet a particular standard, or to conduct oneself in a particular way, may be imposed

142. U.C.C. § 5-108(e) (revised 1995).

143. JAMES, *supra* note 139, at 267, 277.

144. There are literally hundreds of cases expressing this view, and they are found in every American jurisdiction. *See, e.g.*, Chicago Rock Island & Pac. R.R. v. Hugh Breeding, Inc., 232 F.2d 584, 589 (10th Cir. 1956) (determining whether engineer was negligent in driving train at forty miles per hour when visibility was impaired by a snowstorm was question of fact for the jury). One of the earliest U.S. Supreme Court cases to so hold was Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657, 663-64 (1873) ("[A]lthough the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they established negligence."). In FELA cases, the Court has also upheld the right of the jury to determine, along with other disputed questions of fact, "whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances." Wilkerson v. McCarthy, 336 U.S. 53, 61-62 (1949); *see also* Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957); Stone v. New York, Chicago & St. Louis R.R., 344 U.S. 407 (1953).

by contract, by statute, by common law, or by industry practice. Whether there has been a breach of that duty is a question of fact for the jury.[145]

Moreover, in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[146] what the Supreme Court referred to as a fact question for the jury involved not only the determination of the historical facts, but also the application of the law to those facts. In that case, the jury had to determine the facts concerning plaintiff's relationship to defendant, and, applying legal standards, whether plaintiff should be deemed an "employee" within the meaning of the local Workmen's Compensation Act.[147]

The Court in *Byrd* noted that an essential characteristic of the federal system is "the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."[148] The Supreme Court has consistently held that there is a

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145. O'Neill v. Gray, 30 F.2d 776, 780 (2d Cir. 1929) (deciding jury question whether attorney conducted litigation in reasonably skillful manner); City of Philadelphia v. Welsbach St. Lighting Co., 218 F. 721, 729-30 (3d Cir. 1915) (holding that because contract required test to be made by any method sanctioned by standard practice, it was proper for trial court to submit to jury question of whether the method followed was the one contemplated by the contract, and also whether tests made upon the device employed were pursuant to method sanctioned by standard practice); Passarellol v. Lexington Ins. Co., 740 F. Supp. 1314, 1357, 1364 (S.D.N.Y. 1982) (holding that whether auditor's conduct was breach of obligation to client under GAAS and GAAP, and whether it was a breach of engagement letter to fail to disclose irregularities, were questions of fact for the jury); Society of Mt. Carmel v. Fox, 335 N.E.2d 588 (Ill. App. Ct. 1975) (arguing defendant's alleged negligence is a question of fact to be determined by application of professional standards and practices existing at the time the building was designed); Morgan v. Engles, 127 N.W.2d 382 (Mich. 1963) (holding question of whether defendant violated standard of practice by failure to refer plaintiff to orthopedic specialist is for jury); Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 277 N.W. 226, 228 (Minn. 1937) (holding care required in performance of contractual duty is question for jury); Guzzi v. Jersey Cent. Power & Lighting Co., 90 A.2d 23, 26 (N.J. Super. Ct. App. Div. 1952) (explaining question of whether the defendant's installation and maintenance of gas supply to plaintiff's home conformed to standard practice in industry is question for jury); Arshansky v. Royal Concourse Co., 283 N.Y.S.2d 646 (N.Y. App. Div. 1967) (holding whether operation was performed in accordance with standard practice was question of fact for jury). Courts have sometimes reserved to themselves the application of law to the facts in eases involving probable cause, such as malicious prosecution cases and false imprisonment cases. Weiner, *supra* note 68, at 1910-18. There is also a minority view expressed in certain North Carolina cases, which appears to give the trial judge authorization to pass upon the reasonableness of a party's conduct, but these cases can also be explained by the court's belief that only one inference could reasonably be drawn from the evidence. *Id.* at 1886-87.

146. 356 U.S. 525 (1958).

147. *Id.* at 527; *see also* McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 356 (1991) ("If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of a crew,' it is a question for the jury."); Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273 (1959) (determining whether decedent was respondent's employee was jury question); De Lahunta v. City of Waterbury, 59 A.2d 800 (Conn. 1948) (discussing whether plaintiff had a constitutional right to have "undisputed facts" establishing the existence of absolute nuisance determined by a jury).

148. *Byrd*, 356 U.S. at 537.

strong federal policy favoring jury trials.[149] Thus, a state law provision such as revised section 5-108(e), even if not found to be unconstitutional, would not bind the federal court. A federal judge would be required to determine which issues should go to the jury in accordance with federal law and practice.[150] As in *Byrd*, the influence—if not the command—of the Seventh Amendment should cause a federal court to disregard revised section 5-108(e)'s instruction that "[d]etermination of the issuer's observance of the standard practice is a matter of interpretation for the court,"[151] and allocate to the jury factual issues in accordance with normal federal practice.

In state cases as well, courts have concluded that an application of law to fact should be determined by jurors because such an application was considered a question of fact under the relevant constitutional provisions.[152] Even where facts as to what happened were not in dispute, courts have found that it is nonetheless for the jury to determine whether the conduct in question violated the standard, because reasonable people could draw different conclusions.[153]

Courts have recognized that the determination of whether a party's conduct meets a standard may involve several different questions, and that all are questions for the jury. In *Bryant v. Hall*,[154] the Fifth Circuit stated that "[w]here, as here, not only the facts constituting the conduct of the parties, but also the standard of care which they should have exercised, are to be determined, the case is *entirely one of fact and to be decided by the jury* and not one of law for the court."[155] Thus, the Fifth Circuit assigned to the jury not only finding the facts,

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149. "The federal policy favoring jury trials is of historic and continuing strength." Simler v. Conner, 372 U.S. 221, 222 (1963) (citing Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-49 (1830); *Byrd*, 356 U.S. at 537-39). "Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved." *Id.* at 222.

150. The federal judge is the "governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides." Herron v. Southern Pac. Co., 283 U.S. 91, 95 (1931). Thus, federal courts are not subject to state constitutional provisions or statutes which govern jury trials. *Id.* at 94.

