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Summary of Amendments to UCC Article 2

By Linda J. Rusch
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Background

The National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) promulgate the Uniform Commercial Code (UCC). Both NCCUSL and ALI members are on the drafting committees and both membership bodies approve any changes in the official text of the UCC.

The effort to revise UCC Article 2: Sales started in 1989 with the appointment of the Permanent Editorial Board (PEB) study committee. The PEB study committee issued its report in 1991 and a NCCUSL-ALI drafting committee was appointed. The revision process became very controversial, as areas of substantive disagreement developed. In 1999, the ALI membership approved a draft of revised Article 2 but the NCCUSL membership did not approve the draft. The drafting committee was reconstituted. In 2001, the ALI approved a draft of amendments to Article 2 and again the NCCUSL membership

did not approve the draft. In 2002, the NCCUSL membership approved a draft of amendments to Article 2 in substance the same as the 2001 draft approved by the ALI membership with three differences: the definition of goods, the statute of frauds, and the provision concerning liquidated damages. In 2003, the ALI membership approved the draft as approved by the NCCUSL membership.

The following is a summary of the substantive changes proposed to the current statutory text of Article 2. If a section is not mentioned, there have been no substantive changes made to the statutory text. Many sections have been amended with non-substantive changes, such as changes to remove gender based language. Proposed significant changes to the official comments are noted. The changes to the official comments will not be final until October 2003. Copies of the final act with changes to the official comments can be obtained from the NCCUSL offices.

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Scope of Article 2

Article 2 applies to "transactions in goods." UCC § 2-102. Three changes are proposed to the scope of Article 2. First, the definition of goods excludes "information." Amended UCC § 2-103(1)(k). Information is not a defined term. Second the subject matter of "foreign exchange transactions" is excluded from the definition of "goods." Amended UCC § 2-103(1)(i). A foreign exchange transaction is a defined term that distinguishes currency exchanges accomplished through crediting and debiting trading balances from physical exchange of money. The former transaction is excluded from Article 2. Third, new section 2-108 provides for the relationship of Article 2 to other laws concerning goods. Those other laws are certificate of title laws, consumer law, specialized laws dealing with certain types of products, and the federal E-Sign act. Amended UCC § 2-108.

A change that will affect all of Article 2 is the revision of the definition of good faith to mean "honesty in fact and reasonable commercial standards of fair dealing" for all transactions within the scope of Article 2. Amended UCC § 2-103(1)(j). This change comports with the revision of the definition of good faith in the other articles of the UCC.

Formation and Terms

Amended Article 2 contains several redefined and new terms and some contract formation rules designed to facilitate electronic commerce. In most respects, these changes are in accord with the Uniform Electronic Transactions Act that has been enacted in over 40 states. First, throughout the article the word "writing" has been changed to "record."

"A change that will affect all of Article 2 is the revision of the definition of good faith to mean 'honesty in fact and reasonable commercial standards of fair dealing' for all transactions within the scope of Article 2."

"Record" is defined in Amended UCC § 2-103(1)(m) the same as in the other revisions to the UCC. Second, the definitions of "sign" (amended UCC § 2-103(1)(p)) and "conspicuous" (amended UCC § 2-103(1)(b)) have been revised to accommodate electronic communications. Third, new definitions of "electronic" (amended UCC § 2-103(1)(f)), "electronic agent" (amended UCC § 2-103(1)(g)), and "electronic record" (amended UCC § 2-103(1)(h)) are provided.

The following rules are provided regarding contract formation and terms. First, the fact that a record or signature is

electronic in form or that an electronic record was used to form a contract is not sufficient to deny the record, signature, or contract legal effect and enforceability. Amended UCC § 2-211. Second, Article 2 does not require that a transaction be conducted electronically. Amended UCC § 2-211. Third, the interaction of electronic agents or the interaction of an individual with an electronic agent may result in contract formation. Amended UCC § 2-204. Fourth, Article 2 provides an attribution rule to determine if an electronic record or electronic signature is attributed to a person. Amended UCC § 2-212. Fifth, Article 2 provides that if receipt of an electronic communication has a legal effect, that effect is not changed merely because no individual is aware of the receipt. Amended UCC § 2-213. Finally, Article 2 provides that receipt of an electronic communication does not establish the content of that electronic communication. 2-213.

The amendments make minimal changes to the statute of frauds in UCC § 2-201. The dollar amount is raised from \$500 to \$5,000 and the word "writing" is changed to "record" throughout the section. The admissions exception found in subsection (3) is broadened to apply to admissions "under oath" not just in court. The introductory language that some courts had read to preclude the use of non-statutory exceptions to the writing requirement has been deleted and the commentary makes clear that estop-

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pel principles may override the requirement of a record meeting the statute of frauds requirements. Finally, a new subsection is added to provide that compliance with the Article 2 statute of frauds is the only statute of frauds that needs to be met in a sale of goods subject to Article 2.

The parol evidence rule in UCC § 2-202 likewise contains minimal

is preserved in the preliminary comment to amended UCC § 2-207. Once a contract is formed by any method, including but not limited to an exchange of an offer and acceptance, the amended UCC § 2-207 provides that the terms of the contract will be terms that appear in the records of both parties, terms to which both parties agree, and supplemental terms under the

"One of the more significant revisions is the complete rewriting of UCC § 2-207."

changes. In addition to changing the word "writing" to "record", the section is restructured to codify the former comment to the section that ambiguity is not a prerequisite to admission of course of dealing, usage of trade, or course of performance to explain terms in a record. Finally, the preliminary comment states that a merger clause is not conclusive evidence of the parties' intent to integrate the record.

One of the more significant revisions is the complete rewriting of UCC § 2-207. Unlike the former section, the revised section does not address any issues of offer or acceptance within the statutory text of section 2-207. The principle that a definite and seasonable expression of acceptance may contain terms different than or in addition to the terms in the offer is expressed in amended UCC § 2-206. The principle that contract formation may be prevented by using a clause that expressly conditions formation on acceptance of the terms in that party's record

UCC. The preliminary commentary to the section discusses determining the parties' agreement to terms. The comment states that the intent is not to give effect either to the last or the first form sent but to leave to the courts the determination of whether there is agreement to a term that is not found in the records of both parties.

The amended Article 2 makes a significant change to the terms provisions found in part 3 of Article 2. Amended Article 2 eliminates the statutory definitions of shipping terms for FOB, FAS, CIF, C & F, and ex-ship and all cross references to those terms. Amended Article 2 also eliminates the provisions on overseas shipment and bills of lading in a set and on the meaning of the "no arrival no sale" term.

Other changes made to the sections of Article 2 on contract terms are as follows. First, section 2-208 on course of performance is deleted for those

states adopting revised Article 1 where course of performance is incorporated in UCC § 1-303. Second, parties may specify a standard for the nature and timing of a notice of termination. Amended UCC § 2-309. Third, several sections are amended to make clear that the Article 2 rules are subordinate to the rules of Revised Article 5. Amended UCC § 2-325, 2-506, and 2-514. Finally, amended UCC § 2-513 allows the parties to fix a standard of inspection in addition to a place and method of inspection.

Warranties

Several changes are made to the existing warranty sections of Article 2. First, the warranty of title and non-infringement is amended in two respects. Amended UCC § 2-312. The warranty of title may be breached not only if the transfer is not good or rightful but also if the transfer "unreasonably exposes the buyer to litigation because of a colorable claim or interest in the goods." This language is taken from the comment to current Article 2. The amendment makes clear the warranty of non-infringement may be disclaimed. Second, the express warranty provision is also amended in two respects. Amended UCC § 2-313. Express warranties under this section are limited to the context of parties in privity of contract. The section separates out the concept of a warranty of quality concerning the goods from the concept of a reme-

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dial promise. A "remedial promise" is defined in amended UCC § 2-103(1)(n) to mean promises by the seller to repair or replace or refund upon the happening of an agreed event. Third, the implied warranty of merchantability section is amended to provide that a good be fit for the ordinary purpose for which goods "of that description are used." Amended UCC § 2-314. The preliminary comment to that section provides that the test for product defect in tort and breach of the implied warranty of merchantability should be same when recovery is sought for injury to person and property.

