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August, 2009

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Russell A. Hakes
Stephen L. Sepinuck
Robyn L Meadows



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The Uniform Commercial Code Survey: Introduction

By Russell A. Hakes, Stephen L. Sepinuck, and Robyn L. Meadows*

The most significant legislative development in commercial law during 2008 was the establishment by the Uniform Law Commission of the Joint Review Committee on U.C.C. Article 9 with a charge to propose “specific amendments or corrections” to Article 9.¹ The committee has a narrow focus, looking particularly at areas where non-uniformity has arisen, and expects to complete its task in 2009.

This year’s Survey adds a new survey on the international sale of goods focusing on the Convention on the International Sale of Goods (“CISG”).² Given the economic significance of contracts under the CISG and the number of nation signatories, this Survey should prove useful to the commercial lawyer.

The year 2008 will long be remembered for our financial crisis resulting from failures in the credit markets. As we discussed in the introduction to last year’s Survey, securitizations, which are facilitated by Article 9 of the Uniform Commercial Code (U.C.C.), played a central role in what happened,³ and resolving some of the issues arising out of securitizations will be important to resolving the credit crisis. Areas of commercial law other than Article 9 are also coming to the fore in the many commercial litigation cases that have arisen and will arise out of these problems in the credit market. For example, one of problems associated with securitizations is the disassociation of ownership and responsibility.⁴ One of the cases reviewed in this year’s Payments Survey involves a bankruptcy court grappling with an attempt to foreclose by the mortgage loan originator (now servicing the loan) that had transferred the loan to the Federal Home Loan Mortgage

* Russell A. Hakes is a Professor of Law at Widener University School of Law in Wilmington, Delaware. Stephen L. Sepinuck is a Professor of Law at Gonzaga University School of Law in Spokane, Washington, and Chair of the Uniform Commercial Code Committee of the American Bar Association. Robyn L. Meadows is Vice Dean and Professor of Law at Widener University School of Law in Harrisburg, Pennsylvania. Professors Hakes, Sepinuck, and Meadows are the editors of this year’s Uniform Commercial Code Survey.

1. Press Release, Uniform Law Commission, New Drafting and Study Committees to Be Appointed, (Jan. 22, 2008), <http://nccusl.org/Update/DesktopModules/NewsDisplay.aspx?ItemID=195>.

2. Gregory M. Duhl, *International Sale of Goods*, 64 Bus. Law. 1281 (2009).

3. See Stephen L. Sepinuck, Robyn L. Meadows & Russell A. Hakes, *The Uniform Commercial Code Survey: Introduction*, 63 Bus. Law. 1281, 1281 (2008).

4. See *id.* at 1282.

Section 10.21 limits the power of directors to adopt or amend supermajority provisions in bylaws. See section 10.21 and the Official Comment thereto.

Section 10.22 limits the power of directors to repeal a bylaw adopted by shareholders that opts in to the provisions of that section. See section 10.22 and the Official Comment thereto.

§ 10.20. AMENDMENT BY BOARD OF DIRECTORS OF SHAREHOLDERS

- (a) A corporation's shareholders may amend or repeal the corporation's bylaws.
- (b) A corporation's board of directors may amend or repeal the corporation's bylaws, unless:
 - (1) the articles of incorporation, section 10.21 or, if applicable, section 10.22 reserve that power exclusively to the shareholders in whole or part; or
 - (2) except as provided in section 2.06(d), the shareholders in amending, repealing, or adopting a bylaw expressly provide that the board of directors may not amend, repeal, or reinstate that bylaw.

OFFICIAL COMMENT

The power to amend or repeal bylaws is shared by the board of directors and the shareholders, unless that power is reserved exclusively to the shareholders by an appropriate provision in the articles of incorporation. Section 10.20(b)(1) provides that the power to amend or repeal the bylaws may be reserved to the shareholders "in whole or part." This language permits the reservation of power to be limited to specific articles or sections of the bylaws or to specific subjects or topics addressed in the bylaws.

Section 10.20(b)(2) permits the shareholders to amend, repeal, or adopt a bylaw and reserve exclusively to themselves the power to amend, repeal, or reinstate that bylaw if the reservation is express. The provision, however, is made expressly subject to section 2.06(d), which limits the authority of shareholders to restrict board action on bylaws with regard to procedures or conditions set forth in certain bylaws regulating the election of directors. See the Official Comment to section 2.06.

Section 10.21 limits the power of directors to adopt or amend supermajority provisions in bylaws. See section 10.21 and the Official Comment thereto.

