PUBLICATION UPDATE

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Negotiable Instruments Under the Uniform Commercial Code

Publication 613 Release 88 March 2023

HIGHLIGHTS

- This release contains updates and revisions to provide the current status of the law, including developments in statutory, and regulatory law. The release includes discussion of several important recent developments and adds new and revised material on a number of significant topics.

Updated chapters include:

Chapter 3A—Restrictive Indorsements. *Accommodation party.* A recent Texas case held that if a party signs an instrument as an accommodation party, that party is not liable to the party accommodated in an action for contribution. See *Chow v. Lee (In re Lee)*, 2021 Bankr. LEXIS 3397 (Bankr. E.D. Tex. Dec. 13, 2021), at § 3A.01.

"Pay any bank" indorsement. The United States District Court for the Southern District of New York noted that the Underpinning exception has consistently been held to be narrow in scope. See *Lesser v. Td Bank, N.A.*, 2020 U.S. Dist. LEXIS 71416 (S.D.N.Y. Apr. 23, 2020), at § 3A.03.

Liability of payors. The depository or collecting banks are abolished excused from liability unless such banks pay out over a restrictive indorsement, actually retain proceeds of the instrument in the forger's account, or fail to act in good faith or in accordance with reasonable commercial standards. See *Mortgage v. JPMorgan Chase Bank, N.A.*, 2021 N.Y. Misc. LEXIS 7877 (N.Y. Sup. Ct. Nov. 29, 2021); at § 3A.06.

Chapter 4—Parties to Commercial Paper. *Contracts.* The Texas Court of Appeals recently held that a suit on a check under § 3.414 is a suit on a contract, whether it is brought by a holder or a payee. See *Gurka v. Trevino*, 2022 Tex. App. LEXIS 6181 (Tex. App. Aug. 23, 2022), at § 4.01.

Signature requirement. An entity that holds a note that has been indorsed in blank has the right to enforce the note. The signature need not be on the instrument itself for the indorsement to be effective, under Rhode Island law. See *U.S. Bank N.A. v. Shakoori-Naminy*, 2022 U.S. Dist. LEXIS 207719 (D.R.I. Nov. 16, 2022), at § 4.02.

Money orders. Personal money orders are not mentioned in the UCC; authority is divided as how to treat such instruments. See § 4.03[2].

Accommodation party. The Arkansas Court of Appeals ruled that a trial court did not err in concluding that a signator on a note was an accommodation party on the note, instead of a guarantor, where the fact that he did not sign the note until after the proceeds had been disbursed was of no moment under Ark. Code § 4-3-419, and any benefit he received from the loan proceeds was indirect. See *Hogan v. Bank of Little Rock*, 2021 Ark. App. 72, ¶ 1, 618 S.W.3d 194 (Ark. App. 2021), at § 4.05.

Standing. Under New Mexico's UCC, a plaintiff may establish standing to foreclose (1) when that plaintiff is the holder of the note; (2) when that plaintiff is a nonholder in possession of the note with the rights of the holder; and (3) when that plaintiff does not possess the note, but is still entitled to enforce subject to the lost-instrument provisions of Article 3. See *LSF9 Master Participation Tr. v. Cain*, 2022 N.M. App. Unpub. LEXIS 320 (N.M. App. Aug. 17, 2022), at § 4.08.

Chapter 15—Depositary Banks and Their Customers: The Expedited Funds Availability Act. *Jurisdiction.* In a recent case arising from a bank's alleged failure to timely return a forged check within the midnight deadline required by the UCC, the court held that general personal jurisdiction did not exist in under the state's long-arm statute. The EFAA impose duties of investigation or minimum holding periods for deposited checks upon depository or intermediary banks. See *Provident Sav. Bank v. Focus Bank*, 2020 U.S. Dist. LEXIS 196548 (E.D. Mo. Oct. 22, 2020), at § 15.01[2][a].

Customer's right to payment. An Illinois federal district court stated that the EFAA plainly regulates deposits made by electronic means and it requires that those funds be available by the next business day. See *Driverdo LLC v. JP Morgan Chase Bank, N.A.*, 2021 U.S. Dist. LEXIS 148702 (N.D. Ill. Aug. 9, 2021), at § 15.01[2][c].

