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The Uniform Commercial Code Survey: Introduction

By Jennifer S. Martin, Colin P. Marks, and Wayne Barnes*

The survey that follows highlights the most important developments of 2015 dealing with domestic and international sales of goods, personal property leases, payments, letters of credit, documents of title, investment securities, and secured transactions. Along with the usual descriptions of interesting judicial decisions in these areas, which are highlighted in the survey, there has also been important legislative progress. The 2010 amendments to U.C.C. Article 9¹ have been adopted in all fifty states, the District of Columbia, and Puerto Rico.² Those revisions were summarized in the Introduction to the 2009 survey.³ Additionally, the 2012 amendments to U.C.C. Article 4A, which address issues related to the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, have been adopted by forty-four states and the District of Columbia, and introduced in Connecticut, Delaware, and Oklahoma.⁴

Other legislative initiatives have seen modest adoptions. In 2011, the Uniform Law Commission completed a new Uniform Certificate of Title for Vessels Act that is designed to harmonize state certificate of title laws with federal laws regarding vessels, and with Article 9 to impede theft and facilitate boat financing.⁵ This has been adopted by the States of Virginia and Connecticut and the District

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1. See NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLE 9 (2010), http://www.uniformlaws.org/shared/docs/ucc9/ucc9_am10_notstyled.pdf.

2. See *UCC Article 9 Amendments (2010)*, *Legislative Tracking*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%209%20Amendments%20\(2010\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%209%20Amendments%20(2010)) (last visited May 13, 2016).

3. Russell A. Hakes & Stephen L. Sepinuck, *The Uniform Commercial Code: Introduction*, 65 BUS. LAW. 1205, 1205–08 (2010).

4. See *UCC Article 4A Amendments (2012)*, *Legislative Tracking*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%204A%20Amendments%20\(2012\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%204A%20Amendments%20(2012)) (last visited May 13, 2016).

5. The final act approved at the 2011 annual meeting of the Uniform Law Commission can be accessed at http://www.uniformlaws.org/shared/docs/certificate_of_title_for_vessels/ucotav_prestylefinal_jul11.pdf (last visited May 13, 2016).

of Columbia and is under consideration in Alabama.⁶ Adoption of the 2003 revisions to Article 7 continues, with the revisions having been adopted by the District of Columbia and forty-nine states and are under consideration in Missouri.⁷

There were also significant and instructive judicial developments in 2015. There were interesting developments under Article 2, including a formation decision applying section 2-207 in a case involving a seller that submitted a proposal for a dryer system where the buyer responded with its own purchase order that was “expressly made conditional on assent to the terms.” When a dispute arose concerning the quality of the dryer, the court denied summary judgment, finding that the buyer’s purchase order was not an acceptance but, rather, was a counter-offer and that further proceedings would determine when the contract arose.⁸

The survey of cases under the United Nations Convention on International Sales of Goods (“C.I.S.G.”) covered cases decided in 2015. One notable case raised multiple issues under the C.I.S.G., including formation, finding that the rules of section 2-207 governing terms that materially alter the offer do not apply, as the C.I.S.G. provisions are closer to the common law mirror image rule.⁹

The leasing survey also includes a number of interesting cases. One case from the Eastern District of Michigan involved the characterization of a water supply agreement to determine if the transaction contemplated by that agreement constituted a true lease. The facts considered by the court included, among other things, what might be considered a “bundled transaction,” property that could constitute fixtures, and the respective rights and obligations of parties relating to an agreement to which neither was an original party.¹⁰ In another case out of the Southern District of New York, the court considered a “hell or high water” clause that barred a party from presenting the defenses of lack of consideration and lack of authority. The court cited authority that “hell or high water” clauses are enforceable against “sophisticated parties” and that such a clause constitutes a waiver of all challenged defenses (including lack of consideration and lack of authority).¹¹

In the payments area, one of the reported decisions included in this year’s survey is a decision that reiterates the courts’ reluctance to apply the discovery rule to toll the statute of limitations in Article 3 and 4 actions. An elderly woman with Alzheimer’s had been victimized by a check-forging thief for hundreds of thousands of dollars, but the court did not allow the eventual personal representa-

6. See *Certificate of Title for Vessels Act (2011)*, Legislative Tracking, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Certificate%20of%20Title%20for%20Vessels%20Act> (last visited May 13, 2016).

