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Chapter 6: Commercial Law

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C H A P T E R 6

Commercial Law

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A. BANKING LAW

§6.1. **Massachusetts motor vehicle certificate of title law.** A title certificate statute was enacted on September 9, 1971 with an effective date of September 1, 1972.¹ The new law requires all owners of vehicles which are not exempted under the statute to apply for title certificates.² The statute does not immediately apply to vehicles properly registered as of September 1, 1972, but those vehicles will also require certificates upon (1) the purchase of the vehicle from a dealer in the Commonwealth or any other transfer of ownership; (2) creation of a security interest in the vehicle after the effective date of the statute; (3) notification of the owner by a lienholder whose security interest was not perfected as of September 1, 1972 that the lienholder wants to perfect his security interest; or (4) September 1, 1974.³

The law is important to banking institutions and other secured parties because it provides the *sole method for perfecting a security interest* in a motor vehicle for which a certificate of title has been issued on or after September 1, 1972.⁴ Such a security interest is perfected by the delivery to the registrar of (1) any existing document of title, including, for example, a pre-existing title certificate or a notarized bill of sale; (2) an application for a certificate of title (Form RMV-1) containing the name and address of the lienholder, and the date and type of the security agreement; and (3) the required fee.⁵ The security interest is perfected from the time of its creation if delivery is completed within ten days thereafter, and otherwise it is perfected at the time of delivery.⁶ Vehicles

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§6.1. ¹ Acts of 1971, c. 754, adding G.L., c. 90D.

² G.L., c. 90D, §4. Exempt vehicles are listed in G.L., c. 90D, §2, and include vehicles owned by the United States, vehicles owned by dealers or manufacturers and held for sale including "demonstrator" models, vehicles owned by non-residents and not required by law to be registered, and vehicles regularly engaged in interstate transportation of persons or property for which a certificate of title has been issued in another state.

³ G.L., c. 90D, §§34 and 35.

⁴ G.L., c. 90D, §26.

⁵ G.L., c. 90D, §21.

⁶ Id.

brought into Massachusetts under security interests validly perfected under the law of another jurisdiction require title certificates, and the security interest remains perfected for four months after the issuance of the certificate and also thereafter if, within the four month period, the interest is perfected in Massachusetts.⁷ Upon issuance of a certificate of title the registrar is required to mail the certificate to the first lienholder noted thereon and, if none, to the owner.⁸

Section 23 governs notice requirements in the event that a lienholder assigns his security interest to a third party. Where the assignee does not take the actions necessary to be named on the certificate as the lienholder, third persons may deal with the assignor without liability to the assignee and the assignor remains liable for any obligations as lienholder. The new section may also restrict the continued perfected status of a security interest which has been assigned to a third party who is not named on the certificate as lienholder to a limited group (i.e., creditors of and transferees from the owner only, but query whether trustees in bankruptcy or transferees from persons other than the owner would be bound). It is recommended, therefore, that assignees take the necessary steps to be named on the certificate as lienholder.

Section 24 of the Act requires, upon satisfaction of the security interest, that the lienholder execute a release of his security interest within 10 days after demand by the debtor or, in any event, within 30 days after satisfaction. The release is to be noted on the space provided in the certificate of title or on a form approved by the registrar. In a normal situation the secured party will be able to meet these requirements easily as it will have possession of the certificate of title which would have been delivered to it by the registrar.

§6.2. Massachusetts Fair Credit Reporting Act: Differences from federal law. On September 22, 1971 Massachusetts adopted a state Fair Credit Reporting Act.¹ The state law corresponds in almost all respects to the Federal Fair Credit Reporting Act which was adopted in 1970.² The following differences appear to be of importance: (1) *Section 51(3)(e)*, describing circumstances under which a consumer reporting agency may furnish a consumer report, deletes the federal language which permitted such a report if the person requesting it had "a legitimate business need for the information in connection with a business transaction involving the consumer,"³ and substitutes therefor language which permits a consumer report if the person using the report "intends to use the information in connection with a transaction either entered into or being negotiated with a consumer, if by the terms of the transaction either party transfers an interest in real or personal property, pays

⁷ *Id.*

⁸ G.L., c. 90D, §11.

§6.2. ¹ Acts of 1971, c. 805, adding G.L., c. 93, §§50-68.

² 15 U.S.C. §§1681 *et seq.* (1970).

³ 15 U.S.C. §1681b(3)(E) (1970).

money or renders services, or becomes obligated so to transfer property, pay money or render services.” (2) *Section 62(a)* requires the user of a consumer report to advise the consumer of the name and address of the consumer reporting agency furnishing the report if the report is the basis of a denial or termination of consumer credit, insurance or employment. The federal law requires disclosure of the name and address only if consumer credit, insurance or employment is denied or the charge therefore is increased.⁴ The state law, therefore, expands the requirement of disclosure to include *termination* as well as denial. (3) *Section 65* provides for jurisdiction in any court of competent jurisdiction. The federal law provides for jurisdiction of the appropriate United States District Court in addition to any other court of competent jurisdiction. (4) *Section 68*, for which there is no equivalent in the federal law, provides that failure to comply with the provisions of the state law shall constitute an unfair trade practice under the provisions of Chapter 93A, Section 2(a).

The state Fair Credit Reporting Act became effective December 21, 1971.

§6.3. Sex discrimination in granting mortgage loans. Section 4(3B) of Chapter 151B was amended on October 13, 1971¹ (effective January 11, 1972) by establishing as an unlawful practice the discrimination against any person in the granting of any mortgage loan (including but not limited to discrimination in the interest rate, terms or duration of such mortgage loan) by reason of sex. Previously the discrimination prohibition had been limited to race, color, religious creed, national origin or ancestry. This restriction applies to any person engaged in the business of granting mortgage loans.