Section 10.22 limits the power of directors to repeal a bylaw adopted by shareholders that opts in to the provisions of that section. See section 10.22 and the Official Comment thereto.

Corporation where it had presumably been included in a securitization.⁵ Even though the note was still in possession of the loan originator (to whom it was payable), as servicer, and the court recognized that under principles of Article 3 of the U.C.C. the servicer, as holder of the note, was entitled to enforce it, the court prohibited the foreclosure from proceeding based upon federal rules of procedure involving joinder—the real parties in interest could not be identified and were not joined in the action.⁶ In a similar vein, a bankruptcy court in the Southern District of Ohio disallowed the claim of the trustee of mortgage pass-through certificates to pre-petition arrearage payments on a mortgage in a chapter 13 bankruptcy because the claimant had not adequately established its status as the secured creditor.⁷ In an interesting contrast, the U.S. District Court for the District of Arizona declined to stop a non-judicial foreclosure when the foreclosing servicer neither produced nor had possession of the note.⁸

Courts are also amenable to sanctioning creditors in some of these actions. The U.S. District Court for the District of Massachusetts upheld sanctions imposed by the bankruptcy court on putative creditors and attorneys who signed the pleadings for misrepresentations about who owned a mortgage loan.⁹ A district court in Florida reinstated a bankruptcy trustee's action against Countrywide Home Loans seeking sanctions for bad faith and abuse of process because of motions Countrywide had filed without ensuring their accuracy, which the bankruptcy court had dismissed for failure to state a claim.¹⁰

The Surveys that follow discuss other cases arising out of the financial crisis.¹¹ As more and more of these cases wend their way through the courts and result in published precedents, it becomes increasingly important to the resolution of the credit crises that the resulting law is correct. A key purpose of this Survey is to make that task easier by noting those decisions that get difficult questions right from a commercial law perspective and highlighting other cases in which key principles were ignored, often with bad results. An all too frequent comment heard in discussions of troubling precedents in U.C.C. subcommittee meetings is that the briefs submitted in the cases often overlook or misstate the key legal principles that should have been used to resolve the case. This Survey is one attempt to mitigate that problem by discussing legal developments and how they fit into the framework of commercial law.

5. See Stephen C. Veltri & Greg Cavanagh, *Payments*, 64 *BUS. LAW.* 1199, 1208–09 (2009) (discussing *In re Kang Jin Hwang*, 396 B.R. 757 (Bankr. C.D. Cal. 2008)).

6. *Kang Jin Hwang*, 396 B.R. at 760–62, 765–66, 770–72. Other recent cases struggled with this issue. See *In re Hawkins*, No. BK-S-07-13593-LBR, 2009 WL 901766 (Bankr. D. Nev. Mar. 31, 2009); *In re Jacobson*, 402 B.R. 359 (Bankr. W.D. Wash. 2009); *In re Vargas*, 396 B.R. 511 (Bankr. C.D. Cal. 2008); *In re Woodberry*, 383 B.R. 373 (Bankr. D.S.C. 2008).

7. *In re Wells*, No. 08-17639, 2009 WL 1740675, at *1 (Bankr. S.D. Ohio June 19, 2009).

8. *Diessner v. Mortgage Elec. Registration Sys.*, No. 2:09-CV-00095 JWS, 2009 WL 1457624, at *2 (D. Ariz. May 18, 2009).

9. *In re Nosek*, No. 08-40095-WGY, 2009 WL 1473429, at *2–4 (D. Mass. May 26, 2009).

10. *Walton v. Countrywide Home Loans, Inc.*, No. 08-2337, slip op. at 1, 24 (S.D. Fla. June 9, 2009).

11. See *In re Am. Home Mortgage Holdings, Inc.*, 388 B.R. 69 (Bankr. D. Del. 2008), discussed in Steven O. Weise, *Personal Property Secured Transactions*, 64 *BUS. LAW.* 1245–46 (2009).

Again this year, the Survey on leasing features cases involving NorVergence leases and the problems NorVergence's fraudulent scheme has caused lessees.¹² The courts continued to rebuff attacks on floating forum selection clauses, consistent with the majority of cases in prior years, and addressed the enforceability of and limitations to waiver-of-defense clauses.

12. Teresa Davidson et al., *Leases*, 64 *BUS. LAW.* 1187, 1192–1194 (2009) (discussing waiver-of-defense clauses and floating forum selection clauses in NorVergence leases).