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H**Motions, Pleadings and Filings**

United States District Court,
 W.D. Michigan,
 Southern Division.
 In re Daniel & Michelle OSWALT, Debtors.
 Citicorp Trust Bank, a Delaware corporation,
 Appellant,
 v.
 Marcia R. Meoli, Chapter 7 Trustee, Appellee.
 No. 1:04-CV-317.

Dec. 15, 2004.

Background: Chapter 7 trustee brought adversary proceeding against mortgagee, seeking to avoid security interest in debtors' mobile home and real property to which home was affixed on grounds that security interest was not properly perfected. Finding that an amendment to Michigan's Mobile Home Commission Act (MHCA) was a "new law" that did not apply retroactively to debtors' bankruptcy case, the Bankruptcy Court, Jo Ann C. Stevenson, J., 310 B.R. 576, denied mortgagee's motion for summary judgment. Mortgagee sought interlocutory appeal.

Holdings: The District Court, Robert Holmes Bell, Chief Judge, held that:

- (1) the subject amendment was a clarification of the Michigan Legislature's original intent that a security interest in an affixed mobile home perfected in accordance with real property law is valid and enforceable, and
 - (2) mortgagee, which had recorded its mortgage in accordance with Michigan's real property law, was properly perfected in debtors' mobile home.
- Reversed and remanded.

West Headnotes

[1] Bankruptcy ↪3782
 51k3782 Most Cited Cases

[1] Bankruptcy ↪3786
 51k3786 Most Cited Cases

On appeal, the district court reviews a bankruptcy court's findings of fact for clear error and conclusions of law de novo. Fed.Rules Bankr.Proc.Rule 8013, 11 U.S.C.A.

[2] Statutes ↪210
 361k210 Most Cited Cases

Because the only way in which a legislature can act is through the enactment of legislation, use of the word "enact" in a statute's preamble is a formality and is not determinative of whether the legislature was passing a new statute or clarifying its original intent.

[3] Secured Transactions ↪9
 349Ak9 Most Cited Cases

Amendment to Michigan's Mobile Home Commission Act (MHCA), indicating that security interest in mobile home affixed to real property could be perfected under either real estate law or through Act, was not a new law, but was a clarification of legislature's original intent that security interest in affixed mobile home perfected in accordance with real property law is valid and enforceable; case law allowed legislature to clarify its intent through enactment of amendment, this amendment's enacting section plainly set forth legislature's intent "that a security interest or lien on a mobile home affixed to real property may be perfected in the manner provided under law for perfecting a lien on real property, and not exclusively by a notation of the security interest or lien on the certificate of title," and legislative analysis accompanying amendment confirmed legislature's intent that bill "reinstate" financing practices that existed in state prior to recent Court of Appeals decision that had altered the MHCA. M.C.L.A. § 125.2330i.

[4] Statutes ↪230
 361k230 Most Cited Cases

Under Michigan law, an amendment to a statute may be a clarification of the legislature's original intent rather than the enactment of an entirely new

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law, particularly when uncertainty exists as to the meaning of a statute.

[5] Secured Transactions ↪8.1
 349Ak8.1 Most Cited Cases

[5] Secured Transactions ↪85
 349Ak85 Most Cited Cases

Passage of amendment to Michigan's Mobile Home Commission Act (MHCA), indicating that security interest in mobile home affixed to real property could be perfected under either real estate law or through Act, accomplished two things: (1) it clarified the legislature's intent regarding a creditor's security interest under the MHCA, and (2) it created an optional procedure by which the owner of an affixed mobile home could cancel the certificate of title for the home and treat it as part of the real property. M.C.L.A. § 125.2330i.

[6] Secured Transactions ↪85
 349Ak85 Most Cited Cases

Mortgagee was properly perfected in Chapter 7 debtors' affixed mobile home under Michigan law; amendment to Michigan's Mobile Home Commission Act (MHCA) clarified the legislature's intent in enacting the MHCA and clearly stated that perfection of a security interest in a mobile home affixed to real property pursuant to real property law was permitted under the statute, and mortgagee had recorded its mortgage in accordance with Michigan's real property law. M.C.L.A. § 125.2330i.

***819** John C. Arndts, Dykema Gossett PLLC, Sarah E. Heineman, Dykema Gossett PLLC, Grand Rapids, MI, for appellant.

Marcia Meoli, Hann Persinger P.C., Holland, MI, Chapter 7 Trustee.

OPINION

ROBERT HOLMES BELL, Chief Judge.

****1** This matter is before the Court on appeal by Citicorp Trust Bank ("Citicorp"). Citicorp appeals the April 19, 2004 order of the Bankruptcy Court denying Citicorp's motion for summary judgment and holding that the July 14, 2003 amendment to the Mobile Home Commission Act, MICH. COMP. LAWS § 125.2301-2350 ("MHCA"), was a "new

law" that did not apply retroactively to a bankruptcy case filed before the bill went into effect. For the reasons that follow, the order of the Bankruptcy Court is reversed.

I.

Daniel and Michelle Oswald ("Debtors") owned a mobile home and real property located in Constantine, Michigan. The mobile home was affixed to the real property. The Debtors granted a mortgage on the property to Citicorp on December 3, 2001. Thereafter, on December 19, 2001, Citicorp properly recorded the mortgage with the St. Joseph County Register of Deeds. On April 11, 2003, the Debtors filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. On September 11, 2003, the Trustee filed a complaint against Citicorp to avoid Citicorp's security interest in the mobile home claiming that it was not properly perfected under Michigan law. Thereafter, Citicorp filed a motion for summary judgment arguing that Citicorp's security interest in the mobile home was properly perfected based upon the July 14, 2003 amendment to the MHCA. Citicorp asserted that the amendment clarified the Michigan Legislature's intent in enacting the MHCA. On April 19, 2004, the Bankruptcy Court denied Citicorp's motion for summary judgment.

The perfection of a security interest in a mobile home has recently become a contentious subject in Michigan due to a series of judicial opinions culminating in a Sixth Circuit Court of Appeals decision in *In re Kroskie*, 315 F.3d 644 (6th Cir.2003). In *In re Kroskie*, the court of appeals held that the Michigan Legislature intended that the MHCA provide the exclusive method of perfecting a security interest in a mobile home. 315 F.3d at 648. Prior to the *Kroskie* decision, many creditors in Michigan perfected their security interests in affixed mobile homes through the filing of a mortgage on that real estate. As a result of *In re Kroskie*, a mortgage lender's security interest in an affixed mobile home that was recorded with a mortgage on the real property was not enforceable against other creditors who filed with the Mobile Home Commission. Accordingly, lenders discontinued making mortgage loans for affixed mobile homes, forcing borrowers to apply for higher-interest rate personal property loans. After *In re Kroskie*, the Michigan Legislature acted

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promptly. The Legislature amended the MHCA adding MICH. COMP. LAWS § 125.2330i. The Legislature also included a statement of its intent in the enacting section of the statute:

It is the intent of this legislature that a security interest or lien on a mobile home affixed to real property may be perfected in the manner provided under law for perfecting a lien on real property, and not exclusively by a notation of the security interest on the certificate of title.

***820 **2** Enacting Section 1, Public Act No. 44, S.B. 425 (2003). The amendment also provided a procedure in which the owner of an affixed mobile home could cancel the certificate of title for the home. MICH. COMP. LAWS § 125.2330i (2003). Citicorp contends that this amendment was intended to clarify the Michigan Legislature's intent that a security interest in a mobile home affixed to real property perfected in accordance with real property law is valid and enforceable. The Trustee asserts that MICH. COMP. LAWS § 125.2330i is a new law that does not apply retroactively to this case.

II.

[1] Before the Court is Citicorp's appeal of the April 19, 2004 order of the Bankruptcy Court denying Citicorp's motion for summary judgment. Pursuant to 28 U.S.C. § 158(a)(3) granting district courts jurisdiction to hear appeals from interlocutory orders and decrees of the bankruptcy courts, this Court granted Citicorp's motion for leave to appeal because the case involved controlling legal issues regarding the MHCA. *See* June 4, 2004 Order (Docket # 7). On appeal, the Court reviews the bankruptcy court's findings of fact for clear error and conclusions of law *de novo*. *See* Bankruptcy Rule 8013; *In re Baker & Getty Financial Services, Inc.*, 106 F.3d 1255, 1259 (6th Cir.1997).

