DELBERT HOSEMANN
Secretary of State

2009 BUSINESS REFORM STUDY GROUPS MEETING
OF THE UNIFORM COMMERCIAL CODE AND DEBTOR CREDITORS LAWS
STUDY GROUP

Second Meeting

Wednesday, September 9, 2009
11:00 A.M.

Secretary of State's Office
700 North Street
Jackson, Mississippi

AGENDA

1. Welcome and Introduction of Members and Attendees – Cheryn Baker

2. Approval of Minutes of First Meeting held on June 25, 2009

3. Remarks by Chairman Jerome Hafter

4. Subgroup Reports

    a. UCC Articles 1 and 2 – Rod Clement
    b. UCC Articles 3, 4 and 9 – Paul Carrubba
    c. Debtor Creditor Laws (Bankruptcy Alternatives) -- Ed Lawler
    d. Subcontractor Liens – Jerome Hafter

5. Next Steps for Upcoming Meetings

6. Reminder of Upcoming Meetings: Dates and Future Programs

7. Other Business

8. Adjourn 1:00 P.M (or earlier)

Upcoming Meeting Date: September 23

MEMORANDUM

TO: Cheryn Baker

FROM: Rod Clement

DATE: September 8, 2009

RE: Proposed choice of law provisions for Revised Article 1 of UCC

Attached as Exhibit A is a proposed Section 1-301 for Mississippi's version of Amended Article 1. Bill Henning, Owen Lalor and I collaborated on an earlier version of this proposal, but Bill has not yet had an opportunity to comment on the last version of Exhibit A. Exhibit B and Exhibit C are amendments to Section 11-7-18 and Section 75-2-719 that I prepared.

This proposed choice of law provision is intended to accomplish two goals. First, it provides entities incorporated under Mississippi law with more flexibility to choose the law to govern commercial transactions. Second, this proposed Section 1-301, together with the conforming amendments, limits Mississippi's non-uniform provisions regarding implied warranties to consumer transactions.

A. Background

The current choice of law provision in Mississippi's version of Article 1, Miss. Code Ann. § 75-1-105(a), provides as follows:

> Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement, this code applies to transactions bearing an appropriate relation to this state. Provided, however, the law of the State of Mississippi shall always govern the rights and duties of the parties in regard to disclaimers of implied warranties of merchantability or fitness, limitations of remedies for

> breaches of implied warranties of merchantability or fitness, or the necessity for privity of contract to maintain a civil action for breach of implied warranties of merchantability or fitness notwithstanding any agreement by the parties that the laws of some other state or nation shall govern the rights and duties of the parties.

The choice of law provision for Revised Article 1, which the UCC study group has described as the "post-2008" version in the group's discussions, reads as follow:

> (a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to the another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.
>
> (b) In the absence of an agreement effective under subsection (a), and except as provided in subsection (c), the code applies to transactions bearing an appropriate relation to this state.

We saw two issues with this uniform version of Section 1-301. First, it does not address Mississippi's non-uniform limitation on choice of law in the case of limited warranties. Second, it does not address an issue that we have discussed in the UCC study group meetings, which is whether in non-consumer transactions the parties should be able to choose the law of a state to which neither party has a relationship.

B. Consumer transactions

In drafting this proposal, we assumed that the legislature would not enact a choice of law provision that reduced consumer protections. Therefore we added subparagraph (d) to our proposal. Subparagraph (d) provides,

> Application of the law of a state determined pursuant to subsection (a) or (c) may not deprive a consumer of the protection of any statute of the state in which the consumer principally resides at the time that the transaction became enforceable, which statute is both protective of consumers and may not be varied by agreement.

The intention of subparagraph (d) is that, in a contract governed by Mississippi law, a consumer would be able to claim the benefits of consumer protection statutes in his state. So a resident of Mississippi would be able to claim the benefits of Mississippi laws protecting consumers, including the limitations on waiving implied warranties. A resident of Tennessee would be able to claim the benefits of any Tennessee laws protecting consumers, but would not be able to assert Mississippi laws protecting consumers.