Purpose of EFAA. The EFAA was enacted to provide faster availability of deposited funds. It sets forth specific time periods, in which depository banks must make deposits available for withdrawal, and makes banks civilly liable to individuals for damages incurred because of an EFAA violation. See *Taccino v. Act 1st Fed. Credit Union*, 2021 U.S. Dist. LEXIS 152663 (D. Md. Aug. 12, 2021), at § 15.02[1][c].

Hold periods. In a Florida case, the plaintiffs cited to 12 C.F.R. § 229.13, which allows banks to exceed maximum hold periods specified in the availability schedule. This merely allows a bank to exceed a maximum hold period—it does not require a bank to do so. The regulations do not set forth minimum holding periods. See *Perlberger v. Citigroup Inc.*, 2021 U.S. Dist. LEXIS 147314 (S.D. Fla. May 5, 2021), at § 15.04[2].

Teller's checks. A teller's check is a "good funds" instrument under Regulation CC, with the consequence that the depositor of a teller's check can withdraw funds represented by the instrument the day after the check is deposited. See *Delaware v. Pennsylvania*, 2021 U.S. LEXIS 6295 (July 23, 2021).

Electronic check collection. A "remotely created payment order" means any payment instruction or order drawn on a person's account that is created by the payee or the payee's agent and deposited into or cleared through the check clearing system. The term includes a "remotely created check," as defined in Regulation CC.

See *FTC v. Benefytt Techs., Inc.*, 2022 U.S. Dist. LEXIS 160358 (M.D. Fla. Aug. 11, 2022), at § 15.10[2][d].

Chapter 15A—Depositary Banks and Their Customers: The Gramm-Leach-Bliley Privacy Act of 1999. *Privacy notice "opt out" provision.* An exception can be found in section 313.13 of the Privacy Rule. If a financial institution shares information under this exception, it must give its customers a privacy notice that describes this disclosure. A financial institution's consumers and customers do not have a right to opt out of this information sharing. See § 15A.07[3].

Disclosure of account numbers. The Gramm-Leach-Bliley Act prohibits financial institutions from sharing account numbers or similar access numbers or codes for marketing purposes. This prohibition applies even when a consumer or customer has not opted-out of the disclosure of NPI concerning the account. The exceptions in sections 313.14 and 313.15 of the Privacy Rule do not apply to the disclosure of account numbers for marketing purposes. See § 15A.08[2].

Limits on reuse and redisclosure of NPI. If a financial institution receives NPI from a nonaffiliated financial institution, its ability to reuse and redisclose that information is limited. The limits depend on how the information is disclosed to the financial institution. It does not matter whether or not an entity is a financial institution. See § 15A.11.

Chapter 15B—Check Clearing for the 21st Century Act—The "Check 21 Act." *Substitute checks.* Under the Check 21 Act, a substitute check becomes the "legal equivalent of the original check for all purposes, including any provision of any Federal or State law, and for all persons" so long as it conforms with certain requirements. See *Speedy Check Cashers, Inc. v. United States Postal Serv.*, 286 F. Supp. 3d 934, 937 (N.D. Ill. 2017), at § 15B.01.

Regulation CC. Regulation CC was amended in 2020 pursuant to a Request for Comment (RFC) issued by the Consumer Financial Protection Bureau and the Federal Reserve. Among the changes included in the final rule are: Minimum amount of deposited funds moved to $225, permissive adjustment to funds availability changed to $450, and "new account," large deposit and exception holds for next-day availability changed to $5,525. See § 15B.10.

Chapter 20—Debit Cards. *Constitutionality of the CFPB.* In 2022 litigation that involved the CFPB's Payday Lending Rule, the Fifth Circuit held that the CFPB's self-funding mechanism violated the Appropriations Clause of the U.S. Constitution and its underpinning, the separation of powers, in that Congress had ceded its power of the purse to the Bureau. The court said that because the funding employed by the Bureau to promulgate the Payday Lending Rule was wholly drawn through the agency's unconstitutional funding scheme, there was a linear nexus between the infirm provision (the Bureau's funding mechanism) and the challenged action (promulgation of the rule), which required that the Payday Lending Rule be vacated. A petition for writ of certiorari was filed to challenge the ruling. See *Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 623 (5th Cir. 2022), at § 20.05.

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