III.

The Bankruptcy Court below determined that at the time of the filing of the bankruptcy petition the amendment to the MHCA had not been enacted, therefore, *In re Kroskie* was the controlling authority regarding the rights of the debtor and creditors. Further, the Bankruptcy Court held the amendment was not simply a clarification of intent but was in fact a new law that could not be given retroactive effect. The Bankruptcy Court relied upon the language in the preamble of the

amendment, "The People of the State of Michigan enact." Public Act No. 44, S.B. 425 (2003) (emphasis added). The Bankruptcy Court reasoned that if this had been a clarification of the MHCA, there would have been no need to "enact" a new law. Further, the Bankruptcy Court noted that the bill clearly stated, "This act is ordered to take immediate effect." Based upon this, the Bankruptcy Court reasoned that the Legislature intended that the amendment was not retroactive, and therefore denied Citicorp's motion for summary judgment.

[2] The Bankruptcy Court places too much emphasis upon the preamble to the amendment. The Bankruptcy Court held that the use of the word "enact" demonstrates that MICH. COMP. LAWS § 125.2330i is a new law and not simply a clarification, reasoning that if it was only a clarification it would not have been necessary to enact another law. This places an undue emphasis upon the word "enact." The only way in which a legislature can act is through the enactment of legislation. The fact that the word "enact" is used in the preamble is a formality and is not determinative of whether the Legislature was passing a new statute or clarifying its original intent.

****3** [3] Further, the Bankruptcy Court and the Trustee misconstrue this case as one involving the retroactive effect of MICH. COMP. LAWS § 125.2330i. This case involves a situation where the Legislature has clarified their original intent in enacting the MHCA in light of a controversy that arose regarding the statute, it does not involve the retroactive application of a new statute. Indeed, were that the issue it could be easily dispensed with by noting that the statutory language does not have any language mandating retroactive application and specifically states that the act is to ***821** take immediate effect. *See Selk v. Detroit Plastic Prod.*, 419 Mich. 1, 9, 345 N.W.2d 184, 187-88 (1984) ("Amendments of statutes are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent."). In addition to the Legislature's statement that the act take immediate effect, the legislative history contains a statement of the Legislature's intent regarding the perfection of a security interest in an affixed mobile home that leads this Court to view MICH. COMP. LAWS § 125.2330i as a clarification of the original intent regarding the MHCA. *See* Enacting Section 1 of

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Public Act No. 44, S.B. 425 (2003).

[4] The Michigan Supreme Court has held that an amendment to a statute may be a clarification of the Legislature's original intent rather than the enactment of an entirely new law, particularly when uncertainty exists as to the meaning of a statute. *Prod. Credit Ass'n of Lansing v. State, Dept. of Treasury, Revenue Div.*, 404 Mich. 301, 273 N.W.2d 10 (Mich.1978); *Detroit Edison Co. v. Janosz*, 350 Mich. 606, 613-14, 87 N.W.2d 126, 130 (Mich.1957); see also *People v. Berg*, 85 Mich.App. 639, 644-45, 272 N.W.2d 167, 169-70 (Mich.Ct.App.1978) ("[a]n amendment made soon after controversies arise in regard to a statute can be taken as a legislative interpretation of the original act rather than a substantial change of it.") (citing *Harper v. Progressive Casualty Co.*, 79 Mich.App. 764, 768, 263 N.W.2d 1, 3 (Mich.Ct.App.1977)).

In holding that MICH. COMP. LAWS § 125.2330i was not retroactive, the Bankruptcy Court appears to have overlooked the line of cases that establish that the Legislature can clarify its intent through the enactment of an amendment. The Trustee argues that the cases interpreting an amendment as a clarification of intent are not applicable to the present case. The Trustee principally relies upon *Harper*, 79 Mich.App. 764, 263 N.W.2d 1. In *Harper*, the court of appeals construed an amendment to the Michigan No-Fault Act as a clarification of the Legislature's intent regarding work loss benefits for a temporarily unemployed plaintiff. 79 Mich.App. at 768-69, 263 N.W.2d at 3. In determining that the amendment clarified the Legislature's original intent in the No-Fault Act, the court of appeals looked at the legislative analysis that accompanied the amendment to the statute. *Id.* at 767, 263 N.W.2d at 2. The court also placed great weight on the fact that when questions arose regarding the exclusion from coverage of temporarily unemployed parties, the Legislature acted quickly in passing the amendment resolving the issue. *Id.* The Trustee contends that the Court must undertake the same type of review of the legislative analysis in this case, as engaged in by the court in *Harper* to determine the legislative intent of MICH. COMP. LAWS § 125.2330i. Further, the Trustee argues that such a review leads to the conclusion that MICH. COMP. LAWS § 125.2330i is not a clarification but is a new law that does not

apply to this case.

**4 While the Court agrees with the Trustee on the proper analysis for determining the Legislature's intent, it does not agree with the Trustee's conclusion regarding the legislative analysis of MICH. COMP. LAWS § 125.2330i. Determining the Legislature's intent is always a difficult task. See, e.g. *People v. Robideau*, 419 Mich. 458, 486-87, 355 N.W.2d 592, 604 (Mich.1984) (noting the difficulty in determining legislative intent). In this case, however, the Court is aided in determining the Legislature's intent by the statement in the enacting section of the amendment. The enacting section of MICH. COMP. LAWS § 125.2330i plainly sets forth the Legislature's intent, "that a security interest or *822 lien on a mobile home affixed to real property may be perfected in the manner provided under law for perfecting a lien on real property, and not exclusively by a notation of the security interest or lien on the certificate of title." Enacting Section 1, Public Act No. 44, S.B. 425 (2003). The Legislature's intent is unambiguously spelled out in this section: a security interest in a mobile home affixed to real property, perfected under the real property law, is a valid method of perfection under the MHCA.

Moreover, the legislative analysis accompanying MICH. COMP. LAWS § 125.2330i confirms the Legislature's intent. The legislative analysis specifically addresses the problem created by the Sixth Circuit's interpretation of the MHCA, "[s]ince 1979 ... [a] creditor's security interest in an affixed mobile home was asserted through the filing of a mortgage on that real estate. As a result of the U.S. Sixth Circuit Court's [*Kroskie*] decision, however, this practice changed dramatically." Third Analysis of Senate Bill 425, 92nd Leg. Regular Session (Mich.2003). Further, the Legislature clearly states the intent of the amendment in their conclusion, "[t]he bill *reinstates* the financing practices that existed in Michigan before the [*Kroskie*] decision." *Id.* The use of the word "reinstates" in the analysis illustrates that the Legislature intended to return to the financing practices in effect pre-*Kroskie*, not enact a new procedure for perfecting mortgages in affixed mobile homes.

The Trustee acknowledges that the Legislature identified the problem created by *Kroskie* in their

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analysis of the bill, but contends that in order to solve the problem the Legislature drafted a specific procedure, not existing prior to the passage of MICH. COMP. LAWS § 125.2330i, that allowed those who complied with it to perfect liens in mobile homes by merely recording mortgages. As such, the Trustee contends that MICH. COMP. LAWS § 125.2330i was not a clarification of intent but was a new solution to the problem that had arisen and therefore does not apply to this case.

