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Forms and Procedures Under the Uniform Commercial Code

Publication 749

Release 106

May 2025

HIGHLIGHTS

Revision to Parts and Appendices Covering Article 1, Article 2, Article 3, and Consumer Law.

- This release contains updates and revisions to Article 1, Article 2, and Article 3 to provide the current status of the law. The release includes discussion of several important recent developments and adds new and revised material on a number of significant topics.

Article 1—General Provisions. Part 1, Effect of Article 1 Upon Commercial Transactions, revises the history and effect of Article 1. The 2022 UCC Amendments have been recommended for enactment by state legislatures throughout the U.S. and

enacted in these twenty-five states. See ¶ 12.00[2].

Article 2—Sales. Part 4, Rights and Remedies, examines the relationship among “rights,” “remedies,” and “obligations”.

Ability to modify remedies. Section 2-714 states a buyer’s damages for breach of warranty. Section 2-719(2) “vindicates” and protects a buyer’s right to a meaningful remedy. *Martin v. Thor Motor Coach Inc.*, 602 F. Supp. 3d 1087 (N.D. Ind. 2022). See ¶ 24.01.

Revocation of acceptance. A buyer properly revoked its acceptance where the seller did not contest that its products were non-conforming and the seller’s recall induced the revocation. *Nutrition Ctr., Inc. v. King Bio, Inc.*, 428 F. Supp. 3d 1245

(D. Wyo. 2019). See ¶ 24.08[3].

Impracticability doctrine. During the COVID-19 pandemic, a buyer established a breach of contract claim against a seller for its failure to supply 3-M quality personal protective equipment as ordered by the buyer. The masks supplied were not 3-M quality, did not meet the contract specifications, and were in fact counterfeit. Buyer had performed its contractual obligations when it wired payment to seller; seller breached when the masks did not conform to the contract. *Kettering Adventist Healthcare v. Jade Designs, L.L.C.*, 677 F. Supp. 3d 735 (S.D. Ohio 2023). See ¶ 24.23[1].

Incidental damages. Under § 2-715(1), a buyer can recover incidental damages resulting from a seller's breach including "expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach." *Nutrition Ctr., Inc. v. King Bio, Inc.*, 428 F. Supp. 3d 1245 (D. Wyo. 2019). See ¶ 24.41[2].

Reclamation rights. Reclamation is a limited in rem remedy allowing sellers to regain possession of goods, delivered on credit, to an insolvent buyer. A party's reclamation right was subordinate to a bank's prepetition and post-petition liens when the bank had a prior valid perfected floating lien in a debtor's inventory.

Whirlpool Corp. v. Wells Fargo Bank, N.A. (In re hhgregg, Inc.), 949 F.3d 1039 (7th Cir. 2020). See ¶ 24.42[2].

Consequential damages. In a case involving separately framed glass panes, referred to as "lites," purchased by a resort, the contract excluded consequential damages. The contractor's requested damages arose from the consequences of the manufacturer's breach. It wanted the cost to remove the defective lites and replace them. Those damages were collateral to the breach itself, and were, therefore, consequential. *Far East Aluminum Works Co. v. Viracon, Inc.*, 520 F. Supp. 3d 1106 (D. Minn. 2021). See ¶ 24.51[5].

Nonconforming goods. A buyer who accepts nonconforming goods can still revoke that acceptance pursuant to Section 2-608 if the buyer reasonably assumed the seller would cure the nonconformity but did not. Although a buyer continued to possess, control, and profit from the goods for nearly three years, the goods nevertheless were nonconforming and damages were appropriate. Section 2-714 states the measure of damages is the difference between the value of the goods accepted and "the value they would have had if they had been as warranted." Here, the difference was between the value of the contracted-for goods and the nonconforming goods. *Transit Wireless, L.L.C. v. Fiber-Span, Inc. (In re Fiber-Span, Inc.)*, 40 F.4th 79 (3d Cir. 2022). Although a buyer may recover damages if they accept non-

conforming goods that breach a warranty, parties can limit the remedy to repairing or replacing goods. Where a warranty's express language unambiguously stated that repair or replacement were the "exclusive remedies" available for a breach of warranty, buyer expressly waived any other remedies. *Pleasant Grove Indep. Sch. Dist. v. Fieldturf USA Inc.*, 648 S.W.3d 608 (Tex. App. 2022). A buyer can revoke its acceptance of non-conforming goods or sue for breach of warranty and recover damages for any nonconformity if it timely notifies the seller of breach. Here the buyer was entitled to recover damages for nonconforming kitchen cabinets from a seller, even though she had accepted them. *Campbell v. Bradco Supply Co.*, 194 A.D.3d 143 (N.Y. App. Div. 2021). See ¶ 24.52.