151. U.C.C. § 5-108(e) (revised 1995).

152. Lofy v. Southern Pac. Co., 277 P.2d 423, 425 (Cal. Dist. Ct. App. 1954) (stating jury's role to draw proper inferences when facts in dispute); *De Lahunta*, 59 A.2d at 800 (determining question of whether traffic stanchion constituted a nuisance and was proximate cause of injury was properly determined by jury); Orr v. Avon Fla. Citrus Corp., 177 So. 612, 614 (Fla. 1937) (determining that it is for jury to find that defendant was negligent and was acting for company within the scope of his agency); Ney v. Yellow Cab Co., 117 N.E.2d 74, 80 (Ill. 1954) (reviewing jury question whether circumstances surrounding defendant's violation of statute may be proximate cause of damage that followed); Gard v. Sherwood Constr. Co., 400 P.2d 995, 1002 (Kan. 1965) (holding that issues of negligence and probable cause are for jury); Guzzi v. Jersey Cent. Power & Light Co., 90 A.2d 23, 26 (N.J. Super. Ct. App. Div. 1952) (holding that it is jury question whether defendant's installation and maintenance of gas supply conformed to standard practice in industry); Shobert v. May, 66 Pac. 466 (Or. 1901).

153. *De Lahunta*, 59 A.2d at 800, 803.

154. 238 F.2d 783 (5th Cir. 1956).

155. *Id.* at 787 (emphasis added).

but also determining the standard of care, applying the standard to the facts, and drawing appropriate inferences.

In a letter of credit case, an issuer has a duty to comply with a standard: the "standard practice of financial institutions that regularly issue letters of credit."[156] When the question of whether the issuer met or failed to meet that standard depends upon disputed questions of fact, or upon inferences drawn from facts, it is the jury which should resolve the factual disputes, and draw the appropriate inferences.

V. A COMPARISON WITH U.C.C. SECTIONS 2-302 AND 4A-202(c)

The official comment to revised section 5-108(e) asserts that "similar rules in Sections 4A-202(c) and 2-302" provide support for the decision to have judges, not juries, determine the nature and scope of standard practice.[157] A close look at these sections shows that there is little or no support in these rules for broadening the judge's sphere of decision and thereby constricting the jury trial right.

U.C.C. section 2-302 pertains to an unconscionable contract or clause. It provides that a court, as a matter of law, may find a clause or contract unconscionable and refuse to enforce it.[158] The statutory delegation of this power to the court does not, however, abrogate the constitutional right to a jury trial. The issue of unconscionability has always been a question of equity, not law, and therefore has always been a question for the judge.[159] There is no similarity

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156. U.C.C. § 5-108(e) (revised 1995).

157. Paragraph 5 of the official comment 1 to U.C.C. revised section 5-108(e) provides:

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

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

158. U.C.C. § 2-302 provides as follows:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

U.C.C. § 2-302 (1989).

159. County Asphalt Inc. v. Lewis Welding & Eng'g Corp., 444 F.2d 372, 379 (2d Cir. 1971). In this case, the Second Circuit, rejecting plaintiff's claim that a jury trial right on the issue of unconscionability was guaranteed by the Seventh Amendment of the U.S. Constitution,

between unconscionability, a matter of equity not entitled to a jury trial, and revised section 5-108(e), a claim at law, where plaintiff seeks money damages, and is entitled to a jury.

Moreover, the claim that section 4A-202(c)[160] supports the decision in revised section 5-108(e) to abrogate jury rights is surprising, to say the least. In fact, the official comment to that section shows, by analogy, how revised section 5-108(e) has gone beyond constitutional limits. Section 4A-202(c) deals with the commercial reasonableness of a security procedure. The official comment to that section (which is combined with the comment for 4A-203 and found following 4A-203), supports having a jury, rather than a judge, determine whether a bank's conduct meets a given standard: "The issue of whether a particular security procedure is commercially reasonable is a question of law. *Whether the receiving bank complied with the procedure is a question of fact.*"[161]

While there is a serious question whether, by legislation, commercial reasonableness can constitutionally be made a question of law for the court,[162] it

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noted that such an argument hardly merited consideration: "In 1791, when the [Seventh] amendment was adopted, the discretionary power to grant equitable relief according to the 'conscience' of the chancellor was so unmistakably a matter for the equity side rather than the law side of the court no further discussion of the constitutional ground is warranted." *Id.*

160. U.C.C. § 4A-202(c) (1989). Article 4A of the U.C.C., Fund Transfers, deals with electronic transfers of funds.

161. U.C.C. § 4A-203 cmt. 4, para. 2 (1989) (emphasis added).

162. An analysis of whether section 4A-202(c) violates the right to a jury trial by making the determination of "commercial reasonableness" a matter of law is beyond the scope of this Article. It is interesting to note in passing, however, that the drafters of Article 4A took great pains to try to explain why commercial reasonableness should be a question of law. The official comment states, "[i]t is appropriate to make the finding concerning commercial reasonability a matter of law because security procedures are likely to be standardized in the banking industry and a question of law standard leads to more predictability concerning the level of security that a bank must offer to its customers." U.C.C. § 4A-203 cmt. 4, para. 2 (1989). This is quite a curious statement. First, no evidence, authority, or reference supports the statement that bank security procedures are "likely" to be standardized. Second, the use of the term "question of law standard" is quite novel. What is a "question of law standard"? Perhaps it is the standard created when a fact question for the jury gets relabeled as a question for the judge.