[5] The Court does not agree with this characterization and the changes in the amendment, from the proposed legislation to the statute as enacted, demonstrate that the Trustee's position is incorrect. In effect, the passage of MICH. COMP. LAWS § 125.2330i accomplished two things: (1) it clarified the Legislature's intent regarding a creditor's security interest under the MHCA; and (2) it created an optional procedure by which the owner of an affixed mobile home could cancel the certificate of title for the home and treat it as part of the real property. In a previous version of the bill, the statutory language required the owner's compliance with the procedure set out in § 125.2330i in order to treat the mobile home as part of the real property. *See* S.B. 425, 92nd Leg., Regular Session (Mich.2003) (as passed by the Senate May 14, 2003) ("If a mobile home is affixed to real property ... the owner *shall* deliver both of the following to the department") (emphasis added). The version of the bill actually enacted, however, changed the language to, "[i]f a mobile home is affixed to real property in which the owner of the mobile home has the ownership interest, the owner *may* deliver all of the following to the department" MICH. COMP. LAWS 125.2330i (2003) (emphasis added). Changing the statutory language from a required procedure to a permissive procedure is not insignificant. *See Nation v. W.D.E. Elec. Co.*, 454 Mich. 489, 497 n. 12, 563 N.W.2d 233, 237, n. 12 (Mich.1997) ("We are aided in discovering legislative intent in enacting any statute by examining the proposed legislation it considered and rejected, contrasted with the provisions as finally *823 adopted.") (quoting *Miller v. State Farm Mut. Auto. Ins. Co.*, 410 Mich. 538, 566, 302 N.W.2d 537, 545 (Mich.1981)). When this change is coupled with the addition of the enacting section, it is clear that the Legislature intended that perfection by a creditor under real property law be

permissible and effective regardless of whether the owner complied with the procedure set forth in MICH. COMP. LAWS § 125.2330i.

**5 [6] If the Legislature intended that perfection under real property law was allowed only if the owner elected to use the certificate of title canceling procedure, it would have either left the mandatory language of the amendment unchanged or included such language in the enacting section. In light of the fact that the Michigan Legislature acted promptly after the Sixth Circuit decision altering the MHCA, the expressions of the Legislature's intent in the bill analysis and enacting section, as well as the removal of the mandatory language from the amendment, it is clear to this Court that the Legislature intended MICH. COMP. LAWS § 125.2330i to be a clarification of the MHCA returning the statute to the allowance of perfection of a security interest in an affixed mobile home under real property law. Consequently, Citicorp was properly perfected in the Debtor's mobile home because they had recorded a mortgage covering the real property and the mobile home in accordance with the real property laws of Michigan.

The Court also notes that the Trustee is not an innocent, unknowing victim who is surprised to find out that Citicorp has an interest in the Debtor's affixed mobile home. Citicorp properly recorded its mortgage in the local county register of deeds giving notice to the world of their interest in the real estate and the affixed mobile home. When the Trustee was assembling the assets of the Debtor's bankruptcy estate, she could have easily discovered Citicorp's interest in both the real property and the affixed mobile home. As the Legislature made clear in MICH. COMP. LAWS § 125.2330i, Citicorp's actions were consistent with the public policy of Michigan regarding mobile homes affixed to real property and they were not at variance with the MHCA.

IV.

Accordingly, the April 19, 2004 order of the Bankruptcy Court is reversed. MICH. COMP. LAWS § 125.2330i clarified the Legislature's intent in enacting the MHCA and clearly stated that perfection of a security interest in a mobile home affixed to real property pursuant to real property law was permitted under the statute. Citicorp was

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properly perfected in the mobile home and they are entitled to summary judgment against the Trustee. An order will be entered consistent with this opinion.

ORDER

This matter is before the Court on appeal from the Bankruptcy Court. Citicorp Trust Bank appeals the April 19, 2004 order of the Bankruptcy Court denying their motion for summary judgment. In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that the April 19, 2004 order of the Bankruptcy Court denying Citicorp's motion for summary judgment is **REVERSED** and the case is **REMANDED** to the Bankruptcy Court for further proceedings in accordance with this opinion.

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. 2004 WL 2234465 (Trial Motion, Memorandum and Affidavit) Brief of Appellee (Jun. 24, 2004)

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Katherine Simpson Allen - Co-Editor
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 Matthew Nelson - Asst. Editor (CFS)
 Laura R. Matula - Layout Editor

Electronic Filing of UCC Financing Statements

*By Trish Bogenrief
 Corporation Service Company®
 Wilmington, Delaware*

Electronic filing of Financing Statements was one of the goals of the UCC's Revised Article 9. The "vision" is that all parties to a secured transaction will be in the closing room and the Financing Statements will have been prepared in advance on a third party's software application. The application will have been programmed with all of the filing requirements for every jurisdiction, but can be changed prior to submission. Once the negotiations are complete and the authorizing Security Agreement has been signed, all relevant changes are made to the Financing Statements and they are transmitted electronically. In Filing Offices that accept XML (extensible mark-up language), the acknowledgment that the Financing Statement has been received and ac-

cepted is returned in a matter of seconds, allowing funds to be released. This is a 24/7 process in most Filing Offices, as the computer systems filing logic is programmed to accept or reject filings based on UCC §9-516. This takes the human element out of not only the rejection process but also the indexing process. The filer's entry is what is indexed and retained, thereby eliminating the concern of data entry errors by the Filing Office staff.

To assist in making this a reality, the requirement for a signature on the Financing Statement was eliminated in Revised Article 9. There are currently 34 state/central-level Filing Offices using a variety of electronic filing options. All of the offices allowing electronic filing use a "fill in the blank" option on their website. This requires a payment by credit card and a line-by-line

There are currently 34 state/central-level Filing Offices using a variety of electronic filing options.

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entry process, often not allowing the filer to cut and paste collateral descriptions, but rather re-enter them with a limited number of characters. These States are: AR, CA, CO, DE, ID, IN, IA, KS, KY, ME, MA, MI, MN, MS, MO, MT, NV, NH, NJ, NM, NY, NC, ND, OH, OK, PA, SD, TX, UT, VT, WA, WI, and WY.

The best option, which is available in 10 states—CA, DE, MS, MO, NH, NM, NY, NC, TX, WA—allows for bulk filing through a third party link. The technology most commonly being used is XML, which is web-based and a simple computer language, not computer jargon. XML is used in nine of the states, with Texas the exception. Texas uses EDI (electronic data interchange), which was developed by the Article 9 Filing Project in the mid-90's before there was comfort with web-based technology. It is a complicated computer language that is expensive to implement for both the Filing Office and the service provider, and is only capable of handling initial Financing Statements and termination amendments. In mid-2001, a combined effort of the Filing Offices and service providers developed a user guide. It allows the user to access a service provider software application that not only will send the electronic submission to the appropriate Filing Office(s), but also retains the entry for both the current transaction and for future amendments of all types. The only remaining issue is that attachments either are not allowed or must be cut and pasted into the submission instead of simply attaching them to the transmission. Fortunately, in the next few months, Delaware will be releasing a new version that will allow "pdf" attachments to the submission. It is anticipated that other states will follow this example in the near future.

Unfortunately, "local level" Filing Offices (in some counties, town clerk offices and some cities) where real property related Financing Statements are filed, are not currently contemplating electronic filing of UCC Financing Statements. The same software that enables electronic filing allows the service provider to be able to either cut and paste the submission into a Filing Office web based form or print and send to the Filing Office utilizing the more conventional courier/local agent method.

In 2005, several more states will implement this technology using a third-party link. Currently

several states and the U.S. Virgin Islands are in various stages of development—AR, ID, IA, KS, ME, MA, OH, PA, RI, VA and VI—and should have this capability by mid-2005. Additionally, the following states plan to have XML available by the end of 2005—AK, AZ, MT, NE, OR, SD. That will mean that the "vision" will become a reality in 27 States by the end of 2005. To stay current on the progress being made in electronic filing nationwide but also a variety of other UCC Filing Office issues, access the "RA9 Quick Reference Guide", which is updated on a regular basis and available on the web at: www.incspot.com.



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Summary of Uniform Commercial Code Article 2A Amendments

By Linda J. Rusch
Hamline University School of Law
St. Paul, Minnesota

Background

The National Conference of Commissioners on Uniform State Laws in 2002 and the American Law Institute in 2003 finally approved amendments to Uniform Commercial Code (UCC) Article 2A. These amendments were approved at the same time as the amendments to UCC Article 2 and for the most part are the same as the amendments to that article. The effort to revise UCC Article 2A: Leases commenced in 1996 and was conducted simultaneously with the revision of Article 2. The charge to the Article 2A drafting committee was to make changes to Article 2A that were appropriate given the amendments to Article 2 and the revision of Article 9. The following is a summary of the substantive changes to the statutory text of Article 2A.

