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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 2018 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, and Hawaii, as well as the District of Columbia, and is currently under consideration in Georgia, Florida, and Alabama as of the date of this survey.[3]

There were also significant and instructive judicial developments in 2018. There were interesting developments under Article 2, including a case that addressed application of section 2-202's rules on extrinsic evidence where the buyer contracted to purchase "all of [the] right, title and interest in and to the" inventory of a competitor, but did not update the inventory list when the sale closed months later. When a dispute arose over the amount of inventory

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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 4, 2019).

2. 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 4, 2018).

3. *See Certificate of Title for Vessels Act (2011), Legislative Tracking*, UNIF. L. COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Certificate%20of%20Title%20for%20Vessels%20Act (last visited May 4, 2018).

on hand, the district court granted summary judgment to the seller and the U.S. Court of Appeals for the Eighth Circuit affirmed in a decision that diverged from section 2-202's permissive standard on admissibility of extrinsic evidence by barring the introduction of parol evidence on grounds that the word "all" was "unambiguous."[4] In another case where the seller claimed a disclaimer of implied warranties precluded a buyer of a used car's suit for breach, the court held that a seller cannot disclaim warranties when it commits fraud.[5]

The distinction between a true lease and a disguised sale is frequently the topic of cases included in the leases survey, and this year is no exception. One case of interest, however, demonstrated that U.C.C. section 1-203 is not the only way to resolve such issues. The case involved a Chapter 13 creditor who moved for relief from the bankruptcy automatic stay relating to a debtor's confirmed Chapter 13 plan on the basis that the contract between the creditor and the debtor regarding a portable storage shed was a lease, and not a security interest as it was categorized in the Chapter 13 plan. Though the court acknowledged the U.C.C. had been adopted by the state, the court instead relied on the state's Rental-Purchase Agreement Act to determine that the contract at issue was a rental-purchase agreement, and as such, it could not be characterized as creating a security interest, irrespective of how the U.C.C. characterized the transaction.[6]

In the payments area, several federal regulatory updates are reported, including amendments to Regulation CC regarding disputes concerning fraudulent checks paid when the paper check is no longer available for visual inspection. The new rules create a rebuttable presumption of alteration (vs. forgery) for any such dispute, thereby triggering the U.C.C. loss-allocation rules relating to alteration.[7] Further, one of the reported decisions included in this year's survey relates to the duty of ordinary care owed by banks under section 3-103(a)(9). In that case, the court held that the bank was not required to inspect and compare the drawer-customer's check signatures against the signature on file, especially where the checks were mostly under $10,000. Rather, the bank employed standard automated check processing procedures, based on alerting for irregularities found. Such procedures were held to conform to reasonable commercial banking standards, and thus the bank was determined to have acted with ordinary care.[8]

There were several decisions concerning letters of credit during the survey period. One case dealt with a request for injunctive relief against honor made by the plaintiff, an applicant, against the issuer of letters of credit in favor of various Turkish beneficiaries, based on allegations of fraud under section 5-109. The trial court initially entered the injunctive relief, based on supposed irreparable injury in the form of the underlying obligor's financial condition and the

4. *See* Jennifer S. Martin, *Sales*, 74 BUS. LAW. 1207, 1213–14 (2019).
5. *Id.* at 1216–17.
6. *See* Edward K. Gross, Dominic A. Liberatore & Stephen T. Whelan, *Leases*, 74 BUS. LAW. 1225, 1225–27 (2019).
7. *See* Carter Klein & Robert J. Denicola, *Payments*, 74 BUS. LAW. 1243, 1243–44 (2019).
8. *See id.* at 1262.

sovereign immunity of some of the Turkish banks involved in the transaction, not to mention the political instability at the time in Turkey. However, although the injunction concerningly remained in place for twenty-two months, the trial court eventually decided that the plaintiff had not demonstrated a likelihood of prevailing on the merits of its fraud claim.[9]

This year saw only a small amount of case law addressing Article 7, including one case that addressed the presence and enforcement of a warehouse lien under section 7-209. In that case, the court addressed two primary arguments that the warehouse did not have a valid lien. The first argument was that the defendant was not a warehouse at all and thus was not entitled to assert a section 7-209 lien; the court rejected this claim, finding that despite both warehousing and other services were performed, and that the storage fees may not have been separately charged for, the defendant was nevertheless engaged in storage services and was thus a warehouse entitled to a lien. The second claim concerned whether the sale of the goods to enforce the lien was conducted in a commercially reasonable manner, given that the storer was not given any notice of the warehouse's lien sale. The court similarly rejected this claim, as there was no evidence that the amount received at the sale differed from the market value of the sold goods. As such, absent damages caused by the lack of notice, the storing party was not entitled to any remedy for the lack of notice.[10]

The securities survey recounts a recent English Court of Appeal case that provides a detailed examination of an entitlement holder's rights against an issuer under English law, which, while not referring to U.C.C. Article 8 directly, would be generally applicable to U.S. law as well. The plaintiff was the ultimate beneficial investor in debt securities called "longevity notes," the payout on which depended on the dates of death of certain "reference lives." The plaintiff filed suit directly against the issuer, asserting that a contract represented by the Pricing Supplement, which provided actuarial information relating to the reference lives, had been breached. The substantive issue that the court faced was whether the plaintiff, as the ultimate beneficial investor, was the proper party to maintain the suit against the issuer. The court of appeal upheld a grant of summary judgment in favor of the issuer, holding certain breaches of contract by the issuer must go without redress under the no look-through principle. Under this principle, each party has rights only against their own counterparty.[11]

One notable case took up the issue of whether an Article 9 lender with a security agreement that did not reference an earlier security agreement had a security interest in deposit accounts based on the earlier security agreement which provided that the lender's security interest would "continue" after the debtor paid the original obligation. The court ruled that the earlier security agreement was not related to the later agreement and was not executed in connection with the subsequent loan and, therefore, the bank's later loan was not secured by deposit

9. *See* James G. Barnes, *Letters of Credit*, 74 Bus. Law. 1267, 1271–72 (2019).
10. *See* Anthony B. Schutz, *Documents of Title*, 74 Bus. Law. 1277, 1277–78 (2019).
11. *See* Carl Bjerre, *Investment Securities*, 74 Bus. Law. 1283, 1283–88 (2019).

accounts.[12] In another case, a court found a financing statement ineffective to perfect where the Article 9 lender described the collateral as the collateral on the security agreement, but then failed to attach the security agreement.[13]

12. *See* Stephen Sepinuck, *Personal Property Secured Transactions*, 77 BUS. LAW. 1291, 1295 (2019).
13. *See id.* at 1300.