

Oklahoma City University School of Law

From the Selected Works of Alvin C. Harrell

Spring 2009

The Work of the Oklahoma Bar Uniform Laws Committee: Oklahoma Enacts UCC Article 3 and 4 and 4A Amendments

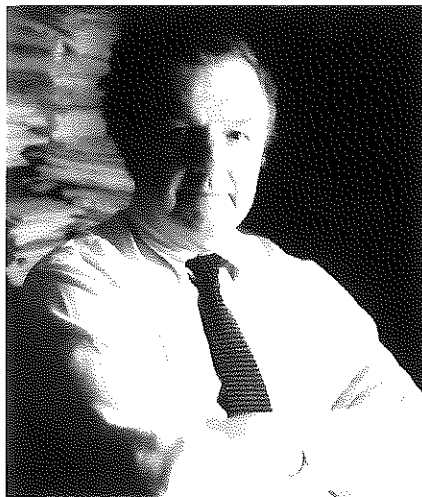
Alvin C. Harrell, *Oklahoma City University School of Law*
Frederick H. Miller



Available at: https://works.bepress.com/alvin_harrell/108/

The Work of the Oklahoma Bar Uniform Laws Committee: Oklahoma Enacts UCC Article 3 and 4 and 4A Amendments

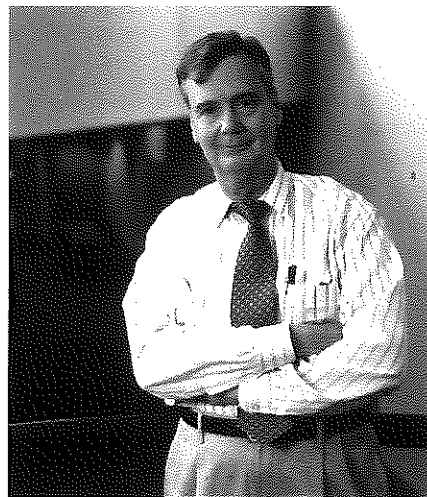
By Fred H. Miller and Alvin C. Harrell



Fred H. Miller is of Counsel with Phillips Murrah PC in Oklahoma City, and a retired Professor of Law, former Kenneth McAfee Chair in Law and Centennial Professor, and also the George Lynn Cross Research Professor Emeritus at the University of Oklahoma College of Law. He is a member of the American Law Institute and serves on the Permanent Editorial Board for the Uniform Commercial Code. Professor Miller is a Commissioner from Oklahoma to the National Conference of Commissioners on Uniform State Laws (NCCUSL), and formerly was its Executive Director, chair of NCCUSL's Executive Committee and President. Professor Miller was involved with each drafting committee or study committee for the recent revisions to the Uniform Commercial Code as well as UCOTA. He also was Co-Reporter Draftsman for the 1974 Uniform Consumer Credit Code.

Professor Miller has coauthored recent *Introductions to the Annual Survey of Consumer Financial Services Law* for *The Business Lawyer*. He is the former Chair of the American Bar Association Uniform Commercial Code Committee, and was a member of the Council of the ABA Business Law Section. He has taught at the University of Iowa, Oklahoma City University, University of Alabama and William Mitchell Schools of Law (at Alabama as Visiting Charles Tweedy Professor of Law and at William Mitchell as Visiting Distinguished Professor of Law), and served as Associate Dean of the University of Oklahoma College of Law.

Professor Miller is a member of the Governing Committee of the Conference on Consumer Finance Law.



Alvin C. Harrell is a Professor of Law at Oklahoma City University School of Law, and President of Home Savings and Loan Association of Oklahoma City. He is coauthor of a dozen books, including *THE LAW OF MODERN PAYMENT SYSTEMS AND NOTES* (with Professor Fred H. Miller). Professor Harrell is Editor of the *Annual Survey of Consumer Financial Services Law* in *The Business Lawyer*. He chaired an American Bar Association UCC Committee Task Force on State Certificate of Title Laws, and was Reporter for the NCCUSL Uniform Certificate of Title Act (UCOTA) Drafting Committee. He is Executive Director of the Conference on Consumer Finance Law and a member of its Governing Committee, a member of the American Law Institute (ALI), a member of the American College of Commercial Finance Lawyers and the American College of Consumer Financial Services Lawyers, and served as Chair of the Financial Institutions and Commercial Law Section of the Oklahoma Bar Association. He chairs the UCC Legislative Review Subcommittee of the Oklahoma Bar Association. At the April 2008 meeting of the American College of Commercial Finance Lawyers, Professor Harrell was elected to the Board of Regents for the 2008–2009 term.