Definitions

As with all of the modern revisions to the UCC, the definition of "good faith" has been revised to "honesty in fact and the observance of reasonable commercial standards of fair dealing." Amended UCC § 2A-103(1)(m). The definition of "goods" has been revised to follow the revision of the definition of "goods" in amended Article 2 by excluding "information" from the definition. However, in amended Article 2A, unlike amended Article 2, the term "goods" does not exclude "foreign exchange transactions." Amended UCC 2A-103(1)(n). The

definition of "finance lease" has been revised to accommodate the situation where the lessor has reacquired the goods from another lease. Amended UCC 2A-103(1)(l).

Consumer Rules

A few changes have been made to the consumer rules in Article 2A. A new definition of "consumer" has been added. A "consumer" is a person who leases goods intended primarily for personal, family or household use. Amended UCC 2A-103(1)(e). The definition of "consumer lease" has been amended to use the new definition of consumer. Amended UCC 2A-103(1)(f). While the statute no longer has language allowing for the insertion of a dollar cap as did former Article 2A, the legislative note indicates that states should be free to insert a dollar cap. Section 2A-14 has been amended to change the deference to other consumer law from deference to a "consumer protection statute of this State, or final consumer protection decision of a court of this State existing on the effective date of this article" to deference to a "rule of law that establishes a different rule for consumers." Amended UCC 2A-104(1)(c).

Conformity with Revised Article 9

Several changes were made to Article 2A in order to better dovetail that article with the provisions of Revised Article 9. To that end, the definition of "buyer in ordinary course of business" is

deleted as it is contained in Revised Article 1. Amended UCC 2A-103(1). The definition of "lessee in ordinary course of business" is revised to track the revised definition of "buyer in ordinary course of business." Amended UCC 2A-103(1)(u). Finally, the choice of law provision concerning certificates of title has been amended to be consistent with UCC 9-303. Amended UCC 2A-105.

Electronic Commerce

Many provisions of Article 2A were amended to accommodate electronic commerce. Throughout Article 2A, the word "writing" was changed to "record." Amended UCC 2A-107 (signed waivers), 2A-201 (statute of frauds), 2A-202 (parol evidence rule), 2A-208 (no oral modification clauses), 2A-214 (warranty disclaimers), 2A-309 (mortgages and fixtures), 2A-310 (accessions), 2A-401 (demand for adequate assurance), and 2A-406 (notice of acceptance of partial performance). New definitions of the terms "electronic," "electronic agent," "electronic record," "record," and "sign" were added. Amended UCC 2A-103(1)(h), (i), (j), (cc), and (dd). The definition of "conspicuous" was amended to accommodate that concept in electronic communications. Amended UCC 2A-103(1)(d). These definitions are the same as the definitions in amended Article 2.

Given that the federal Electronic Signatures in Global and

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National Commerce Act (E-SIGN) (codified at 15 U.S.C. § 7001 et. seq.) applies to transactions governed by Article 2A, 15 U.S.C. § 7003(a), amended Article 2A takes advantage of the "exemption to preemption" provision of E-SIGN, "15 U.S.C. § 7002, so that the Article 2A electronic commerce rules apply. Amended UCC 2A-104(4)".

The substantive rules on electronic commerce in Article 2A follow the rules in amended Article 2, which in turn follow the provisions of the Uniform Electronic Transactions Act (UETA). Article 2A provides the following:

(a) The interaction of electronic agents or the interaction of an electronic agent with an individual may result in contract formation. Amended UCC 2A-204.

(b) The fact that a record or signature is electronic in form or that an electronic record was used to form a contract are insufficient to deny the record, signature, or contract legal effect and enforceability. Amended UCC 2A-222.

(c) A transaction need not be conducted electronically. Amended UCC 2A-222.

(d) An electronic record or electronic signature is attributed to a person if it is that person's act or its electronic agents acts or otherwise bound under other rules of law. Amended UCC 2A-223.

(e) 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 2A-224.

(f) Receipt of an electronic communication does not establish the content of that electronic communication. 2A-224.

Statute of Frauds. Amended UCC 2A-201

The statute of frauds remains the same except for the following substantive changes. First the word "writing" is changed to "record." Second, the admissions exception is broadened from testimony in court to testimony "under oath." Third, a new subsection is added to provide that a statute of frauds that requires a writing because the performance is not made within a certain time period is ineffective for a lease transaction covered by Article 2A.

Parol Evidence Rule. Amended UCC 2A-202

The parol evidence rule has been amended in conformity to the amendment to UCC 2-202. First the word "writing" is changed to "record." Second, a new subsection provides that course of dealing, course of performance and usage of trade evidence are admissible to explain terms in a record without a determination that the term is ambiguous.

Course of Performance

Section 2A-207 on course of performance is deleted for those states adopting Revised Article 1. Revised Article 1 incorporates the idea of course of performance in Revised 1-303.

Warranties

The warranty against interference and the warranty of non-infringement contained in Amended UCC 2A-211 are changed in several different respects. First, a non-finance lessor's warranty against interference is broadened to include a warranty against all claims or interests in the goods that do not arise from the lessee's actions.

Second, a finance lessor will give a warranty of non-interference against claims or interests in the goods arising from the lessor's actions. Third, all lessors give a warranty against "a colorable claim to or interest in the goods which will unreasonably expose the lessee to litigation." In the case of a finance lessor, that warranty only is against colorable claims or interests arising from the lessor's actions. Fourth, the section provides for a disclaimer of both the warranty of non-interference and the warranty of non-infringement in a new subsection (4).

The implied warranty of merchantability in amended UCC 2A-212 has two changes. In the text, the requirement that the goods be fit for the ordinary purpose is keyed to the description of the goods instead of the "type" of goods. Second, the new official comment 2 provides that the test for product defect in tort and breach of the implied warranty of merchantability should be the same when recovery is sought for injury to person and property.

The disclaimer section, amended UCC 2A-214, contains several changes in conformity with the amendments to UCC 2-316 concerning disclaimers of warranty in consumer contracts. First, in order to disclaim the implied warranty of merchantability in a consumer contract, the disclaimer must be in a record, be conspicuous and include the following language "the lessor 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

(Continued on page 5)

use the following language, “the lessor assumes no responsibility that the goods will be fit for any particular purpose for which you may be leasing these goods, except as otherwise provided in this contract.” Both of those consumer disclaimers will also be effective in a non-consumer lease. Disclaiming warranties in non-consumer leases has not been changed. Third, to disclaim implied warranties by virtue of the lessee’s inspection, the lessor must demand that the lessee inspect. Finally, a new subsection is added providing that remedies for breach of warranty are limited in accord with sections 2A-503 and 2A-504.

Risk of Loss.

Amended UCC 2A-219

Two changes have been made to the provisions on passage of risk of loss. First, if goods are to be delivered through a bailee and tender is based on notification to the bailee, the bailee must acknowledge to the lessee the lessee’s right to possession. Second, in a non-carrier and non-bailee delivery, the risk of loss passes on the lessee’s receipt of the goods regardless of whether the lessor or the supplier, in a finance lease situation, is a merchant.

Insecurity, Repudiation, and Excuse

A few changes are made to UCC 2A-401 through 2A-406. First, in accord with the medium neutral orientation of the amendments, the word “writing” has been changed to “record” in each section in which it appears. Second, repudiation is defined in amended UCC 2A-402 to include language or conduct that makes it apparent that a person will not or cannot perform its obligations

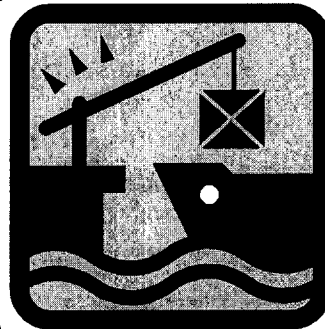
under the contract. Third, the terminology in amended UCC 2A-404 and 405 has been changed from obligations regarding “delivery” to obligations regarding “performance.”