Two new warranty-like obligations are added to deal with representations regarding the quality of the goods in the non-privacy context. New UCC § 2-313A provides for an obligation when representations made in a record are given directly to a remote purchaser of the goods. This section applies to "new goods or goods sold or leased as new goods in a transaction of purchase in the normal chain of distribution." The remote purchaser must be a buyer or lessee in the normal chain of distribution. The seller's obligation arises if (i) the seller "makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise," (ii) that affirmation, promise, description or remedial promise is "in a record packaged with or accompanying the goods," and (iii) the seller "reasonably ex-

pects the record to be, and the record is, furnished to the remote purchaser." The seller's obligation is that the goods will conform to the representation "unless a reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise or description created an obligation" and to perform the remedial promise. New UCC § 2-313B provides for an express warranty-like

obligation for representations to the public by a seller to remote purchasers. This obligation only applies as to "new goods or goods sold or leased as new goods in a transaction of purchase in the normal chain of distribution" and the remote purchaser must buy or lease in the normal chain of distribution. The seller's obligation arises if (i) the seller "makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise," (ii) that affirmation of fact, promise, description or remedial promise is made "in advertising or a similar communication to the public," and (iii) the remote purchaser purchases the goods "with knowledge of and with the expectation that the goods will conform to the affirmation of fact, promise or description, or that the seller will perform the remedial promise." The seller's obligation is that the goods will con-

form to the representation "unless a reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise or description created an obligation" and to perform the remedial promise.

Under either section 2-313A or 2-313B, the seller has breached the obligation if the goods do not

"Two new warranty-like obligations are added to deal with representations regarding the quality of the goods in the non-privacy context."

conform to the representation when the goods leave the seller's control. The seller may modify or limit remedies as long as the modification or limitation is given to the remote purchaser by the time of purchase. Unless limited or modified, the seller is liable for the remote purchaser's incidental and consequential damages except for lost profits. The loss to the remote purchaser for breach of the seller's obligation is determined in any reasonable manner.

The amendments to Article 2 also make some changes to the disclaimer provisions found in section 2-316. Most of the changes involve disclaimers in a consumer contract. Consumer contract is defined as a contract between a merchant seller and a consumer. Amended UCC § 2-103(1)(d). Consumer is defined as an individual who buys or contracts to buy goods primarily for family, personal or household purposes. Amended UCC § 2-103(1)(c). First, to dis-

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claim the implied warranty of merchantability in a consumer contract, the disclaimer must be in a record, be conspicuous and include the following language "the seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract." Second, to disclaim the implied warranty of fitness for a particular purpose in a consumer contract, the disclaimer must be in a record, be conspicuous and use the following language, "the seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in this contract." If the language quoted above is used in a non-consumer contract, that language will be sufficient to disclaim the applicable implied warranty. Third, if a seller uses "as is" or "with all faults" in a consumer contract, those terms must be conspicuously set forth in a record if the consumer contract is evidenced by a record. Finally, to disclaim implied warranties by virtue of the buyer's inspection in any contract, the seller must demand that the buyer inspect the goods.

The last change made to the warranty sections is to revise UCC § 2-318 to take into account the changes to the express warranty section and the addition of the two new sections 2-313A and 2-313B. The three existing alternatives are retained but revised to allow the remedial promise under 2-313 or the obligation to the remote purchaser under 2-313A and

2-313B be extended to the class of persons designated in the applicable alternative.

Performance and Breach

The amendments to Article 2 keep intact the sections on demand for adequate assurance and anticipatory repudiation with only two changes. First the demand for adequate assurance may be in a "record." Amended UCC § 2-609. Second, a non-inclusive definition of repudiation modeled after the Restatement (Second) of Contracts § 250 is

"Amended Article 2 provides a complete revision of the seller's right to cure found in section 2-508."

added to section 2-610.

Similarly the rules on tender of delivery in sections 2-503 and 2-504 are largely unchanged except for the following. If tender is made by way of delivery through a bailee without the goods being moved, the bailee's acknowledgement of the tender of delivery must be to the buyer, delivery orders may be in a "record," and the bailee's receipt of notice as to the buyer's rights fixes rights to the goods as against third persons subject to the rules in Article 9. Amended UCC § 2-503. If tender is to be made by a shipment contract, the seller must put "conforming" goods in the carrier's possession. Amended UCC § 2-504.

The Article 2 structure of ac-

ceptance, rejection and revocation of acceptance also remains largely unchanged except for the following. First in order to reject an installment in an installment contract, the value of that installment to the buyer must be substantially impaired. Amended UCC § 2-612. Second, if the buyer wrongfully but effectively rejects the goods, the buyer will have an obligation to take reasonable care of the goods, amended UCC § 2-602, a merchant buyer will have the obligation to deal with the goods as stated in amended UCC § 2-603 but will not have the right to indemnity and a commission as in the case of a rightful rejection, and a buyer will be able to store, reship or resell the goods as provided in UCC § 2-604. Previously those three sections had been limited to the buyer who had rightfully and effectively rejected the goods. Finally, the buyer's reasonable use of the goods post rejection or post revocation of acceptance will not constitute an acceptance of the goods, but the buyer may be obligated to pay for the value of the use to the buyer. If the buyer's use of the goods post rejection or post revocation of acceptance is unreasonable, the seller will have the option to treat that usage as an acceptance. Amended UCC § 2-602 and § 2-608.

Amended Article 2 provides a complete revision of the seller's right to cure found in section 2-508. First, the cure section will cover cure in installment contracts and will allow cure when the buyer has justifiably revoked acceptance

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because the non-conformity was not discovered prior to acceptance and acceptance was induced by the difficulty of discovery or by the seller's assurances. If the time for contract performance has not expired, the cure must be of a "conforming tender of delivery within the agreed time." If the time for contract performance has expired, the cure must be "appropriate and timely" based upon the buyer's circumstances. In either situation, in order to have a right to cure, the seller has to have performed in good faith under the broader definition of good faith incorporated into the amendments. In either situation, the seller must give the buyer seasonable notice of the intent to cure, and the cure must be at the seller's own expense. The seller must compensate the buyer for the buyer's reasonable expenses caused by the breach and subsequent cure.

The requirements for the buyer to give notice of breach have been revised. Amended UCC § 2-605 has been amended in several respects. First, that section provides that the obligation to state the defect that is ascertainable by reasonable inspection will be required to justify a revocation of acceptance and not merely to justify a rejection. Second, the requirement to state the defect will apply only if the seller has a right to cure, not merely the ability to cure the defect. Third, the requirement that the seller make the request in writing in a transaction between merchants has been

changed to allow a request in a record. Fourth, the failure to state a defect when required by this section will no longer bar the buyer from establishing breach of contract although the buyer may be barred from being able to assert a rightful rejection or justifiable revocation of acceptance. Finally, subsection (2) is limited to the situation in which the documents have been tendered to the buyer, and does not apply in situations in which the documents have been tendered to someone who is not the buyer, such as a bank issuing a letter of credit. Section 2-607 is amended to provide that failure to give timely notice of breach of warranty in the case of accepted goods bars a remedy only to the extent the seller is prejudiced by the un-

"In either situation, in order to have a right to cure, the seller has to have performed in good faith under the broader definition of good faith..."

timely notice.

The risk of loss provisions remain intact with the following three changes to section 2-509. If goods are to be delivered through a bailee and tender is based on notification to the bailee, the bailee must acknowledge to the buyer that the buyer has a right to possess the goods in order to pass risk of loss. A delivery order used to effect tender and pass the risk of loss may be in a "record." In a non-carrier,

non-bailee delivery, risk of loss passes upon buyer's receipt of the goods, not upon tender of delivery as previously provided when the seller was a merchant.

Finally, the excuse terminology in section 2-615 is changed to excuse from "performance" not just excuse from "delivery."

Remedies

Many changes have been made to the remedial scheme while keeping the basic remedial theory underlying Article 2 largely unchanged. Both indexing sections have been rewritten to provide a comprehensive indexing of seller's and buyer's remedies in amended UCC § 2-703 and § 2-711 respectively.

Seller's remedies

The seller's right to stop delivery under amended UCC § 2-705 is broadened by eliminating the requirement that for goods to be stopped the stoppage must be of a "carload, truckload, planeload or larger shipments of express or freight."

The seller's right to reclaim is broadened. For a credit seller's right under amended UCC § 2-702, the requirement of demand within 10 days of delivery has been changed to demand with reasonable time. The language regarding a longer period of time for making the demand when there is a misrepresentation of solvency has been deleted. To defeat a reclaiming credit seller, the good faith purchaser must give value.

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The cash seller's right to reclaim has been codified in amended UCC § 2-507. To reclaim, the cash seller must make a demand within a reasonable time after the seller discovers the payment mechanism failed. The cash seller's reclamation right is subject to the rights of a buyer in ordinary course or other good faith purchaser for value.