§6.4. Protection of consumers against careless and erroneous billings. Massachusetts adopted an act concerning erroneous billings which became effective January 5, 1972.¹ A consumer who receives a statement of account in connection with an extension of credit may give written notice to the creditor of any errors in the statement. Under the statute the creditor is required to send a written acknowledgment of the consumer's notice within 14 days of receipt of the notice and within 60 days of receipt of the notice to make corrections and notify the consumer thereof or notify the consumer in writing as to his reasons for belief that the account was correct. The 60-day period can be extended within certain time limits in the event that the creditor requests additional information from the consumer or from a third party in conformance with the statute, but in no event shall the period be extended beyond 120 days.²

⁴ Id. §1681m(a).

§6.3. ¹ Acts of 1971, c. 874, §2.

§6.4. ¹ Acts of 1971, c. 860, §1, adding G.L., c. 93C.

² G.L., c. 93C, §3.

A creditor who, upon receipt of a notice from a consumer relating to an alleged billing error, fails to comply with the requirements stated above (1) forfeits his right to collect any finance charge or other charge imposed by the creditor in connection with the amount which the customer alleges to be in error; (2) if such amount is in fact in error, is liable to the consumer for actual damages or a sum to be awarded by a court of not less than \$100 nor more than \$300; and (3) in the case of a successful action to enforce liability, is liable for the costs of the action together with attorneys' fees.³

In addition to the required responses, a creditor upon the opening of an account and not less than quarterly during each year must provide the customer with a written notice explaining certain requirements of the Act, including the requirements of notice and the time periods in which the adjustments must be made.⁴ Failure to comply with the Act constitutes an unfair or deceptive act or practice under the provisions of Chapter 93A, Section 2(a).⁵ Although the Act is not entirely clear, it appears to relate to any consumer credit transaction where periodic billing is the practice, such as revolving credit arrangements, credit card programs and home mortgage transactions where the creditor sends monthly statements to the consumer.

§6.5. Prohibition against serving as a director or officer of more than one banking institution. Effective January 1, 1975, a trustee, director or other officer of a savings bank, cooperative bank or trust company may at the same time be a trustee, director or other officer of another savings bank, cooperative bank, trust company, state or federally chartered savings and loan association or national banking association *only* if there is in force a permit therefor issued by the Commissioner of Banks in writing with the reasons stated thereon as to why the public interest warrants the issuance of the permit.¹ Such permit is to be issued after hearing only if the Commissioner finds that it is not incompatible with the public interest for the permit to issue.

§6.6. Issuance of credit cards by savings banks. Effective September 5, 1972, savings banks are authorized to issue and honor credit cards for the purpose of making loans to one or more persons.¹ The impact on the banking industry of the increase in competition between savings and commercial banks resulting from this legislation and from the development of NOW accounts is discussed below at §6.11.

§6.7. Trustee process legislation. Prior to the decision of the three judge federal court in *Schneider v. Margossian* which is discussed below

³ G.L., c. 93C, §4.

⁴ G.L., c. 93C, §5.

⁵ G.L., c. 93C, §6.

§6.5. ¹ Acts of 1972, c. 520, amending G.L., c. 168, §10, c. 170, §8A, and c. 172, §16.

§6.6. ¹ Acts of 1972, c. 381, adding G.L., c. 168, §37B.

in this SURVEY,¹ Massachusetts adopted legislation relating to trustee process. Section 20 in Chapter 246 of the General Laws was amended,² with respect to the exemption for moneys of the defendant deposited in any account designated as a payroll account, to provide penalties for depositing funds in a payroll account with the intent to evade attachment by trustee process. The penalties include a fine of not less than \$100 nor more than \$1,000 or imprisonment in the house of correction for not more than three months. A corporate president or treasurer making such deposits with the proscribed intent is subject to the penalties established by the Act. Section 28 of Chapter 246 was also amended³ to increase the exemption for wages for personal labor or services to \$125 per week and the exemption for pensions payable to the defendant to \$100 per week. The increased exemptions became effective January 1, 1973 and apply to only actions commenced on or after that date. Section 28A was added to Chapter 246⁴ and it exempts from attachment by trustee process \$500 of any natural person deposited in any account or accounts in a trust company, savings bank, cooperative bank, credit union, national banking association or any other banking institution. The exemption does not include deposits of businesses, trusts or organizations, and no natural person is entitled to more than one \$500 exemption at any time. If the plaintiff determines that the defendant has been the beneficiary of more than one exemption, the plaintiff may apply to the court for further attachments.⁵

§6.8. Late charges in mortgage transactions. Chapter 412 of the Acts of 1972¹ was approved on June 8, 1972 and became effective September 6, 1972. This legislation provides that no mortgagee, assignee or holder of a mortgage note secured by a first lien on a dwelling house of four or less separate households and occupied or to be occupied in whole or in part by the mortgagor shall require the mortgagor to pay a penalty or late charge for any payment made within 15 days from the due date of such payment and, in the event a late charge shall be properly assessable, such late charge may not exceed 3 percent of the amount of principal and interest overdue. The legislation applies only to contracts entered into on or after September 6, 1972.

§6.9. Residential mortgages: Certification of title.¹ This legislation was adopted on June 29, 1972 and became effective on September 27, 1972. With respect to a mortgage loan on real estate improved with a dwelling designed to be occupied by not more than four families and occupied or to be occupied in whole or in part by the mortgagor, when-

§6.7. ¹ See §6.13, *infra*.

² Acts of 1972, c. 392.

³ Acts of 1972, c. 174, §1.