Rejection, Acceptance, and Revocation of Acceptance

Amended Article 2A continues the rules on rejection, acceptance, and revocation of acceptance of the goods with a few changes. First, the lessee’s right of rejection is explicitly subject to the ability of the parties to modify that remedy by agreement. Amended UCC 2A-509(1). Second, the lessee who has either rightfully or wrongfully but effectively rejected goods is subject to the obligations regarding care of the goods prescribed in amended UCC 2A-509(3), 2A-511, and 2A-512. However, a merchant lessee’s right to indemnity or a commission is limited to the case of a rightfully rejection. Third, the test for rejection in an installment contract is changed from a substantial impairment in value that cannot be cured to a substantial impairment in value to the lessee. Amended UCC 2A-510(1). Fourth, a lessee’s reasonable use of goods post after a rightful rejection or justified revocation of acceptance is not an acceptance of the goods, but the lessee may be obligated to pay the lessor for the value of the use to the lessee. Amended UCC 2A-517(6). Finally, the section provides that, subject to amended UCC 2A-517(6), unreasonable use of the goods inconsistent with the lessor’s or supplier’s rights in the goods is an acceptance of the goods. Amended UCC 2A-515(1)(c).

Cure, Amended UCC 2A-513

The cure section has been completely rewritten in accord with the complete revision of the cure section in Article 2, UCC 2-508. If the lessee rightfully rejects the goods in either a one-shot or installment lease or, in a non-consumer lease, justifiably revoked acceptance because the non-conformity was not discovered prior to acceptance and acceptance was induced by the lessor’s assurances or, in a non-finance lease, by the difficulty of discovery, the lessor or supplier has a right to cure the non-conformity if several conditions are met. First, the lessor or supplier must have performed in good faith. Second, the lessor or supplier must give reasonable notice of the intent to cure. Third, the cure must be at the lessor’ or supplier’s own expense. Fourth, the lessor or supplier must compensate the lessee for the lessee’s reasonable expenses caused by the breach and subsequent cure. If those conditions are met and if the time



for contract performance has expired, the cure by making a tender of conforming goods will be allowed if it is “appropriate or timely under the circumstances.” If those conditions are met and if the time for contract performance has not expired, the cure must be of a “conforming tender of delivery within the agreed time.”

Notice of Breach

If a lessee accepts goods, in order to have an action for breach of contract, the lessee must give timely notice of breach to the lessor or supplier.

(Continued on page 6)

Amended UCC 2A-516(3) provides that an untimely notice will bar the lessee's remedy only to the extent the lessor or supplier are prejudiced by the failure.

To reject goods or to revoke acceptance of the goods, a lessee must give timely notice of rejection or revocation of acceptance. Amended UCC 2A-509(2), 2A-517(4). Former UCC 2A-514 provided that in the case of a rejection, the lessee was precluded from relying on an unstated defect that was ascertainable by reasonable inspection to justify the rejection or to claim a default if the lessor or supplier could have cured the unstated defect or if between merchants, the lessor or supplier had in writing asked for a full statement of defects. Amended UCC 2A-514 continues that rule with the following changes. First, 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 lessor or supplier has a right to cure, not merely the ability to cure the defect. Third, the requirement that the lessor or supplier make the request in "writing" has been changed to allow a request in a "record." Finally, the failure to state a defect when required by this section will no longer bar the lessee from establishing default although the lessee may be barred from being able to assert a rightful rejection or justifiable revocation of acceptance.

Liquidated Damages,
Amended UCC 2A-504

Three changes are made to the liquidated damages provision. First, language is added to subsection (1) that the enforce-

ability of a clause limiting remedies is determined under UCC 2A-503. Second, the lessee's right to restitution of payments already made is expanded to include all circumstances in which the lessor stops performance due to the lessee's default or insolvency. Third, the statutory liquidated damages provision that required deduction of 20% of the rent due or in a consumer lease, the lesser of that amount or \$500, from the breaching lessee's remedy of restitution is deleted.

Statute of Limitations,
Amended UCC 2A-506

Unlike the extensive changes to the Article 2 statute of limitations in amended UCC 2-725, the Article 2A statute of limitations is changed in only one respect. The parties are precluded from reduction of the period of limitations in a consumer lease or an action for indemnity.

Specific Performance,
Amended UCC 2A-507A

The specific performance remedy has been moved from former UCC 2A-521 to amended UCC 2A-507A because the right to specific performance has been expanded to give both the lessor and the lessee the ability to request specific performance. In addition, in a non-consumer lease, the amended statute provides that courts may enforce the parties' agreement to specific performance unless the sole remaining obligation is to pay money.

Lessee's Remedies

The provisions on the lessee's remedies have three changes in addition to those described above concerning rejection, acceptance, and revocation of acceptance. First, a compre-

hensive index of the lessee's remedies is not provided in amended UCC 2A-508. Second, a lessee has an additional ground

for replevin if the goods have been shipped under reservation and satisfaction of the security interest has been made or tendered. Amended UCC 2A-507A. Third, amended UCC 2A-522 allows a consumer lessee to obtain identified goods for which the lessee has paid in whole or part upon keeping good a tender of unpaid rent and security under the lease regardless of whether the lessor is insolvent.

Lessor's Remedies

A comprehensive index of the lessor's remedies is provided in amended UCC 2A-523. The biggest change is to allow a lessor to obtain consequential damages in addition to direct damages and incidental damages for a lessee's default in a non-consumer lease. Amended UCC 2A-530. Section 2A-526 is amended to delete the requirement that the goods be a "carload, truckload, planeload, or larger shipments of express or freight" in order for the seller to stop delivery based upon the lessee's breach. Section 2A-528 is amended to delete the language in the lessor's lost profit measure of "due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition."



* See the description of the amendments to Article 2 in the December 2003 Commercial Law Newsletter.



2005 Midwinter Meeting Council Report: Committee on Uniform Commercial Code

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Report prepared by: Stephanie A Heller

Mission Statement

The UCC Committee focuses on commercial transactions and practices covered directly by the UCC (e.g., sales and leases of goods, payments, letters of credit, documents of title, investment securities, and secured transactions) as well as those covered tangentially (e.g., software contracting, suretyship, international commercial transactions, and electronic money). In doing so, the Committee monitors commercial law developments affecting such transactions, pays close attention to how other law interacts with the UCC, generates commentary and model agreements in those areas, and actively participates in statutory reform efforts.

Chair

Stephanie A Heller

Federal Reserve Bank of New York (Legal)
33 Liberty St
New York, NY
10045-0001
Phone: (212) 720-8198
Fax: (212) 720-1530
Email: stephanie.heller@ny.frb.org

Vice-Chair

Christina L Kunz

William Mitchell College of Law
875 Summit Ave
Saint Paul, MN
55105-3076
Phone: (651) 290-6340
Fax: (651) 290-6404
Email: ckunz@wmitchell.edu

Vice-Chair

Stephen L Sepinuck

Gonzaga Univ Sch Of Law
PO Box 3528
Spokane, WA
99220-3528
Phone: (509) 323-6379
Fax: (509) 323-5840
Email: ssepinuck@lawschool.gonzaga.edu

1. Membership

Uniform Commercial Code	1554 Members
Subcommittees	
Annual Survey	22 Members
Article 7	13 Members
Commercial Law Newsletter	37 Members
General Provisions and Relation to Other Law	70 Members
International Commercial Law	70 Members
Internet Coordinator	3 Members

Investment Securities	99 Members
Leasing	104 Members
Letters of Credit	141 Members
Meetings and Programs	14 Members
Membership	12 Members
Payments	138 Members
Publications	6 Members
Sale of Goods	162 Members
Secured Transactions	421 Members
UCC Litigation	124 Members
Task Forces	
Consumer Involvement	11 Members
Deposit Account Control Agreements - Joint Task Force of the Committees on Consumer Financial Services, Commercial Financial Services and Banking Law	86 Members
Article 9 Forms	91 Members
State Certificate of Title Laws	33 Members
Working Groups	
Electronic Contracting Issues - Joint Working Group with the Committee on Cyberspace Law	189 Members
Simplification	15 Members
Transferability of Electronic Financial Assets - Joint Working Group with the Committee on Cyberspace Law	108 Members

Provide specific examples of any membership outreach, recruitment, and retention efforts your Committee has implemented or has planned for the 2004-2005 fiscal year.

