



DELBERT HOSEMANN
Secretary of State

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

Third Meeting

Wednesday, September 23, 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. Subgroup Recommendations
 - a. UCC Articles 1 and 2 – Rod Clement
 - b. UCC Articles 3, 4 and 9 – Paul Carrubba and Betty Morgan Benton
3. Subgroup Reports
 - a. Debtor Creditor Laws (Bankruptcy Alternatives) -- Ed Lawler
 - b. Subcontractor Liens – Jerome Hafter
 - i. Meeting on September 30 at 1pm
4. Next Steps for Upcoming Meetings
5. Other Business
6. Adjourn 1:00 P.M (or earlier)

From: [Ed Lawler](#)
To: [Kay Earles](#);
cc: [Cheryn Baker](#);
Subject: Re: UCC Study Group - Update on Choice of Law for Revised Article 1
Date: Tuesday, September 22, 2009 11:08:55 AM

Kay: Unfortunately, I am not available for the meeting tomorrow. I met with Judge Ellington last week regarding the issues taken up by my subcommittee and we are working on a lunch meeting with the other Bankruptcy Judges before the next subcommittee meeting. Judge Olack was out of town all of last week. I have no other developments to report at this time. Let me know if there are any questions. Thank you. Ed

Kay Earles wrote:

Sent on behalf of Rod Clement

To UCC Study Group Members

Attached are the latest drafts on the choice of law provision for Revised Article 1.

(This may not be as relevant to the Debtor/Creditor group; but if you were at the September 9th meeting when this was discussed, and if you will be at the Wednesday's meeting, this will help you understand the topic better.)

Attached are (a) a draft of a change to Section 75-2-315.1 that addresses an issue that was raised at the September 9 meeting of the entire group regarding the ability of a retailer to assert implied warranties against his seller if a consumer asserted a breach of implied warranties against the retailer, and (b) my September 8 memo on choice of law, which was previously circulated and which is still relevant to the choice of law discussion on Wednesday.

Best regards.

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EXHIBIT A TO SUBGROUP 2 REPORT

**Amendments to Mississippi
Uniform Commercial Code Articles 3 and 4
(Revised for Approval on September 23)**

Article 3:

1. § 75-3-103. Definitions
2. § 75-3-106. Unconditional Promise or Order
3. § 75-3-116. Joint and Several Liability, Contribution
4. § 75-3-119. Notice of Right to Defend Action
5. § 75-3-204. Indorsement
6. § 75-3-304. Defenses and claims in Recoupment
7. § 75-3-309. Enforcement of Lost, Destroyed, or Stolen Instrument
8. § 75-3-312. Lost, Destroyed, or Stolen Cashier's Check, Teller's Check, or Certified Check
9. § 75-3-415. Obligation of Indorser
10. § 75-3-416. Transfer Warranties
11. § 75-3-417. Presentment Warranties
12. § 75-3-419. Instruments Signed for Accommodation
13. § 75-3-602. Payment
14. § 75-3-604. Discharge by Cancellation or Renunciation
15. § 75-3-605. Discharge of Secondary Obligors (formerly "Discharge of Indorsers and Accommodation Parties")

Article 4:

16. § 75-4-104. Definitions and Index of Definitions
17. § 75-4-105. Definitions of types of banks
18. § 75-4-207. Transfer Warranties
19. § 75-4-208. Presentment Warranties
20. § 75-4-212. Presentment by Notice of Item Not Payable by, Through, or at Bank; Liability of Drawer or Indorser
21. § 75-4-301. Deferred Posting; Recovery of Payment by Return of Items; Time of Dishonor; Return of Items by Payor Bank
22. § 75-4-403. Customer's Right to Stop Payment; Burden of Proof of Loss

Article 3 Amendments

§ 75-3-103. Definitions

(a) In this chapter:

(1) "Acceptor" means a drawee who has accepted a draft.

~~(2)~~ "Consumer account" means an account established by an individual primarily for personal, family, or household purposes.

~~(3)~~ "Consumer transaction" means a transaction in which an individual incurs an obligation primarily for personal, family, or household purposes.

~~(2)~~(4) "Drawee" means a person ordered in a draft to make payment.

~~(3)~~(5) "Drawer" means a person who signs or is identified in a draft as a person ordering payment.

~~(4)~~ "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing. ~~(6)~~ [Reserved.]

~~(5)~~(7) "Maker" means a person who signs or is identified in a note as a person undertaking to pay.

~~(6)~~(8) "Order" means a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative but not in succession. An authorization to pay is not an order unless the person authorized to pay is also instructed to pay.

~~(7)~~(9) "Ordinary care" in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this chapter or Chapter 4.

~~(8)~~(10) "Party" means a party to an instrument.

~~(9)~~ "Promise" means a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.

(11) "Principal obligor," with respect to an instrument, means the accommodated party or any other party to the instrument against whom a secondary obligor has recourse under this article.

(12) "Promise" means a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.

(13) "Prove" with respect to a fact means to meet the burden of establishing the fact (Section 75-1-201(8), -Mississippi Code of 1972).

(14) [Reserved.]

~~(14)~~(15) "Remitter" means a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser.

~~(16)~~ "Remotely created check" means a check that is not created by the paying bank and that does not bear a signature applied, or purported to be applied, by the person on whose account the check is drawn.
~~"Remotely created consumer item" means an item drawn on a consumer account, which is not created by the payor bank and does not bear a handwritten signature purporting to be the signature of the drawer.~~

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(17) "Secondary obligor," with respect to an instrument, means (i) an indorser or an accommodation party, (ii) a drawer having the obligation described in Section 75-3-414(d), or (iii) any other party to the instrument that has recourse against another party to the instrument pursuant to Section 75-3-116(b).

(b) Other definitions applying to this chapter and the sections in which they appear are:

“Acceptance”	Section 75-3-409
“Accommodated party”	Section 75-3-419
“Accommodation party”	Section 75-3-419
“Account”	Section 75-4-104
“Alteration”	Section 75-3-407
“Anomalous indorsement”	Section 75-3-205
“Blank indorsement”	Section 75-3-205
“Cashier’s check”	Section 75-3-104
“Certificate of deposit”	Section 75-3-104
“Certified check”	Section 75-3-409
“Check”	Section 75-3-104
“Consideration”	Section 75-3-303
“Draft”	Section 75-3-104
“Holder in due course”	Section 75-3-302
“Incomplete instrument”	Section 75-3-115
“Indorsement”	Section 75-3-204
“Indorser”	Section 75-3-204
“Instrument”	Section 75-3-104
“Issue”	Section 75-3-105
“Negotiable instrument”	Section 75-3-104
“Negotiation”	Section 75-3-201
“Note”	Section 75-3-104
“Payable at a definite time”	Section 75-3-108
“Payable on demand”	Section 75-3-108
“Payable to bearer”	Section 75-3-109
“Payable to order”	Section 75-3-109
“Payment”	Section 75-3-602