We intentionally limited subparagraph (d) to states and did not include "nations." It is one thing to be subject to laws of other states of the United States, in which all of the states have some form of the Uniform Commercial Code, but it is a much bigger step to be subject to consumer protection laws of other nations, some of which have a common-law tradition but most of which do not. So under subparagraph (d), if Mississippi law governed the sale of goods to a consumer in Czechoslovakia, the consumer in Czechoslovakia could not assert consumer protections available under the law of Czechoslovakia.

An alternative to this language would be to draft this language more narrowly so that it applies only to Mississippi's non-uniform limitations on waivers of implied warranties:

> Application of the law of the state or nation determined pursuant to subsection (a) or (c) may not deprive a consumer of the protection of any rule of law in this Chapter governing disclaimers of implied warranties of merchantability or fitness, limitations of remedies for breaches of implied warranties of merchantability or fitness, or the necessity for privity of contract to maintain a civil action for breach of implied warranties of merchantability or fitness.

This language tracks the language in the current Mississippi choice of law provision in Article 1. One aspect of this language is that it would allow citizens of other states to

assert the limits on waivers of implied warranties against Mississippi manufacturers. I have not discussed this more narrow alternative language with Owen or Bill, so it is subject to their review and comments.

The attached proposed amendments to Section 11-7-18 and Section 75-2-719 are intended to bring the relevant parts of those statutes within this subparagraph (d). Mississippi's non-uniform version of Section 75-2-315.1, which by its terms is already limited to consumer transactions, already is within subparagraph (d).

C. Non-consumer domestic transactions

In drafting the provisions regarding non-consumer transactions, our goal was to allow commercial parties maximum freedom of contract in choosing the law to govern their contracts. Under this statute, domestic companies could agree to have the law of another state to govern their contract, even if neither party has a relationship with that state. For example, a corporation organized under the laws of Mississippi and a corporation organized under the laws of California might want to agree to have the laws of Delaware govern their contract because the Mississippi corporation is not familiar with California law and the California corporation is not familiar with the laws of Mississippi, but both companies are comfortable using Delaware law. The post-2008 uniform version of Section 1-301 of Article 1 would not allow the parties to choose Delaware law because the uniform version of Section 1-301 requires that some relationship exist between the parties and the state whose law the parties choose. We thought that, in non-consumer transactions, the parties would want to have and should have the freedom to choose the law to govern their transactions. The only limitation in this alternative is that, unless one of the companies has a reasonable relation to a nation other than the United States, the

parties can only choose the law of another state of the United States, and not the law of another nation. So while the two domestic companies in the above example can choose the law of Delaware or any other state of the United States to govern their contract, they could not choose the law of Brazil to govern their contract.

D. Non-consumer international transactions

Under this proposal, if one of the parties to a contract has a reasonable relationship with a nation other than the United States, then the parties can choose the law of any state or nation, regardless of whether a reasonable relation exists between the parties and the state or nation chosen. A company organized under Mississippi law and a company organized under the laws of Spain could agree to have the law of Delaware or England govern their contract. We think that ability for Mississippi companies to be able to choose the law to govern their contracts is especially important in international transactions because international counterparties are more likely to be familiar with the laws of other states, such as Delaware or New York, and more comfortable having the laws of those states govern their contracts than Mississippi law.

E. Default rule

If the parties do not make an express choice of law, then under this proposal the law of Mississippi would apply to transactions having a reasonable relation to Mississippi. This default rule is substantially the same as the rules under the current choice of law provision in Mississippi, the pre-2008 version of Revised Article 1 and the post-2008 version of Revised Article 1, and so does not make a change to existing law.

F. Conclusion

While the proposed choice of law provisions is more liberal than the current or post-2008 choice of law provision for Amended Article 1 in the sense of allowing commercial entities more freedom of contract, we think that this choice of law is not contrary to any policies of the State of Mississippi or the UCC, and is consistent with the UCC study group's mission of making Mississippi laws more amenable to businesses operating in Mississippi.

EXHIBIT A

§ 75-1-301. Territorial Applicability; Parties' Power to Choose Applicable Law.

(a) If one of the parties to a transaction is a consumer, an agreement by the parties that any or all of their rights and obligations are to be governed by the laws of another state or nation is not effective unless the transaction bears a reasonable relation to the designated state or nation.