The UCC Committee has appointed a new membership chair. Terri Ann Motosue has agreed to take over our membership efforts beginning this Spring Meeting. We are very excited to have Terri join us and bring to the position a fresh set of eyes. Terri is reviewing our current membership efforts as well as those of other large committees and will be making recommendations to me regarding initiatives that she wishes to pursue. One likely area will be informal mentoring or at least a frequently asked questions list for new members.

The UCC Committee chair continues to welcome each new member with a letter. We have revised the letter as of July 2004 to include a copy of the UCC Committee brochure, a copy of the UCC meeting schedule for the upcoming meeting (or if that is not yet available, a copy of the prior meeting schedule as an example) The Committee brochure was developed in 2003 and updated for Spring Meeting 2004. We distribute the brochure at our meetings as well as the first-timers reception. The chair of the committee has asked each of its subcommittee, task force and working group chairs to send their own welcome letters.

The UCC Committee continues to be committed to meeting the needs expressed by its membership in recent membership surveys. As previously noted, in response to a desire from the membership to make the Annual and Spring Meetings as useful as possible, the UCC Committee no longer schedules a subcommittee, task force, or working group meeting unless the majority of the meeting involves substantive presentations or discussions. Moreover, these meetings must be planned significantly in advance of the actual meeting date so that a detailed description of the meeting can be sent out to the full membership ahead of time, allowing our membership to determine whether attendance at the meeting is a worthwhile use of their resources. My sense is that this approach was very well received at the Annual Meeting and we will continue doing this going forward.

The UCC Committee leadership is also actively looking for ways to involve our membership between meetings given that the majority of our membership does not attend meetings but wants to be involved. Since Annual Meeting, working with Section staff, we have established a list serve for each of our subcommittees, task forces, and working groups. These list serves are being used by our leadership to circulate drafts of work products that are being developed by the Committee and, where appropriate, to engage in substantive discussions of issues of interest to the group. So, for example, the Consumer Involvement Task Force recently circulated to its list serve a draft of a web resource guide for consumer lawyers and solo practitioners who find themselves handling UCC cases on an infrequent basis. The Payments Subcommittee posted a UCC payments question submitted by a new member.

The Task Force on Deposit Account Control Agreements has been the most successful at involving membership in the work of the group between meetings, through conference calls, list serve distributions, and face-to-face meetings (where members unable to attend can dial in). I truly believe that these efforts to involve membership in the work of the Committee outside of the Annual and Spring meetings are critical to the continued success of the UCC Committee.

2. Diversity

Race:

Asian/Pacific Islander	1.17%
Black/African American	0.82%
Hispanic	0.69%
Native American	0.00%
White/Caucasian	51.99%
Other	0.41%
Unknown	44.92%

Gender:

Male	72.32%
Female	19.02%
Unknown	8.65%

2a. Describe your efforts to involve minorities, young lawyers, women, and lawyers with disabilities in its activities. What steps do you undertake to facilitate their participation, i.e., what opportunities have you provided? Do you assign a mentor? Also, describe your committee's efforts to involve these minority groups at the committee leadership level.

Diversity in Leadership: The chair and vice chairs of the UCC Committee encourage anyone to volunteer for open leadership positions (we announce any openings at Spring and Annual), encourage current leadership to consider diversity when proposing candidates, and always consider diversity before approving leadership appointments. Approximately half of our leadership are women. Since Annual Meeting we have filled six out of six open positions with women (in two instances these positions reflected movements from vice chair positions to chair positions)

Section Diversity Committee: The UCC Committee has a liaison to the Committee on Diversity. Each chair of a program is encouraged to reach out to our liaison for help in finding qualified minority speakers. In addition, the liaison has been encouraged to make direct contact with the program chairs to offer suggestions on panelists. We have been largely successful at ensuring that women are represented on our programs but still need to do more to make our panels truly diverse.

2b. If you have a Business Law Fellow or Ambassador assigned to your committee, in what projects have you involved him/her?

As I mentioned to Sue and Nhu after the Annual Meeting, the UCC Committee has not been successful in working with its Business Law Fellow. Judge Rymell was assigned Linda Rusch as her mentor. Besides being extremely easy to get along with, Linda is a very conscientious individual. As such, Linda reached out to Judge Rymell prior to Spring Meeting 2004 (the first Business Law Section meeting for Judge Rymell) and offered her insights and assistance both prior to and during the meeting. As chair of the UCC Committee I too called Judge Rymell to express my excitement about meeting and working with her. Unfortunately Judge Rymell was unable to attend Spring Meeting. Both Linda and I indicated our desire to work with her in connection with Annual Meeting. No further contact has been made. Apparently, Judge Rymell attended the Annual Meeting but she did not introduce herself to the UCC leadership. Immediately following Annual Meeting I voiced my concerns to the Section about how this particular relationship was progressing. I was told that Nhu would talk with both Linda and Judge Rymell. My understanding is that Linda spoke with Nhu but I am not aware of what if anything has come of this.

3. Programs and Meetings

Programs: ABA Annual Meeting

- Liquidity Assurances in Troubled Times: How Major Institutions Make Sure Prompt Payment is Made When Due; Attendance 31
- Who Put the Good in Good Faith?; Attendance 19

Committee Forums: ABA Annual Meeting

- (Co-Sponsored) Choice of Law/Forum in International Transactions: Whose Law Is It (Anyway)?; Attendance 62

I was extremely disappointed with program turn out at the Annual Meeting and believe that it is directly attributable to two factors. The first factor is that the topics the UCC Committee presented – letter of credit issues and good faith – is of interest to specific segments of the Business Law Section which are smaller in size. While we tried to fashion the L/C program to be of interest to any lawyer doing a deal, it drew only the typical L/C crowd. Similarly, a tremendous amount of thought went into the good faith program (not to mention its prominent panel) but unfortunately that was not enough to draw a crowd. I think the failure of the good faith program is tied to the ticket structure at the Annual Meeting. The UCC Committee has many academics who are members that show up at the Annual Meeting who are clearly interested in this type of programming. These participants, however, do not need CLE credits and are on extremely tight budgets. As a result, they do not go to the programs regardless of the merits of the program.

While I obviously do not control all of the factors that caused the poor turnout to the UCC Committee programs, I do control the program content. Last year, my primary criterion when selecting programs was whether the topic was one that had previously been overlooked. In my experience, the UCC Committee has traditionally been heavy on Article 9 programming and programming related to the NCCUSL drafting projects. I had hoped to give other areas of the UCC some of the spotlight. Going forward, I plan on combining my own desire to cover topics outside of secured transactions with the realities of the Annual Meeting format. So, for example, the UCC Committee will present more Article 9 practitioner driven programming at the Annual Meeting (using the Committee Forum for perhaps a more academic program if the format reverts to one where Committee Forums do not require tickets). At the Spring Meeting, where programs are open to all participants, we will offer a Committee Forum on the impact of Arbitration on UCC Article 2 and two programs – one on Check 21 and counseling your corporate, consumer and bank clients (lots of co-sponsorship) and one on indemnification clauses in various contexts. We will also participate in the New Lawyer Institute for a second year.

We will also hold our first ever “Stump the Chumps” event at the full meeting of the UCC Committee at the Spring Meeting in Nashville. As the title suggests, a panel of brave but perhaps somewhat foolhardy UCC experts will attempt to answer questions posed by the audience. People are encouraged to submit questions in advance, but questions may also be presented from the floor during the meeting. You will have to show up to learn the identity of our panel and to see who among us will “stump the chumps”!

As discussed in response to question 1 on membership, the UCC Committee is committed to providing substantive programming at its subcommittee meetings. At the 2004 Annual Meeting we held several mini programs including:

- Recent Developments in Efforts to Make UCC Article 8 “Go Global”
- Drafting Contracts for Mixed Transactions (Goods, Services and Information): How Best to Serve Your Client and Stay Out of Court
- True Lease vs. Security Interest – A Distinction With a Real Difference to You and Your Clients
- Delaware LLCs: Doing it Serially
- OBS: True Sale, Setoff and Legal Isolation
- When the UCC and Federal Law Collide – OCC Preemption and Check 21
- Playing 'Gotcha' with UCC 3, 4 and 4A
- True Lease” Definitions and Policy: Treasury's New Anti-Leasing Proposals.