“Person entitled to enforce”	Section 75-3-301
“Presentment”	Section 75-3-501
“Reacquisition”	Section 75-3-207
“Special indorsement”	Section 75-3-205
“Teller's check”	Section 75-3-104
“Transfer of instrument”	Section 75-3-203
“Traveler's check”	Section 75-3-104
“Value”	Section 75-3-303

(c) The following definitions in other chapters apply to this chapter:

“Bank”	Section 75-4-105
“Banking day”	Section 75-4-104
“Clearinghouse”	Section 75-4-104
“Collecting bank”	Section 75-4-105
“Depository bank”	Section 75-4-105
“Documentary draft”	Section 75-4-104
“Intermediary bank”	Section 75-4-105
“Item”	Section 75-4-104
“Payor bank”	Section 75-4-105
“Suspends payments”	Section 75-4-104

(d) In addition, Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

§ 75-3-106. Unconditional Promise or Order

(a) Except as provided in this section, for the purposes of Section 75-3-104(a), a promise or order is unconditional unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another [writing record](#), or (iii) that rights or obligations with respect to the promise or order are stated in another [writing record](#). A reference to another [writing record](#) does not of itself make the promise or order conditional.

(b) A promise or order is not made conditional (i) by a reference to another [writing record](#) for a statement of rights with respect to collateral, prepayment, or acceleration, or (ii) because payment is limited to resort to a particular fund or source.

(c) If a promise or order requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the promise or order, the condition does not make the promise or order conditional for the purposes of Section 75-3-104(a). If the person whose specimen signature appears on an instrument fails to countersign the instrument, the failure to countersign is a defense to the obligation of the issuer, but the failure does not prevent a transferee of the instrument from becoming a holder of the instrument.

(d) If a promise or order at the time it is issued or first comes into possession of a holder contains a statement, required by applicable statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee, the promise or order is not thereby made conditional for the purposes of Section 75-3-104(a); but if the promise or order is an instrument, there cannot be a holder in due course of the instrument.

§ 75-3-116. Joint and Several Liability, Contribution

(a) Except as otherwise provided in the instrument, two (2) or more persons who have the same liability on an instrument as makers, drawers, acceptors, indorsers who indorse as joint payees, or anomalous indorsers are jointly and severally liable in the capacity in which they sign.

(b) Except as provided in Section 75-3-419(e)(f) or by agreement of the affected parties, a party having joint and several liability who pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law.

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~~(c) Discharge of one (1) party having joint and several liability by a person entitled to enforce the instrument does not affect the right under subsection (b) of a party having the same joint and several liability to receive contribution from the party discharged.~~

§ 75-3-119. Notice of Right to Defend Action

In an action for breach of an obligation for which a third person is answerable over pursuant to this chapter or Chapter 4, the defendant may give the third person ~~written~~ notice of the litigation in a record, and the person notified may then give similar notice to any other person who is answerable over. If the notice states (i) that the person notified may come in and defend and (ii) that failure to do so will bind the person notified in an action later brought by the person giving the notice as to any determination of fact common to the two (2) litigations, the person notified is so bound unless after reasonable receipt of the notice the person notified does come in and defend.

§ 75-3-204. Indorsement

~~(Unchanged, but note non-uniform text below.)~~

(a) "Indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument; provided, however, that an indorsement of instruments representing student loans, including loans that are insured by the United States Secretary of Education under 20 U.S.C.A. 1071, et seq., as amended, or by a state or nonprofit private institution or organization with which the United States Secretary of Education has an agreement under 20 U.S.C.A. 1078(b) as amended, may be made by signed blanket indorsement, rather than in the manner otherwise provided in this subsection, if a notation to that effect is made in the name of the transferee on the instrument representing the student loan.

(b) "Indorser" means a person who makes an indorsement.

(c) For the purpose of determining whether the transferee of an instrument is a holder, an indorsement that transfers a security interest in the instrument is effective as an unqualified indorsement of the instrument.

(d) If an instrument is payable to a holder under a name that is not the name of the holder, indorsement may be made by the holder in the name stated in the instrument or in the holder's name or both, but signature in both names may be required by a person paying or taking the instrument for value or collection.

§ 75-3-305. Defenses and Claims in Recoupment

(a) Except as ~~stated in subsection (b)~~ otherwise provided in this section, the right to enforce the obligation of a party to pay an instrument is subject to the following:

(i) A defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor

to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings;

(2) A defense of the obligor stated in another section of this chapter or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract; and

(3) A claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument; but the claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought.

(b) The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1), but is not subject to defenses of the obligor stated in subsection (a)(2) or claims in recoupment stated in subsection (a)(3) against a person other than the holder.

(c) Except as stated in subsection (d), in an action to enforce the obligation of a party to pay the instrument, the obligor may not assert against the person entitled to enforce the instrument a defense, claim in recoupment, or claim to the instrument (Section 75-3-306) of another person, but the other person's claim to the instrument may be asserted by the obligor if the other person is joined in the action and personally asserts the claim against the person entitled to enforce the instrument. An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument.

(d) In an action to enforce the obligation of an accommodation party to pay an instrument, the accommodation party may assert against the person entitled to enforce the instrument any defense or claim in recoupment under subsection (a) that the accommodated party could assert against the person entitled to enforce the instrument, except the defenses of discharge in insolvency proceedings, infancy, and lack of legal capacity.

(e) In a consumer transaction, if law other than this article requires that an instrument include a statement to the effect that the rights of a holder or transferee are subject to a claim or defense that the issuer could assert against the original payee, and the instrument does not include such a statement:

(1) the instrument has the same effect as if the instrument included such a statement;

(2) the issuer may assert against the holder or transferee all claims and defenses that would have been available if the instrument included such a statement; and

(3) the extent to which claims may be asserted against the holder or transferee is determined as if the instrument included such a statement.

(f) This section is subject to law other than this article that establishes a different rule for consumer transactions.

~~Legislative Note: If a consumer protection law in this state addresses the same issue as subsection (e), it should be examined for consistency with subsection (e) and, if inconsistent, should be amended.~~

§ 75-3-309. Enforcement of Lost, Destroyed, or Stolen Instrument

(a) A person not in possession of an instrument is entitled to enforce the instrument if:

(1) The person seeking to enforce the instrument:

~~(i) the person was in possession of the instrument and (i) was~~ entitled to enforce it the instrument when loss of possession occurred; ~~or~~

(ii) has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;

~~(ii)(2)~~ (2) the loss of possession was not the result of a transfer by the person or a lawful seizure; ~~and~~

~~(iii)(3)~~ (3) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, Section 75-3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

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§ 75-3-312. Lost, Destroyed, or Stolen Cashier's Check, Teller's Check, or Certified Check

(a) In this section:

(1) "Check" means a cashier's check, teller's check, or certified check.

(2) "Claimant" means a person who claims the right to receive the amount of a cashier's check, teller's check, or certified check that was lost, destroyed, or stolen.