I. Activities of the Oklahoma Bar Association Uniform Laws Committee in 2008–2009

Each year the Oklahoma Bar Association (OBA) Uniform Laws Committee (the Committee) reports on legislative activity with regard to enactment of uniform laws. The purpose of the Committee is to work with the Oklahoma Commissioners to the Uniform Laws Conference (ULC)¹ (who traditionally have been appointed to the Committee by the OBA President) to determine, often in cooperation with other Sections and Committees of the Oklahoma Bar Association, which statutes prepared by the ULC are suitable for enactment in Oklahoma, to work with members of the Oklahoma Legislature in an effort to have such statutes introduced and passed and, after a statute is passed and signed by the Governor, to prepare Oklahoma Comments explaining what the statute does and its impact on or relation to other Oklahoma statutes and case law.² These Comments are published in the Oklahoma Statutes Annotated under an arrangement with the publisher of those statutes, for compensation paid to the OBA, and provide guidance to Oklahoma attorneys about the uniform law and its impact on other, existing law.

The Committee customarily meets at least two times each year, once in the early fall to determine which statutes will

1. Also known as the National Conference of Commissioners on Uniform State Laws, or NCCUSL.

2. This is an important function, e.g., in terms of integrating new or updated uniform laws with other, existing state law. For examples, see *infra* Part III. See also Fred H. Miller & Robert T. Luttrell, *Local Comments to Uniform Laws: A Winning Combination*, 48 Consumer Fin. L.Q. Rep. 60 (1994).

be recommended and whether any adjustments in the ULC uniform text should be recommended to better coordinate with existing Oklahoma law and policy, and once in the late spring at the end of the legislative session to coordinate the development of Oklahoma Comments for newly-enacted uniform laws. This process encourages the enactment of modern and well-written statutes that facilitate the preservation of state law and the viability of our federalist system of national and state law. In addition, the work of the Committee in studying and working to implement suitable statutes contributes to improvements in Oklahoma law for the benefit of the state's citizens and its economy. In the last legislative session (2009), the Oklahoma Legislature enacted and the Governor signed six uniform laws that both update and otherwise improve existing Oklahoma law or create new law for issues where previously there was not adequate legal guidance.³ The 2009 Oklahoma enactments included important amendments to the Uniform Commercial Code (UCC), as described below.⁴

II. The 2009 Oklahoma UCC Amendments

A. Introduction

Senate Bill 991, passed in the 1st Session of the 52nd Oklahoma Legislature in 2009 (the bill), might aptly be called a UCC cleanup bill. In the main it enacted most, but not all, of the 2002 amendments to the uniform

text of UCC Articles 3, 4 and 4A, but it also included other provisions, e.g., minor amendments to UCC Articles 1 and 7.⁵ A brief summary follows.

B. Article 1

The bill amended UCC Article 1 section 1-303(f) (course of performance as a waiver or modification of contract terms) to add a reference to section 2A-208 which was inadvertently omitted when revised section 1-303 was enacted.

C. Article 3

The bill added definitions that are used in relation to the later suretyship provisions of Article 3. The bill amended the suretyship (accommodation party) provisions of UCC Article 3 (principally section 3-605) to coordinate with the rules of the *Restatement of the Law Third, Suretyship and Guaranty*. The changes are principally in section 3-605, but section 3-419 was also amended by Section 9 of the bill as part of that process.⁶

The bill also deleted the Article 3 definition of "good faith," which now is in UCC Article 1 at section 1-203(b)(20), and made several cross-reference updates.

The bill amended UCC section 3-106 to change the requirements for a "writing" to require only a "record," thereby accommodating electronic records. This change also was made in certain other provisions of UCC Articles 3 and 4 and 4A. It does not change the Article 3 section 3-104 requirement that a negotiable instrument be in writing.⁷

The bill deleted subsection (c) of UCC section 3-116 (Joint and Several Liability; Contribution), as regards material covered elsewhere. This is explained in Official Comment 1 to section

3-116 as amended, and also in the Oklahoma Comment to Section 3 of the bill.