The seller's damage remedies are revised in several different ways. The person in the position of the seller will be entitled to exercise all remedies of the seller. Amended UCC § 2-707. A new subsection of amended UCC § 2-706 provides that the seller's failure to resell in accord with amended UCC § 2-706 will not bar other remedies. The damage measurement based upon market price in amended UCC § 2-708 will measure the market price of goods in the case of an anticipatory repudiation at the "expiration of a commercially reasonable time after the seller learned of the re-

"In a non-consumer contract, the enforceability of liquidated damage clauses will be determined in light of actual or anticipated harm."

pudiation." The contrary provision in former section 2-723 is deleted. The lost profit measure is will be available when the resale remedy is inadequate. Amended UCC § 2-708. The language in the lost

profit measure of "due allowance for costs reasonably incurred and due credit for payments or proceeds of resale" is deleted.

Amended UCC § 2-708. Finally, in non-consumer contracts, sellers will be allowed to recover as part of their damages, consequential damages in addition to incidental damages. Amended UCC § 2-710.

Buyer's remedies

The rules of sections 2-502 and 2-716, as amended by revised Article 9 (which broadened the ability of a buyer to obtain the goods from the seller) are continued in the revision, with the vesting rule provided in those sections not limited to consumer buyers but broadened to all buyers. Amended UCC § 2-502 and § 2-716.

The buyer's damage remedy based upon market price is altered in two respects. Amended UCC § 2-713. The market price of goods in the case of an anticipatory repudiation is measured at the "expiration of a commercially reasonable time after the buyer learned of the repudiation." In cases other than anticipatory repudiation, the market price will be measured at the time for tender of the goods.

Buyer's or seller's remedies

Section 2-716 is amended to allow both sellers and buyers to obtain specific performance. In non-consumer contracts, the courts may enforce the parties' agreement to specific performance unless the sole remaining

obligation is payment of money.

The liquidated damages provision, amended UCC § 2-718, is amended in the following respects. In a non-consumer contract, the enforceability of liquidated damage clauses will be determined in light of actual or anticipated harm. The provision stating that an unreasonably large liquidated damage clause is void as a penalty is deleted. Language providing that the enforceability of a clause limiting remedies is determined under 2-719 has been added. The buyer's right to restitution of the price paid has been expanded to all circumstances in which the seller stops performance due to buyer's breach or insolvency. Finally, the amendments delete the statutory liquidated damages (equal to the lesser of a percentage of the price or \$500) as a deduction from the breaching buyer's remedy of restitution for the price paid.

The statute of limitations in amended UCC § 2-725 has been significantly revised. The limitations period is enlarged from the previous four years from accrual of the cause of action, by providing that the limitation period can also be "one year after the breach was or should have been discovered, but no longer than five years after the right of action accrued." The amendments provide that the limitation period cannot be reduced in a consumer contract. In addition to retaining the accrual rules from current law, the revision provides specific accrual rules for

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breach by repudiation, for breach of a remedial promise, for claims over, for breach of the warranty of title and noninfringement, for breach of an express warranty or implied warranties in the privity context, and for breach of the obligations in Section 2-313A and 2-313B.

Third Party Rights

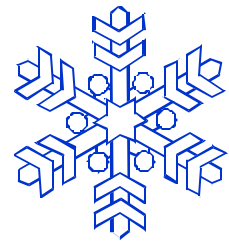
The assignment and delegation provision, amended UCC § 2-210, has been restructured but only a few new things have been added. First, it provides that the rules of that section are subject to Article 9. Second, it provides that attachment, perfection, or enforcement of a security interest in the seller's rights does not materially change the buyer's duty or increase the buyer's risk unless the seller delegates its performance. Third, it provides that a term that prohibits delegation is enforceable.

One change has been made to the rights of buyers in the ordinary course. Section 2-403(2) is amended to provide that the goods are transferred free of any interest of the entruster. Section 2-402 is amended to make clear that entrustment rule trumps the rights of an article 9 secured party.



Dark thoughts in a Winter Storm

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Metaphor is a powerful organizing principle, but metaphors can distort reality. In *Winter Storm v. TPI*, the United States Court of Appeals for the Second Circuit, by mistaking metaphor for description, issued a decision that could do serious mischief to the world's payment mechanisms.¹

The facts: Winter Storm Shipping, a non-US corporation with a place of business in Malta, chartered a vessel to Thai Petrochemical Industry (TPI), a Thai corporation, for a voyage from Saudi Arabia to Thailand. Winter Storm, claiming that TPI owed it over \$360,000 for the charter, brought an action in US District Court in New York, invoking the court's admiralty jurisdiction and obtaining an order of attachment against TPI under admiralty rules. Winter Storm then served The Bank of New York (BNY) with processes of maritime attachment and garnishment. After the first such process, BNY placed a stop order on any funds relating to TPI passing through the bank. Sure enough, TPI attempted to wire funds from its Bangkok bank to Oppsal Shipping Co. (Oppsal) in London for an unrelated transaction, and the wire passed through BNY. BNY diverted the amount of Winter Storm's claim to a suspense account, and sent the rest on to Oppsal's bank, Royal Bank of Scotland (Royal Bank), in London. TPI then served a second process, and attached the funds in the suspense account. The District Court vacated the attachment,² but the Second Circuit reversed.

Winter Storm has many instructive points to make about the nature of admiralty jurisdiction and maritime attachment. All these nautical niceties can not, however, disguise the fact that the opinion rests on a legal blunder that has nothing to do with admiralty law: The court failed to realize that there was no property of TPI's in New York to attach.

To understand what went wrong in *Winter Storm*, it would be well to review some basic facts and law about the nature of bank deposits and wire transfers. First, when you have money deposited at a bank, the bank does not keep currency in a box with your name on it – in legal terms, the bank is not a bailee of currency. The law has long recognized that your bank deposit is simply a debt owed to you

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by the bank.³ Just as you borrow money to spend it on a house or a factory or a college education for your children, so the bank borrows money from you to lend to other people who need houses, factories and college educations.

Your bank deposit can, of course, be attached. The bank's debt to you is a species of intangible property, and attaching that debt merely requires that the court issuing the attachment have personal jurisdiction over the garnishee. So a debt owed by BNY to TPI could be subject to an order of attachment issued by the District Court. The Second Circuit's blunder consisted of wrongly assuming that BNY's debt was owed *to TPI*.

Winter Storm's mistake owes much to the metaphorical way we normally describe funds transfers. Just as we can speak of having money in the bank when all we have is the bank's obligation to pay, so we can speak of money flowing from Thailand to New York when what we really have is a series of debit and credit entries at various financial institutions. We can describe the transfer as if paper money was somehow flowing through those wires, and I used that language (and will use it again) in describing such transfers. But it's one thing to indulge in a convenient fiction, and another to take it as the correct picture of the world. When we say the Sun rises, we don't mean that it revolves around the Earth.

What really happens in a wire transfer? TPI had funds in a bank in Thailand. Oh, there I go again. More precisely, the Thai bank owed TPI money in the form of a deposit obligation. If Oppsal also had an account at the bank in Thailand, TPI could have instructed the bank to debit TPI's account and credit Oppsal's account. But Oppsal's account was at Royal Bank in London, and TPI did not have an account there. However, both the Thai bank and Royal Bank had accounts at BNY.

So here's the sequence: The Thai bank debited TPI's account. It then ordered BNY to debit the

Thai bank's account, and credit Royal Bank's account, at BNY in New York. Finally, had the transfer not been interrupted by *Winter Storm's* attachment, BNY would have told Royal Bank to credit Oppsal's account at Royal Bank in London.

If you've been following this, you'll note that, had the wire transfer been completed, each bank would have offsetting debits and credits: The Thai bank decreases its debt to TPI and BNY's debt to it by the same amount. BNY, in turn decreases its debt to the Thai bank and increases its debt to Royal Bank by the same amount. Finally, the increase in BNY's debt to Royal Bank is balanced by Royal Bank's increased debt to Oppsal. At no point is there a debt of BNY to TPI.

"But it's one thing to indulge in a convenient fiction, and another to take it as the correct picture of the world."

All of this may come as news to the panel that decided *Winter Storm*. At a critical point, the opinion refers to "TPI's funds in the hands of BNY,"⁴ and there is similar language elsewhere.⁵ The court seems to have understood wire transfers on the model of a physical transfer of a bundle of currency, with BNY playing the role of a shipping company. If that were the case, there would have been good grounds for sustaining the attachment. But talk of "TPI funds that might pass through the bank"⁶ is metaphor, not description. Bewitched by the metaphor, the court construed BNY's debt to the Thai bank (or Royal Bank — it's impossible to tell which) as a debt to TPI.