⁴ Acts of 1972, c. 801.

⁵ For further discussion of trustee process legislation see §10.5.

§6.8. ¹ Adding G.L., c. 183, §59.

§6.9. ¹ Acts of 1972, c. 547, §1, adding G.L., c. 93, §70.

ever the mortgagor is required or agrees to be responsible for attorneys' fees and expenses charged by an attorney acting on behalf of the mortgagee, the mortgagor or his attorney must be given a copy of any certification of title to the mortgaged property and such certification shall be deemed to have been rendered for the benefit of the mortgagor to the same extent as it was for the mortgagee. This legislation does not apply to mortgages subject to the provisions of Sections 90A through 90E of Chapter 140. Failure to comply with this statute constitutes an unfair or deceptive act or practice under the provisions of Chapter 93A. In connection with the adoption of Chapter 93, Section 70, Section 17B of Chapter 184 was revised to eliminate inconsistent language.²

§6.10. Other statutory developments.

1. *Maximum finance charges for open end credit transactions.*¹ New legislation (effective July 1, 1973) establishes maximum interest rates with respect to open end credit plans. The interest rates are limited to 1½ percent per month on so much of the outstanding unpaid balance as does not exceed \$500 and 1 percent per month on balances over \$500. If the total amount of any finance charges for any 12-month period is less than \$6, no more than \$6 may be assessed during that period.

General Laws, Chapter 140C, Section 6B provides that a finance charge imposed with respect to transactions involving the sale of retail goods or services pursuant to an open end credit plan shall be computed on either the average daily balance or on the previous balance after all payments, returns or other credits have been deducted. Additionally, payments must be credited to the debtor's account not more than two days after receipt thereof. The same restrictions apply to retail instalment sales and services transactions which are governed by Chapter 255D.

2. *Amendments to truth-in-lending law.* Several amendments were made to Chapter 140C (truth-in-lending) by Chapter 229 of the Acts of 1972. These amendments were designed to bring Chapter 140C into compliance with Regulation Z of the Governors of the Federal Reserve Board.²

3. *Group insurance for employees of banks.*³ This legislation was approved on March 23, 1972 to become effective June 21, 1972, and permits savings banks, cooperative banks and credit unions to provide group life, accident and health, medical, surgical and/or hospital insurance for their employees, officers and directors.

4. *Savings banks—Trustee of retirement plans.*⁴ Legislation was adopted on March 23, 1972 to be effective June 21, 1972 permitting

² Acts of 1972, c. 547, §2. For a more detailed discussion of Chapter 547 of the Acts of 1972 see §9.1 *infra*.

§6.10. ¹ Acts of 1972, c. 783, amending G.L., c. 140, §114B, c. 140C, §6B, and c. 255D, §27.

² For further discussion see §§10.4-10.5.

³ Acts of 1972, c. 110, amending G.L., c. 167, §57.

⁴ Acts of 1972, c. 116, adding G.L., c. 168, §66B.

savings banks to act as trustees of retirement plans under the "Self-Employed Individuals Tax Retirement Act of 1962."

5. *Cooperative Banks—Increase in time for first payment on construction loans.*⁵ This legislation was adopted on February 17, 1972 to be effective May 17, 1972, and permits a cooperative bank to make construction mortgage loans provided that payments on account of principal or interest shall commence not later than 24 months from the date of the mortgage note. Prior law required payments to commence not later than 12 months from the date of the mortgage note.

6. *Elimination of notice requirement upon executor or administrator of a decedent who maintained an account with a cooperative bank, savings bank or trust company.*⁶ Effective October 11, 1972, the requirement of notice for withdrawals from certain time accounts (essentially 90-day notice accounts) held with cooperative banks, savings banks and trust companies has been eliminated for the executor or administrator of the estate of a deceased depositor.

7. *General.* Amendments were made to Chapters 168, 170 and 172 of the General Laws (1) to permit savings banks, cooperative banks and trust companies to increase the amount which they may invest in banking premises;⁷ (2) to provide for mortgage loans not exceeding 95 percent of the value of the real estate with respect to certain dwellings which are occupied in whole or in part by the mortgagor;⁸ (3) to permit trust companies to make second mortgage loans on real estate provided that such second mortgages are not the primary security and provided further that such second mortgages may be taken on residential property only as collateral for a business or commercial loan;⁹ and (4) to increase the maximum amount of deposits to \$40,000 in the case of an individual account and \$80,000 in the case of joint accounts.¹⁰

§6.11. Savings banks: Negotiable orders of withdrawal. In *Consumers Savings Bank v. Commissioner of Banks*,¹ the plaintiff filed a bill in equity seeking a declaration that it had authority to arrange for the transfer of funds from savings accounts by negotiable orders of withdrawal without requiring the depositor or his representative to appear at the offices of the bank. The plaintiff had devised a plan whereby a savings account depositor could withdraw funds by means of a negotiable order

⁵ Acts of 1972, c. 27, amending G.L., c. 170, §23.

⁶ Acts of 1972, c. 711, amending G.L., c. 167, §48B.

⁷ Acts of 1972, c. 94, amending G.L., c. 168, §53; Acts of 1972, c. 345 amending G.L., c. 170, §30; and Acts of 1971, c. 316 amending G.L., c. 172, §30.

⁸ Acts of 1972, c. 315 adding G.L., c. 170 §24(3B) and Acts of 1972, c. 336, adding G.L., 168, §35 (6B).

⁹ Acts of 1972, c. 437, adding G.L., c. 172, §48A.

¹⁰ Acts of 1972, c. 84, amending G.L., c. 168, §21.