(3) "Declaration of loss" means a written statement, made in a record under penalty of perjury, to the effect that (i) the declarer lost possession of a check, (ii) the declarer is the drawer or payee of the check, in the case of a certified check, or the remitter or payee of the check, in the case of a cashier's check or teller's check, (iii) the loss of possession was not the result of a transfer by the declarer or a lawful seizure, and (iv) the declarer cannot reasonably obtain possession of the check because the check was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(4) "Obligated bank" means the issuer of a cashier's check or teller's check or the acceptor of a certified check.

(b) A claimant may assert a claim to the amount of a check by a communication to the obligated bank describing the check with reasonable certainty and requesting payment of the amount of the check, if (i) the claimant is the drawer or payee of a certified check or the remitter or payee of a cashier's check or teller's check, (ii) the communication contains or is accompanied by a declaration of loss of the claimant with respect to the check, (iii) the communication is received at a time and in a manner affording the bank a reasonable time to act on it before the check is paid, and (iv) the claimant provides reasonable identification if requested by the obligated bank. Delivery of a declaration of loss is a warranty of the truth of the statements made in the declaration. If a claim is asserted in compliance with this subsection, the following rules apply:

(1) The claim becomes enforceable at the later of (i) the time the claim is asserted, or (ii) the ninetieth day following the date of the check, in the case of a cashier's check or teller's check, or the ninetieth day following the date of acceptance, in the case of a certified check.

(2) Until the claim becomes enforceable, it has no legal effect and the obligated bank may pay the check or, in the case of a teller's check, may permit the drawee to pay the check. Payment to a person entitled to enforce the check discharges all liability of the obligated bank with respect to the check.

(3) If the claim becomes enforceable before the check is presented for payment, the obligated bank is not obliged to pay the check.

(4) When the claim becomes enforceable, the obligated bank becomes obliged to pay the amount of the check to the claimant if payment of the check has not been made to a person entitled to enforce the check. Subject to Section 75-4-302(a)(1), payment to the claimant discharges all liability of the obligated bank with respect to the check.

(c) If the obligated bank pays the amount of a check to a claimant under subsection (b)(4) and the check is presented for payment by a person having rights of a holder in due course, the claimant is obliged to (i) refund the payment to the obligated bank if the check is paid, or (ii) pay the amount of the check to the person having rights of a holder in due course if the check is dishonored.

(d) If a claimant has the right to assert a claim under subsection (b) and is also a person entitled to enforce a cashier's check, teller's check, or certified check which is lost, destroyed, or stolen, the claimant may assert rights with respect to the check either under this section or Section 75-3-309.

§ 75-3-415. Obligation of Indorser

(a) Subject to subsections (b), (c), and (d) and to Section 75-3-419(d), if an instrument is dishonored, an indorser is obliged to pay the amount due on the instrument (i) according to the terms of the instrument at the time it was indorsed, or (ii) if the indorser indorsed an

incomplete instrument, according to its terms when completed, to the extent stated in Sections 75-3-115 and 75-3-407. The obligation of the indorser is owed to a person entitled to enforce the instrument or to a subsequent indorser who paid the instrument under this section.

(b) If an indorsement states that it is made "without recourse" or otherwise disclaims liability of the indorser, the indorser is not liable under subsection (a) to pay the instrument.

(c) If notice of dishonor of an instrument is required by Section 75-3-503 and notice of dishonor complying with that section is not given to an indorser, the liability of the indorser under subsection (a) is discharged.

(d) If a draft is accepted by a bank after an indorsement is made, the liability of the indorser under subsection (a) is discharged.

~~(e) If an indorser of a check is liable under subsection (a) and the check is not presented for payment, or given to a depository bank for collection, within thirty (30) days after the day the indorsement was made, the liability of the indorser under subsection (a) is discharged.~~

§ 75-3-416. Transfer Warranties

(a) A person who transfers an instrument for consideration warrants to the transferee and, if the transfer is by indorsement, to any subsequent transferee that:

(1) The warrantor is a person entitled to enforce the instrument;

(2) All signatures on the instrument are authentic and authorized;

(3) The instrument has not been altered;

(4) The instrument is not subject to a defense or claim in recoupment of any party which can be asserted against the warrantor; ~~and~~

(5) The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer; ~~and~~

~~(6) With respect to a remotely created check, that the person on whose account the remotely created check is drawn authorized the issuance of the check in the amount stated on the check and to the payee stated on the check.
With respect to a remotely created consumer item, that the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn.~~

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(b) A person to whom the warranties under subsection (a) are made and who took the instrument in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the instrument plus expenses and loss of interest incurred as a result of the breach.

(c) The warranties stated in subsection (a) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(d) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

§ 75-3-417. Presentment Warranties

(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee making payment or accepting the draft in good faith that:

(1) The warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;

(2) The draft has not been altered; ~~and~~

(3) The warrantor has no knowledge that the signature of the drawer of the draft is unauthorized; ~~and~~

~~(4) With respect to a remotely created check, that the person on whose account the remotely created check is drawn authorized the~~

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issuance of the check in the amount stated on the check and to the payee stated on the check.

With respect to any remotely-created consumer item, that the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn.

(b) A drawee making payment may recover from any warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft, breach of warranty is a defense to the obligation of the acceptor. If the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from any warrantor for breach of warranty the amounts stated in this subsection.

(c) If a drawee asserts a claim for breach of warranty under subsection (a) based on an unauthorized indorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the indorsement is effective under Section 75-3-404 or 75-3-405 or the drawer is precluded under Section 75-3-406 or 75-4-406 from asserting against the drawee the unauthorized indorsement or alteration.

(d) If (i) a dishonored draft is presented for payment to the drawer or an indorser or (ii) any other instrument is presented for payment to a party obliged to pay the instrument, and (iii) payment is received, the following rules apply:

(1) The person obtaining payment and a prior transferor of the instrument warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the instrument, a person entitled to enforce the instrument or authorized to obtain payment on behalf of a person entitled to enforce the instrument.

(2) The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

(e) The warranties stated in subsections (a) and (d) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) or (d) is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(f) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

§ 75-3-419. Instruments Signed for Accommodation

(a) If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation."

(b) An accommodation party may sign the instrument as maker, drawer, acceptor, or indorser and, subject to subsection (d), is obliged to pay the instrument in the capacity in which the accommodation party signs. The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation.

(c) A person signing an instrument is presumed to be an accommodation party and there is notice that the instrument is signed for accommodation if the signature is an anomalous indorsement or is accompanied by words indicating that the signer is acting as surety or guarantor with respect to the obligation of another party to the instrument. Except as provided in Section 75-3-605, the obligation of an accommodation party to pay the instrument is not affected by the fact that the person enforcing the obligation had notice when the instrument was taken by that person that the accommodation party signed the instrument for accommodation.