There are a number of cases interpreting "commercial reasonableness" under Article 9, and they basically send disputed fact questions to the jury. *See* Leasing Serv. Corp. v. River City Constr., Inc., 743 F.2d 871 (11th Cir. 1984) (applying Alabama law) ("Generally the issue of commercial reasonableness is a question for the jury." (quoting Henderson v. Hanson, 414 So. 2d 971 (Ala. Civ. App. 1982))). Where there are no disputes as to material facts, however, the issue becomes a question of law. *See In re* Matter of Excello Press Inc., 890 F.2d 896, 905 (7th Cir. 1989) (citing with approval Federal Deposit Ins. Corp. v. Forte, 535 N.Y.S.2d 75 (2d App. Div. 1988) ("Whether a sale was commercially unreasonable is, like other questions about 'reasonableness,' a fact-intensive inquiry . . . .")); United States v. Conrad Publ'g Co., 589 F.2d 949, 954 (8th Cir. 1978) (stating "whether a sale of collateral was conducted in a commercially reasonable manner is essentially a factual question"); Credit Alliance Corp. v. Cornelius & Rush Coal Co., 508 F. Supp. 63, 67 (N.D. Ala. 1980); Credit Alliance Corp. v. David O. Crump Sand & Fill Co., 470 F. Supp. 489 (S.D.N.Y. 1979); Advanced Irrigation Inc. v. First Nat'l Bank, 366 N.W.2d 783 (N.D. 1985) (The determination of commercial reasonableness as a matter of law is only appropriate "where all of the inferences support the conclusion that the sale was commercially reasonable. Questions of fact become questions of law when

cannot be disputed, and the comment so states, that *the bank's compliance with that procedure is a question of fact.* Similarly, in revised section 5-108(e), the interpretation of whether a particular practice is a standard practice in the banking industry, when contained in a written trade code, may be a question of law, but *the bank's compliance with that standard practice is a question of fact.* Thus, a comparison with 4A-202(c) serves to highlight how improper it is for revised section 5-108(e) to provide that the court, rather than the jury, shall determine whether the bank has complied with a particular standard.

In Revised Article 5, the drafters went a step further than had the drafters in Article 4A. In so doing, the Article 5 drafters stepped over the boundaries of a constitutionally protected right. In Article 4A, there is still an acknowledgement in the official comment that the bank's compliance with a standard is a question of fact for the jury. In revised section 5-108(e), the drafters pushed further to create black letter law that relabeled the matter of a defendant's compliance with a standard—historically a question of fact for the jury—as a "matter of interpretation for the court."[163]

VI. ARGUMENTS MADE IN SUPPORT OF THE CONSTITUTIONALITY OF REVISED SECTION 5-108(e)

In addition to the general policy reasons given in the official comment for taking fact issues away from the jury, defenders of revised section 5-108(e) have offered several arguments supporting the constitutionality of the provision. In a written statement submitted to the New Jersey Law Revision Commission, Robert M. Rosenblith, one of the Advisors to the Drafting Committee, stated as follows:

> Permitting juries to decide [on] an ad hoc basis the applicable standard or the conclusion of observance was felt to be inappropriate for the stability of the L/C business. While juries still could determine factually what the issuer did or did not do, the Drafting Committee determined that the court should determine preliminarily, as a matter of law, what the standards are and apply

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reasonable men can reach but one conclusion." (citing City of Hazelton v. Daugherty, 275 N.W.2d 624, 627 (N.D. 1979))). In Bankers' Trust Co. v. J.V. Dowler, 390 N.E.2d 766 (N.Y. 1979), the court found commercial reasonableness as a matter of law, but based its decision on the fact that "undisputed facts and irrefutable documentary evidence bearing upon each of the elements of commercial reasonableness make it manifest that there could be no realistic expectation that the Company would succeed in obtaining a factual or legal determination in its favor." *Id.* at 770. In other words, the court found no material disputed issue of fact.

It could be argued that a "commercially reasonable" sale is more likely to create factual issues than a "commercially reasonable" security procedure. Even so, it does not justify taking from the trier of fact the question of a commercially reasonable security procedure in those cases when factual issues arise, as they inevitably will. Normally, of course, the question of reasonableness is one for the jury. It is only for the court when the evidence is so clear that no reasonable person could determine the issue in any way but one. *See, e.g.*, Amfac v. Waikiki Beachcomber Inv. Co., 839 P.2d 10 (Haw. 1992).

163. U.C.C. § 5-108(e) (revised 1995).

> the facts determined by the fact finder to conclude whether or not the issuer had observed the standards.[164]

Rosenblith concedes that the jury at least has a role in factually determining what the issuer did. Even if the statute were to be read this way, however, this would not resolve the constitutional defect. In most letter of credit cases, there will be no dispute as to what the issuer did. The real dispute will center on (a) what the standard practice is, and (b) whether the issuer's conduct complied with that standard practice. Both of these issues, according to Rosenblith, are to be determined by the court as a matter of law. As discussed above, however, this would mean that any disputed material factual issues, as well as inferences that could be drawn from the facts, would be denied jury review, in violation of the constitutionally protected right to a jury trial.[165]

In his written statement, Rosenblith's response to the concern that revised section 5-108(e) might be unconstitutional was to state that "there is nothing inherently improper in parties agreeing to waive a jury trial in a commercial dispute governed by a written agreement."[166] While this assertion standing on its own is true, and parties to letter of credit cases frequently choose to waive their rights to a jury, revised section 5-108(e) does not provide for a voluntary waiver of a jury trial. Rather, it legislates that questions of fact be denied jury review and decided by the court as a matter of law.

With respect to the waiver issue raised by Rosenblith, that concept is further developed by Sandra Stern, one of the Uniform Commissioners from New York.[167] In Stern's article on Revised Article 5, she asserts that revised section 5-108(e) is not unconstitutional because it is not black letter law, but instead is a default rule which operates in the absence of contrary agreement by the parties.[168] The argument is that since Article 5 provides that certain provisions such as revised section 5-108(e) can be varied, the parties can simply opt out of revised section 5-108(e) by stating in the letter of credit that the determination of the bank's observance of standard practice will be a matter for the jury. Under this theory, if a beneficiary did not "opt out" by varying the provision, then it is not unconstitutional for the default provision to operate to prevent him from having a jury trial.[169]

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164. Statement of Robert M. Rosenblith to The N.J. Law Revision Commission (January 18, 1996) (on file with the *Indiana Law Journal*)[hereinafter Rosenblith Statement].

165. *See* discussion *supra*, part IV.