§6.11. ¹ 1972 Mass. Adv. Sh. 929, 282 N.E.2d 416. For a more extensive treatment of this decision and the policy issues it raises, the reader is referred to Comment, *The Negotiable Order of Withdrawal (NOW) Account: "Checking Accounts" for Savings Banks?* 14 B.C. Ind. & Com. L. Rev. 471 (1973).

of withdrawal. The negotiable order of withdrawal was simply a draft to be drawn by the depositor on the savings bank as drawee, payable through a commercial bank with which the savings bank maintained an account. Depositors incur a small service charge for each draft issued, the standard fee apparently being 15 cents per draft.

The plaintiff had sought approval for its so-called NOW account from the Commissioner of Banks for Massachusetts but on September 28, 1970 the Commissioner denied the request for approval. At trial the Commissioner relied upon certain sections of Chapter 168 of the Massachusetts General Laws to support her contention that negotiable orders of withdrawal are not permitted as a device for the withdrawal of funds from a savings account. The Court held that Chapter 168 did not spell out the mechanics of withdrawal and, therefore, did not proscribe the plan. The Court reasoned that Section 26 of Chapter 168 permitted withdrawals "at such time and such manner as the by-laws [of the bank] direct" and, therefore, "leaves the establishment of methods of withdrawal to the individual banks."² The Commissioner further argued that all savings accounts require passbooks. However, Section 1 of Chapter 168 requires only a "book or other instrument issued to the depositor as evidence of his deposit." Because of the rather curious statement that a "negotiable order of withdrawal qualifies as an 'other instrument' evidencing deposit," it appears that the Court read Section 1 as requiring only a memorandum of deposit such as a typical deposit slip.³

As was said in *Savings Bank v. Bank Commr. of Maryland*, 248 Md. 461, 475, "If . . . a depositor of the Bank, on making a withdrawal, has the option of requesting cash, or a treasurer's check, or of purchasing a money order, . . . according him a fourth option of drawing a check on his own account . . . is a distinction without a difference." That language is most persuasive and helpful in the determination of this case.⁴

Commercial banks are prohibited from offering this type of withdrawal device by Section 217.5(c) of Regulation Q of the Board of Governors of the Federal Reserve System; cooperative banks are similarly prohibited under Section 13 of Chapter 170 which requires passbooks; and federal savings and loan associations are prohibited from honoring this type of withdrawal device by 12 U.S.C. § 1464(b) (1) and 12 C.F.R. § 434.4-1.

The introduction of NOW accounts by Massachusetts savings banks coupled with the adoption of legislation authorizing such savings banks to issue credit cards may disturb the delicate competitive equilibrium between the various types of banking institutions doing business within the Commonwealth of Massachusetts. Savings banks in Massachusetts currently have assets well in excess of \$15 billion which exceeds sub-

² 1972 Mass. Adv. Sh. at 930, 282 N.E.2d at 417.

³ Id. at 931, 282 N.E.2d at 417.

⁴ Id.

stantially the combined assets of commercial banks (national banks and trust companies). Any significant shift of deposits from commercial banks, cooperative banks and credit unions to savings banks could have potentially serious consequences to the banking industry and the public in general.⁵ Savings banks, as noted above, are the only type of banking institution which is permitted to offer a savings account from which deposits may be withdrawn by negotiable orders of withdrawal. Savings banks thus have been afforded a competitive edge which is not available to other types of banking institutions. As a result, the savings bank has become for some customers a preferable "one-stop" banking institution where a customer can take advantage of a credit card revolving loan account and a regular savings account which pays 5¼ percent interest and has all of the practical features of a demand checking account.⁶

Cooperative banks and credit unions are at a competitive disadvantage because such institutions cannot establish a savings account from which deposits may be withdrawn by negotiable orders of withdrawal. Commercial banks are at a similar disadvantage because they cannot pay interest on demand deposits;⁷ they can pay only 4½ percent interest on regular savings accounts,⁸ and they must maintain "reserves" against demand deposits.⁹ The concept of reserves was introduced in the Depression years as a safety factor to insure that a bank would be able to honor withdrawal demand from highly volatile demand deposit accounts. The lack of a reserve requirement in connection with NOW accounts is inconsistent with one of the fundamental principles of the Banking Act of 1933 and raises questions of public safety.

Although the current banking structure has developed over a number of years, there has been demand for readjustment in the recent past. As a result of such demands, a President's Commission on Financial Structure and Regulation was organized and the Massachusetts legislature also created a special commission to study the matter in detail. The President's Commission on Financial Structure and Regulation recently issued a report commonly known as the "Hunt Report" which recommended changes, but which noted that the changes should be considered as a whole and that the piecemeal adoption of any specific recommendations

⁵ It should be noted, however, that NOW accounts are only available to individuals. Accordingly, corporate or business checking accounts will remain in commercial banks.

⁶ Under state law NOW accounts are not classified as demand accounts because savings banks can require up to 90 days notice before withdrawal from a regular savings account. However, because this power has infrequently, if ever, been used by a savings bank, the NOW account is for all practical purposes similar to a demand account.

⁷ Section 217.2(a) of Regulation Q of the Board of Governors of the Federal Reserve System.

⁸ *Id.* §217.7(c).

⁹ G.L., c. 172, §27 requires Massachusetts trust companies to maintain 15% or 20% of the trust company's demand and time deposits that are withdrawable within 30 days.

might create new competitive disturbances. In the introduction of the report the commission stated that its recommendations

. . . are interrelated and the Commission urges that they be considered as a package, even though some of the proposed changes, if enacted separately, would improve the financial system. The Commission believes that piecemeal adoption of the recommendations raises the danger of creating new and greater imbalances.¹⁰

While many of the recommendations of the Hunt Report are desirable, including permitting thrift institutions to offer demand deposits, the isolated adoption of legislation authorizing savings banks to issue credit cards and a judicial decision permitting NOW accounts are not the result of an integrated, systematic approach to readjustment within the banking industry and have, therefore, created serious public policy questions.