Winter Storm relied in part on an earlier Second Circuit case, *United States v. Daccarett*.⁷ *Daccarett* was a civil forfeiture action in which the government sought to seize the funds of alleged drug lords that were being transferred from European to Columbian bank accounts. The government interpreted wire transfers of the funds as they passed

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through New York, and the court upheld the seizures. *Winter Storm* quoted *Daccarett's* statements that:

On receipt of the [electronic funds transfers] from the originating banks, the intermediary banks possess the funds, in the form of bank credits, ... before transferring them on to the destination banks.

* * *

... an [electronic funds transfer] while it takes the form of a bank credit at an intermediary bank is clearly a seizable *res* under the forfeiture statutes.⁸

But in *Daccarett*, the funds in the European banks — or more precisely, the debts owed to the defendants by the European banks — were claimed to be proceeds of drug transactions, and as such property subject to seizure. Moreover, any traceable proceeds of that property would be subject to seizure. Thus, when the New York bank debited its account with the European bank and credited the account of the Columbian bank, the New York bank's debt to the Columbian bank was arguably traceable proceeds of drug transactions. Accordingly, seizure did not require that property *of the drug lords* be held by the bank, merely that the New York bank's debt to the Columbian bank be traceable proceeds of drug transactions, and *Daccarett* held no more.

Not that the *Winter Storm* court wasn't warned. The District Court had vacated the attachment on the authority of Section 4A-503 of the Uniform Commercial Code, which provides that a court can't restrain an intermediary bank from acting on a payment order. *Winter Storm* held that:

[Section 4A-503's] effect in this case ... is to

deprive *Winter Storm* of the ability to serve process of maritime attachment upon *TPI's funds in the hands of BNY*. That is an impermissible effect because Admiralty Rule B preempts U.C.C. § [4A]-503.⁹

But Admiralty Rule B merely allows for attachment of "defendant's tangible or intangible personal property ... in the hands of garnishees" The court thought that Rule B applied because it believed, mistakenly, that TPI had funds at BNY.

Winter Storm characterized section 4A-503 as a "state statute enacted for the protection of banks."¹⁰ Perhaps the court should have read the section and the Official Comment more carefully.

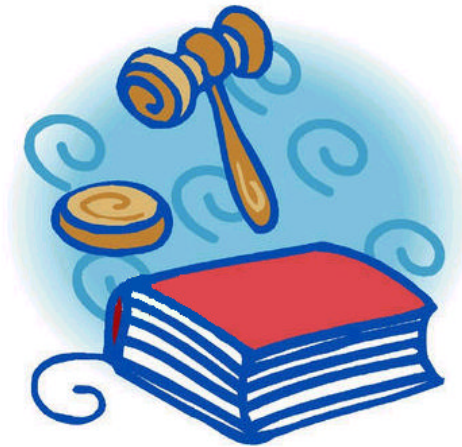
The Official Comment begins with the sentence "This section is related to ... comment 4 to section 4A-502," which states that

A creditor may want to reach funds involved in a funds transfer. The creditor may try to do so by serving process on the originator's bank, an intermediary bank or the beneficiary's bank. ... A creditor of the originator can levy

on the account of the originator in the originator's bank before the funds transfer is initiated The creditor of the originator cannot reach any other funds *because no property of the originator is being transferred*. ...[emphasis added]

Admiralty rules may preempt state law, but admiralty rules do not create new rules for property. That is left to state law.

One irony of *Winter Storm's* preemption of state law is that it does not apply to Fedwire, the wire transfer system of the Federal Reserve Banks. Fedwire is governed by Regulation J promulgated by the Federal Reserve Board. But the Fed has



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chosen to follow the states on these matters by incorporating most of Article 4A (including section 4A-503) as the governing rules for Fedwire.¹¹

Can the result in *Winter Storm* be made to work? To do so, we'd have to hypothesize a debt of BNY to TPI that won't involve unbalancing BNY's debits and credits. It's not impossible: We can say that instead of BNY taking two actions — decreasing its debt to Thai Bank and increasing its debt to Royal Bank, it took four actions: First, it decreased its debt to Thai Bank and took on a debt to TPI. Next, it cancelled the debt to TPI and took on a debt to Royal Bank.

Because wire transfers are usually accomplished by computers, the four actions would be virtually simultaneous, so that the life of BNY's debt to TPI would, like some transuranic element, be measured in microseconds. Still, that may be enough to allow an attachment to be served on the intermediary bank that will force it to stop the process once the debt is created.

Now this whole line of reasoning has a substantial amount of unreality. For one thing, there weren't really four actions, in the sense that BNY created book entry debits to TPI. Moreover, there's something more than a little forced about saying that BNY had a debt to TPI when TPI most likely did not request the transfer to be wired through BNY, or have any idea that it could be dealing with BNY.¹² BNY's only relation to TPI was that the wire contained a line listing TPI as the originator of the transfer, the sole purpose of which was to let Oppsal know how to credit the payment.

What are *Winter Storm*'s potential ramifications? Let's start by asking what might happen back in Thailand between the originator, TPI, and its bank? Under section 4A-402(c) of Article 4A, an originator, such as TPI, would be the beneficiary of a "money-back guarantee:"

The obligation of [a] sender to pay its payment order is excused if the funds transfer is not completed by acceptance by the beneficiary's bank.

A similar principle is part of the UNCITRAL Model Law on International Credit Transfers, which is quite similar to Article 4A.¹³ If a money-back guarantee were to apply in Thailand, then the Thai bank would have to recredit TPI's account, except in the unlikely event that TPI had instructed the bank to route the funds through BNY.¹⁴ The result of all this would be that the Thai bank, not TPI, would be out the \$360,000 attached in New York.

Neither Article 4A nor the UNICTRAL Model Law has been enacted in Thailand, but it's not too much of a stretch to imagine a Thai court applying a money-back principle to international funds transfers. While the Model Law has not been adopted in any jurisdiction, many believe it to be persuasive authority for courts dealing with electronic funds transfers.

If the Thai bank has to recredit TPI's account, it may look to BNY for redress. Since the Thai bank presumably chose to route the wire transfer through BNY, it can not rely on the money-back guarantee.¹⁵ It may, however, wish to explore the implications of an intriguing footnote in *Winter Storm*.

Winter Storm follows *Reibor International Ltd. V. Cargo Carriers (KACZ-CO.) Ltd.*¹⁶ in holding that an attachment of a wire transfer can be effective only if served between the time the intermediary receives a payment order and the time it issues a payment order to the next bank in the chain. As I said earlier, this gap is normally measured in microseconds. What made the attachment possible in *Winter Storm* was that BNY, having once been served with process, placed a stop order on future wire transfers originated by TPI. Part of the subsequent funds transfer to Oppsal was then routed to

(Continued on page 12)

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a suspense account, where it was reached by the second process of attachment served by Winter Storm's diligent lawyers.

But if the Winter Storm's first process was not effective, what right did BNY have to route part of the wire to a suspense account? As the *Winter Storm* opinion notes:

Had the BNY bank officer recently read the *Reibor* opinion, he might very well have regarded those first processes as absolutely void, and not placed a "stop order" on any after-acquired TPI funds. In point of fact, however, BNY did place the stop order, ... and so TPI funds were in the bank's possession when Winter Storm's later processes of attachment were served TPI may feel aggrieved by BNY's conduct, a question about which we intimate no view¹⁷

If the District Court were to hold the Thai bank entitled to recover from BNY because BNY had no right to place a stop on the funds transfer, then banks are likely to ignore future processes of maritime attachment, to the great relief of banks and bank customers everywhere. But if the court holds that BNY is not liable, or in the more likely event that the issue is not resolved by a clear holding, then foreign banks operating in jurisdictions that support a money-back guarantee may be reluctant to wire funds through banks located in the Second Circuit.