(d) If the signature of a party to an instrument is accompanied by words indicating unambiguously that the party is guaranteeing collection rather than payment of the obligation of another party to the instrument, the signer is obliged to pay the amount due on the instrument to a person entitled to enforce the instrument only if (i) execution of judgment against the other party has been returned unsatisfied, (ii) the other party is insolvent or in an insolvency proceeding, (iii) the other party cannot be served with process, or (iv) it is otherwise apparent that payment cannot be obtained from the other party.

(e) If the signature of a party to an instrument is accompanied by words indicating that the party guarantees payment or the signer signs the instrument as an accommodation party in some other manner that does not unambiguously indicate an intention to guarantee collection rather than payment, the signer is obliged to pay the amount due on the instrument to a person entitled to enforce the instrument in the same circumstances as the accommodated party would be obliged, without prior resort to the accommodated party by the person entitled to enforce the instrument.

~~(e)(f)~~ An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. In proper circumstances, an accommodation party may obtain relief that requires the accommodated party to perform its obligations on the instrument. An accommodated party ~~who that~~ pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party.

§ 75-3-602. Payment

(a) Subject to subsection ~~(b)~~(c), an instrument is paid to the extent payment is made ~~(i)~~ by or on behalf of a party obliged to pay the instrument, and ~~(ii)~~ to a person entitled to enforce the instrument. ~~To the extent of the payment, the obligation of the party obliged to pay the instrument is discharged even though payment is made with knowledge of a claim to the instrument under Section 75-3-306 by another person.~~

(b) Subject to subsection (e), a note is paid to the extent payment is made by or on behalf of a party obliged to pay the note to a person that formerly was entitled to enforce the note only if at the time of the payment the party obliged to pay has not received adequate notification that the note has been transferred and that payment is to be made to the transferee. A notification is adequate only if it is signed by the transferor or the transferee; reasonably identifies the transferred note; and provides an address at which payments subsequently are to be made. Upon request, a transferee shall seasonably furnish reasonable proof that the note has been transferred. Unless the transferee complies with the request, a payment to the person that formerly was entitled to enforce the note is effective for purposes of subsection (c) even if the party ~~obliged to pay the note has received a notification under this subsection~~ paragraph.

(c) Subject to subsection (e), to the extent of ~~the payment,~~ a payment under subsections (a) and (b), the obligation of the party obliged to pay the instrument is discharged even though payment is made with knowledge of a claim to the instrument under Section 75-3-306 by another person.

(d) Subject to subsection (e), a transferee, or any party that has acquired rights in the instrument directly or indirectly from a transferee, including any such party that has rights as a holder in due course, is deemed to have notice of any payment that is made under subsection (b) after the date that the note is transferred to the transferee but before the party obliged to pay the note receives adequate notification of the transfer.

~~(b)~~(e) The obligation of a party to pay the instrument is not discharged under subsections (a) through (d) if:

(1) A claim to the instrument under Section 75-3-306 is enforceable against the party receiving payment and (i) payment is made with knowledge by the payor that payment is prohibited by injunction or similar process of a court of competent jurisdiction, or (ii) in the case of an instrument other than a cashier's check, teller's check, or certified check, the party making payment accepted, from the person having a claim to the instrument, indemnity against loss resulting from refusal to pay the person entitled to enforce the instrument; or

(2) The person making payment knows that the instrument is a stolen instrument and pays a person it knows is in wrongful possession of the instrument.

(f) As used in this section, "signed," with respect to a record that is not a writing, includes the attachment to or logical association with the record of an electronic symbol, sound, or process with the present intent to adopt or accept the record.

§ 75-3-604. Discharge by Cancellation or Renunciation

(a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed ~~writing~~ record.

(b) Cancellation or striking out of an indorsement pursuant to subsection (a) does not affect the status and rights of a party derived from the indorsement.

(c) In this section, "signed," with respect to a record that is not a writing, includes the attachment to or logical association with the record of an electronic symbol, sound, or process with the present intent to adopt or accept the record.

§ 75-3-605. Discharge of Indorsers and Accommodation Parties Discharge of Secondary Obligors

~~(a) In this section, the term "indorser" includes a drawer having the obligation described in Section 75-3-414(d).~~

~~(b) Discharge, under Section 75-3-604, of the obligation of a party to pay an instrument does not discharge the obligation of an indorser or accommodation party having a right of recourse against the discharged party.~~

~~(c) If a person entitled to enforce an instrument agrees, with or without consideration, to an extension of the due date of the obligation of a party to pay the instrument, the extension discharges an indorser or accommodation party having a right of recourse against the party whose obligation is extended to the extent the indorser or accommodation party proves that the extension caused loss to the indorser or accommodation party with respect to the right of recourse.~~

~~(d) If a person entitled to enforce an instrument agrees, with or without consideration, to a material modification of the obligation of a party other than an extension of the due date, the modification discharges the obligation of an indorser or accommodation party having a right of recourse against the person whose obligation is modified to the extent the modification causes loss to the indorser or accommodation party with respect to the right of recourse. The loss suffered by the indorser or accommodation party as a result of the modification is equal to the amount of the right of recourse unless the person enforcing the instrument proves that no loss was caused by the modification or that the loss caused by the modification was an amount less than the amount of the right of recourse.~~

~~(e) If the obligation of a party to pay an instrument is secured by an interest in collateral and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of an indorser or accommodation party having a right of recourse against the obligor is discharged to the extent of the impairment. The value of an interest in collateral is impaired to the extent (i) the value of the interest is reduced to an amount less than the amount of the right of recourse of the party asserting discharge, or (ii) the reduction in value of the interest causes an increase in the amount by which the amount of the right of recourse exceeds the value of the interest. The burden of proving impairment is on the party asserting discharge.~~

~~(f) If the obligation of a party is secured by an interest in collateral not provided by an accommodation party and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of any party who is jointly and severally liable with respect to the secured obligation is discharged to the extent the impairment causes the party asserting discharge to pay more than that party would have been obliged to pay, taking into account rights of contribution, if impairment had not occurred. If the party asserting discharge is an accommodation party not entitled to discharge under subsection (e), the party is deemed to have a right to contribution based on joint and several liability rather than a right to reimbursement. The burden of proving impairment is on the party asserting discharge.~~

~~(g) Under subsection (e) or (f), impairing value of an interest in collateral includes (i) failure to obtain or maintain perfection or recordation of the interest in collateral, (ii) release of collateral without substitution of collateral of equal value, (iii) failure to perform a duty to preserve the value of collateral owed, under Chapter 9 or other law, to a debtor or surety or other person secondarily liable, or (iv) failure to comply with applicable law in disposing of collateral.~~

~~(h) An accommodation party is not discharged under subsection (c), (d), or (e) unless the person entitled to enforce the instrument knows of the accommodation or has notice under [Section 75-3-419\(c\)](#) that the instrument was signed for accommodation.~~

~~(i) A party is not discharged under this section if (i) the party asserting discharge consents to the event or conduct that is the basis of the discharge, or (ii) the instrument or a separate agreement of the party provides for waiver of discharge under this section either specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral.~~