7. See *UCC Article 7 Amendments (2003)*, Legislative Tracking, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%207,%20Documents%20of%20Title%20\(2003\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%207,%20Documents%20of%20Title%20(2003)) (last visited May 13, 2016).

8. See Jennifer S. Martin, *Sales*, 71 BUS. LAW. 1247, 1250–51 (2016).

9. See Kristen David Adams & Candace M. Zierdt, *International Sales of Goods*, 71 BUS. LAW. 1345, 1353–54 (2016).

10. See Edward K. Gross, Dominic A. Liberatore & Stephen T. Whelan, *Leases*, 71 BUS. LAW. 1263, 1266–69 (2016).

11. *Id.* at 9–10.

tives of the woman's estate to utilize the discovery rule to toll the Code's three-year statute on account of either the woman's incapacity or the delay in the representative's discovery of the theft. Rather, short of actual concealment by the payor bank, the statute would not be tolled. Acknowledging the "severe consequences" of the holding, the court nevertheless justified its strict ruling on the need for certainty and uniformity in banking transactions. The case highlights the importance of careful attention to bank statements and activity and assisting those who may be unable to do so for themselves.¹²

There were several decisions concerning letters of credit in 2015. One case dealt with a letter of credit clause requiring the presentation of the original standby letter of credit and arguably the presentation of original amendments, if any, as well. Such clauses are often included in letters of credit, although their benefits can be outweighed by the burden of compliance. The presentation at issue included the original standby letter of credit, but not every one of the amendments, and the issuer had dishonored the presentation. The decision upheld the requirement of presenting the original standby letter of credit in the face of clear language, but held that the amendment originals were not similarly required, as the language was ambiguous. The court thus erred on the side of not requiring presentation of the amendment originals and also held that the presentation met the strict compliance standard of section 5-108(a).¹³

This year saw only a small amount of case law addressing Article 7, including one case that addressed section 7-307's requirements of bills of lading for the establishment of a carrier's lien, as well as section 7-209's requirements of warehouse receipts for the establishment of a warehouseman's lien.¹⁴

One of the most interesting developments in securities law involved section 8-115, which shields a broker, securities intermediary, or similar actor from liability to a third party for conversion arising out of the actions of the broker's or intermediary's customer. The Eleventh Circuit looked hard at this provision as applied against a dense fabric of facts, and ultimately a divided panel upheld a jury verdict holding the broker liable for conversion, notwithstanding the section 8-115 shield, because the statute's exception for collusion was held to apply.¹⁵

While the amendments to Article 9 targeted specific commercial law issues, there were judicial decisions on others that continue to challenge lenders. One notable case took up the issue of whether an Article 9 lender with a perfected security interest in accounts and payment intangibles could claim an interest in insurance proceeds of the debtor for business interruption after a tragic derailment accident, finding that Article 9 does not apply to claims under an insurance policy where the loss was not for damage to collateral but was, instead, for lost business.¹⁶

12. See Stephen C. Veltri & Greg Cavanaugh, *Payments*, 71 *BUS. LAW.* 1279, 1295–96 (2016).

13. See James G. Barnes & James E. Byrne, *Letters of Credit*, 71 *BUS. LAW.* 1299, 1300–1301 (2016).

14. See Anthony B. Schutz, *Article 7: Documents of Title*, 71 *BUS. LAW.* 1307, 1309–10 (2016).

15. See Carl S. Bjerre, *Investment Securities*, 71 *BUS. LAW.* 1311, 1311–14 (2016).

16. See Steve Weise & Stephen L. Sepinuck, *Personal Property Secured Transactions*, 71 *BUS. LAW.* 1345, 1345–46 (2016).