(b) If neither party to a transaction is a consumer, the following rules apply:

(1) If the transaction does not bear a reasonable relation to a nation other than the United States, an agreement by the parties that any or all of their rights and obligations are to be determined by the law of this state or another state is effective, whether or not the transaction bears a reasonable relation to the designated state; and

(2) If the transaction bears a reasonable relation to a nation other than the United States, an agreement by the parties that any or all of their rights and obligations are to be determined by the law of this state or another state or nation is effective, whether or not the transaction bears a reasonable relation to the designated state or nation.

(c) In the absence of an agreement effective under subsection (a) or (b), and except as provided in subsection (e), this Chapter applies to transactions bearing an appropriate relation to this state.

(d) Application of the law of a state determined pursuant to subsection (a) or (c) may not deprive a consumer of the protection of any statute of the state in which the consumer principally resides at the time that the transaction became enforceable, which statute is both protective of consumers and may not be varied by agreement.

(e) If one of the following provisions of this Chapter specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:

[cross-references to other provisions intentionally deleted for purposes of this memorandum]

EXHIBIT B

§ 11-7-18. Implied warranties, limitations and disclaimers

Except as otherwise provided in Sections 75-2-314, 75-2-315, 75-2-315.1 and 75-2-719, there shall be no limitation of remedies or disclaimer of liability as to any implied warranty of merchantability or fitness for a particular purpose in a sale to a consumer, as defined in Section 75-1-201(b)(11), of consumer goods, as defined in Section 75-9-102(a)(23). This section may not be waived or varied by agreement.

EXHIBIT C

§ 75-2-719. Contractual Modification or Limitation of Remedy

(1) Subject to the provisions of subsections (2), (3), and (4) of this section and of Section 75-2-718 on liquidation and limitation of damages,

(a) The agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Code.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

(4) Any limitation of remedies which would deprive ~~the buyer~~a consumer, as defined in Section 75-1-201(b)(11) of a remedy to which ~~he~~the consumer may be entitled for breach of an implied warranty of merchantability or fitness for a particular purpose ~~shall be prohibited. The provisions~~arising out of ~~this subsection do not apply to computer hardware, computer software, and services performed on computer hardware and computer software, which are sold between merchants.~~the purchase of consumer goods, as defined in Section 75-9-102(a)(23), shall be prohibited. This subsection may not be waived or varied by agreement.

Rod Clement draft 09/9/09

[new] § 15-1-81. **Actions on non-negotiable promissory notes**.

(a) An action to enforce the obligations of a party to pay a promissory note payable at a definite time must be commenced within six (6) years after the due date or dates stated in the promissory note, or if a due date is accelerated, within six (6) years after the accelerated due date.

(b) If demand for payment is made to the maker of a promissory note payable on demand, an action to enforce the obligation of a party to pay the promissory note must be commenced within six (6) years after the demand. If no demand for payment is made to the maker, an action to enforce the promissory note is barred if neither principal nor interest on the promissory note has been paid for a continuous period of ten (10) years.

(c) For purposes of this section, a "promissory note" is a non-negotiable unconditional written promise, signed by the maker of the promise, to pay absolutely and in any event a certain sum of money either to, or for the order of, the bearer or a designated person. Promissory notes for purposes of this section include but are not limited to non-negotiable promissory notes that: 1) bear a variable rate of interest; 2) provide for default interest; 3) are non-recourse to the maker of the promise; or 4) qualify as "instruments" under Mississippi Code Ann. § 75-9-102(a)(47), as the same may be amended from time to time.

(d) This section shall not apply to negotiable promissory notes, drafts, checks, certificates of deposit or any other instrument or item for which Section 75-3-118 of the Mississippi Code, as the same may be amended from time to time, provides the applicable statute of limitations. Neither a lease nor a security agreement is a promissory note for purposes of this section. A promissory note is not investment property (as defined in Miss. Code Ann. § 75-9-102(a)(49), as the same may be amended from time to time), a letter of credit, or writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card. It is the intention of this section that notes, as defined in Article 3 of the Mississippi Uniform Commercial Code, and promissory notes, as defined in this section, shall have the same statutes of limitations.

(e) This section shall not apply to obligations arising from retail installment contracts. For purposes of this section, a "retail installment contract" is a contract for the sale of goods under which the buyer makes periodic payments and the seller retains a security interest in the goods. For the purposes of this section, "goods" have the same meaning as the definition of "goods" in Section 75-9-102(a)(44) of the Mississippi Code, as the same may be amended from time to time.