~~(a) If a person entitled to enforce an instrument releases the obligation of a principal obligor in whole or in part, and another party to the instrument is a secondary obligor with respect to the obligation of that principal obligor, the following rules apply:~~

~~(1) Any obligations of the principal obligor to the secondary obligor with respect to any previous payment by the secondary obligor are not affected. Unless the terms of the release preserve the secondary obligor's recourse, the principal obligor is discharged, to the extent of the release, from any other duties to the secondary obligor under this article.~~

~~(2) Unless the terms of the release provide that the person entitled to enforce the instrument retains the right to enforce the instrument against the secondary obligor, the secondary obligor is discharged to the same extent as the principal obligor from any unperformed portion of its obligation on the instrument. If the instrument is a check and the obligation of the secondary obligor is based on an indorsement of the check, the secondary obligor is discharged without regard to the language or circumstances of the discharge or other release.~~

~~(3) If the secondary obligor is not discharged under paragraph (2), the secondary obligor is discharged to the extent of the value of the consideration for the release, and to the extent that the release would otherwise cause the secondary obligor a loss.~~

(b) If a person entitled to enforce an instrument grants a principal obligor an extension of the time at which one or more payments are due on the instrument and another party to the instrument is a secondary obligor with respect to the obligation of that principal obligor, the following rules apply:

(1) Any obligations of the principal obligor to the secondary obligor with respect to any previous payment by the secondary obligor are not affected. Unless the terms of the extension preserve the secondary obligor's recourse, the extension correspondingly extends the time for performance of any other duties owed to the secondary obligor by the principal obligor under this article.

(2) The secondary obligor is discharged to the extent that the extension would otherwise cause the secondary obligor a loss.

(3) To the extent that the secondary obligor is not discharged under paragraph (2), the secondary obligor may perform its obligations to a person entitled to enforce the instrument as if the time for payment had not been extended or, unless the terms of the extension provide that the person entitled to enforce the instrument retains the right to enforce the instrument against the secondary obligor as if the time for payment had not been extended, treat the time for performance of its obligations as having been extended correspondingly.

(c) If a person entitled to enforce an instrument agrees, with or without consideration, to a modification of the obligation of a principal obligor other than a complete or partial release or an extension of the due date and another party to the instrument is a secondary obligor with respect to the obligation of that principal obligor, the following rules apply:

(1) Any obligations of the principal obligor to the secondary obligor with respect to any previous payment by the secondary obligor are not affected. The modification correspondingly modifies any other duties owed to the secondary obligor by the principal obligor under this article.

(2) The secondary obligor is discharged from any unperformed portion of its obligation to the extent that the modification would otherwise cause the secondary obligor a loss.

(3) To the extent that the secondary obligor is not discharged under paragraph (2), the secondary obligor may satisfy its obligation on the instrument as if the modification had not occurred, or treat its obligation on the instrument as having been modified correspondingly.

(d) If the obligation of a principal obligor is secured by an interest in collateral, another party to the instrument is a secondary obligor with respect to that obligation, and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of the secondary obligor is discharged to the extent of the impairment. The value of an interest in collateral is impaired to the extent the value of the interest is reduced to an amount less than the amount of the recourse of the secondary obligor, or the reduction in value of the interest causes an increase in the amount by which the amount of the recourse exceeds the value of the interest. For purposes of this subsection, impairing the value of an interest in collateral includes failure to obtain or maintain perfection or recordation of the interest in collateral, release of collateral without substitution of collateral of equal value or equivalent reduction of the underlying obligation, failure to perform a duty to preserve the value of collateral owed, under Article 9 or other law, to a debtor or other person secondarily liable, and failure to comply with applicable law in disposing of or otherwise enforcing the interest in collateral.

(e) A secondary obligor is not discharged under subsections (a)(3), (b), (c), or (d) unless the person entitled to enforce the instrument knows that the person is a secondary obligor or has notice under Section 75-3-419(c) that the instrument was signed for accommodation.

(f) A secondary obligor is not discharged under this section if the secondary obligor consents to the event or conduct that is the basis of the discharge, or the instrument or a separate agreement of the party provides for waiver of discharge under this section specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral. Unless the circumstances indicate otherwise, consent by the principal obligor to an act that would lead to a discharge under this section constitutes consent to that act by the secondary obligor if the secondary obligor controls the principal obligor or deals with the person entitled to enforce the instrument on behalf of the principal obligor.

(g) A release or extension preserves a secondary obligor's recourse if the terms of the release or extension provide that:

(1) the person entitled to enforce the instrument retains the right to enforce the instrument against the secondary obligor; and

(2) the recourse of the secondary obligor continues as if the release or extension had not been granted.

(h) Except as otherwise provided in subsection (i), a secondary obligor asserting discharge under this section has the burden of persuasion both with respect to the occurrence of the acts alleged to harm the secondary obligor and loss or prejudice caused by those acts.

(i) If the secondary obligor demonstrates prejudice caused by an impairment of its recourse, and the circumstances of the case indicate that the amount of loss is not reasonably susceptible of calculation or requires proof of facts that are not ascertainable, it is presumed that the act impairing recourse caused a loss or impairment equal to the liability of the secondary obligor on the instrument. In that event, the burden of persuasion as to any lesser amount of the loss is on the person entitled to enforce the instrument.

Article 4 Amendments

§ 75-4-104. Definitions and Index of Definitions

(a) In this chapter, unless the context otherwise requires:

- (1) "Account" means any deposit or credit account with a bank, including a demand, time, savings, passbook, share draft, or like account, other than an account evidenced by a certificate of deposit;
- (2) "Afternoon" means the period of a day between noon and midnight;
- (3) "Banking day" means the part of a day on which a bank is open to the public for carrying on substantially all of its banking functions;
- (4) "Clearinghouse" means an association of banks or other payors regularly clearing items;
- (5) "Customer" means a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank;
- (6) "Documentary draft" means a draft to be presented for acceptance or payment if specified documents, certificated securities (Section 75-8-102) or instructions for uncertificated securities (Section 75-8-102), or other certificates, statements, or the like are to be received by the drawee or other payor before acceptance or payment of the draft;
- (7) "Draft" means a draft as defined in Section 75-3-104 or an item, other than an instrument, that is an order;
- (8) "Drawee" means a person ordered in a draft to make payment;
- (9) "Item" means an instrument or a promise or order to pay money handled by a bank for collection or payment. The term does not include a payment order governed by Chapter 4A or a credit or debit card slip;
- (10) "Midnight deadline" with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later;
- (11) "Settle" means to pay in cash, by clearinghouse settlement, in a charge or credit or by remittance, or otherwise as agreed. A settlement may be either provisional or final;
- (12) "Suspends payments" with respect to a bank means that it has been closed by order of the supervisory authorities, that a public officer has been appointed to take it over, or that it ceases or refuses to make payments in the ordinary course of business.