§6.12. Constitutionality of repossession and replevin: *Fuentes v. Shevin*.¹ Although not arising from a Massachusetts case, the United States Supreme Court's decision in *Fuentes v. Shevin*, has had considerable effect on Massachusetts banking institutions with respect to replevin and repossession of personal property purchased and/or financed on credit. In *Fuentes*, the debtors sought declaratory and injunctive relief against continued enforcement of state replevin statutes (Florida and Pennsylvania) on the ground that the procedures established by the replevin statutes violated the 14th Amendment's guarantee that no state shall deprive a person of property without due process of law. The Florida replevin statute permitted a creditor to apply to a state court for the issuance of a writ of replevin which when issued directed a sheriff to seize property in possession of the defendant and to hold the same pursuant to the statute for satisfaction of any judgment which the creditor might obtain in the action. The Pennsylvania replevin statute differed somewhat in its procedural requirements, but the differences were not of an essential nature. Under both statutes the defendant was not entitled to notice of the proceeding whereby the writ was issued and had no opportunity to challenge the issuance of the writ. As stated by the Court, "The issue is whether procedural due process in the context of these cases requires an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another."² The Court reviewed various arguments of the creditor and held that the failure of the replevin statutes to provide for notice and a prior hearing constituted the deprivation of an interest protected by the 14th Amendment. The Court rejected the creditor's argument that the 14th Amendment only applies to property in which

¹⁰ The Report of the President's Commission on Financial Structure and Regulation 9 (1971).

¹ 407 U.S. 67 (1972).

² *Id.* at 80.

the debtor had title, stating that the Amendment protects “any significant property interest” including the right of possession.³ The Court also noted that the deprivation need not be permanent as the 14th Amendment protects temporary, nonfinal deprivations of property. Further, the Court rejected the creditor’s arguments that the 14th Amendment protects only goods which are “absolute necessities of life” and that replevin procedures are necessary to protect important governmental or general public interests.

There was a dissent from Justice White who was joined by Chief Justice Burger and Justice Blackmun. Justice White pointed out that the creditor had an interest in preserving the collateral, an interest which overrode the minimal deprivation occasioned upon the debtor. Justice White also noted the long-standing traditional use of replevin by creditors in almost all states and stated that this decision could be negated by simple contractual provisions which permitted the creditor to repossess upon default without legal action.

Many in the public press, and in fact some in legal circles, read *Fuentes* as prohibiting any kind of repossession unless procedures were established for notice to the debtor and an opportunity to be heard. It must be remembered, however, that the prohibition of the 14th Amendment runs only against *state* action which deprives persons of property without due process. It would appear, therefore, that *Fuentes* does not extend to the situation where a creditor invokes self-help repossession, that is, where the creditor, pursuant to the terms of the security agreement, merely exercises his right to repossess the property in question without the aid of any state instrumentality, such as a court or sheriff. Such is the position put forward by Justice White in his dissent. The issue of the constitutionality of self-help repossession has been before several federal district courts recently and has been upheld in almost all instances.⁴

A review of the Massachusetts replevin statute (Chapter 247 of the Massachusetts General Laws) fails to disclose procedures for notice to the defendant and an opportunity for the defendant to be heard before issuance of the writ of replevin. It would appear, therefore, that the Massachusetts statute would not pass constitutional muster in view of the holding in *Fuentes*.

§6.13. Constitutionality of trustee process: *Schneider v. Margossian*.¹ This case involved another attack upon traditional creditors’ remedies on the basis that the remedy (attachment by trustee process) was

³ *Id.* at 86-87.

⁴ See, e.g. *McCormick v. First Nat’l Bank*, 322 F. Supp. 604 (S.D. Fla. 1971). But see *Adams v. Egley*, 338 F. Supp. 614 (S.D. Cal. 1972) where the court struck down self-help repossession on 14th Amendment grounds. The Adams case is currently on appeal to the Ninth Circuit Court of Appeals.

In Massachusetts, a creditor’s right to repossession under G.L., c. 106, §9-503 was enforced without discussion of constitutional questions in *Still Associates, Inc. v. Murphy*, 1971 Mass. Adv. Sh. 245, 247, 267 N.E.2d 217, 219.

§6.13. 1 349 F. Supp. 741 (D. Mass. 1972).

violative of procedural due process under the 14th Amendment. The debtors sought declaratory and injunctive relief from the continued enforcement of Chapter 246 of the Massachusetts General Laws insofar as it denied defendants in civil actions notice and an opportunity to be heard prior to attachments of their property. Following the rationale of *Sniadach v. Family Finance Corp.*² and the *Fuentes* decision, the court held that the Massachusetts trustee process statute violated the 14th Amendment because it lacked any procedures designed to give the defendant notice and an opportunity to be heard prior to the attachment of his property.

The court, however, stated that its decision had prospective effect only (except for the cases before it) and that, therefore, the decision had no effect upon actions started prior to September 22, 1972. Additionally, the court ruled that state courts could continue to charge trustees with respect to amounts held upon attachments made prior to September 22, 1972. The decision striking trustee process generally was inevitable in view of the *Sniadach* and *Fuentes* decisions. However, that portion of the opinion which gives the decision prospective effect only appears certain to be challenged.

