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August, 2002

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Available at: https://works.bepress.com/robyn_meadows/23/

The Uniform Commercial Code Survey: Introduction

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

As has been true for each of the last few years now, the most significant activity involving the Uniform Commercial Code (U.C.C. or "Code") last year was in the legislative arena. Three particular matters are worthy of note.

First, by the end of June and after a flurry of activity, all fifty states and the District of Columbia had enacted revised Article 9.[1] This was an amazing success for the drafters, the sponsoring organizations, the state bar committees which pressed for enactment, and for the state legislatures themselves. It also avoided some extremely complex choice-of-law problems that might have arisen if the revisions went into effect only in some states.

Second, over the summer, the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved revisions to Article 1.[2] One of the most significant changes is a new choice-of-law provision that significantly enhances the ability of parties engaged in a U.C.C. transaction to choose a state's law in which neither of them resides or conducts business.[3] Consumers are protected by a requirement that the chosen jurisdiction bear a reasonable relation to the transaction and by a new rule that prevents the choice from depriving the consumer of an otherwise applicable consumer protection statute that cannot be varied by agreement.[4]

Another significant change is to the definition of good faith, which is augmented from mere "honesty in fact," to also require "observance of reasonable commercial standards of fair dealing."[5] This change may be more significant than is commonly believed. While the recent revisions to Articles 3, 4, 4A, 8, and 9 already enhanced the definition of "good faith" in those articles in this manner,[6]

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1. Press Release, NCCUSL, States Uniformly Enact UCC 9 Revisions (July 2001), *available at* http://www.nccusl.org/nccusl/pressreleases/pr1-07-01.asp.

2. *See* AM. LAW INST., ACTIONS TAKEN ON 2001 ANNUAL MEETING DRAFTS, *available at* http://www.ali.org/ali/ALI2001_ActionsTKN.htm; Press Release, NCCUSL, Uniform Law Group To Meet in West Virginia (July 2001), *available at* http://www.nccusl.org/nccusl/pressreleases/pr2-07-01.asp.

3. *See* U.C.C. § 1-301 (2002), replacing former U.C.C. § 1-105.

4. *See id.* § 1-301(e).

5. *See id.* § 1-201(b)(20).

6. *See id.* §§ 3-103, 4-104(c), 4A-105(a)(6), 8-102(a)(10), 9-102(a)(43).

only the change to Article 8 expressly made that enhancement applicable to the general duty of good faith imposed by Article 1 (in connection with Article 8 transactions).[7] The revisions to Article 9 attempted to do this by Comment,[8] but technically the definition there—as well as in Articles 3, 4, and 4A—applies only to the phrase "good faith" when used in the text of that article.[9] Thus, a strict reading of the Code as currently enacted would indicate that the standard of mere honesty in fact applies to most contractual and legal duties arising in transactions governed by Articles 3, 4, 4A, and 9. Not until Article 1 is enacted, will the higher standard of commercial reasonableness generally apply.

Finally, despite receiving some blistering academic criticism,[10] the long-awaited revisions to Article 2 finally seemed to be ready for approval. The ALI in fact approved them at its annual meeting in May, but two months later NCCUSL again balked after a last minute effort to reach a compromise on scope issues failed to please all concerned. Negotiations continue in an effort to craft something that will satisfy the drafting committee and the Code's two sponsoring organizations while appeasing the software industry. However, the revisions remain a year away, at the earliest.

On the judicial front, there were many interesting decisions. The surveys that follow highlight the most important of them. It is intriguing to note that approximately twenty percent of the cases discussed in these surveys are criticized by the authors, at least for their reasoning if not for their result. Will that ratio increase when courts start interpreting revised Article 9? We will have to await next year's survey for preliminary results on that question.

7. *See id.* § 8-102.

8. *See id.* § 9-102 cmt. 19 (indicating that the enhanced definition is intended to apply to the general duty of good faith imposed by Article 1 in connection with any Article 9 transaction); *see also id.* §§ 9-620 cmt. 11, 9-625 cmt. 2 (both applying that point to a specific context).

9. Article 9 uses the phrase "good faith" in sections 9-321(a), 9-330(a)(1), 9-330(b), 9-330(d), 9-403(b), 9-405(a), 9-615(g), and 9-617(b). Article 3 uses it most notably in section 3-302 (defining a "holder in due course").

10. *See, e.g.*, Roy Ryden Anderson, *Of Hidden Agendas, Naked Emperors, and a Few Good Soldiers: The Conference's Breach of Promise . . . Regarding Article 2 Damage Remedies*, 54 SMU L. REV. 795 (2001).