(b) Other definitions applying to this chapter and the sections in which they appear are:

"Agreement for electronic presentment"	Section 75-4-110
"Bank"	Section 75-4-105
"Collecting bank"	Section 75-4-105
"Depository bank"	Section 75-4-105
"Intermediary bank"	Section 75-4-105
"Payor bank"	Section 75-4-105
"Presenting bank"	Section 75-4-105
"Presentment notice"	Section 75-4-110

(c) The following definitions in other chapters apply to this chapter:

“Acceptance”	Section 75-3-409
“Alteration”	Section 75-3-407
“Cashier’s check”	Section 75-3-104
“Certificate of deposit”	Section 75-3-104
“Certified check”	Section 75-3-409
“Check”	Section 75-3-104
“Control”	Section 75-7-106
“Good faith”	Section 75-3-103
“Holder in due course”	Section 75-3-302
“Instrument”	Section 75-3-104
“Notice of dishonor”	Section 75-3-503
“Order”	Section 75-3-103
“Ordinary care”	Section 75-3-103
“Person entitled to enforce”	Section 75-3-301
“Presentment”	Section 75-3-501
“Promise”	Section 75-3-103
“Prove”	Section 75-3-103
“Record”	Section 75-3-103
“Remotely -Created check consumer item”	Section 75-3-103
“Teller’s check”	Section 75-3-104
“Unauthorized signature”	Section 75-3-403

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(d) In addition, Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

§ 75-4-105. “Bank”; “Depository Bank”; “Payor Bank”; “Intermediary Bank”; “Collecting Bank”; “Presenting Bank”
Definitions of Types of Banks

In this chapter:

(1) ~~“Bank” means a person engaged in the business of banking, including a savings bank, savings and loan association, credit union, or trust company; [Reserved.]~~

(2) "Depository bank" means the first bank to take an item even though it is also the payor bank, unless the item is presented for immediate payment over the counter;

(3) "Payor bank" means a bank that is the drawee of a draft;

(4) "Intermediary bank" means a bank to which an item is transferred in course of collection except the depository or payor bank;

(5) "Collecting bank" means a bank handling an item for collection except the payor bank;

(6) "Presenting bank" means a bank presenting an item except a payor bank.

§ 75-4-207. Transfer Warranties

(a) A customer or collecting bank that transfers an item and receives a settlement or other consideration warrants to the transferee and to any subsequent collecting bank that:

(1) The warrantor is a person entitled to enforce the item;

(2) All signatures on the item are authentic and authorized;

(3) The item has not been altered;

(4) The item is not subject to a defense or claim in recoupment ([Section 75-3-305\(a\)](#)) of any party that can be asserted against the warrantor; ~~and~~

(5) The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer; ~~and~~

~~(6) With respect to a remotely created check, that the person on whose account the remotely created check is drawn authorized the issuance of the check in the amount stated on the check and to the payee stated on the check.
With respect to any remotely created consumer item, that the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn.~~

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(b) If an item is dishonored, a customer or collecting bank transferring the item and receiving settlement or other consideration is obliged to pay the amount due on the item (i) according to the terms of the item at the time it was transferred, or (ii) if the transfer was of an incomplete item, according to its terms when completed as stated in Sections 75-3-115 and 75-3-407. The obligation of a transferor is owed to the transferee and to any subsequent collecting bank that takes the item in good faith. A transferor cannot disclaim its obligation under this subsection by an indorsement stating that it is made "without recourse" or otherwise disclaiming liability.

(c) A person to whom the warranties under subsection (a) are made and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses and loss of interest incurred as a result of the breach.

(d) The warranties stated in subsection (a) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(e) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

§ 75-4-208. Presentment Warranties

(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee that pays or accepts the draft in good faith that:

(1) The warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;

(2) The draft has not been altered; and

(3) The warrantor has no knowledge that the signature of the purported drawer of the draft is unauthorized; and

(4) With respect to a remotely created check, that the person on whose account the remotely created check is drawn authorized the issuance of the check in the amount stated on the check and to the payee stated on the check.

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With respect to any remotely created consumer item, that the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn.

(b) A drawee making payment may recover from a warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft (i) breach of warranty is a defense to the obligation of the acceptor, and (ii) if the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from a warrantor for breach of warranty the amounts stated in this subsection.

(c) If a drawee asserts a claim for breach of warranty under subsection (a) based on an unauthorized indorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the indorsement is effective under Section 75-3-404 or 75-3-405 or the drawer is precluded under Section 75-3-406 or 75-4-406 from asserting against the drawee the unauthorized indorsement or alteration.

(d) If (i) a dishonored draft is presented for payment to the drawer or an indorser or (ii) any other item is presented for payment to a party obliged to pay the item, and the item is paid, the person obtaining payment and a prior transferor of the item warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the item, a person entitled to enforce the item or authorized to obtain payment on behalf of a person entitled to enforce the item. The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

(e) The warranties stated in subsections (a) and (d) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(f) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

§ 75-4-212. Presentment by Notice of Item Not Payable by, Through, or at Bank; Liability of Drawer or Indorser

(a) Unless otherwise instructed, a collecting bank may present an item not payable by, through, or at a bank by sending to the party to accept or pay a ~~written~~ record providing notice that the bank holds the item for acceptance or payment. The notice must be sent in time to be received on or before the day when presentment is due and the bank must meet any requirement of the party to accept or pay under Section 75-3-501 by the close of the bank's next banking day after it knows of the requirement.

(b) If presentment is made by notice and payment, acceptance, or request for compliance with a requirement under Section 75-3-501 is not received by the close of business on the day after maturity or, in the case of demand items, by the close of business on the third banking day after notice was sent, the presenting bank may treat the item as dishonored and charge any drawer or indorser by sending it notice of the facts.

§ 75-4-301. Deferred Posting; Recovery of Payment by Return of Items; Time of Dishonor; Return of Items by Payor Bank

(a) If a payor bank settles for a demand item other than a documentary draft presented otherwise than for immediate payment over the counter before midnight of the banking day of receipt, the payor bank may revoke the settlement and recover the settlement if, before it has made final payment and before its midnight deadline, it:

(1) Returns the item; ~~or~~

(2) Returns an image of the item, if the party to which the return is made has entered into an agreement to accept an image as a return of the item and the image is returned in accordance with that agreement; or

~~(3)~~ (3) Sends ~~written~~ record providing notice of dishonor or nonpayment if the item is unavailable for return.

(b) If a demand item is received by a payor bank for credit on its books, it may return the item or send notice of dishonor and may revoke any credit given or recover the amount thereof withdrawn by its customer, if it acts within the time limit and in the manner specified in subsection (a).

(c) Unless previous notice of dishonor has been sent, an item is dishonored at the time when for purposes of dishonor it is returned or notice sent in accordance with this section.

(d) An item is returned:

(1) As to an item presented through a clearinghouse, when it is delivered to the presenting or last collecting bank or to the clearinghouse or is sent or delivered in accordance with clearinghouse rules; or

(2) In all other cases, when it is sent or delivered to the bank's customer or transferor or pursuant to instructions.