The bill amended UCC section 3-305 (Defenses and Claims in Recoupment) to make clear that the section is subject to a contradictory consumer protection rule limiting holder in due course rights, and amended section 3-309 (Enforcement of Lost, Destroyed, or Stolen Instrument) to make clear that the result in *Dennis Joslin Co. v. Robinson Broadcasting Corp.*⁸ is disapproved.

Negotiable instruments law requires payment to the holder of the instrument in order to obtain discharge of the obligation. That rule is at variance with contract law and UCC Article 9⁹ and has been criticized in transactions where the note is not produced and marked when a payment is made.¹⁰ Section 10 of the bill amended Oklahoma UCC section 3-602 to address this criticism for promissory notes, by allowing discharge by payment to the original party entitled to enforce the note until notice of a transfer. What constitutes notice for purposes of section 3-602 also is clarified. What constitutes "signing" for the purpose of a renunciation of rights under UCC section 3-604 is similarly clarified, at revised section 3-604(c), in Section 11 of the bill.

D. Article 4

The bill amended Oklahoma UCC section 4-102 (Applicability) to reinsert a part of the uniform text omitted some time ago, dealing with choice of law. The bill also amended a definitional provision of UCC section 4-104 to update cross-references, and made an amendment to UCC section 4-105 (Definitions of Types of Banks).

The bill amended UCC section 4-301, to permit return of the image of an item

pursuant to agreement or sending a record as a means to provide notice of dishonor.¹¹

E. Other UCC Articles

The bill amended UCC Article 4A section 4A-505 (Preclusion of Objection to Debit of Customer's Account) to clarify that its time period may, within limits, be varied by agreement.

The bill amended UCC Article 7 section 7-209 to cure an omission that occurred when revised Article 7 (Documents of Title) was enacted by the Oklahoma Legislature.

F. Agricultural Liens

The bill also amended 42 Okla. Stat. section 47, to delete a previous notice requirement and to substitute notice by filing as the means of perfection for an agricultural lien pursuant to UCC Article 9. The amendment states that the lien created by the section is not effective unless so filed; this should be interpreted, consistent with the rules of Article 9 as to perfection of liens, to mean effective against third parties (*i.e.*, perfection).

III. Variations from the Uniform Text

As noted above at Part II.A., the bill did not enact all of the uniform text of the 2002 amendments to UCC Articles 3, 4 and 4A. The uniform text addresses so-called "remotely created consumer items," e.g., check-like drafts created by the payee, which have been a source of fraud in some circumstances. The bill did not include these provisions, as federal law was changed to also address this matter,¹² and while the provisions in federal law and the uniform text of the UCC are much alike they are not identi-

cal and so a problem of preemption could be engendered by state enactment.¹³

Another provision not adopted would have incorporated the so-called "holder in due course" rule of the Federal Trade Commission (the FTC rule) as a matter of state law. Oklahoma law in the Oklahoma Uniform Consumer Credit Code (U3C) already addresses this issue,¹⁴ and several cases decided in other jurisdictions which Oklahoma courts could follow reach a result like the FTC rule by common law.¹⁵ In addition, there is little or no evidence that the FTC rule is not working. Accordingly, given the strong enforcement of current Oklahoma law by the Department of Consumer Credit, this provision is unnecessary and would be redundant, especially given the amendment to UCC section 3-305 on contradictory consumer protection rules, noted above at Part II.C.

As a final matter, an unfortunately worded Oklahoma Supreme Court opinion seemed to suggest that the duty of good faith and fair dealing under the UCC, rather than being a measure of how an agreement or a duty should be performed, instead created an independent cause of action.¹⁶ This is out-of-step with other case law as well as a Commentary issued by the Permanent Editorial Board for the UCC,¹⁷ and Section 21 of another bill (H.B. 1603) statutorily corrects the Court's decision on this point.