In a Supplemental Memorandum and Order, dated October 26, 1972, the court clarified its prior decision and noted that Chapter 246 was struck down only insofar as it denies defendants in civil actions notice and an opportunity to be heard prior to the making of attachments of their property by way of trustee process. The court specifically stated that Chapter 246 was not found to be unconstitutional in its entirety and noted, for example, that Chapter 246, Section 32 (Eighth) permitting wage attachments upon a judgment appeared to have procedures which would pass constitutional muster.

Consistent with recent attacks on traditional creditors remedies under the due process clause, it should be noted that the Federal District Court of Massachusetts now has a case before it attacking the constitutionality of real estate attachments.³

§6.14. Authority of national banks to provide travel agency services. *Arnold Tours, Inc. v. Camp*¹ was an action brought by 42 travel agencies against the Comptroller of the Currency and a national bank for declaratory and injunctive relief with respect to a ruling of the Comptroller authorizing national banks to engage in the travel agency business. The action has a considerable history including two considerations by the United States Supreme Court.² In its present posture the trial judge was acting upon the plaintiffs' motion for summary judgment and the defendants' motions for summary judgment.

² 395 U.S. 337 (1969).

³ *Aberman Realty Bldg. Corp. v. Smith*, Civil No. 72-2516 (D. Mass., filed Aug. 11, 1972).

§6.14. ¹ 338 F. Supp. 721 (D. Mass. 1972).

² 397 U.S. 315 (1970); and 400 U.S. 45 (1970).

The National Bank Act provides that a national banking association shall have the power to exercise all such incidental powers as shall be necessary to carry on the business of banking.³ In 1963 the Comptroller issued regulations which purported to grant to a national bank *carte blanche* to undertake the complete operation of a travel agency on the grounds that such services were incidental to their banking services. The Court noted that the 1963 regulation represented a radical departure from past administrative rulings and held that the Comptroller did, in fact, exceed his statutory authority when he issued the regulations authorizing national banks to provide travel agency services.

The court noted that national banks provided services which were related to travel, such as the sale of travelers checks and the making of travel loans, but concluded that the operation of a travel agency was not incidental to its banking powers. Further, the Court held that there was no genuine issue of material fact and accordingly granted the plaintiffs' motion for summary judgment. The court entered an order declaring that the Comptroller's regulation (12 C.F.R. 7.1) was invalid as being in excess of his statutory powers and that the national bank in question must divest itself of its travel agency service within six months from the date of filing of the order and that said bank be thereafter permanently enjoined from engaging in the travel agency business.

B. UNIFORM COMMERCIAL CODE

The following discussion is intended to analyze those cases of the Supreme Judicial Court which significantly clarify or develop the law of Massachusetts with respect to the Uniform Commercial Code.

§6.15. Contracts for the sale of securities: Statute of Frauds. *Colt v. Fradkin*¹ involved an application of Section 8-319 of the Uniform Commercial Code² to an option to purchase securities at a specified price and for a specified period. The option was contained in each of two oral

³ 12 U.S.C. §24(7th).

§6.15. ¹ 1972 Mass. Adv. Sh. 607, 281 N.E.2d 213.

² G.L., c. 106, §8-319 provides as follows: "A contract for the sale of securities is not enforceable by way of action or defense unless

(a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price; or

(b) delivery of the security has been accepted or payment has been made but the contract is enforceable under this provision only to the extent of such delivery or payment; or

(c) within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under paragraph (a) has been received by the party against whom enforcement is sought and he has failed to send written objection to its contents within ten days after its receipt; or

(d) the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price."

agreements between the plaintiff, a New York stockbroker, and the defendants, William and Irving Fradkin. The terms of the agreements were determined by a master:

[O]n July 26, 1967, the parties entered into an oral agreement by telephone conversation, wherein [each of] the defendants agreed to purchase 40,000 shares of unregistered stock [of Logic Corporation (Logic)] at 5¢ per share and the plaintiff would have the option to purchase 20,000 shares from the defendant, William Fradkin and 20,000 from the defendant, Irving Fradkin by paying to each of them \$1,000.00 at any time within 2 years from the issuance of said stock. It was further agreed that in the event that the Logic stock proved worthless and the defendants suffered any loss, the plaintiff agreed to pay to the defendants jointly, one-third of such loss, thereby participating equally in any such loss.³

The plaintiff confirmed the above oral agreement by letter to each of the defendants later that same day and enclosed an “investment letter and a subscription form,” both of which were executed by the defendants and sent to Logic’s lawyers. The plaintiff arranged for issuance of the shares and on August 8, 1967 the shares were duly issued to the defendants. On April 1, 1968 plaintiff exercised his options (pursuant to the parties’ oral agreements) by sending each of the defendants a letter with a \$1,000 check enclosed. Each of the defendants returned the check and refused to turn over 20,000 shares. The plaintiff then brought this suit for specific performance of the oral agreement, and the defendants pleaded the statute of frauds as a defense.

UCC §8-319 provides a special statute of frauds which applies to a “contract for the sale of securities,” and the first issue was whether the ultimate transaction would qualify as a sale. “Sale” is defined in UCC §2-106 as “the passing of title from the seller to the buyer for a price.” Although both sides argued that §8-319 properly applied, the Court took pains to emphasize that “[t]he fact that plaintiffs had an *option to buy or not to buy* did not negate the existence of a contract for sale by the defendants.”⁴ (Emphasis added). The Court cited *Mortimer B. Burnside & Co., Inc. v. Havener Securities Corp.*⁵ where a New York court enforced an oral agreement “to assign to plaintiff one third of the 25,000 common stock purchase warrants issued to defendant . . . by Ormont Drug & Chemical Co., Inc., in the event plaintiff purchased Ormont stock from one Friedman.” The *Burnside* court specifically decided that the transfer was made for a price:

The answer to that question is furnished by section 2-304 of the Uniform Commercial Code which states that “The price can be

³ Record at 15.