¹ 310 F.3d 263 (2d Cir. 2002) (All citations are to the slip opinion, Docket No. 02-7078 (2d Cir. November 6, 2002)), *cert.den.* ____ U.S. ____ (No. 02-1506, June 16, 2003)

² 198 F.Supp. 2d 385 (SDNY 2002)

³ Joseph S. Sommer of The Federal Reserve Bank of New York has advised me that "The first U.S. case I know of to state that a bank deposit is only a debt is *In re Franklin Bank*, 1 Paige 249 (N.Y. Ch. 1828). The U.S. Supreme Court picked up the same point in *Bank of the Republic v. Millard*, 77 U.S. (10 Wall.) 152, 156 (1869). The first English cases were *Carr v. Carr*, [1811] 1 Mer. 543, followed by the more extensively reasoned *Devaynes v. Noble* [1816] 1 Met. 529, 568-69. However, the usually-cited English leading case is *Foley v. Hill*, [1848], 2 HLC 28, 9 ER 1002 (H.L.). *Millard* cited *Foley*."

⁴ *Winter Storm* at 27

⁵ *Id.* at 2, 5, 8, 9, 18, 20 (fn. 7), 22 and 23.

⁶ *Id.* at 5.

⁷ 6 F.3d 37 (2d Cir. 1993)

⁸ *Id.* at [54].

⁹ *Winter Storm* at 27-28 (emphasis added).

¹⁰ *Id.* at 28.

¹¹ 12 CFR §§ 210.25(b)(1), 210.32 App. B.

¹² *Daccarett* was clear (and correct) in holding that when a wire transfer goes through an intermediary bank, the originator does not become a customer of, or have an account at, the intermediary bank. 6 F.3d at 51-52.

¹³ Article 14, § 1.

¹⁴ U.C.C. § 4A-402(e).

¹⁵ U.C.C. § 4A-402(e).

¹⁶ 759 F.2d 262 (2d Cir. 1985)

¹⁷ *Winter Storm* at 20, fn. 7.



Uniform Certificate of Title Law

by Alvin C. Harrell*

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At the 2002 Annual Meeting of the National Conference of Commissioners on Uniform State Laws (NCCUSL), the Conference's Executive Committee authorized the formation of a Drafting Committee to prepare a Certificate of Title Act (COTA). The Drafting Committee was formed, and met three times prior to the 2003 NCCUSL Annual Meeting, in the process generating six COTA drafts. Commissioner Lee McCorkle of Ohio is Chair and Professor Alvin Harrell is Reporter of the Drafting Committee. Prior to the 2003 NCCUSL Annual Meeting, the Executive Committee designated the Act as "Uniform," and the 2003 Annual Meeting Draft of the Uniform Certificate of Title Act (UCOTA) was read. This constituted a first reading of the act under NCCUSL's procedural rules, which require that an act be read twice before being finally approved.

The Drafting Committee has continued to consider and refine the 2003 Annual Meeting Draft, but the broad parameters of that draft are developing with a sufficient consensus to allow a brief description here. Of course, some details remain subject to definition, and perhaps debate, although the Drafting Committee's impression of commissioners' re-

sponses generally was that they were positive, receptive and constructive. In addition, the widespread and enthusiastic participation in Committee drafting meetings by representatives of potentially affected parties, including agencies, financiers, and others, serves as recognition that an updated uniform act is needed. As with all NCCUSL acts in draft, nothing should be taken as final until UCOTA has been adopted by the Conference.

Five basic purposes of UCOTA have emerged to date. First, UCOTA seeks to create a uniform and straightforward legal structure for the creation, transfer, and termination of certificates of title, and for basic, uniform rules the applicable agencies (to be designated in each state, and called the "office" in the draft) which will continue to administer that structure. The administrative details and operational systems (both paper and electronic) of these offices are not specified, except where necessary to legal uniformity (*e.g.*, the requirements for an application for a certificate of title); generally, the draft provides broad parameters designed to provide a floor in terms of clarity, simplicity, and uniformity.

Second, UCOTA seeks to create parallel and compatible systems for electronic and paper certificates of title, designed to permit the seamless integration of UCOTA into existing and future state certificate of title systems, and the simultaneous development of electronic systems, without disruption to either. UCOTA is designed to allow implementation by states at all points on the technology spectrum, and to accommodate movements of an office along that spectrum, without disruption.

Third, UCOTA must fit within other state laws, most importantly the UCC, including Articles 2, 2A, and 9, and UETA. This includes integration with both the substantive rules and the scope provisions of the UCC, *e.g.*, Article 9 sections 9-303 and 9-311.

Fourth, UCOTA is designed to provide rules governing private commerce, *e.g.*, certificate of title transactions between contracting parties. This includes rules governing various types of innocent purchasers, priorities between competing claims, errors and omissions, fraud problems, conflicts between written and electronic certificates of title, etc. There are also provisions governing the perfection of security interests.

Finally, UCOTA must fit into the requirements of, and be compatible with, federal law, including federal odometer disclosure requirements and the National Motor Vehicle Title Information System.

As noted, all of these matters remain open for further discussion and refinement. In addition, con-

sideration may be given to possible expansion of the scope of UCOTA to cover watercraft and manufactured housing certificates of title (the Drafting Committee is currently limited to vehicle issues).

Current drafts may be accessed through the NCCUSL website, www.nccusl.org. Interested parties are invited to submit comments and suggestions to the UCOTA Drafting Committee.



**Professor Harrell is Chair of the ABA UCC Committee Task Force on State Certificate of Title Laws, and Reporter for the NCCUSL Certificate of Title Act Drafting Committee. The following also contributed to this report: Michael Ferry, Commissioner of Missouri and a member of the Drafting Committee; William H. Henning, Executive Director of NCCUSL; Commissioner Lee McCorkle of Ohio, Chair for the Uniform Certificate of Title Act Drafting Committee; and Edwin E. Smith, Commissioner of Massachusetts and a member of the Drafting Committee.*

Message from the Chair: Uniform Commercial Code Committee

*by Stephanie A. Heller
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This is my first column as chair of the UCC Committee and my first opportunity to publicly express my thanks to Linda Rusch and the rest of the UCC leadership team for making my transition to chair as smooth and welcoming as possible. I would also like to take this opportunity to recognize the two new vice chairs of the Committee, Professors Christina Kunz and Stephen Sepinuck.

This is an exciting time for the UCC Committee. After more than a decade of UCC revisions, the task of modernizing the Code is coming to an end. I think we can all be extremely proud of the contributions that this Committee has made to the drafting effort. Our Committee routinely provided expert advisors and thoughtful com-

ments to the various drafting projects. The subcommittees also took on the task of educating the bar, through programs, articles and books, on the ways in which the revision projects would affect the practice of law.

With the end of the major drafting projects we can expect to see a shift in the work of the Committee. As we free up the resources that were previously devoted to these projects, new projects will emerge that focus more on current issues of concern to practitioners. For example, last month we established a new joint Task Force on Deposit Account Control Agreements. This new project, discussed more fully in the subcommittee reports, was formed in response to a real need in the legal commu-

nity to negotiate a form agreement that all of the interested parties could agree to use. The Business Law Section is uniquely positioned to bring all these parties together.

Of course the subcommittees will also continue the important work that they do in educating the bar on UCC matters. Whereas in the past many of these efforts have been driven by changes in the Code, we can expect to see more programs that explore the fluid boundaries of the Code and the interplay between the UCC and other areas of commercial practice. I anticipate that the subcommittees will also look to increase the ways in which they can serve as a resource to law students, young lawyers, professors, consumer representatives and solo practitioners through publications

(both traditional print and electronic), listserves and websites.

Before concluding, let me briefly note that planning is well under way for programs and meetings at the Section Spring Meeting on April 1-4, 2004 in Seattle, Washington. Although the details have not been finalized, we are developing the following three programs for the Spring Meeting:

- Bypass Surgery: Strategies for Contracting Out of UCC Rules,
- Harmony & Discord: Con-

sumer Protection in Commercial Transactions, and

- Woulda, Coulda, Shoulda – How to Draft Loan Documents under Revised Article 9 to Survive Challenges in Bankruptcy.

Several of the Subcommittees will also offer mini-programs at the subcommittee meetings. More details on all of these programs will be provided in the next newsletter. In the meantime, please mark your calendars for

this event.

Finally, I cannot help commenting on what I have observed over the past ten years as I have worked with many of you on Committee projects. Our membership has a diversity of talent and a spirit of dedication that cannot be matched. I am truly proud to be associated with all of you.

See you in Seattle.



UCC Subcommittee on Sales of Goods

Now that the proposed amendments to Article 2 of the UCC have been approved by NCCUSL and ALI, the Sales of Goods Subcommittee is focusing its work on the process of enacting the amendments and education regarding the effect of the amendments. We so-

licit the participation of membership of the Subcommittee and others in preparation of articles analyzing the amendments, development of materials that can be used to assist the enactment process and presenting programs regarding changes in the law. Those inter-

ested in participating in the project are encouraged to contact Rob Beattie by e-mail or 612-607-7495.

