Widener University Delaware Law School

From the SelectedWorks of Russell A. Hakes

2003

The Uniform Commercial Code Survey: Introduction

Russell A. Hakes
Stephen L Sepinuck
Robyn L Meadows

Available at: https://works.bepress.com/russell_hakes/13/

The Uniform Commercial Code Survey: Introduction

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

This year we are rapidly approaching the end of the Uniform Commercial Code (UCC) revision process that has commanded our attention since the 1980s. There remain, however, several very important matters to be completed before the revisions become law. A Revised Article 1 and Amendments to Articles 3 and 4 were each approved and made available to the states for legislative action during 2002. On May 14, 2003, the American Law Institute (ALI) approved the revised versions of Article 2, Article 2A, and Article 7. Because the National Conference of Commissioners on Uniform State Laws (NCCUSL) had approved Articles 2 and 2A last fall, the process for those two articles is complete, making them available to the states for adoption.[1] Revised Article 7 will be presented for final approval at the August 2003 annual meeting of NCCUSL.[2] That approval is anticipated, which would result in Revised Article 7 being available to the states for legislative action in the spring of 2004.

Not surprisingly, adoption by the various states of Revised Article 1[3] and the Amendments to Articles 3 and 4[4] have not begun at a rapid rate. No one even dreamed of adoptions at a rate that would compare to the phenomenal success of Revised Article 9. There is no intensely interested industry group to help drive the adoption process nor is there the necessity that the changes be simultaneously effective nationwide. Adoptions of these revisions are expected to proceed at a pace more similar to previous revisions to the UCC. There are also early indica-

* Russell A. Hakes is a Professor of Law at Widener University in Wilmington, Delaware. Stephen L. Sepinuck is a Professor of Law at Gonzaga University School of Law in Spokane, Washington. Robyn L. Meadows is a 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. *See* News Release, Work Concludes on Revision of Uniform Commercial Code Articles 2 and 2A, *available at* http://www.nccusl.org/nccusl/DesktopModules/NewsDisplay.aspx?ItemID = 52.

2. *See* Drew L. Kershen, *The Uniform Commercial Code Survey: Article 7–Documents of Title*, 58 BUS. LAW. 1613 (2003).

3. As of May 2003 only two jurisdictions, Virginia and the U.S. Virgin Islands, had adopted Revised Article 1, and it had been introduced during 2003 into the legislatures of five jurisdictions, Connecticut, Hawaii, Massachusetts, North Dakota, and Texas. *See* UCC Article 1, General Provisions, at the NCCUSL website, *available at* http://www.nccusl.org (last visited May 30, 2003).

4. As of May 2003, no jurisdiction had adopted the Amendments to Articles 3 and 4, but they had been introduced into the legislatures of 5 jurisdictions, Connecticut, Hawaii, Massachusetts, Minnesota, and New Mexico. *See* UCC Articles 3 and 4 at the NCCUSL website, *available at* http://www.nccusl.org (last visited May 30, 2003).

tions of some resistance to certain aspects of each of these proposed revisions. The Virginia adoption of Article 1 retained the choice of law provisions in the prior version of Article 1,[5] rather than adopt the more permissive choice of law rules giving greater contractual flexibility to the parties by removing the requirement of residence or conducting business in the chosen jurisdiction.[6] Bankers have raised concerns about some of the provisions in Amended Articles 3 and 4.[7]

The path Articles 2 and 2A have taken to approval by the ALI and NCCUSL has been perhaps the most tortured path taken by any article of the UCC in its history.[8] There is every reason to expect that the enactment process will encounter a new version of that tortured path. At least one well-organized group has publicly announced its opposition to Article 2[9] and its primary reason for opposition is related to the Uniform Computer Information Transactions Act (UCITA)[10] more than to the merits of the provisions of Article 2.[11] The differing views about UCITA have been one of the factors heavily influencing the Article 2 and Article 2A drafting processes.[12]

As the legislative revision process slows down, the judiciary's role in the development of commercial law under the UCC will receive more focus. This year's Survey again reflects the importance of the courts in developing commercial law.