Article 3—Negotiable Instruments. Part 1, Overview of Negotiable Instruments, presents an overview of Article 3.

2022 Amendments. The 2022 Amendments to the UCC were promulgated to modernize commercial transactions and make them conducive to the sale and transfer of cryptocurrency. The Amendments raise unique Issues related to Article 3 and cryptocurrency. Among other changes, the Amendments eliminate the current Article 3 requirement that drafts and bills of exchange be in a traditional paper form and "signed" with wet ink signatures. See ¶ 31.01.

Action to enforce a note. An action to enforce a note is barred if the

maker has paid neither principal nor interest on the note for a continuous period of ten years and no one has made a demand for payment to the maker. In one case, the parties agreed the borrower made no payments for a continuous ten-year period. Moreover, no valid demand for payment was made to the borrower within the requisite ten-year period. *Brown v. Brown*, 481 F. Supp. 3d 682 (M.D. Tenn. 2020). See ¶ 31.02.

Promissory notes. In a recent case, a lower court was correct in treating a home equity line of credit as a promissory note. It was a promise to pay a fixed amount of money and thus came within § 3-104(e). Borrowers' argument that the Agreement was not a promissory note because it did not describe a fixed amount due failed. *Wishengrad v. Carrington Mortg. Servs.*, 529 P.3d 880 (Nev. 2023). See ¶ 31.04[3].

Forged endorsements. Under § 3-414, an insurance company's obligation to pay under an annuity policy was discharged when the bank accepted the checks even though the endorsements on the checks were forged. *Kasongo v. American Gen. Life Ins. Co.*, 479 F. Supp. 3d 754 (N.D. Ill. 2020). See ¶ 31.04[3].

Standing to foreclose on a note. To establish standing, a party seeking to foreclose must possess and hold its note and mortgage prior to filing a complaint in foreclosure. *Flagstar Bank, FSB v. Kepple*, 190 Conn. App. 312 (2019). Other recent cases that discuss standing to enforce a note include: *Wilmington Sav. Fund*

Soc’y, FSB v. Hall, 853 S.E.2d 869 (Ct. App. 2021); *Bank of NY Mellon v. Orla*, 100 Mass. App. Ct. 1126 (2022); *Bishay v. U.S. Bank National Association*, 100 Mass. App. Ct. 1115 (2021); *Bank Tr. N.A v. Phann*, 2023-Ohio-2214, 220 N.E.3d 1001 (Ct. App.). See ¶ 31.05A.

Wilmington Savings Fund was a holder, and therefore entitled to enforce a note, when the chain of endorsements from Firststar Bank to Lender was unbroken. The footnote to the initial allonge established that Firststar Finance had authority to endorse the note. It indicated Firststar Bank and Firststar Finance were the same legal entity. Therefore, Firststar Finance’s endorsement did not break the chain from Firststar Bank to Wilmington. *Wilmington Sav. Fund Soc’y, FSB v. Hall*, 853 S.E.2d 869 (Ct. App. 2021). See ¶ 31.05A.

Lower court did not err in concluding assignee could enforce the note and mortgage. An affidavit demonstrated assignee’s loan servicer possessed the note when it was lost and assignee did not transfer the note to any other individual. Thus, assignee met § 3-309(a) requirements and was entitled to enforce debtor’s lost note. *Bank of NY Mellon v. Orla*, 100 Mass. App. Ct. 1126 (2022). See ¶ 31.05A.

A bank may rely on its own business records and those of its predecessors to prove the matters addressed within the records. U.S. Bank produced the PSA, the accompanying mortgage loan schedule, and the collateral checklist. Together, these

business records established that the lender conveyed the note to U.S. Bank. *Bishay v. U.S. Bank National Association*, 100 Mass. App. Ct. 1115 (2021). See ¶ 31.05A.

A bank’s foreclosure on property securing a debt is an action in rem against the property, not against the debtor. No relevance attaches to the bank’s inability to also pursue collection against the debtor as maker of the note. Thus, a bank can have standing to foreclose against a debtor who received a bankruptcy discharge from obligation on a promissory note. *Bank Tr. N.A v. Phann*, 2023-Ohio-2214, 220 N.E.3d 1001 (Ct. App.). See ¶ 31.05A.

Types of negotiable instruments. A certificate of deposit is an Article 9 instrument if it meets the § 3-104 requirements for a negotiable instrument or the writing is treated like a negotiable instrument. *McMillon v. European Serv.*, 275 So. 3d 375 (La. Ct. App. 2019). See ¶ 31.08[2].

A letter of credit was deemed not to be a negotiable instrument, but an underlying personal guarantee was still valid. The letter of credit was found to be a contract. *SMS Fin. 30, L.L.C. v. Frederick D. Harris, M.D., Inc.*, 2018-Ohio-2064, (Ct. App.). See ¶ 31.08[3].

