PUBLICATION UPDATE

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Negotiable Instruments Under the Uniform Commercial Code

Publication 613 Release 90 March 2024

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.

Chapter 1E—The 2022 Amendments to the Uniform Commercial Code. New Chapter 1E addresses the changes made by the 2022 amendments to the Uniform Commercial Code relating to negotiable instruments. The main impact of the amendments is the addition of Article 12, dealing with "controllable electronic records," including in particular digital assets. Substantial conforming and other changes were made to Article 9. In addition, there were amendments to all other UCC Articles, except Article 4 on bank deposits. The 2022 amendments include changes to "payments amendments," Articles 3, 4, and 4A. See § 1E.03. Four of the sections in Article 3 on negotiable instruments are changed by the amendments. See § 1E.04. The amendments changed eight sections in Article 4, most to refer to records instead of writings and electronics. They also made a significant change in the comment to one section that was not being changed. Very minor changes were made to two additional section comments and the prefatory note. See § 1E.05.

Chapter 5—Obligations of the

Maker of a Note. *Maker's basic obligation.* In a recent federal district court case in New York, the court stated that N.Y.U.C.C. § 3-412 applies when the "drawee's proffered acceptance in any manner varies the draft as presented," and under those circumstances, "the holder may refuse the acceptance and treat the draft as dishonored." *Safdieh v. Citibank, N.A.*, 2023 U.S. Dist. LEXIS 167044 (E.D.N.Y. Mar. 13, 2023), at § 5.01.

Statutes of limitation. The Michigan Court of Appeals recently held that the statute of repose is a condition that must be satisfied separate and apart from the applicable statute of limitations, which is consistent with MCL 600.5805(14). That statute provides numerous limitations periods, and based on this language, for plaintiff's claim to be timely, it must satisfy both the statute of limitations and the period of repose in MCL 600.5839. *Federated Mut. Ins. Co. v. Corlin Builders, Inc.*, 2023 Mich. App. LEXIS 5115 (Mich. App. July 20, 2023).

A Utah court held there is no basis under the UCC statute of limitations for finding that the statute of limitations began to run with the first defaulted payment. *Norton v. Wells Fargo Bank, N.A.*, 2017 U.S. Dist. LEXIS 45905 (D. Utah Mar. 28, 2017).

Mississippi courts have rejected the argument that the UCC 3-118 statute of limitations begins running upon default absent acceleration; the limitations period begins to run upon maturity. *In re Downing*, 640 B.R. 681 (Bankr. N.D. Miss. 2022).

See § 5.02[1][a].

Chapter 6—Obligations of Drawers of Drafts. *Cashier's checks.* A California court recently stated that cashier's checks are sufficiently similar to money orders and travelers checks to be considered, at least at the pleading stage, "similar written instrument[s]" within the meaning of California Code of Civil Procedure § 1511. Subdivision (a) of section 1511 applies to other similar written instruments "on which a business association is directly liable." Under federal law, a cashier's check is an instrument on which a business association is directly liable. The California Court of Appeals found that the complaint adequately pleaded an obligation under California Government Code § 12650(b)(5) to report and deliver because it alleged checks sold to California buyers were escheated under California Code of Civil Procedure § 1510, and because cashier's checks were sufficiently similar to money orders and travelers checks to be considered similar written instruments under California Code of Civil Procedure § 1511 at the pleading stage. *JPMorgan Chase Bank, N.A. v. Superior Court,* 85 Cal. App. 5th 477, 301 Cal. Rptr. 3d 388 (2022), at § 6.01[1][d].

Duplicate presentment. In a case where one issue was whether payment resulting from the electronic deposit supported a prior-payment defense, the appellate court noted that New Jersey law permits a bank's customer to deposit a check into the customer's account without an indorsement. Thus, irrespective of the fact that the check was not indorsed when it was electronically deposited, the defendant's prior-payment defense was viable because the evidence revealed that the check was electronically deposited before it was presented to a check-cashing business. *Triffin v. SHS Grp., LLC*, 466 N.J. Super. 460, 247 A.3d 7 (N.J. Super. App. Div. 2021), at § 6.02[1][e].

In a case where the plaintiff was a "holder in due course," the court held that prior payment is a personal defense, which may not be asserted against a holder in due course who has no notice of the prior payment. *W. & Lake Check Cashers, LLC v. Propane Pete, LLC*, 2023 IL App (2d) 220291 (Ill. App. 2023), at § 6.02[1][e].

Chapter 8—Contractual Obligations of Indorsers of Notes and Drafts. *Possession of a note.* The New York Eastern District Court recently explained that UCC Article 3 allows for notes to be endorsed to a new owner or "endorsed in blank, naming no specific payee, which makes it a bearer" under this article, allowing any party to enforce it thereafter. Moreover, it noted that the Second Circuit has ruled that physical possession of a note establishes standing where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank. *Freedom Mortg. Corp. v. Habeeb*, 2023 U.S. Dist. LEXIS 130496 (E.D.N.Y. July 27, 2023), at § 8.01[1].

Plural indorsers. Any instrument specially indorsed becomes payable to the order of the special indorsee and may be further negotiated only by that party's indorsement. *JTS Capital 3 LLC v. 2327 Andrews Realty LLC*, 2023 N.Y. Misc. LEXIS 16490 (N.Y. Sup. Ct. July 17, 2023), at § 8.07.

Discharge of the indorser. The UCC defines "payment" as something made (i) by or on behalf of a party obliged to pay the instrument, and (ii) to a person entitled to enforce the instrument. *Huntington Nat'l Bank v. Midwest Heart & Vascular Assocs.*, 2023 U.S. Dist. LEXIS 124716 (N.D. Ill. July 19, 2023), at § 8.08.

Chapter 14—Payor Banks and Their Customers. *Consequences of mistakes.* When an instrument has been paid "by mistake," Tennessee law explains, the payor may, to the extent permitted by the law governing mistake and restitution, recover the payment from the person to whom or for whose benefit payment was made. The right to restitution for an instrument paid, however, is not unlimited. The remedies available under Tennessee Code § 47-3-418(b) may not be asserted against a person who took the instrument in good faith and for value. *Goodman v. Commercial Bank & Tr. Co.*, 72 F.4th 122, 126 (6th Cir. 2023), at § 14.05[1].

Conversion by payment on a forged indorsement. Demonstrating possession of a cash account agreement or the note at the time of commencement is not enough to establish standing in a foreclosure action on a reverse mortgage, because a cash account agreement does not constitute a negotiable instrument within the meaning of UCC § 3-104. Therefore, a plaintiff must do more than prove it possessed the note at the time of commencement to establish standing. *Bank of Ny Mellon Trust Co. Na v. Hendrickson*, 2023 NYLJ LEXIS 902 (Rockland Cnty. Sup. Ct., March 31, 2023), at § 14.09A[3].

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