166. Rosenblith Statement, *supra* note 164.

167. Sandra Schnitzer Stern, *Revised Article 5 Brings Uniformity, Predictability to Letters of Credit*, 143 N.J. L.J. 779 (1996).

168. *Id.* at 803.

169. This is essentially a waiver argument. The position is that parties waive their constitutional right to a jury trial when they fail to vary the terms of a letter of credit to specifically provide that determination of the issuer's observance of standard practice is a matter for the jury. It is doubtful that such a claim of waiver would be upheld, however, since failing to negotiate a change in a standard form letter of credit is not the kind of knowing and voluntary act necessary to waive a constitutional right. In *Brookhart v. Janis*, the Court noted that there is a presumption against the waiver of constitutional rights and for a waiver to be effective "it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'" Brookhart v. Janis, 384 U.S. 1, 4 (1966) (quoting

The problem with this argument is that labeling a provision a "default" provision does not prevent it from being black letter law[170] nor shield it from constitutional scrutiny. If one were to accept the argument, then the vast majority of provisions in the U.C.C. would be immune from constitutional challenge, since they are "default rules."[171] Yet, the fact of being a "default rule" has not prevented courts from scrutinizing various provisions of the U.C.C. which are alleged to be unconstitutional. New York's highest court, for example, found section 7-210, Enforcement of Warehouseman's Lien, unconstitutional under the New York Constitution.[172] The fact that this provision could have been varied by agreement of the parties did not prevent the New York Court of Appeals from finding it unconstitutional.

Additional U.C.C. provisions which have been challenged as unconstitutional include U.C.C. sections 9-503 and 9-504, concerning a secured party's right to take possession and dispose of collateral.[173] While these challenges were not successful, no case turned on the ground that these were "default" provisions from which the parties had the opportunity to, but did not, opt out.

The important point is that Congress or a state legislature cannot circumvent constitutional commands by imposing upon the individual the obligation to take some affirmative step, failing which he must suffer the consequences of an unconstitutional statute. In the trusts and estates area, for example, there are "default rules" which only apply if someone dies without making a will. Such statutes are not, however, immune from constitutional scrutiny. As an example, one such "default rule" provided that if a person died intestate, males would be preferred to females as administrators of the estate. Held up to constitutional scrutiny, the statute could not pass muster, as the U.S. Supreme Court determined in *Reed v. Reed* in 1971.[174] It is no defense that the deceased could have "opted out" of the unconstitutional "default rule" by making a will (and thereby determining who would be the executor). Thus, if revised section 5-108(e) is unconstitutional, as this Article suggests, the fact that a party could opt out of it does not cure the constitutional defect.[175]

Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

170. "Black letter law," according to Black's Law Dictionary, is "[a]n informal term indicating the basic principles of law generally accepted by the courts and/or embodied in the statutes of a particular jurisdiction." BLACK'S LAW DICTIONARY 170 (6th ed. 1990). Revised section 5-108(e) clearly sets forth a basic principle of law embodied in a (proposed) statute. The fact that it can be varied does not mean it is not "black letter law."

171. *See* U.C.C. § 1-102(3) (1995).

172. Svendsen v. Smith's Moving & Trucking Co., 429 N.E.2d 411 (N.Y. 1981).

173. *See, e.g.*, Winfield v. Society Nat'l Bank, 845 F.2d 328 (6th Cir. 1988); Ancoren v. Peters, 829 F.2d 671 (8th Cir. 1987); Menchaca v. Chrysler Credit Corp., 613 F.2d 507 (5th Cir. 1980); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973).

174. 404 U.S. 71 (1971). The Supreme Court struck down as violative of the Equal Protection Clause of the Fourteenth Amendment an Idaho statute which gave preference to males over females in becoming the administrator of an intestate's estate.

175. The editorial board of the New Jersey Law Journal suggested that a party's waiver of a jury trial right by failing to make a timely jury demand, might lend some support to Ms. Stern's position. Editorial, *Inviolate (Sort Of)*, 143 N.J. L.J. 980 (1996). The requirement of a timely demand, however, is part of the orderly management of litigation before the court. It

It has also been suggested that in determining whether a question goes to the judge or the jury, there may be a complexity exception for letter of credit cases on the basis that they are too complex to be considered by the jury.[176] For the most part, cases which have been considered possibly too "complex" for a jury are cases such as *In re U.S. Financial Securities Litigation*,[177] which involved over 5 million documents, 150,000 pages in depositions, and a trial projected to last two years, or *In re Japanese Electronic Products Antitrust Litigation*,[178] which involved more than 20 million documents, 100,000 pages of depositions, and a trial that was likely to take a year.[179] Appellate courts came to different conclusions about whether these cases were too complex for a jury,[180] and the Supreme Court has never squarely ruled on the issue.

While courts have different views on whether cases involving millions of documents and year long trials are too "complex" for a jury,[181] letter of credit cases simply do not have the same degree of complexity. Documents which are material to the case are usually limited to those listed in the letter of credit. It is rare that over ten different documents are required, and many credits will require fewer than ten. There is no case law or law review article suggesting that letter of credit litigation even approaches the level of difficulty of cases which some courts have considered too "complex" for the jury.[182] Moreover, the issues

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is no different from other procedural requirements parties must meet in the litigation process, including, for example, the requirement that a defendant must answer a complaint in a timely manner or be subject to a default judgment. It is quite different to require that private parties, in their relationships with each other, must take certain affirmative steps, failing which, they will be subject to a statute that denies constitutional rights.

176. See *id.* which expressed this concern. *See also* Comment, LETTER OF CREDIT UPDATE, Feb. 1996., at 6 ("The allocation of powers between the court and jury with respect to the interpretation of the UCP is somewhat more complex . . . . The source of the problem is the provisions in the federal and many state Constitutions which preserve the right to trial by jury. In commercial litigation, this often means that issues of considerable complexity are tried before a jury which is unable to assess their import.").

177. 609 F.2d 411 (9th Cir. 1979).

178. 631 F.2d 1069 (3d Cir. 1980).

179. *See* JOHN GUINTHER, THE JURY IN AMERICA 197-98 (1988).