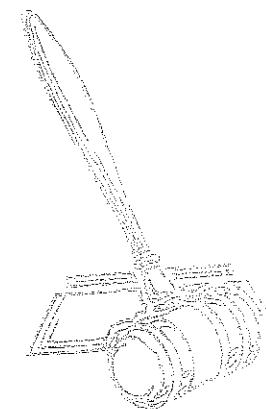
IV. UCC Comments

While not part of the statute, nor the law as opposed to guidance as to the meaning of the law, there are a

number of important changes in the Official Comments to the uniform text that accompany the enacted statutory provisions, and even some changes in the Official Comments to provisions that were unchanged by the bill. Those Comments should be consulted.¹⁸

V. Conclusion

Oklahoma is fortunate to have an active Bar Association Committee to deal with these issues, helping to bridge the gap between national developments and local needs and considerations. The result is exceptional clarity, modernization, and uniformity in Oklahoma law, helping to further the goals of the uniform law process¹⁹ and perhaps sparing Oklahoma from some of the economic and financial pain being experienced elsewhere.



3. Those not described here include: the Uniform Limited Cooperative Association Act; the Uniform Anatomical Gift Act (2006); the Emergency Volunteer Health Practitioner's Act; amendments to the Principal and Income Act (which guides the allocation of receipts by fiduciaries, as between principal and income); and the 2005 uniform text of the Uniform Foreign Country Money Judgments Recognition Act. Oklahoma Comments have been or are being prepared for publication in the Oklahoma Statutes Annotated with respect to all of these enactments, including the UCC Article 3, 4, and 4A Amendments as noted below.

4. See, as to the amendments to UCC Articles 3, 4 and 4A, FRED H. MILLER & ALVIN C. HARRELL, THE LAW OF MODERN PAYMENT SYSTEMS AND NOTES § 8.08 (2008 Supp.). At this writing, the following other states have enacted all or a part of the 2002 amendments to the uniform text of UCC Articles 3, 4, and 4A: Arkansas, Indiana, Kentucky, Minnesota, New Mexico, Nevada, South Carolina, and Texas. A number of introductions in other states are scheduled.

5. The Oklahoma UCC is codified at Title 12A of the Oklahoma Statutes.

6. See revised Tit. 12A Okla. Stat. §§ 3-419, 3-605 (2009).

7. Notably in this regard, the revision to § 3-106, indicated immediately above, in both the bill and the uniform text, expressly states that it does not apply to the requirements for a negotiable instrument at § 3-104. See § 3-106(a).

8. 977 F. Supp. 491 (D.D.C. 1997).

9. See UCC §§ 9-404(a), 9-406(a).

10. See, e.g., Alvin C. Harrell, *Impact of Revised UCC Article 9 on Sales and Security Interests Involving Promissory Notes and Payment Intangibles*, 55 Consumer Fin. L.Q. Rep. 144, 149-50 (2001).

11. See also Miller & Harrell, *supra* note 4; Official Comments to UCC §§ 4-214, 4-215, 4-301, and 4-302; Harrell, *infra* note 13.

12. See Miller & Harrell, *supra* note 4, at § 8.09.

13. On the relation of these and related UCC Article 4 concepts to federal law, see generally Alvin C. Harrell, *Price v. Neal Revisited: UCC and FRB Revisions Impact Bank Accounts and Transactions*, 60 Consumer Fin. L.Q. Rep. 309 (2006).

14. The Oklahoma U3C is codified at Title 14A of the Oklahoma Statutes.

15. See, e.g., *Associates Home Equity Services, Inc. v. Troup*, 778 A.2d 529 (N.J. Super. 2001).

16. *Beshara v. Southern Nat. Bank*, 928 P.2d 280 (Okla. 1996).

17. See, e.g., *Rodgers v. Tecumseh Bank*, 756 P.2d 1223 (Okla. 1988); Oklahoma Comments to Tit. 12A Okla. Stat. § 4-215; Carolyn S. Smith, *Allis-Chalmers v. Lueck: The United States Supreme Court Rejects Tort Liability for Breach of Good Faith*, 43 Consumer Fin. L.Q. Rep. 258 (1989); *PEB Commentary No. 10* Section 1-203 (February 10, 1994).

18. See, e.g., *Prime Financial Services LLC v. Vinton*, 2008 WL 2262185, 65 U.C.C. Rep. Serv. 2d 867 (Mich. Ct. App. 2008) (although the Official Comments do not have the force of law, they are useful aids to interpretation and it is appropriate for a court to consider them as they also promote uniformity).

19. See, e.g., UCC § 1-103(a).