C. Robert Beattie, Chair

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UCC Subcommittees on Scope and Article 1

In Seattle the Subcommittees on Scope and Article 1 will hold a joint meeting on Friday morning at which the outgoing chair of the Article 1 Subcommittee, David Snyder, will wrap up the final issues revolving around the approval of Revised Article 1 and the enactment process. Scope Subcommittee co-chairs Ben Beard and Gail Hillebrand

will discuss briefly the mission and role of the newly merged Subcommittee on General Provisions and Relation to Other Law (including a contest to find the catchiest acronym/nickname for this Subcommittee) and entertain discussion on future projects. The new Subcommittee will (1) focus on the broad principles, fundamental

concepts, and general definitions that pervade the Code, and (2) examine issues related to the interplay between the UCC and non-UCC law, including state, federal, and international law. We look forward to seeing you all in Seattle, and especially look forward to hearing your ideas for launching this new Subcommittee.

The Scope Subcommittee has been collaborating with the Cyberspace Committee's Subcommittee on Electronic Commerce to update and revise the Model Trading Partner Agreement. That project continues and is coming to fruition. There will be a separate meeting of that working group in Seattle.

As you may have surmised, the Subcommittee on Scope and the Subcommittee on Article 1 will be merged into the new Subcommittee on General Provisions and Relation to Other Law following the Spring Meeting in

Seattle. To all those who have contributed to the fine work in these committees over the years - THANK YOU!

We look forward to continuing the great work of these subcommittees in our new subcommittee.

Those interested in participating in the Subcommittee on General Provisions and Relation to Other Law are encouraged to contact the co-chairs, Ben Beard by e-mail or 208-885-4977, or Gail Hillebrand by e-mail or (415) 431-6747.

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UCC Subcommittee on Leasing

The Committee on Leasing heard a presentation on "Lease Securitization Issues" by Martin Fingerhut of Blake, Cassels & Graydon at the ABA's August 2003 Annual Meeting in San Francisco. Canadian and American law were discussed and compared.

The Committee also enjoyed a lively discussion about the proposed amendments to the Terrible 2s (UCC Article 2-Sales and UCC Article 2A-Leases). Written handouts surveyed the criticisms made to date. The Committee focused on a few issues:

- Throughout their course, the American Law Institute, the 2/2A Drafting Committee and the Reporters have said that the Official Comments to UCC 2A-Leases should be re-

vised to spell out more explicitly how and why commercial leasing law differs from sales law. This is particularly true for 2A-201 (statute of frauds), 2A-106 (choice of law/forum in consumer leases), 2A-211 (warranties against interference), 2A-405 (excused performance), 2A-501 (damages- basic lease/sale differences), and 2A-517(f) (new statutory right for lessee to use goods as "mitigation of damages" after rejection or revocation).

- The issue of "scope," and how contract law and intellectual property law fit together under the Terrible 2s as opposed to under UCITA,

was briefly explored.

- Technical glitches in the sections about e-commerce were discussed.
- There was also a discussion of the First Amendment issues noted in Nike v. Kasky, __ U.S. __, 123 S.Ct. 2554 (June 26, 2003), as those issues are raised by proposed new UCC 2-313B (mass advertising), which erodes the common law standards limiting suits against com-

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mercial advertising (*see, e.g.*, Restatement of Torts (2d) §552).

Over the weeks following the meeting, the Committee obtained new clarifying Official Com-

ments on UCC 2A-Leases from the 2/2A Reporter and Drafting Committee. These were e-mailed to all committee members.

UCC Subcommittee on Payments

The Subcommittee on Payments met jointly with the Banking Law Subcommittee on Payments and Electronic Banking and the Cyberspace Law Subcommittee on Electronic Financial Services at the Business Law Section's Annual Meeting in San Francisco in August. At the meeting, we continued the debate that has been going on for some time on whether there is a need to produce new rules – perhaps by revisions to UCC Articles 3, 4 and 4A, or perhaps even by the creation of a new uniform payments law – to accommodate electronic instruments. The choice of topic was prompted by a number of recent developments in the payments area, including the Check 21 legislation, the emergence of check-to-ACH-debit products, and the growing number of ACH transactions originated over the Internet or by telephone.

Roland Brandel of Morrison and Forester presented a historical overview of the emergence of modern payments law and provided some insights into the divergence that has occurred over the years resulting in the creation of both statutory law and

system rules governing various payments mechanisms. While some frustration was expressed over the lack of uniformity among these legal standards and the gaps in legal protection that continue to exist, especially in the area of consumer protection, it seemed to be the sense of the meeting that any revision to Articles 3, 4 and 4A, much less the creation of a new uniform payments law, is not likely to occur in the now foreseeable future.

At the Section's Spring Meeting in Seattle next year, the UCC Subcommittee on Payments plans to meet jointly with the Banking Law Subcommittee on Payments and Electronic Banking on Saturday, April 3 from 10:30 to 12:30. The meeting will include a presentation on the check collection process by a prominent software vendor and a discussion about how this process would be altered with the implementation of the Check 21 legislation that has recently been passed by the House and Senate. We hope to explore how banks will be adapting to the new legislation and how far

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along they are with instituting new technological and operational processes to take advantage of Check 21. Finally, we plan to discuss how the regulators are reacting to the passage of Check 21. For example, the Board of Governors of the Federal Reserve System is currently working on revising Regulations CC and J, both to take into account the anticipated shortening in the time frames for funds availability for banks that are taking advantage of the substitute check process as envisioned in the Check 21 legislation, and to clarify the issues that the Check 21 legislation does not currently address.

We look forward to seeing all of you in Seattle.

Message from the Chair

Commercial Financial Services Committee

by Jeffrey S. Turner
Kaye Scholer LLP
Los Angeles, CA

We have met twice since my last report, at the ABA Annual Meeting in San Francisco, in August, and more recently on October 22, 2003, in Chicago, in conjunction with the annual convention of the Commercial Finance Association.

Although the Annual Meeting in San Francisco was not as well attended by Section of Business Law members as the Spring Meeting in Los Angeles (as is consistently the case with annual meetings), nevertheless those of our members who did attend were rewarded with a wide selection of good meetings, programs and forums. Under the supervision of Martin Fingerhut, we presented a substance-filled forum on issues related to structured finance, securitization and derivatives. I chaired a program where a panel of international experts addressed issues arising in film finance transactions. Several Subcommittees met and hosted substantive presentations. Our Committee enjoyed its customary joint dinner with the UCC Committee, this time hosted by Duane Geck at the Olympic Club.

In Chicago, our Committee meeting featured three interesting presentations on the topics of "Lender as Owner of Collateral," featuring James Prendergast and

John Murdock, "Sales of Accounts Under Revised Article 9," featuring Steve Weise and Teresa Harmon, and "Restructuring Troubled Loans," featuring Nancy Mitchell, Ronald Barliant, Susan Armstrong, David Weisloegel and J.T. Atkins. Written materials relating to these presentations soon will be available on the Committee's website.

In addition, on Friday, October 24, the Committee presented to the 59th Annual Meeting of the Commercial Finance Association, a program chaired by Chris Rockers, with a panel comprising Jennifer Hagle, Larry Peitzman and Catherine Haake, discussing "Why Can't We Just Get Along? The New Dysfunction in Syndicated Credits," a well-received and expanded reprise of a similar presentation made in April of 2003 in Los Angeles by the Loan Workouts Subcommittee (with special thanks to Erik Sieke and Caroline Galanty of Bank of America for authorizing the use and adaptation of their materials).

The Committee next will meet in Seattle on April 1-4, 2004. As usual, we will sponsor two great programs (one covering recent developments, to be presented

by Steve Weise, Jeff Turner and Teresa Harmon, and the other addressing structured finance developments that have flowed from Enron, to be chaired by Lynn Soukup with other panelists to be announced) and a forum (dealing with sales of loans, to be chaired by Chris Rockers, with other panelists to be announced), as well as a joint dinner (at the beautiful Columbia Tower Club), many Subcommittee meetings, and several co-sponsored events. We will be participating in a new enterprise, the "Young Lawyer Institute," on April 1. Also, at 9 am on April 1, there will occur the kickoff meeting of a new joint task force in which we are participating, the goal of which is to develop a "standard" form of deposit account control agreement acceptable to major depositories, secured parties and borrowers. Several members of our Committee will participate in that task force. Details of these and other attractions will be forthcoming soon.