§ 75-4-403. Customer's Right to Stop Payment; Burden of Proof of Loss.

(a) A customer or any person authorized to draw on the account if there is more than one person may stop payment of any item drawn on the customer's account or close the account by an order to the bank describing the item or account with reasonable certainty received at a time and in a manner that affords the bank a reasonable opportunity to act on it before any action by the bank with respect to the item described in Section 75-4-303. If the signature of more than one person is required to draw on an account, any of these persons may stop payment or close the account.

(b) A stop-payment order is effective for six months, but it lapses after 14 calendar days if the original order was oral and was not confirmed in writing within that period. A stop-payment order may be renewed for additional six-month periods by a writing record given to the bank within a period during which the stop-payment order is effective.

(c) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a stop-payment order or order to close an account is on the customer. The loss from payment of an item contrary to a stop-payment order may include damages for dishonor of subsequent items under Section 75-4-402.

UCC and Debtor Creditors Laws Study Group
Subgroup 1 (Articles 1 and 2 of the UCC)
Report and Recommendations to the full Study Group
September 23, 2009

1. Recommendation to adopt Official Text of Revised Article 1 of the Uniform Commercial Code (Definitions and General Provisions) with exceptions.
 - a. The Subgroup recommends that Mississippi adopt the Revised Article 1 (along with the conforming amendments to same) which was completed by the Uniform Law Commissioners in conjunction with the American Law Institute in 2001. A copy of the Revised Article 1 which will replace the current Mississippi Article 1 of the UCC and which has been conformed to Mississippi formatting was included in the materials provided to the Group on June 25, 2009 and attached at Exhibit X.
 - b. The Subgroup recommends the adoption of the following exceptions to the above: the choice of law provision Section 75-1-301 described in and attached at Exhibit Y shall be substituted for the Revised Article 1 choice of law and current Mississippi choice of law provisions. In addition, the Subgroup recommends that Section 11-7-18 be amended as set forth in Exhibit Y to conform to this new choice of law provision.
2. Recommendation to amend Section 75-2-315.1 Exclusion or Modification of Consumer Warranties; Unenforceability. The Subgroup recommends that Section 75-2-315.1 be amended as set forth in Exhibit Y to conform to the changes recommended in Section 1.b above.
3. Recommendation to amend Section 75-2-107(3) in light of *Feliciano Bank* Case. See Exhibit Z.

Respectfully Submitted

Rod Clement

UCC and Debtor Creditors Laws Study Group
Subgroup 2 (Articles 3, 4 and 9 of the UCC)
Report and Recommendations to the full Study Group
September 23, 2009

1. Recommendation to adopt Official Text of 2002 Amendments to Articles 3 and 4 of the Uniform Commercial Code with exceptions.
 - A. The Subgroup recommends that Mississippi adopt the updates to Articles 3 and 4 of the UCC dealing with payment by checks and other paper instruments to provide essential rules for the new technologies and practices in payment systems (the “Amendments”). These amendments were completed by the Uniform Law Commissioners in conjunction with the American Law Institute in 2002. A copy of the Amendments inserted into the current Mississippi adoption of Articles 3 and 4 is attached at Exhibit A.
 - B. The Subgroup recommends the adoption of the following exceptions to the above:
 - a. Revisions to 3-103(16), 3-416 and 3-417 to conform to federal banking regulations concerning remotely created consumer checks
 - b. Deletion of subsection (e) from 3-415
2. Other Recommendations
 - a. The Subgroup recommends the adoption of a statute of limitations for non-negotiable notes to conform to the statute of limitations for negotiable notes in Article 3. See Exhibit B.
 - b. The Subgroup Recommends the adoption of amendments to the Mississippi Limited Liability Act, the Mississippi Limited Partnership Act and the Mississippi Uniform Partnership Act to make enforceable agreements that limit assignability of membership economic interests in limited liability companies and limited partnerships. See Exhibit C.

Submitted by Paul Carrubba, Chairman

Exhibit B

Proposed New Statute § 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].

Exhibit C

Proposed § 79-29-706 **Enforceability of limitations on assignments of membership interests.**

Sections 75-9-406 and 75-9-408 of the Mississippi Code, as the same may be amended from time to time, do not apply to a member's interest in a limited liability company formed under the laws of Mississippi, including the rights, powers and interests arising under the company's certificate of formation or operating agreement or under this chapter. To the extent of any conflict or inconsistency between this section and Sections 75-9-406 and 75-9-408, this section prevails. It is the express intent of this section to permit the enforcement, as a contract among the members of a limited liability company, of any provision of a limited liability company operating agreement that would otherwise be ineffective under Sections 75-9-406 and 75-9-408.

Proposed § 79-14-706 **Enforceability of limitations on assignments of limited partnership interests.**

Sections 75-9-406 and 75-9-408 of the Mississippi Code, as the same may be amended from time to time, do not apply to a limited partnership interest in a limited partnership formed under the laws of Mississippi, including the rights, powers and interests arising under the certificate of limited partnership or limited partnership agreement or under this chapter. To the extent of any conflict or inconsistency between this section and Sections 75-9-406 and 75-9-408, this section prevails. It is the express intent of this section to permit the enforcement, as a contract among the partners of a limited partnership, of any provision of a limited partnership agreement that would otherwise be ineffective under Sections 75-9-406 and 75-9-408.

Proposed § 79-12-57 **Enforceability of limitations on assignments of partnership interests.**

Sections 75-9-406 and 75-9-408 of the Mississippi Code, as the same may be amended from time to time, do not apply to a partnership interest in a partnership formed under the laws of Mississippi, including the rights, powers and interests arising under the limited partnership certificate of limited partnership or limited partnership agreement or under this chapter. To the extent of any conflict or inconsistency between this section and Sections 75-9-406 and 75-9-408, this section prevails. It is the express intent of this section to permit the enforcement, as a contract among the partners of a partnership, of any provision of a partnership agreement that would otherwise be ineffective under Sections 75-9-406 and 75-9-408.

Comparison of Revised Uniform Commercial Code Article 1 with Current Mississippi Statutes

Prepared by Mississippi Secretary of State, Policy & Research Division

June 2009

This table compares the most current version of Article 1 of the Uniform Commercial Code (UCC) with Mississippi’s current adoption of Article 1, which is based on a mix of different revisions of the UCC. The first column lists the most recent Article 1 code sections by section, while the middle column lists the corresponding section (if any) of Mississippi’s adoption of Article 1. The third column summarizes official comments made by the UCC’s drafters which explain the changes between the former and current versions.