Since the Annual Meeting our joint Task Force on deposit account control agreements has held a face-to-face meeting in New York City and intends to hold a second such meeting in February 2005.

4. Books and Newsletters

Newsletters

- March 2004; August 2004

The UCC Committee produced two issues of the Commercial Law Newsletter and is on the brink of publishing another issue. In an effort to increase membership involvement the chair of the UCC Committee has begun to solicit articles for the Commercial Law Newsletter from the entire membership.

The UCC Committee also published its annual UCC survey for The Business Lawyer.

Several other publications have been accepted by the editorial board and are in the publication pipeline:

ABCs of the UCC: Article 7, 2d edition (Linda Rusch)
ABCs of the UCC: Article 2A, 2d edition (Boss & Whelan)
ABCs of the UCC: Articles 3 & 4, 2d edition (Veltri)
ABCs of the UCC: Article 4A, 2d edition (Heller & Turner)

The Committee is also working on other materials that may be candidates for publication:

An update of the Model Trading Partner Agreement
Forms Under Revised Article 9 (2d edition)
Model Jury Instructions under Articles 3 and 4 of the UCC
A third article of the joint working group on electronic contracting practices
The Model Deposit Account Control Agreement (may be stand alone or may be part of the forms book)

5. Special Projects

If your Committee or task force is working on a project that has significance beyond the members of the of the Committee, please describe it here. The Strategic Communications Committee will be selecting several Section projects to promote with special communication plans in the coming year.

The UCC Committee established a joint task force on deposit account control agreements. The task force is joint with the Banking Law Committee, the Commercial Financial Services Committee and the Consumer Financial Services Committee. The first meeting of the joint task force was held at the Spring Meeting 2004. Following that meeting, the task force created several subgroups in order to advance the project between meetings. The work product of these subgroups – draft language for various provisions of the agreement – was vetted at the Annual Meeting. Subsequent to the Annual Meeting the chairs of this Task Force produced a first full draft of the Model Agreement and held a face-to-face meeting in New York to discuss the draft. A second meeting is tentatively scheduled for February with a goal of having a near final draft by Annual Meeting. Interest in the task force is incredibly strong with 86 members having joined since it was established less than one year ago. If successful, the work of the task force will have far reaching impact.

The Committee has been considering whether to establish a task force to explore the need for a uniform law of bank deposits. The chair anticipates establishing this task force following Annual Meeting 2005. We are waiting until then because the parties who are likely to be interested in this project are the same parties who are likely working on the deposit control agreement. The chair will ask the Banking Law Committee, CFS and Consumer Financial Services to participate and make this a joint task force.

The Subcommittee on Litigation and the Subcommittee on Payments has been working on model jury instructions for disputes under UCC Articles 3 and 4. Thus far the project has crept along but we recently added a new co-chair whose sole focus is the advancement of this project. With the resources that she brings to this project, we are optimistic that we will have a good first draft of many if not all of the contemplated jury instructions for review at the Spring Meeting. If successful, this project could pave the way for a line of UCC publications.

6. Accomplishments/Objectives

Describe any significant accomplishments of the Committee for this year and those objectives it plans to accomplish during the 2004-2005 fiscal year. It is important that you identify any projects (ongoing or completed) with the Committee has undertaken and about which the Council and officers should be aware.

Accomplishments:

Historically, the UCC Committee has not used this section to describe its accomplishments and I do not intend to deviate from that practice to any large extent. However, I do feel that it is worth noting that the UCC Committee membership has grown over the last year. I view this as a significant accomplishment because it is an early indication that the UCC Committee is achieving its most important goal of remaining a vibrant and vital Committee despite the end of the UCC drafting process.

Objectives:

The UCC Committee has two primary objectives: (i) to bring its membership up-to-date information and discussion of matters directly and indirectly concerning the UCC; and (ii) to preserve and improve commercial law as embodied or as might be embodied in, or as might impact upon, the UCC. The UCC Committee has attempted to meet these objectives over the past year in the following ways:

(a) Education. The Committee accomplishes this objective through its meeting and the meetings of its subcommittees and task forces; its studies and projects which may produce written reports and model agreements; publications; programs at the Section and Annual meetings, as well as mini-programs at the meeting of its subcommittees; the Committee's publication, The Commercial Law Newsletter, cosponsored with the Commercial Financial Services Committee; and an extensive annual survey published each year in the August issue of The Business Lawyer which covers the substantive law developments under and concerning the UCC.

(b) Law Reform. The Committee accomplishes its objective to preserve and improve upon commercial law both domestically and abroad through on-going monitoring of commercial developments, and production of written reports and studies documenting need (or lack of need) for law reform; participation in or monitoring of ongoing law reform efforts by subcommittees or task forces; individual participation in drafting committees established by the National Conference of Commissioners on Uniform State Laws or the American Law Institute; conduct of research or preparation of reports to assist other groups such as the Permanent Editorial Board in its various functions; and assistance in monitoring the enactments of completed revisions. The Committee actively works to export the UCC abroad by producing educational materials that explain our laws as well as by contributing to the development of US positions for international commercial law projects sponsored by UNCITRAL, Unidroit or the Hague.

Technology Objectives:

A major focus for the Committee leadership in 2005 will be on better use of our web sites and list serves. To this end, after Spring Meeting I asked Jim Frey and his folks to create a list serve for each of our subcommittees, working groups and task forces that did not already have one. Now that these list serves are in place, we will be looking for opportunities to deliver content and advance projects using the list serves. The UCC Committee is also committed to providing more substantive web content to our membership. The Task Force on Consumer involvement is developing a UCC research guide for consumer lawyers and solo practitioners who find themselves handling UCC cases on an infrequent basis. The Task Force expects to unveil the web page in time for the Spring Meeting. The Litigation Subcommittee, working with the section, is developing a UCC brief bank which will be accessible from the UCC Committee web page. The trick over the next year or so will be to place high quality content on our pages in a manner that makes the information easy for our membership to locate and for our leadership to maintain. I am exciting at the prospect of working with Jim Frey and his folks and know with their assistance (along with Linda Rusch) we will create something that far exceeds our modest goals.

7. Long Term Planning and Goals

Describe any significant long term (i.e., beyond the 2004-2005 fiscal year) projects or goals of the Committee. It is important that you identify any projects which the Council and officers should be aware.

Of course the UCC Committee will continue to work toward the objectives described above. However, as I have previously written in my Committee Reports, if the Committee is to remain significant, we must over the next several years shift our focus away from drafting projects and enactment and toward current issues of concern to practitioners (model agreements, jury instructions, brief banks, practitioner guides). We must lessen our dependency on NCCUSL and the UCC generally and energetically embrace our mission to look beyond: to consider the fluid boundaries of the Code and the interplay between the UCC and other areas of commercial practice. We must do this carefully so as not to upset our core constituency. Finding the right balance will be a

challenge and will take time, but I believe that the current leadership is well suited to take on this challenge.

On a much more mundane level, for the first time in many years (perhaps ever), the UCC Committee has an organization chart. The process of creating the chart enabled the Chair and Vice Chair of the Committee to carefully consider the number and nature of our subcommittee, task force and working group structure. We streamlined the structure somewhat and will continue to look for opportunities to sunset subcommittees (or other groups) and to establish new groups to address emerging needs.

One last item that I wish to mention in my report is my own frustration concerning an initiative that I started at the 2003 Annual Meeting. I had attempted to resurrect the Homer Kripke Achievement Award – a UCC Committee award that was established in the mid 1990s and subsequently appears to have been taken over by the American College of Commercial Finance Lawyers. After inquiring with the Section leadership and members of the council, the UCC Committee was instructed to write a proposal to be considered by the council. We submitted such a proposal over a year ago and were told that the council/Section felt it time to institute some guidelines on awards and was deferring any action on our request until the award issue could be considered by the council. The UCC Committee, now a year and a half later, is still sending e-mails inquiring as to whether we can establish an award program that in essence was already blessed in the early 1990s. While I understand the need for guidelines, I respectfully request that the council agree on such guidelines in the near term or allow the UCC Committee to proceed with its award.