180. The Third Circuit, in *In re Japanese Electronic Products*, overruled in part the district court, finding due process precludes trial by jury when jury is unable to perform its task of rational decision making with a reasonable understanding of the evidence and the relevant legal rules. *In re Japanese*, 631 F.2d 1069 (3d Cir. 1980). The Ninth Circuit overruled the district judge in *In re U.S. Financial Securities Litigation*, holding there was no complexity exception, and that the case should go to the jury. *In re U.S. Fin.*, 609 F.2d at 411.

181. Some commentators today believe there may no longer be a complexity exception to jury trials in the federal courts. Greenberg & Wolinetz, *supra* note 47, at 1498-99. Some limited support for having an exception appears in the *Markman* decision, in which the Supreme Court in a patent case held that disputed terms of art in a claim construction were more appropriate for judges than for juries because of the highly technical nature of patents. Markman v. Westview Instruments, Inc., 116 S. Ct. 1384 (1996); *see supra* notes 82-111 and accompanying text.

182. Studies reflecting the competency of juries in dealing with complex issues suggest there is no basis for creating a "complexity exception" for removing complex cases from the jury. GUINTHER, *supra* note 179, at 211-17 (citing study published by the Federal Judicial Center of the United States Supreme Court in 1981); *see also* discussion *supra* part IV.A.3.a.

involved, such as whether a particular conduct meets a standard, are exactly the kind of issues juries routinely decide.[183]

VII. POLICY REASONS OFFERED IN SUPPORT OF CONSTRICTING THE RIGHT TO A JURY TRIAL

In Revised Article 5, the drafters made the decision that the letter of credit community was not well-served by juries, and that judges should determine the outcome of letter of credit litigation.[184] By asserting in the official comment that the court is supposed to determine what the standard practice is against which bank conduct will be measured, and by mandating in the statute that the court as a matter of law will measure and evaluate the bank's conduct to determine if it meets the standard, the drafters virtually eliminated the role of the jury in determining liability of a bank in a letter of credit case. The reasons given by the drafters—promoting more consistent outcomes, speedier resolutions of disputes, uniformity and predictability in letters of credit—should be examined to see whether they provide a reasonable basis for constricting a litigant's access to a jury, assuming for this purpose there is no constitutional violation.

There appear to be no studies which suggest that judges render more consistent or predictable opinions in letter of credit cases than juries, and judges in such cases are not remarkable for consistency or predictability.[185] Moreover, there are

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183. *See* discussion *supra* part IV.A.3.a.

184. In an article in the New Jersey Law Journal, Sandra Stern, one of the Uniform Commissioners for New York and a member of the Drafting Committee for Article 5, stated as follows:

> Banks have generally preferred . . . technical issues to be determined by courts rather than juries. . . . [T]here was general consensus among participants in the drafting process that determinations by judges would lead to a more consistent pattern of decisions, and that legal predictability in the United States facilitates acceptance of our letters of credit abroad.

Stern, *supra* note 167, at 803.

185. Compare, for example, court decisions concerning whether a bank can assert that documents are not in compliance with terms and conditions of a letter of credit if it has failed to notify presenter of discrepancies in a timely manner: Lease Am. Corp. v. Norwest Bank Duluth, N.A., 940 F.2d 345, 349 (8th Cir. 1991) (Failure to notify borrower of defects precludes claim that documents are not in accordance with the terms and conditions of the credit.); Bank of Cochin v. Manufacturers Hanover Trust Co., 808 F.2d 209, 210 (2d Cir. 1986) (Issuing bank's failure to notify opposing bank of discrepancies in letter of credit precluded issuing bank from asserting noncompliance claim.); Voest-Alpine Int'l Corp. v. Chase Manhattan Bank, 707 F.2d 680, 683, 686 (2d Cir. 1983) (Issuing bank was entitled to strict compliance even where it was aware of discrepancies in letter of credit and agreed upon terms.); Crocker Commercial Serv. v. Countryside Bank, 538 F. Supp. 1360 (N.D. Ill. 1981) ("[*R*]*easonable* compliance with a letter of credit entitles beneficiary to payment." (emphasis in original)). Ironically, while on the one hand the drafters claimed judge decisions were more "predictable" than jury verdicts, on the other hand, they lacked confidence in a court's ability to consistently interpret letter of credit law using a broad good faith standard. They adopted instead the narrow "honesty in fact" standard, usually the standard reserved for non-merchants. See Stern article, *supra* note 167, which asserts that without extensive modification of the statute, courts could not apply a "fair dealing" standard without producing "unpredictable"

simply not enough letter of credit cases decided by juries to have any significant effect on making the outcomes more predictable in such cases. Few letter of credit cases go to trial, and when there is a trial, parties may choose to waive the right to a jury. Furthermore, the majority of letter of credit cases are decided on summary judgment motions. It is very difficult to see how eliminating the small number of jury trials a year in letter of credit cases in this country could significantly affect predictability or consistency.

It also does not appear that judge trials in civil cases result in "speedier resolutions" than jury trials. Bench trials may be concluded sooner because they can be scheduled around other work of a court, no time is consumed in picking a jury, and there may be fewer skirmishes about evidence since rules of evidence tend to be applied less strictly. Nonetheless, a jury gives its verdict promptly, so it can go home, while a judge may "reserve" his decision for weeks, or months, or longer. In addition, in reviewing a jury-tried case, appellate courts feel more constrained in overturning judgments based on jury verdicts than on findings made by judges, since there is no constitutional problem of possible invasion of the right to trial by jury in rejecting a judge's findings.[186] Thus, the ultimate resolution of a civil trial by a judge, who reserves decision, or whose findings are rejected at the appellate level, could be much slower than one by a jury whose fact findings are generally not reviewable.

Moreover, while studies have shown that more courtroom days are usually spent in a jury trial than in a bench trial,[187] the "speed of resolution" of a matter does not depend upon courtroom days, but upon the total length of time a case is in the system. That amount of time is no more for a jury case than for a non-jury case.[188]

The drafters also claimed that by changing a fact issue into a matter of law, more cases would be decided on summary judgment motions rather than by going to trial. While it is true that granting summary judgment does eliminate time spent in a trial, most letter of credit cases are already decided on summary

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results.