5. *See* 2003 Va. Acts ch. 353 § 8.1A-301 (Approved March 16, 2003), *available at* http://legl.state.va.us. Subsection 8.1A301(b) of that act tracks the first sentence of UCC subsection 1-105(1) (2000) rather than the more elaborate and permission provisions in UCC subsections 1-301(a), (c), (e), (f) (2002).

6. This proposed change was highlighted in last year's survey. *See* Stephen L. Sepinuck, Robyn L. Meadows, and Russell A. Hakes, *The Uniform Commercial Code Survey: Introduction*, 57 BUS. LAW. 1667 (2002).

7. *See* Stephen S. Veltri, Marina I. Adams and Paul S. Turner, *The Uniform Commercial Code Survey: Payments*, 58 BUS. LAW. 1575 (2003).

8. *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); Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683, 1683–87, 1711–15 (1999).

9. On May 16, 2003, AFFECT, Americans for Fair Electronic Commerce Transactions, announced on its website that it would oppose adoption of Article 2 of the UCC. *See* May 16, 2003—AFFECT's Response to the Uniform Commercial Code—Article 2 Amendments, *available at* http://www-affect@ucita.com/ResponseArticle2.doc (last visited May 30, 2003).

10. The Uniform Computer Information Transactions Act (UCITA) was promulgated as a uniform act by NCCUSL in 1999. *See* Press Release, NCCUSL to Promulgate Freestanding Uniform Computer Information Transactions Act, ALI and NCCUSL Announce that Legal Rules for Computer Information Will Not Be Part of UCC, *available at* http://www.law.upenn.edu/bll/ulc/ucita/2brel.htm (last visited May 30,2003). UCITA has been adopted by only two states. *See* Uniform Law Commissioners, A Few Facts About The . . . Uniform Computer Information Transactions Act, *available at* http://www.nccusl.org/nccusl/uniformactp_factsheets/uniformacts-fs-ucita.asp (last visited May 30, 2003). It has subsequently undergone a number of revisions in response to concerns raised by various groups. The current version was approved by NCCUSL in 2002. *See* UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT (Last Revisions or Amendments Completed Year 2002), *available at* http://www.law.upenn.edu/bll/ulc/ucita/2002final.htm (last visited May 30, 2003).

11. Letter from Miriam Nisbet, President, AFFECT, Americans for Fair Electronic Commerce Transactions, to President Michael Traynor and Members, American Law Institute (April 21, 2003), *available at* http://www-affect@ucita.com/pdf/ART2ltrApril02.pdf (last visited May 30, 2003).

12. *See, e.g.*, Edwin E. Huddleson, III, Barry A. Graynor, Lawrence F. Flick, II, and Stephen T. Whelan, *Leases*, 58 BUS. LAW 1567 (2003).

The authors of the Survey's various sections review some cases in which the courts seem to reach the correct result, but with less than satisfactory reasoning and analysis. They also analyze cases in which courts have resolved difficult issues in well-reasoned opinions that appear to further important commercial law policies. Of course, there are also those cases in which the authors criticize both the result and the analysis used to support the result.

One of the goals of the Uniform Commercial Code Committee's Annual Survey of Commercial Law is to facilitate better court decisions by educating both the bench and the bar about commercial law. Insightful and far-reaching judicial opinions in commercial law are enhanced by carefully crafted arguments presented by well-informed counsel. By the same token, many of the most troubling cases appear to have been decided based upon legal arguments that failed to adequately comprehend the principles and precedents that should have governed the decision. By making those observations we are not taking the position that the experts are always right about how a case should be decided. Rather they are a challenge to lawyers and judges to have each commercial law opinion reflect well-reasoned principles and policies, whether they move the law further along an established path or redirect its development in new directions.