I hope to see all of you in Seattle!



CFS Loan Documentation Subcommittee

As many of you know, our Committee has been giving presentations at the last few annual and spring meetings on the various sections of credit agreements, with the goal of preparing a form "fair and balanced" middle market credit agreement. At the annual meeting in San Francisco, there was a presentation and lively discussion on the miscellaneous provisions. For the spring meeting in Seattle, we are planning a presentation on the default and remedies sections in credit

agreements. Previous presentations include the credit facility provisions, representations, warranties and covenants, and definitions. We intend to have these presentations, together with the forms handed out, posted on our Committee's website soon.

We seem to be wrapping up our project, since the only remaining topics are the general loan provisions, including interest and fees, and conditions precedent. As a result, we need volunteers to serve as an

editorial board to take the presentations and formulate the Committee's "fair and balanced" credit agreement. Anyone who would like to volunteer, please contact me.

I look forward to seeing everyone in Seattle.

R. Marshall Grodner, Chair

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CFS Securitization and Derivatives Subcommittee

The Securitization and Derivatives Subcommittee was particularly active during the ABA Annual Meeting this past August. At the Subcommittee's regular meeting, Marcy Cohen, Director and Counsel of WestLB, summarized the current status of the new Basel Capital Accord and its likely impact on securitization. In addition, Steve Weise of Heller Ehrman discussed those provisions of revised Article Nine that are of particular interest to securitization attorneys. Following this meeting, the Chair of the Subcommittee moderated a Forum sponsored by the CFS Committee on three important structured finance issues: Frank Nocco

of Weil, Gotshal described recent developments in structuring true sales and providing non-consolidation opinions; Joe Collins of Mayer, Brown assessed the current legal and regulatory environment for credit derivatives; and Marcy Cohen of WestLB and Ken Kohler of Mayer, Brown provided an update on a number of accounting developments which are critical to the entire structured finance community.

Since the Annual Meeting, members of the Subcommittee have received regular updates on the constantly changing position of the Financial Accounting Standards Board in connection with

its proposal to significantly revise FAS 140 and FIN 46, the two accounting guidelines that determine whether a securitization transaction will receive off-balance sheet accounting treatment and/or must be consolidated with one of the parties involved in the securitization.

The spring meeting in Seattle will again see a number of sessions devoted to securitization issues. At the Subcommittee's regular meeting, presentations will focus on the state of the "true sale" opinion following Enron, and on attorney best practices in the face of escalating fraud and "accounting improprieties." Also, our parent Committee will sponsor

a program on Enron's lessons for structured finance and derivatives transactions.

Our Subcommittee has grown to over 90 members. Members of the Commercial Financial Services

and UCC Committees who are interested in securitization and related derivatives products are invited to join the Subcommittee by emailing the Chair. We look forward to seeing you next April.

Martin Fingerhut, Chair

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CFS Agricultural and Agri-Business Finance Subcommittee

The Agricultural and Agri-Business Finance Subcommittee met in San Antonio on October 17-18 in connection with the annual meeting of the American Agricultural Law Association. The Subcommittee sponsored two programs at the meeting. The first addressed issues raised by the transfer and encumbrance of water rights.

The second involved a two-hour presentation on livestock nuisance litigation.

The Subcommittee will meet at the Spring Meeting in Seattle on Friday, April 2 at 7:30 a.m. We anticipate a discussion of current issues raised by the Perishable Agricultural Commodities Act (PACA).

Phillip L. Kunkel, Chair

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CFS Creditors' Rights Subcommittee

The Creditors' Rights Subcommittee met jointly with the Bankruptcy Litigation Subcommittee at the Annual Meeting of the ABA in San Francisco on August 9, 2003. The Subcommittee received presentations from Elizabeth M. Bohn, Paul

Steven Singerman and Thomas Klaus Gump. Elizabeth led a detailed discussion entitled "Proving Fraud in Proceedings Objecting to Dischargeability of Debts Under Section 523(a)(2) and Objections to Discharge Under Section 727(a)(4)." Paul brought the Subcommittee up to date on the Stephan Jay Lawrence ongoing contempt proceedings in the Southern District of Florida. Thomas concluded the meeting with "Revised Article 9 of the UCC: A Look Back at the First Two Years."

The Subcommittees also met jointly during the National Confer-

ence of Bankruptcy Judges in San Diego, California on October 16, 2003. Newly appointed Bankruptcy Judge Elizabeth Stong of the Eastern District of New York provided the Subcommittees with a look at her first few weeks on the bench and the issues that are being presented to her.

Our next meeting will be during the Spring Meeting of the Business Law Section in Seattle, Washington on April 1, 2004. If you would like to join our Subcommittee or participate by presenting materials, simply email the Chair, Duane Geck, or the Vice Chair, Carolyn Richter.

Duane M. Geck, Chair

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CFS Intellectual Property Financing Subcom-

We had an interesting technical discussion during the Annual Meeting in San Francisco about who is entitled to the royalty payments due under Bankruptcy Code 365(n) if the licensor is bankrupt and rejects a license, but transfers the intellectual property that is licensed to an-

other party. The question is, who gets the money - the licensor under the license agreement, or the then current owner of the intellectual property? We look forward to seeing you again at the Spring Meeting in Seattle for another interesting discussion -- stay tuned!

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CFS Secured Lending Subcommittee and UCC Secured Transactions Subcommittee

We are delighted that Malcolm Lindquist of Tacoma, Washington will be succeeding as Chair of the Secured Lending Subcommittee, and Lynn Soukup of Washington, D.C., former Chair of the UCC Investment Property Subcommittee, will serve as Vice-Chair. We're sure that the Subcommittee will benefit from its strong new leadership.

At the annual meeting in San Francisco in August, Dan Meehan educated us on the new tax shelter rules and their potential impact on our practices. Bob Eisenbach and Jeff Reisner shared their learning from the U.S. Ninth Circuit Court of Appeals' decision in *Aerocon* and its effect on the financing of copyrights and copyrightable material, from

the perspective of bankruptcy counsel. Malcolm arranged, and co-starred with Leianne and a memorable supporting cast in, a program on legal ethics in work-out situations.

We hope to see all of you in Seattle, where we will focus again on current topics of interest to secured transactions counsel everywhere.

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Joint Task Force on Deposit Account Control Agreements

The Uniform Commercial Code and Commercial Financial Services Committees have joined with the Banking Law and Consumer Financial Services Committee to create a new Business Law Section joint task force to develop a market-based deposit account control agreement for use in lending transactions in which the collateral includes a deposit account within the scope of Article 9 of the Uniform Commercial Code.

The task force was formed in response to a number of concerns raised by members of the Section and others. These concerns related largely to the wide differences in forms and approaches taken by both lending and depository financial institutions in negotiating deposit account control agreements and the amount of time taken and

transaction costs incurred by parties in reaching acceptable resolutions.

The task force will be co-chaired by Marshall Grodner (Commercial Financial Services Committee), Marvin Heileson (Banking Law Committee), Ed Smith (UCC Committee) and Roberta Torian (Consumer Consumer Financial Services Committee).

The initial meeting of the task force will be at the 2004 Section Spring Meeting in Seattle on Thursday, April 1, 2004, from 9:00 to 10:00 a.m. At that meeting, the task force will seek to compile a list of issues most frequently negotiated in deposit account control agreements and to seek input on how to resolve those issues in ways which are fair to all parties.

Those interested in joining the task force or in suggesting issues to be considered should email Ed Smith.