8. **Pro Bono**

Describe the Committee's pro bono activities, if any, since your last report or planned during 2004-2005.

Since its inception, the activities of the Committee have supported the twin goals of the Outreach Committee: to provide assistance to the public and to promote positive public perception of business lawyers. Committee members donate thousands of hours of time every year to reviewing and commenting on proposals to revise the UCC and UCC related legislation both domestically and abroad. This effort requires not only legal analysis and research, but also time with the business people, consumers and others affected by the changes to understand their needs and limitations. In the case of the UCC and other uniform laws, once the Official Text is revised, a similar effort is required to obtain passage of uniform legislation in all fifty states.

In addition, the Committee has for many years had a Task Force on Consumer Involvement. Traditionally, the Task Force was a place where consumer representatives could gather to discuss UCC related issues of concern to them. The meetings also served as an opportunity to exchange information about events being held at the Annual or Spring Meeting that would be of particular interest to consumer advocates and to ensure that there was appropriate consumer representation at those meetings. About a year ago, the Task Force broadened its scope and began considering various projects that it could sponsor that would aid consumer advocates with respect to UCC issues. The practitioner guides discussed above in question 6 is an example of the type of work that the Task Force is and will continue to develop.

The Section has appointed three Consumer Fellows whom the Section supports in attending the Spring and Annual Meetings: David MacMahon and Yvonne Rosmarin. The third Consumer Fellow, Mike Ferry, recently accepted the position of co-chair of the Task Force so one Consumer Fellow slot is currently vacant. We would like to fill this slot with a state AG representative and are pursuing this for Spring Meeting 2005. The UCC Committee has actively involved the consumer representatives in the various legislative efforts to help provide other perspectives on issues of commercial law that affect those who are in need of pro bono services.

Prior to the 2004 Spring Meeting, we welcomed a new member to our leadership, Gail Hilibrand. Gail is a well known consumer advocate who works for Consumers Union and has for many years been a strong presence at the UCC drafting table. Gail joined the UCC Committee as a co-chair of our new General Provisions and Relations to Other Laws. The addition of Gail to our leadership was a conscious choice on my part to bring the consumer perspective to our leadership and our programming. In this regard, at the Spring Meeting in Seattle, the Committee put on a program aimed at educating lawyers and law firms on issues of consumer protection in commercial transactions. The program was a success with over 70 people in attendance (and the majority staying for its entirety). We will continue to do this type of programming.

Jill Gelineau is the Committee's liaison to the Section Pro Bono Committee.

9. Legislative Developments (Optional)

Describe any significant federal or state legislation adopted since your last report or that you anticipate may be adopted during the 2004-2005 fiscal year affecting the substantive law interests of your Committee and indicate any steps your Committee has taken or plans to take (e.g., CLE programs, study, recommendation as to ABA position) with respect to such legislation.

The legislative developments in which the Committee is involved are of two types: (a) revision of current uniform statutes or drafting of new commercial statutes; and (b) enactment of officially promulgated revisions to the Uniform Commercial Code.

(a) Drafting Projects.

Below I list only those UCC revision projects that were on-going in 2004. I also include other drafting projects in which the Committee is currently involved.

(i) Certificate of Title Laws. NCCUSL has appointed a drafting committee for this project. Alvin Harrell, chair of the Committee's Task Force on Certificate of Title Laws, is the reporter. Earl F. Leites is the ABA Advisor to the project. The Committee's Task Force on Certificate of Title Laws continues to provide significant input to this drafting project. In addition, after the 2004 Spring Meeting, the reporter to the Drafting Committee agreed to work with the Committee's Working Group on Simplification as the drafting continues.

(ii) UNIDROIT -- The Subcommittee on International Commercial Law is actively involved in providing input to the US delegation to the UNIDROIT project to harmonize substantive international law for securities holdings.

(iii) UNCITRAL -- Ben Beard, co-chair of the Subcommittee on General Provisions and Relations to other Laws, is serving as an ABA observer to the UNCITRAL Working Group on E-Commerce, which is currently considering, among other things, changes to the Convention on International Sales of Goods.

(b) Legislative Enactments

The following information was obtained from NCCUSL. References to "plans for introduction in 2005" refer to NCCUSL's plans, which are still tentative.

UPDATE ON UCC ARTICLE 1 (2001):

UCC Article 1 (2001) has been adopted in eight states: Alabama, Delaware, Hawaii, Idaho, Minnesota, Texas, Virginia and the U.S. Virgin Islands.

Plans for introduction in 2005: Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, West Virginia, Wisconsin.

UPDATE ON UCC ARTICLE 2 (2003):

UCC Article 2 (2003) has not been adopted in any state.

Plans for Introduction in 2005: Kansas, Minnesota, Nevada.

UPDATE ON UCC ARTICLE 2A (1987)(1990):

UCC Article 2A (1987)(1990) has been adopted in 51 jurisdictions. It has not been adopted in: Louisiana; Puerto Rico.

UPDATE ON UCC ARTICLE 2A (2003):

UCC Article 2A (2003) has not been adopted in any state.

Plans for introduction in 2005: Kansas, Minnesota, Nevada.

UPDATE ON UCC ARTICLES 3 AND 4 (1990):

UCC Articles 3 and 4 (1990) have been adopted in 51 jurisdictions. They have not been adopted in: New York; South Carolina.

Plans for introduction in 2005: New York.

UPDATE ON UCC ARTICLES 3 AND 4 (2002):

UCC Articles 3 and 4 (2002) have been adopted in Minnesota.

Plans for introduction in 2005: Arkansas, Massachusetts, Nevada, Oklahoma

UPDATE ON UCC ARTICLE 4A (1989):

UCC Article 4A (1989) has been adopted in all 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands.

UPDATE ON UCC ARTICLE 5 (1995):

UCC Article 5 (1995) has been adopted in 51 jurisdictions. It has not been adopted in: Puerto Rico; Wisconsin.

Plans for introduction in 2005: Wisconsin.

UPDATE ON UCC ARTICLE 6 (1989):

UCC Article 6 (1989) has been revised in four states: California; District of Columbia; Indiana; Virginia. UCC6 has been repealed in 45 states. It has not been repealed or revised in: Georgia; Maryland; Wisconsin.

Plans for introduction in 2005: Georgia.

UPDATE ON UCC ARTICLE 7 (2003):

UCC Article 7 (2003) has been adopted in eight states: Alabama; Connecticut; Delaware; Hawaii; Idaho; Maryland; Minnesota; Virginia.

Plans for introduction in 2005: Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, Texas, Utah, West Virginia, Wisconsin.

UPDATE ON UCC ARTICLE 8 (1994):

UCC Article 8 (1994) has been adopted in all 50 states plus the District of Columbia, Puerto Rico and the US Virgin Islands.

UPDATE ON UCC ARTICLE 9 (1999):

Revised UCC Article 9 (1999) has been adopted in all 50 states, the District of Columbia and the U.S. Virgin Islands. It has not been adopted in Puerto Rico.

International Conventions:

The receivables convention was signed but not ratified at the very end of 2003 year. The Cape Town Convention (security interests in high ticket mobile goods, such as air planes) was ratified this year.

10. Judicial and Administrative Developments (Optional)

Describe any significant judicial and administrative developments since your last report affect the substantive interests of your Committee.

(a) Judicial. Each year the UCC Committee prepares and publishes an annual survey focusing upon judicial and other developments under or relating to the UCC in the August issue of *The Business Lawyer*.

(b) Administrative.

In July, the Board of Governors of the Federal Reserve System issued final regulations implementing the Check Clearing in the 21st Century Act ("C21") generally and in October issued final regulations implementing C21 with respect to the Federal Reserve Banks' check collection operations. These regulations preempt Articles 3 and 4 of the UCC to the extent of any inconsistency.

The Office of the Comptroller of the Currency issued a pre-emption opinion that arguably provided for the UCC to be pre-empted with respect to the acts of national banks. Working with NCCUSL, the ALI and the PEB, a clarification of the OCC opinion was obtained which indicates that this is not the intent. The OCC clarification has been posted on the UCC website.

11. Section Staff and Leadership Support

How can the Section Officers and Section staff assist you in your role as committee chairs? What questions do you have for us?