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Jennifer S. Martin

Colin P. Marks

Wayne Barnes

Texas A&M University School of Law, wbarnes@law.tamu.edu

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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 2019 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 highlighted in the survey, there has also been legislative progress in several areas. 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-nine states and the District of Columbia, with 2019 adoptions in Oklahoma and Utah.¹ 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.² This has been adopted by the states of Virginia, Connecticut, Hawaii, the District of Columbia, and Florida, as of the date of this survey.³

There were also significant and instructive judicial developments in 2019. There were interesting developments under Article 2, including cases that implicated Article 2's provisions governing express and implied warranties. The U.S. Court of Appeals for the Eighth Circuit affirmed a \$2.4 million judgment in favor of the buyer of a ladder with a label that said the ladder had a working

* Jennifer S. Martin is a professor of law at St. Thomas University School of Law in Miami Gardens, Florida. Colin P. Marks is the Ernest W. Clemens Professor of Law at St. Mary's University School of Law in San Antonio, Texas. Wayne Barnes is a professor of law at Texas A&M University School of Law in Ft. Worth, Texas. Professors Martin, Marks, and Barnes are the editors of this year's Uniform Commercial Code Survey.

1. See *UCC Article 4A Amendments (2012)*, *Legislative Tracking*, UNIF. L. COMMISSION, <https://www.uniformlaws.org/committees/community-home?CommunityKey=19e840f1-9157-4646-bf9b-8f12f0edc042> (last visited May 27, 2020).

2. The final act approved at the 2011 annual meeting of the Uniform Law Commission can be accessed at <https://www.uniformlaws.org/committees/community-home/librarydocuments/viewdocument?DocumentKey=af822bf8-62d0-4674-a9dc-90eadefa0381> (last visited May 27, 2020).

3. See *Certificate of Title for Vessels Act (2011)*, *Legislative Tracking*, UNIF. L. COMMISSION, <https://www.uniformlaws.org/committees/community-home?communitykey=61fb3255-092e-4e91-982b-6fa1ae66fd82&tab=groupdetails> (last visited May 27, 2020).

weight of 300 pounds. The court held that the label was an informal express warranty.⁴ In another case, the buyer of a “certified pre-owned” BMW was able to bring breach of express warranties based on labels on the car’s windshield, a buyer’s guide specifying a certified pre-owned warranty, and statements of the sales agent and seller advertising regarding the certification of the car, even though the purchase order contained a disclaimer of express and implied warranties. Moreover, the court held that the buyer was also able to make out a claim for implied warranties because the Magnuson-Moss Warranty Act preserves implied warranties where a seller makes a written warranty.⁵

The survey of cases under the United Nations Convention on International Sales of Goods (“CISG”) covered one notable case that considered the application of the CISG where a dispute arose from the sale of space heaters pursuant to a Membership Agreement and Cooperation Agreement. The court held that even though the parties ultimately exchanged goods, the relationship between the parties involved a distributorship arrangement outside the scope of the CISG where the agreements did not identify specific quantities and prices of goods, but rather set up a framework for the parties’ relationship.⁶

Perhaps the most noteworthy equipment leasing case decided in 2019 was a published decision by a bankruptcy court interpreting the commercial laws of the State of New York with respect to issues that are common to true leases of any asset type. The case involved an airline that entered into seven aircraft sale-leaseback transactions with a bank as owner trustee (the “Lessor”). The airline filed Chapter 11 many years later, rejected the leases, and the Lessor filed proofs of claim aggregating over \$55 million relating to the leases and guarantees for alleged damages under the leases’ liquidated damage formula. The court, however, found that the liquidated damages provisions in these leases were unenforceable because they violated Article 2A’s requirement that they be reasonable in light of the then-anticipated harm from default. The court’s holding was surprising for many reasons, including because it relied on pre-U.C.C. Article 2A case law regarding liquidated damages, and ignored the official comments to U.C.C. section 2A-504.

In the payments area, several federal regulatory updates are reported, including three proposed changes to the Consumer Financial Protection Bureau’s (“CFPB’s”) Remittance Rule, which is the CFPB rule that implements the Electronic Funds Transfer Act (“EFTA”) protections for remittance transfers. The proposals would reduce the number of institutions required to comply with the Remittance Rule, and also change certain exceptions to some EFTA and Remittance Rule disclosure requirements.⁷ One Article 4A case upheld a lower court decision denying liability of a beneficiary bank for failing to manually catch a mismatch between the beneficiary name and account number, holding that their automated systems were sufficient due diligence and to hold otherwise

4. See Jennifer S. Martin, *Sales*, 75 *Bus. Law.* 2615, 2622–23 (2020).

5. See *id.* at 2623–24.

6. See Kristen Davis & Candace Zierdt, *CISG*, 75 *Bus. Law.* 2729, 2730 (2020).

7. See Carter Klein & Robert J. Denicola, *Payments*, 75 *Bus. Law.* 2651, 2652–2654 (2020).

would reinsert human review contrary to the purpose of section 4A-207.⁸ Further, several cases decided under section 3-405 highlight the threshold determination required that the dishonest employee be found to have had appropriate authority over the items before finding the employer responsible for payment in the face of a forged endorsement. In one case such authority was not present and thus the employer was not liable for payment of the check.⁹

There were several decisions concerning letters of credit during the survey period. The most significant 2019 decision under U.C.C. Article 5 summarily dismissed the fraud and other defenses and claims of a New York issuer (and its applicant) against similarly situated standby letter of credit beneficiaries, which, together with related summary judgment orders for wrongful dishonor, were affirmed on appeal.¹⁰

This year saw only a very small amount of case law addressing Article 7, including one case where a warehouse sought to recover unpaid warehousing charges under a storage agreement. The storer counterclaimed for damage to the product caused by the warehouse's employees. The court concluded that the storer was liable for the storage charges, notwithstanding the warehouse's material breach, because the storer elected to continue in the face of such breach. Further, with respect to the storer's counterclaim for product damage, such damages were limited by the liability limitation clause in the storage contract, which was deemed enforceable under U.C.C. section 7-204(b).¹¹

The Investment Securities portion of this year's Uniform Commercial Code Survey is devoted to a recent state supreme court ruling that warrants detailed attention because of the number of significant issues involved. The case primarily involves whether state-law causes of action relating to securities—in this case the alleged breach of a trust indenture—are automatically assigned to a later purchaser of the securities. Along the way, the case highlights a basic distinction between the direct and indirect holding systems as well as several interesting aspects of statutory interpretation.

Two notable cases took up the issue of identifiability of proceeds under Article 9. In one case, a railway's lender with a security interest that included after-acquired accounts and payment intangibles claimed as proceeds the debtor's contract and tort claims, and the proceeds thereof, against a shipper. Unfortunately, the secured lender was unable to demonstrate which portion of the global settlement of claims against the shipper were its collateral.¹² In the second case, a court held against a secured party claiming a portion of a settlement as proceeds of a security interest in the debtor's intellectual property where nothing in the settlement agreement identified the portion related to the intellectual property.¹³

8. *Id.* at 2658–59.

9. *Id.* at 2673.

10. See James G. Barnes, *Letters of Credit*, 75 *BUS. LAW.* 2679, 2679–80, 2683 (2020).

11. See Anthony B. Schutz, *Documents of Title*, 75 *BUS. LAW.* 2687, 2687 (2020).

12. See Stephen Sepinuck, *Personal Property Secured Transactions*, 77 *BUS. LAW.* 2705, 2715 (2019).

13. See *id.* at 2715.