186. *See* DELMAR KARLEN & CHARLES W. JOINER, TRIALS AND APPEALS 254-55 (1971). Moreover, in cases where the judge is both trier of fact as well as determiner of law, a particular issue which is determined as an issue of law can be more easily reversed at the appellate level. To reverse an issue of law, the appellate court just has to disagree with the decision below. To reverse an issue of fact, the appellate court uses a higher, "clearly erroneous" standard. FED. R. CIV. P. 52(a). Since parties often waive their jury trial rights in letter of credit cases, more issues are decided by judges as triers of fact than juries. Ironically, the drafters' decision to relabel a question of fact as a question of law, if enacted by most state legislatures, will make it much easier for the trial court's decision to be reversed on appeal.

187. GUINTHER, *supra* note 179, at 156-58.

188. An analysis of a data base of 3.5 million federal district court civil cases terminated over the last 16 fiscal years, showed that the mean judge-trial case spent 755 days on the docket, while the mean jury trial case terminated in 678 days. Theodore Eisenberg & Kevin M. Clermont, *Courts in Cyberspace*, 46 J. LEGAL EDUC. 94, 97 (1996); Theodore Eisenberg & Kevin M. Clermont, *Trial by Jury or by Judge: Which is Speedier?*, 79 JUDICATURE 176, 178 (1996). In 1980, the median time required in federal court to handle a case from beginning through trial was 15 months for bench trials and also 15 months for jury trials. GUINTHER, *supra* note 179, at 157.

judgment motion. There is no available evidence, either anecdotal or statistical, which would suggest that trials in letter of credit cases are unduly long, or that eliminating the few trials that take place, either bench trials or jury trials, would have any significant impact upon letter of credit litigation.

With respect to uniformity, a primary goal of the sponsors of uniform laws, NCCUSL and the ALI,[189] is to obtain passage of the laws they propose without non-conforming amendments. Drafting a provision which, even if it were ultimately determined not to be unconstitutional, *appears* unconstitutional under both state and federal law, does not serve the goal of promoting uniform adoption by the states. Non-uniform adoption would of course lead to non-uniform handling of letter of credit cases.[190] To obtain a smooth passage without non-uniform amendments, it would seem important to ensure that the various provisions did not violate state or federal constitutional guarantees. Creating constitutional issues, and leaving them for the courts to resolve, seems at odds with the purposes of NCCUSL and the ALI, which are highly prestigious bodies entrusted with drafting fair, effective, and one would think, clearly constitutional, uniform laws.[191]

The policy reasons proposed by the drafters for eliminating juries under Revised Article 5—predictability, speed, uniformity, complexity—have no

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189. The National Conference of Commissioners of Uniform State Laws ("NCCUSL"), and the American Law Institute ("ALI"), are private, non-legislative entities which participate in the drafting process of uniform state laws. The Commissioners are chosen in each state, usually by appointment by the governor. ALI members are elected by the existing membership, and tend to be professors, judges, partners in major law firms, or in-house counsel for large corporations. Each organization provides members to the Permanent Editorial Board, which has an ongoing supervisory role with respect to the uniform law process. In addition to the individuals from both organizations who make up the drafting committee for each uniform law, there are "advisors" and "active participants" who contribute to the drafting process.

190. The uniformity sought is also, of course, uniformity with the UCP. Since most juries in letter of credit cases will be dealing with letters of credit governed by the UCP, a basic question is whether jury participation will cause non-uniformity of application of the UCP. Again, this depends upon whether there is a significant difference in fact findings by juries and by judges in letter of credit cases. No study has been done on this subject, nor is there any study available as to whether jury verdicts or bench trials more frequently result in reversals in letter of credit cases.

191. This author has spoken with approximately a dozen individuals who were either members of the drafting committee, advisors, or active participants in the drafting process. The view appears to be widely held that whether or not revised § 5-108(e) is unconstitutional, the better way is simply to approve it, work for its adoption, and leave it to private parties to challenge it in court if it is unconstitutional. This willingness to push to the grey areas of constitutionality and beyond, particularly with no solid justification for doing so, tends to give credence to concerns of various academics and practitioners about the dominance of organizations such as the ALI and NCCUSL by special interests. Corinne Cooper, *The Madonnas Play Tug of War with the Whores or Who is Saving the UCC*, 26 LOY. L.A. L. REV. 563 (1993); Kathleen Patchel, *Interest Group Politics, Federalism and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 86 (1993); Donald Rapson, *Who is Looking Out for the Public Interest? Thoughts About the U.C.C. Revision Process in the Light (and Shadows) of Professor Rubin's Observations*, 28 LOY. L.A. L. REV. 249 (1994); Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising U.C.C. Articles 3 and 4*, 26 LOY. L.A. L. REV. 743 (1993).

substance with respect to letter of credit litigation, where already most cases are decided on summary judgment motion, often on cross-motions for summary judgment. Thus, one might wonder what is really driving the decision. It appears to be part of a more general movement to constrict as much as possible, if not eliminate, the civil jury trial in commercial cases. In both section 4A-202(c), where the issue of commercial reasonableness is declared to be a matter of law, and in revised section 5-108(e), where determining the issuer's compliance with a standard is declared to be a matter of law, issues which have traditionally been questions for the jury have now been relabeled as matters for the court.[192]

There are indications that such efforts are continuing with respect to other U.C.C. revisions. A memorandum dated March 7, 1996 to the U.C.C. Article 2 Drafting Committee and Advisors from the Subcommittee on Consumer Issues of the U.C.C. Article 2 Drafting Committee refers to an "Attached Draft of a Statement on the Treatment of Consumer Issues in a Revised U.C.C. Article 2." Referring to this draft, the memorandum states that: "[w]hile it is still a draft, the paper now reflects at least preliminary agreement of the Subcommittee on the best way to deal with consumer issues in the Article 2 Project."[193] The view of the "best" way to deal with the issue of jury trials with respect to consumer issues is found in the draft statement: "[S]ubject to constitutional restrictions, consideration should be given to drafting provisions such as U.C.C. section 2-302 by which courts, not juries, are to make critical judgments about performance or relief for consumers." The Subcommittee's view that this is the "best" way to deal with consumer issues causes one to question, best for whom? Probably not for consumers. And while lip-service is given to "constitutional restrictions," reference is made to section 2-302 as a general model, rather than as a model only for issues like unconscionability, which have historically been decided in equity. This suggests there will be an effort to draft provisions similar to U.C.C. section 2-302 with respect to issues based in law rather than equity, as the drafters have done in section 4A-202(c) and revised section 5-108(e), in order to withdraw from juries issues traditionally decided by them in actions at law.