⁴ 1972 Mass. Adv. Sh. at 611, 281 N.E.2d at 217.

⁵ 25 App. Div. 2d 373, 269 N.Y.S.2d 724 (1966).

made payable in money or otherwise." The word "otherwise" is not limited in any way and therefore it could include any consideration sufficient to support a contract. The purchase of the stock from Friedman, at defendants' request, constituted the consideration for the agreement to transfer the warrants.⁶

Reasoning by analogy to UCC Article 2 (as the New York appellate division did in *Burnside*) the Supreme Judicial Court in *Fradkin* determined that "contract for sale" would include a contract for a future sale of securities at the buyer's option, even when the consideration consisted of a promise (1) to arrange for the issuance of 80,000 unregistered shares of Logic Corporation and, (2) in the event such stock becomes worthless, to share in one-third of the loss.⁷ The Court expressly declined to follow the much discredited case of *Cohn, Ivers & Co. v. Gross*⁸ which held that a contract granting a "call" option was not a contract for the sale of securities under UCC §8-319 but a contract for the sale of general intangibles under UCC §1-206:

That holding might be appropriate in a case where the holder of an outstanding option made a contract to sell it, but it does not properly apply to a case where the owner or prospective owner of securities contracts to sell them at the buyer's option.⁹

Whether the option itself would have been a "contract for the sale of securities" if there had been no consideration was not discussed. It is settled law that an option is not a contract for sale but rather an offer which may not be revoked for a specified period of time.¹⁰ However, that question may be purely academic since an "option contract," in addition to being rare in practice, would be unenforceable not only because of possible violations of the statute of frauds but also because of a lack of consideration.¹¹

Having found the transaction to be a contract for the sale of securities within the meaning of UCC §8-319, the Court undertook to determine whether the conditions imposed under paragraphs (a), (b) and (c)¹² of that section had been satisfied. Plaintiff first argued that UCC §8-319(b) had been satisfied when the defendants received and accepted 80,000 unregistered shares of Logic and the plaintiff agreed to share

⁶ 25 App. Div. 2d at 375, 269 N.Y.S.2d at 726.

⁷ "We agree with the New York court that we may look by analogy to §§2-106 and 2-304 of the Uniform Commercial Code, applicable to the sale of goods, for definitions of 'sale' and 'price.'" 1972 Mass. Adv. Sh. at 611, 281 N.E.2d at 217.

⁸ 56 Misc. 2d 491, 289 N.Y.S.2d 301 (1968).

⁹ 1972 Mass. Adv. Sh. at 611, 281 N.E.2d at 217 citing 3 Willier & Hart, UCC Reporter Digest, §8-319, A4 which states: "[a]s it reads, Section 8-319 would include call options which are contracts for the sale of securities."

¹⁰ WILLISTON ON CONTRACTS §61A (3rd ed. 1957); CORBIN ON CONTRACTS §§259 *et seq.* (1963).

¹¹ CORBIN *supra*, note 10 at §263.

¹² See note 2 *supra*.

one-third of any loss in the event of worthlessness. The Court rejected this argument, reasoning that the original sale of 80,000 shares was a separate transaction from the return sale of 40,000 shares which was contemplated in the agreement.¹³ For purposes of the latter sale, no security had been delivered or accepted. Nevertheless, plaintiff had paid the 5¢ per share option price, and the Court held that to be sufficient for satisfaction of subsection (b).

The Court then turned to UCC §8-319(a) and found that it too had been satisfied. The plaintiff's letters of July 26, 1967 with enclosures were "sufficient to indicate that a contract has been made for sale" by the defendants to the plaintiff "of a stated quantity of described securities at a defined or stated price" and the signature requirement was satisfied by the defendants' signing of the subscription forms and investment letters. The two separate sales were treated as a single transaction: "[t]he three documents, enclosed in the same envelope, must be read as a single instrument in light of all the circumstances. So read, they satisfy the statute."¹⁴ This analysis is consistent with the parties' agreement which included the defendants' promises to purchase 80,000 shares of Logic and a separate option to purchase 40,000 shares of Logic at any time within two years from the date of issuance. However, it is inconsistent with the Court's earlier distinction between the sale of 80,000 shares and the "return" sale of such shares. The distinction, therefore, is not only unnecessary, but also confusing when read in light of the Court's analysis of the present transaction and UCC §8-319.

In its analysis under paragraph (c) the Court followed its previous interpretation of the term "sale" to include sales taking place at a future time at the buyer's option. Plaintiff's letter of July 26, 1972 was "a writing in confirmation of the sale which was sufficient against the sender under paragraph (a);" it was received "within a reasonable time;" and the defendants "failed to send written objection to its contents within ten days after its receipt."¹⁵

The defendants finally argued that "[t]he attempted exercise of an option on April 1, 1968 [when plaintiff sent to each defendant a letter with a \$1,000 check enclosed in an attempt to purchase a total of 40,000 shares of Logic] was the first time a duty to repudiate arose under section 8-319(c)."¹⁶

This argument requires that "confirmation of the sale or purchase" be interpreted as contemplating only present sales and purchases. However,

¹³ "We think, however, that we may look to §2-326(4), which indicates that the sale to the plaintiff is to be treated as a separate contract for sale within the statute of frauds from the sale to the defendants." 1972 Mass. Adv. Sh. at 611-12, 281 N.E.2d at 217.

¹⁴ *Id.* It should be noted that neither petitioner nor respondents argued in their briefs that the provisions of paragraph (a) had been satisfied. See Petitioner's Brief at 13-17, Respondents' Brief at 7.

¹⁵ 1972 Mass. Adv. Sh. at 612-13, 281 N.E.2d at 218.