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UNIFORM STATE LAWS SCORECARD

50 State Survey of Adoptions of Revised Official Text of the UCC¹ & UETA

AS of November 25, 2003

STATES	Article 1 (2001)	Article 2A ² (1990)	Articles 3&4 ³ (2002)	Article 6 ⁴ (1989)	UETA (1999)
Alabama	No Action	Enacted '92	No Action	REPEAL '96	Enacted '01
Alaska	No Action	Enacted '93	No Action	REPEAL '93	HB285
Arizona	No Action	Enacted '92	No Action	REVISE '92	Enacted '00
Arkansas	No Action	Enacted '93	No Action	REPEAL '91	Enacted '01
California	SB 1522	Enacted '91	No Action	REVISE '90	No Action
Colorado	No Action	Enacted '91	No Action	REPEAL '91	Enacted '02
Connecticut	HB 5097	Enacted '02	HB 5098 HB 5095	REPEAL '93	Enacted '02
Delaware	No Action	Enacted '92	No Action	REPEAL '96	Enacted '00
District of Columbia	No Action	Enacted '92	No Action	REVISE '97	Enacted '01
Florida	No Action	Enacted '90	No Action	REPEAL '93	Enacted '00
Georgia	No Action	Enacted '93	No Action	No Action	No Action
Hawaii	HB 1259 SB 1204	Enacted '91	Enacted '03	REPEAL '98	Enacted '00
Idaho	No Action	Enacted '93	No Action	REPEAL '93	Enacted '00
Illinois	No Action	Enacted '91	No Action	REPEAL '91	HB 1075
Indiana	No Action	Enacted '91	No Action	REVISE '97	Enacted '00
Iowa	No Action	Enacted '94	No Action	REPEAL '94	Enacted '00
Kansas	No Action	Enacted '91	No Action	REPEAL '92	Enacted '00
Kentucky	No Action	Enacted '90	No Action	REPEAL '92	Enacted '00
Louisiana	No Action	No Action	No Action	REPEAL '91	Enacted '01
Maine	No Action	Enacted '92	No Action	REPEAL '92	Enacted '00
Maryland	No Action	Enacted '94	No Action	No Action	Enacted '00
Massachusetts	HB 91	Enacted '96	HB 92	REPEAL '96	SB 1915
Michigan	No Action	Enacted '92	No Action	REPEAL '98	Enacted '01
Minnesota	SF 28 HF 155	Enacted '91	SF 28 HF 155	REPEAL '91	Enacted '00
Mississippi	No Action	Enacted '94	No Action	REPEAL '94	Enacted '01
Missouri	No Action	Enacted '92	No Action	No Action	Enacted '03
Montana	No Action	Enacted '91	No Action	REPEAL '91	Enacted '01
Nebraska	No Action	Enacted '91	No Action	REPEAL '91	Enacted '00
Nevada	No Action	Enacted '91	No Action	REPEAL '91	Enacted '01
New Hampshire	No Action	Enacted '93	No Action	REPEAL '93	Enacted '01
New Jersey	No Action	Enacted '94	No Action	REPEAL '94	Enacted '01
New Mexico	No Action	Enacted '92	No Action	REPEAL '92	Enacted '01
New York	No Action	Enacted '94	No Action	REPEAL '01	No Action ⁵

STATES	Article 1 (2001)	Article 2A ² (1990)	Articles 3&4 ³ (2002)	Article 6 ⁴ (1989)	UETA (1999)
North Carolina	No Action	Enacted '93	No Action	SB 230	Enacted '00
North Dakota	HB 1069	Enacted '91	No Action	REPEAL '93	Enacted '01
Ohio	No Action	Enacted '92	No Action	REPEAL '96	Enacted '00
Oklahoma	SB 1625	Enacted '91	No Action	REPEAL '97	Enacted '00
Oregon	No Action	Enacted '89	No Action	REPEAL '91	Enacted '01
Pennsylvania	No Action	Enacted '92	No Action	REPEAL '92	Enacted '00
Puerto Rico ⁶	No Action	No Action	No Action	REPEAL '96	No Action
Rhode Island	No Action	Enacted '91	No Action	REPEAL '01	Enacted '00
South Carolina	No Action	Enacted '01	No Action	REPEAL '01	No Action
South Dakota	No Action	Enacted '89	No Action	REPEAL '93	Enacted '00
Tennessee	No Action	Enacted '93	No Action	REPEAL '98	Enacted '01
Texas	Enacted '03	Enacted '93	No Action	REPEAL '93	Enacted '01
Utah	No Action	Enacted '93	No Action	REPEAL '96	Enacted '00
Vermont	No Action	Enacted '94	No Action	REPEAL '94	Enacted '03
Virginia	Enacted '03	Enacted '91	No Action	REVISE '97	Enacted '00
Washington	No Action	Enacted '93	No Action	REPEAL '93	No Action
West Virginia	No Action	Enacted '96	No Action	REPEAL '92	Enacted '01
Wisconsin	No Action	Enacted '92	No Action	AB 521 (REPEAL)	No Action
Wyoming	No Action	Enacted '91	No Action	REPEAL '91	Enacted '01

Please note that the Enactment Date does not necessarily reflect the effective date. Please refer to the applicable statute for the relevant effective date.

Our thanks to John McCabe and Katie Robinson at the National Conference of Commissioners on Uniform State Laws ("NCCUSL") for their help in compiling the information above. These revisions are based on information provided by NCCUSL available as of **October 6, 2003**.

1. In addition to enactments noted below, all states have adopted the 1995 Official Text of Article 5 of the UCC, other than Puerto Rico (no action) and Wisconsin (no action). Furthermore, all states have adopted the 1994 Official Text of Article 8 of the UCC and the 1998 Official Text of Article 9 of the UCC other than Puerto Rico (no action).
2. South Dakota has adopted only 1987 Official Text without the 1990 Amendments.
3. New York and South Carolina are the only states that still have the 1951 version of Articles 3 & 4.
4. States which have repealed Article 6 are identified by indicating "Repeal" next to the state name; states adopting the revisions suggested in Alternative B to the 1989 Official Text are identified by indicating "Revise" next to the state name.
5. New York has adopted the Electronic Signature and Records Act.
6. In addition to the enactments noted, Puerto Rico has only adopted the following Articles: the 1995 version of Article 1, Article 4A, the 1978 version of Article 8, the original versions of Article 5 and Article 7, and the 1972 version of Article 9.

JOIN THE UCC E-MAIL DISCUSSION GROUP

This free discussion group, created and moderated by the editors of the UCC Bulletin (and sponsored by West Group), is conducted using e-mail. Once you have joined, you receive approved messages and are able to send your messages to the group.

To subscribe, go to: <http://lists.washlaw.edu/mailman/listinfo/ucclaw-l>
and follow the instructions.

UCC Scorecard - Revisions

ARTICLE 1 – GENERAL PROVISIONS

Final Version: December, 2001

Status: Adopted by two states, the Virgin Islands, and pending in several more.

UCC Committee Contact:

David Snyder (216) 687-2319

Margaret Moses (312) 915-6430

ARTICLE 2 – SALES

Final Version: November 2003

Status: Approved at NCCUSL annual meeting 2002 and at ALI annual meeting in 2003.

UCC Committee Contact:

Rob Beattie (612) 607-7000

ARTICLE 2A – LEASES

Final Version: November 2003

Status: Approved at NCCUSL annual meeting 2002 and at ALI annual meeting in 2003.

UCC Committee Contact:

Ed Huddleson (202) 333-1360

ARTICLE 3 – NEGOTIABLE INSTRUMENTS

Final Version: November, 2002

Status: Adopted in one state and pending in several more.

UCC Committee Contact:

Stephanie Heller (212) 720-8198

Paul Turner (310) 472-5802

ARTICLE 4 – BANK DEPOSITS AND COLLECTIONS

Final Version: November, 2002

Status: Adopted in one state and pending in several more.

UCC Committee Contact:

Stephanie Heller (212) 720-8198

Paul Turner (310) 472-5802

ARTICLE 7 – DOCUMENTS OF TITLE

Final Version: October 2003

Status: Approved at ALI annual meeting in 2003 and at NCCUSL annual meeting in 2003.

UCC Committee Contact:

William Towle (406) 721-0720.

ARTICLE 9 – SECURED TRANSACTIONS

Latest Amendments December, 2001

Status: Adopted by all 50 states.

UCC Committee Contact:

Steve Weise (213) 244-7831

Pete Carson (415) 693-2000

UNIFORM ELECTRONIC TRANSACTIONS ACT

Final Version: 1999

Status: Adopted by 42 states and pending in several more.

UCC Committee Contact:

Rob Beattie (612) 607-7000

Ben Beard (208) 885-6747

UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT

Final Version: 1999, amended 2002

Status: Adopted by 2 states.

UCC Committee Contact:

Mary Jo Howard Dively (412) 392-2136

UNIFORM CONSUMER LEASES ACT

Final Version: May, 2001

Status: Adopted in one state.

UCC Committee Contact:

Michelle Hughes (757) 499-8800



Section of Business Law Application for Membership

- ☐ I, _____ am applying for membership in the ABA Section of Business Law and enclose \$ _____ as my annual membership dues for the year 2003-2004. I understand that Section dues include \$20 for a basic subscription to *The Business Lawyer* for one year and \$14 for a basic subscription to *Business Law Today* for one year; these subscription charges are not deductible from the dues, and additional subscriptions are not available at these rates.

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