In the draft of new U.C.C. Article 2B, dealing with licenses such as computer software agreements and the like, there is another example of "commercial reasonableness"—traditionally a question of fact—being denominated a matter for the court. Section 2B-113(b) provides: "Commercial reasonableness of an authentication procedure is a question of law to be determined by the court in light of the commercial circumstances, the purposes of the authentication procedure, the relative position of the parties and the procedures in general use for similar types of transactions or messages."[194] In light of all the issues and circumstances to be considered in determining commercial reasonableness, it

192. *See supra* notes 159-60 and accompanying text.

193. Memorandum from the Subcommittee on Consumer Issues of the U.C.C. Article 2 Drafting Committee and Advisors to the U.C.C. Article 2 Drafting Committee and Advisors (March 7, 1996) (on file with the *Indiana Law Journal*).

194. U.C.C. § 2B-133(b) (1996) (Proposed Draft) (on file with the *Indiana Law Journal*).

appears likely that genuine, disputed factual issues could arise. If so, such issues should be for the jury, not the court.

In the "Selected Issues" section following the draft of section 2B-113, there is an acknowledgment that this provision is modeled after sections 4A-201 and 202. Comment 4 seems to suggest, however, that factual issues would be even more likely to arise under this provision than under section 4A-202(c):

> Since Article 2B deals with a more open environment and multiple parties of differing sophistication, resources and bargaining power, rather than only with banks and customers, the "authentication system" concept does not have the entirely dominant impact that security system has in Article 4A. It is simply not reasonable to anticipate that all parties engaged in transactions covered by this article will arrive at or even consider using agreements to establish speeific procedures for authentication.[195]

Given the likelihood that disputed factual issues as to commercial reasonableness may arise among the "multiple parties of differing sophistication, resources and bargaining power," it is not clear why the drafters believe that the withdrawal of such factual issues from the jury by statute can pass constitutional scrutiny.

It is beyond the scope of this Article to discuss the pros and cons of civil jury trials generally. It is worth noting, however, that opponents of the civil jury rarely, if ever, point to any studies which support their criticism of the process. John Guinther, in his book, *The Jury in America*, notes, however, that the single significant research study designed to assay the abilities of juries in complicated cases concluded that:

> Judges and lawyers were uniformly complimentary of the diligence of the juries. With slightly less consensus, they also affirmed the validity of the juries' deliberative processes . . . . Almost without exception, respondents who acknowledged the existence of difficult issues in their jury trials also mentioned explicitly that *the jury had made the correct decision or that the jury had no difficulty applying the legal standard to the facts.*[196]

Thus, whatever the reason may be for opposing juries, a valid reason cannot be based on the issue of jury competence. In letter of credit cases, it cannot be based on predictability, because there are too few jury trials to have an effect upon predictability. One possible source of opposition to juries may be simply the preferences of the economically powerful, who believe that judges more than juries will tend to identify with and maintain the advantages of those in power. This was true under English rule, and was one of the reasons that caused the American states to insist upon a jury trial right. The concern over the jury trial right was, in fact, the initial impetus for the cntire Bill of Rights.[197] It is to prevent restrictions or contractions of the constitutional guarantee that courts scrutinize carefully any abridgement of the right to a jury trial.[198]

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195. *Id.*

196. GUINTHER, *supra* note 179, at 213 (quoting study published by the Federal Judicial Center of the United States Supreme Court in 1981) (emphasis added by Guinther).

197. *Id.* at 31; *In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 420 (9th Cir. 1979).

198. *See* Dimick v. Schiedt, 293 U.S. 474, 486 (1935) ("Maintenance of the jury as a factfinding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with

Revised section 5-108(e) is unconstitutional because it paints with too broad a brush, removing from the jury all disputed questions of material fact concerning whether the issuer breached its duty to observe standard practice of financial institutions that regularly issue letters of credit.[199] In any given case, of course, a particular issue governed by revised section 5-108(e) might be undisputed, unambiguous, or raise no issue of material fact. In such a case, the issue could properly be decided by the court as a matter of law. But revised section 5-108(e) commands the judge to determine *all* matters pertaining to whether an issuer breached its duty, whether or not genuine disputed issues of material fact are present. Its effect is to remove from the judge the obligation to determine whether certain issues are material factual ones which must be decided by the jury.

Is it possible to read the statute in a way that is constitutional? The official comment pertaining to the interpretation of revised section 5-108(e)[200] is not law, so it could be disregarded.[201] In that case, a court would no longer assume the duty of determining the existence and scope of standard practice, except to the extent consistent with section 1-205(2). It is more difficult, however, to deal with the critical middle sentence of revised section 5-108(e): "Determination of the issuer's observance of the standard practice is a matter of interpretation for the court." While the plain meaning appears to be that the court will determine both the bank's conduct and whether it meets the standard, arguably, the sentence could be read so that the question of the bank's actual conduct would be a jury question. This leaves the question of whether it is unconstitutional for the court to determine as a matter of law whether the bank's conduct met the required standard. Even if the jury had determined both the standard and the conduct, the application of the standard to the conduct could depend upon different inferences to be drawn from the evidence presented.[202] In that case, the Constitution mandates that the jury apply the standard.