(f) This section takes effect on [July 1, 2012] and shall apply to all promissory notes for which the statute of limitations in effect immediately prior to that date has not run. This section shall have no application to promissory notes for which the statute of limitations has run prior to [July 1, 2012].

MEMORANDUM

To: Cheryn Baker

From: Rod Clement

Date: September 9, 2009

Re: Proposed new statute specifying statute of limitations for non-negotiable notes

Attached is a draft of statute providing a statute of limitations for non-negotiable promissory notes. The purpose of this memo is to provide some background for this draft.

Article 3 of Mississippi's Uniform Commercial Code, specifically Section 75-3-118(a) and (b), provides a six-year statute of limitations for notes. However, this section only applies to promissory notes that are "negotiable instruments" governed by Article 3. Miss. Code Ann. § 75-3-104(b). Mississippi does not have a statute that expressly provides a statute of limitations for promissory notes that are not "negotiable" notes under Article 3, so by default the general three-year statute of limitations in Section 15-1-49 of the Mississippi Code provides the statute of limitations for promissory notes that are not negotiable.

This difference between the statute of limitations for negotiable and non-negotiable notes raises several problems. First, in order to determine the statute of limitations on a promissory note, one must determine whether it is "negotiable" under Article 3. The elements of negotiability are listed in Section 75-3-104(a) and in the sections following Section 75-3-104. The voluminous annotations under these statutes show that whether a particular note is negotiable or not is an issue about which sophisticated attorneys can differ and on which the courts have provided inconsistent guidance. Second, the statute of limitations for enforcing a deed of trust, and the priority of the deed of trust against subsequent purchasers and creditors of the grantor of the deed of trust is determined by the statute of limitations on the underlying indebtedness. Miss. Code Ann. § 15-1-21; § 89-5-19. However, it is impossible for one reviewing the land records to determine whether the note secured by the deed of trust is negotiable or not. For this reason it is impossible to determine from the land records when a deed of trust has expired.

This proposed statute is intended to address these problems by providing in this draft statute, tentatively identified as new Section 15-1-81 of the Mississippi Code, that the statute of limitations for non-negotiable promissory notes is the same as for negotiable notes. To try to minimize any gap between the application of this section and Section 75-3-118, subsections (a) and (b) of this proposed statute closely track the language of Section 75-3-118(a) and (b).

Subsection (c) gives a definition of a promissory note for purposes of this section. Article 3 of the UCC does not provide a definition of a promissory note, and the

definition of promissory notes in Article 9, Miss. Code Ann. § 75-9-102(a)(65), is limited to negotiable notes (non-negotiable notes are most likely to be "payment intangibles" under Article 9). So I adopted a definition of "promissory note" from general reference sources. I specified that variable rates are "promissory notes" to anticipate questions about whether these common types of notes provided for a "certain sum of money" as provided in the definition.

Subsection (d) clarifies that the proposed statute does not apply to negotiable instruments for which Section 75-3-118 provides the applicable statute of limitations. I listed specific types of documents which are covered by Article 3 and not the proposed statute. Listing these particular instruments raises the possibility that there may be others that are excluded and that are not listed, but I balanced that risk against the value of making clear that the proposed statute did not apply to the most common documents subject to Article 3 and determined that the value of clarity for the most common types of instruments was more important than the risk of omitting less common documents.

Subsection (e) specifically excludes retail installment contracts from this statute. Bill Henning raised the question about whether the proposed statute would cover retail installment sales contracts. Whether retail installment sales contracts are negotiable is often not an easy question and is one that has generated litigation. One of the reasons for the proposed statute is to make it easier to determine when deeds of trust have become barred by the running of the statute of limitations. Retail installment sales contracts are not secured by deeds of trust, so including them within the scope of the proposed statute was not consistent with the purposes of the proposed statute. I could not find a definition of a retail installment contract in Mississippi cases or statutes, so I relied on general reference sources.

Subsection (f) addresses the effective date and transition. I thought that it was prudent to have a later effective date so borrowers and lenders would have time to take this change in law into account. The particular date of July 1, 2012 is somewhat arbitrary; I tried to pick date that a little over a year after the date that the governor would sign the bill if it was introduced in the next legislative session.

I would appreciate any comments on this proposal.