Article 3 allows recovery in the case of a lost check only if the loss of possession was not the result of a transfer by the person trying to enforce the check. Here, the purchaser’s loss of possession was the result of a transfer, precluding recovery under Article 3. *Bartel v. Bank of Am.*

Corp., 193 A.3d 767 (D.C. App. Ct. 2018). See ¶ 31.08[3].

Bearer instruments. There was insufficient evidence to establish that a bank was the note's holder within Article 3's requirements. *Wells Fargo Bank, N.A. v. Barbe*, 349 So. 3d 1018 (5th Cir. 2022). Under Article 3, a negotiable instrument must state an unconditional promise or order to pay a fixed amount of money. Multiple courts have held that a line of credit is distinct from an agreement to pay a sum certain. *CadleRock Joint Venture LP v. Esperanza Architecture & Consulting Inc.*, 500 P.3d 402 (Colo. App. 2021). See ¶ 31.17[1].

Order instruments. An insurance company fulfilled its obligations when it made out a check jointly to a homeowner and an assignee who was working on the homeowner's property. *Expert Inspections, L.L.C. v. United Prop. & Cas. Ins. Co.*, 47 Fla. L. Weekly D 127 (Dist. Ct. App. 2022). See ¶ 31.17[1].

Liability of the maker of a note. Recent cases include: *Monroe v. Arizona Acreage L.L.C.*, 246 Ariz. 557, (2019); *Bank of N.Y. Mellon v. Walker*, 78 N.E.3d 930 (Ohio Ct. App. 2017); *Zelby Holdings, Inc. v. VideogeniX, Inc.*, 92 Mass. App. Ct. 86 (2017). See ¶ 31.20.

Fictitious payee rule. Under § 3-420(a), a depository bank is liable in conversion if it takes a check, via transfer, other than a negotiation, from a person not entitled to enforce it. The bank is presumptively liable for the check amount. *Taubman v.*

USAA Fed. Sav. Bank, 408 F. Supp. 3d 1053 (N.D. Cal. Oct. 7, 2019). A bank only bears some of the loss if a customer can prove the bank failed to exercise ordinary care, and such failure substantially contributed to the loss. A bank exercises ordinary care if it adheres to local business practices, even if those practices are not necessarily in the customer's best interest. *Grodner & Assocs., APLLC v. Regions Banks*, 338 F. Supp. 3d 488 (M.D. La. 2018). Section 3-405 places the risk of employee embezzlement on employers because they are best positioned to prevent such losses. *Auto Sision, Inc. v. Wells Fargo*, 375 F. Supp. 3d 627 (E.D. Pa. 2019). See ¶ 31.26[8].

Good faith. A law firm successfully alleged that a depository bank breached its duty of care. *H.G. Silverman Litig. Grp., P.C. v. TD Bank, N.A.*, 2022 U.S. Dist. LEXIS 149830 (E.D. Pa. Aug. 19, 2022). Complaint failed to state a claim for breach of fiduciary duty. According to California case law, the bank-customer relationship is not fiduciary, but contractual in nature. Therefore, banks do not owe a duty to supervise account activity or inquire about the purpose of used funds. *A.B. Concrete Coating, Inc. v. Wells Fargo Bank, N.A.*, 491 F. Supp.3d 727 (E.D. Cal. 2020). "Ordinary care" does not require a bank to examine an instrument if the process of collection or payment is automated, its failure to examine does not violate its prescribed procedures, and its procedures do not vary unreasonably from general banking usage not disapproved by" Articles 3

and 4. *Dog Bites Back, L.L.C. v. JPMorgan Chase Bank, N.A.*, 2021 U.S. Dist. LEXIS 183183 (D. Nev. Sept. 24, 2021). The Code recognizes a bank has an implied duty of ordinary care to its customers. Neither party can disclaim a bank's responsibility to act in good faith and exercise ordinary care. And Maryland case law holds a bank customer can bring a breach of contract claim to enforce that duty. *Bloom v. PNC Bank, N.A.*, 2023 U.S. Dist. LEXIS 57356 (D.D.C. Mar. 3, 2023). A bank observes reasonable commercial standards if its failure to examine the

check does not violate the bank's prescribed procedures and those procedures do not vary unreasonably from general banking usage. *Silverman Litig. Grp., P.C. v. TD Bank, N.A.*, 2022 U.S. Dist. LEXIS 149830 (E.D. Pa. Aug. 19, 2022). See ¶ 31.28.

Article 9—Secured Transactions. Part 1, Introduction to Article 9, reviews the history of Article 9. The 2022 UCC Amendments have been recommended for enactment by state legislatures throughout the U.S. and enacted in these twenty-five states. See ¶ 91.01[3][3].

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