¹⁶ Respondents' Brief 7.

the Court for the third time resorted to Article 2 of the Uniform Commercial Code to construe paragraph (c) as applying to a writing in confirmation of the contract for a sale or a purchase, regardless of whether such sale or purchase is to presently take place or take place at a future time.

§6.16. Forged indorsements. *Gordon v. State Street Bank and Trust Company*¹ involved the question of whether a drawer of a check may recover against a drawee bank for accepting a forged indorsement if the intended payee received the funds. According to the report of evidence, it was the drawer's policy to obtain a borrower's wife's signature in making loans, but in this case the drawer "intended that the money was to be for only [the borrower]." Upon learning that the borrower's wife never indorsed a check made jointly payable to the borrower and his wife, the drawer sued the drawee bank to recover the face amount of the check paid on the forged indorsement of the borrower's wife.²

The Court adopted, for the first time in Massachusetts, the pre-Code rule³ that a drawee bank is not liable for payment on a forged indorsement where the proceeds of the check are received by the person intended to receive them.⁴ Alternatively, the Court suggested that the same result might be obtained by application of UCC §3-405(1) which provides that "[a]n indorsement by any person in the name of a named payee is effective if . . . (b) a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument. . . ."

There are three possible reasons why the Court hesitated to base its decision entirely on Section 3-405. First the court was uncertain whether the section applied to the facts in *Gordon*:

[T]he language of subsec. 1(b) may be applicable to the present situation. Although so to apply subsec. 1(b) goes somewhat beyond the examples stated in comment 3 (see Uniform Commercial Code, 1962 Official Text pp. 291-294) to §3-405, one of the underlying purposes (of placing the risk of loss from a wrongful indorsement on the drawer where his intended payee received the funds) is as applicable to this situation as it is to those stated in the examples.⁵

Secondly, even if the facts in *Gordon* were within the purview of UCC §3-405(1) (b), the Court was uncertain as to what kind of interest must be lacking in the payee to make the forged indorsement effective:

If it be considered that *Gordon's* *expectation of her indorsement* gave her some minimal "interest in the instrument," then the case

§6.16. ¹ 1972 Mass. Adv. Sh. 409, 280 N.E.2d 152.

² See G.L., c. 106, §3-419(1)(c).

³ See G.L., c. 106, §1-103.

⁴ See authorities cited at 1972 Mass. Adv. Sh. 412, 280 N.E.2d at 155.

⁵ *Id.* at 411, 280 N.E.2d at 154.

may not be covered by the Uniform Commercial Code at all.⁶ (Emphasis added).

Thirdly, the Court may have wanted to clarify the law of Massachusetts as to a bank's liability where "[t]he drawer is not damaged . . . for no person not intended by him to take an interest has done so as a consequence of the forged indorsement [of the check]."⁷

§6.17. Bill of lading as evidence of condition of merchandise: Plasti-leather Corporation v. Aetna Casualty and Surety Company.¹ The defendant insured the plaintiff's merchandise "against the perils of transportation" from point A to point B. A shipper issued a "clean" bill of lading at point A, reciting that the merchandise was "wrapped entirely in burlap covering" and "in apparent good order and condition;" the goods arrived at point B in a damaged condition. Plaintiff had the burden of proving that the damage occurred in transit between points A and B. He argued that the description contained in the bill of lading created a presumption that the merchandise was in good order and condition at point A, and that this presumption made out a prima facie case.

The Court followed the well settled rule that a "bill of lading [with the recital of "apparent good order and condition"] is prima facie evidence as to *external conditions only*."² (Emphasis added). This rule is to be distinguished from section 1-202 which does not apply to the condition of the merchandise but rather merely to "the facts stated in the [bill of lading]"

§6.18. Prospective profits as an element of damages. Matsushita Electric Corporation v. Sonus Corporation¹ is an instructive application to complex facts of UCC provisions regarding (1) formation of a contract arising out of a course of negotiations,² (2) late delivery of goods specified under a contract as constituting a breach of such contract, and justification for such late delivery,³ (3) justification for withholding payment for an incomplete delivery,⁴ (4) breach of express warranty and reasonable notice of such breach,⁵ and (5) damages attributed to the

⁶ Id. at 412, 280 N.E.2d at 155. The Court does state that "[o]n the evidence the judge was warranted in finding that . . . [the drawer] intended . . . [the borrower] alone to receive the proceeds of the check and that he did receive them." Id. at 411, 280 N.E.2d at 154.

⁷ Id. at 411-12, 280 N.E.2d at 154.

¹ 1972 Mass. Adv. Sh. 507, 280 N.E.2d 402.

² See authorities cited at 1972 Mass. Adv. Sh. 509-10, 280 N.E.2d at 404.

¹ 1972 Mass. Adv. Sh. 1345, 284 N.E.2d 880.

² See G.L., c. 106, §§2-102, 2-105(1) and (2), 2-202, 2-204, 2-205, 2-206, 2-207.

³ Id. §§2-301, 2-705(1).

⁴ Id. §2-507(1).

⁵ Id. §§2-313(1)(b) and (c), 2-607(3)(a).

several breaches of contract.⁶ An analysis of those aspects of the case would not be useful in this chapter. However, the case deserves further mention for one novel element in its decision. The Massachusetts doctrine that loss of *prospective profits* is a recoverable element of damages⁷ is incorporated into the provisions of UCC §1-106(1) which provides that “[t]he remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed”

⁶ *Id.* §§1-106, 2-714, 2-715(2).

⁷ See *Rombola v. Cosindas*, 351 Mass. 382, 385, 220 N.E.2d 919, 922 (1966).