For the sentence to pass constitutional muster, it would have to state: "Determination of the issuer's observance of the standard practice is a matter of interpretation for the court, unless there are disputed issues of material fact, or unless different, conflicting inferences could be drawn from the evidence presented." As drafted, the sentence contracts the jury's role in deciding disputed factual issues and in drawing inferences from the evidence. This is an impermissible abrogation. Constitutional jurisprudence makes clear that the court cannot impinge upon a constitutionally protected right either directly or indirectly. The United States Supreme Court has held, "[t]he Seventh Amendment . . . requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take

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utmost care.").

199. This duty is imposed by the first sentence of revised section 5-108(e): "An issuer shall observe standard practice of financial institutions that regularly issue letters of credit." U.C.C. § 5-108(e) (revised 1995).

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

201. While this may be possible in theory, in practice, judges tend to be very deferential to such official comments. *See supra* notes 56, 60.

202. *See* discussion *supra* part IV.C.

from the jury or to itself such prerogative."[203] It is clear that if revised section 5-108(e) stated that there would be no jury trials on issuer liability in letter of credit cases, this would be a direct violation of the constitutional right to a jury trial. Instead, however, revised section 5-108(e) accomplishes this result indirectly. As noted above, it is not permissible to withhold from the jury indirectly what cannot be withheld directly, without violating the constitutional guarantee of a jury trial.

VIII. PROPOSED AMENDMENT TO REVISED SECTION 5-108(e) AND TO THE OFFICIAL COMMENT

In order not to impinge upon the constitutional right to a jury trial in letter of credit cases, NCCUSL or any individual state could simply delete the second sentence of revised section 5-108(e).[204] The section would then read as follows: "An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice."

Eliminating the overreaching second sentence would leave judges with the ability to follow their normal practice and the established jurisprudence of federal or state constitutional law. Before trial, the court would typically decide motions for summary judgment. If genuine issues of material fact existed as to what was standard practice, what the issuer did, or whether the issuer observed the standard practice, then those issues of fact would be tried to a jury, unless the parties had waived a jury. If a jury was waived, the fact issues would be tried to a judge. Summary judgment would be granted if no genuine issues of material fact existed as to any of these questions.

If the second sentence of revised section 5-108(e) is deleted, the official comment relating to it should be of no effect. To be clear that the official comment is not suggesting an unconstitutional interpretation of the statute or a practice in violation of U.C.C. section 1-205(2), NCCUSL or the Permanent Editorial Board might want to consider either a modification of the official comment or simply delete the offending paragraph altogether. The pertinent paragraph begins, "Identifying and determining compliance with standard practice are matters of interpretation for the court, not the jury."[205] It should be replaced, if at all, with a comment which harmonizes with other U.C.C. provisions, existing case law, and constitutional jurisprudence, such as the proposal set forth below:

> The issue of what is a standard practice of financial institutions that regularly issue letters of credit may be a question of fact or a question of law. If the practice at issue is set forth in a written codification of trade usage, such as the Uniform Customs and Practice for Documentary Credits, then the

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203. Walker v. New Mexico & So. Pac. R.R., 165 U.S. 593, 596 (1897).

204. The second sentence is: "Determination of the issuer's observance of the standard practice is a matter of interpretation for the court." U.C.C. § 5-108(e) (revised 1995).

205. U.C.C. § 5-108(e) cmt. 1, para. 5 (revised 1995); *see supra* notes 59-63 and accompanying text.

> meaning of the writing is a question for the court.[206] If extrinsic evidence must be presented to understand the practice, it is a matter for the court if it is unambiguous and raises no disputed questions of fact. If the extrinsic evidence is ambiguous or changing, raises questions of fact, or constitutes evidence from which more than one inference could be drawn, it is a matter for the jury. If a practice is contained in a writing that is not as widely accepted and utilized as the UCP, then the question of its existence, scope, and whether it is a trade usage or standard practice is a question of fact for the jury. If a practice is not in writing, determination of the existence and scope of the practice and whether it is a standard practice are questions for the jury. As in section 4A-202(c), a determination of whether the issuer has complied with the standard practice is a question of fact for the jury.

By adopting an amended version of revised section 5-108(e), legislatures will not offend the constitutional principle of the right to a jury trial. Parties may always, of course, choose not to ask for a jury trial in a letter of credit case, as in other cases. But the party who wants his case submitted to a jury should have that right.

There is an obvious policy reason in support of the decision *not* to abridge jury trial rights. That reason is that individual constitutional rights are more important than efficiency, speed of resolution, predictability, or uniformity, and they should not be given up easily.[207] The right to a jury trial was considered critical by our eighteenth-century forebears, and courts and judges up to the present day have asserted that a constitutional right, "once gained, must be zealously guarded, for" when it is not, it "tend[s] to become [a] mere privilege which those in power can remove when they find the conferring of [it] no longer convenient to their purposes."[208]

Courts are constitutionally mandated to determine whether a particular issue in a letter of credit case is one of fact or one of law, in accordance with well-established precedent. If a question is factual, it cannot be legislated to be a question of law without diluting the constitutional guarantee of a right to jury trial.

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206. *See* U.C.C. § 1-205(2) (1996).

207. As Judge Gibbons noted in his dissent in *In re Japanese Electronic Products Antitrust Litigation*, "the provisions of the Bill of Rights which limit the way in which the federal courts conduct their business are designed to promote values other than efficiency. The inefficiencies which those provisions impose on the system are a small price to pay for the vindication of the values which the Bill of Rights advances." 631 F.2d 1069, 1091 (3d Cir. 1980) (Gibbons, J., dissenting).

208. GUINTHER, *supra* note 179, at 1. Chief Justice Rehnquist has stated that "[t]he right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 388 (1979) (Rehnquist, J., dissenting). As Judge Arnold has explained:

> It is almost impossible to exaggerate the centrality of the institution of the jury to almost all of the important episodes of Anglo-American legal history. Many of the central ideas of the American and English common law owe their origin to the fact that the jury was the chief mechanism for trying factual disputes. It is the single most important institution in the history of Anglo-American law.

Morris Sheppard Arnold, *The Civil Jury, A Historical Perspective*, *in* THE AMERICAN CIVIL JURY 9, 10 (1987).