<u>UCC – Part 1</u>	<u>MS – Part 1</u>	<u>Changes from prior version of Article 1</u>
<p>§ 75-1-101. Short Titles.</p> <p>(a) This [Act] may be cited as the Uniform Commercial Code.</p> <p>(b) This article may be cited as Uniform Commercial Code – General Provisions.</p>	<p>§ 75-1-101. Short Title.</p> <p>Chapters 1 through 10 of this title shall be known and may be cited as Uniform Commercial Code.</p>	<p>Subsection (b) is new, added in order to make the structure of Article 1 parallel with that of the other articles of the Uniform Commercial Code.</p>
<p>§ 75-1-102. Scope of Article.</p> <p>This article applies to a transaction to the extent that it is governed by another article of the Uniform Commercial Code.</p>	<p>No corresponding provision.</p>	<p>New section</p> <p style="background-color: yellow;">This section was revised to make it clearer that the provisions in Article 1 apply to any transaction governed by one of the other articles of the Uniform Commercial Code.</p>
<p>§ 75-1-103. Construction of Uniform Commercial Code to Promote its Purposes and Policies; Applicability of Supplemental Principles of Law.</p> <p>(a) The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are:</p> <p>(1) to simplify, clarify, and modernize the law governing commercial transactions;</p> <p>(2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and</p> <p>(3) to make uniform the law among the various jurisdictions.</p> <p>(b) Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.</p>	<p>§ 75-1-102. Purposes; Rules of Construction; Variation by Agreement.</p> <p>(1) This code shall be liberally construed and applied to promote its underlying purposes and policies.</p> <p>(2) Underlying purposes and policies of this code are</p> <p>(a) to simplify, clarify and modernize the law governing commercial transactions;</p> <p>(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;</p> <p>(c) to make uniform the law among the various jurisdictions.</p> <p>§ 75-1-103. Supplementary General Principles of Law Applicable.</p> <p>Unless displaced by the particular provisions of this code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.</p>	<p>This section combines the previous Sections 1-102 and 1-103. Except for changing the form of reference to the Uniform Commercial Code and minor stylistic changes, the language is the same as in the previous sections. The provisions have been combined in this section to reflect the interrelationship between them.</p>
<p>§ 75-1-104. Construction Against Implied Repeal.</p> <p>The Uniform Commercial Code being a general act intended as a</p>	<p>§ 75-1-104. Construction Against Implicit Repeal.</p> <p>This code being a general act intended as a unified coverage of its subject</p>	<p>Except for changing the form of reference to the Uniform Commercial Code, this section is identical to former Section 1-104.</p>

unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.	matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.	
<p>§ 75-1-105. Severability.</p> <p>If any provision or clause of the Uniform Commercial Code or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Uniform Commercial Code which can be given effect without the invalid provision or application, and to this end the provisions of the Uniform Commercial Code are severable.</p>	<p>§ 75-1-108. Severability.</p> <p>If any provision or clause of this code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.</p>	Except for changing the form of reference to the Uniform Commercial Code, this section is identical to former Section 1-108.
<p>§ 75-1-106. Use of Singular and Plural; Gender.</p> <p>In the Uniform Commercial Code, unless the statutory context otherwise requires:</p> <p>(1) words in the singular number include the plural, and those in the plural include the singular; and</p> <p>(2) words of any gender also refer to any other gender.</p>	<p>§ 75-1-102. Purposes; Rules of Construction; Variation by Agreement.</p> <p>(5) In this code unless the context otherwise requires</p> <p>(a) words in the singular number include the plural, and in the plural include the singular;</p> <p>(b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.</p>	Other than minor stylistic changes, this section is identical to former Section 1-102(5).
<p>§ 75-1-107. Section Captions.</p> <p>Section captions are part of the Uniform Commercial Code.</p>	<p>§ 75-1-109. Section Captions.</p> <p>Section captions are parts of this code.</p>	No change.
<p>§ 75-1-108. Relation to Electronic Signatures in Global and National Commerce Act.</p> <p>This article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., except that nothing in this article modifies, limits, or supersedes Section 7001(c) of that Act or authorizes electronic delivery of any of the notices described in Section 7003(b) of that Act.</p>	No corresponding provision.	<p>New section</p> <p>Section 102(a) of the federal Electronic Signatures in Global and National Commerce Act allows a state statute to modify, limit, or supersede the provisions of section 101 if certain criteria are met. Article 1 fulfills the first two of those three criteria; this Section fulfills the third criterion listed above.</p>

<u>UCC - Part 2</u>	<u>MS - Part 2</u>	
<p>§ 75-1-201. General Definitions.</p> <p>(a) Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other articles of the Uniform Commercial Code that apply to particular articles or parts thereof, have the meanings stated.</p> <p>(b) Subject to definitions contained in other articles of the Uniform Commercial Code that apply to particular articles or parts thereof:</p>	<p>§ 75-1-201. General Definitions.</p> <p>Subject to additional definitions contained in the subsequent chapters of the Uniform Commercial Code which are applicable to specific chapters or Parts thereof, and unless the context otherwise requires, in the Uniform Commercial Code:</p>	<p>See attached document discussing changes to individual definitions.</p> <p>In order to make it clear that all definitions in the Uniform Commercial Code do not apply if the context otherwise requires, a new subsection (a) to that effect has been added, and the definitions now appear in subsection (b). In other words, the definition applies whenever the defined term is used unless the context in which the defined term is used in the statute indicates that the term was not used in its defined sense.</p> <p>Consider, for example, Sections 3-103(a)(9) (defining “promise,” in relevant part, as “a written undertaking to pay money signed by the person undertaking to pay”) and 3-303(a)(1) (indicating that an instrument is issued or transferred for value if “the instrument is issued or transferred for a promise of performance, to the extent that the promise has been performed”). It is clear from the statutory context of the use of the word “promise” in Section 3-303(a)(1) that the term was not used in the sense of its definition in Section 3-103(a)(9). Thus, the Section 3-103(a)(9) definition should not be used to give meaning to the word “promise” in Section 3-303(a).</p>
<p>§ 75-1-202. Notice; Knowledge.</p> <p>(a) Subject to subsection (f), a person has “notice” of a fact if the person:</p> <p>(1) has actual knowledge of it;</p> <p>(2) has received a notice or notification of it; or</p> <p>(3) from all the facts and circumstances known to the person at the time in question, has reason to know that it exists.</p> <p>(b) “Knowledge” means actual knowledge. “Knows” has a corresponding meaning.</p> <p>(c) “Discover”, “learn”, or words of similar import refer to knowledge rather than to reason to know.</p> <p>(d) A person “notifies” or “gives” a notice or notification to another person by taking such steps as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it.</p> <p>(e) Subject to subsection (f), a person “receives” a notice or notification when:</p> <p>(1) it comes to that person’s attention; or</p> <p>(2) it is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications.</p>	<p>§ 75-1-201. General Definitions.</p> <p>(25) Subject to subsection (27), a person has “notice” of a fact if the person:</p> <p>(A) Has actual knowledge of it;</p> <p>(B) Has received a notice or notification of it; or</p> <p>(C) From all the facts and circumstances known to the person at the time in question, has reason to know that it exists.</p> <p>A person “knows” or has “knowledge” of a fact when the person has actual knowledge of it. “Discover” or “learn” or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by the Uniform Commercial Code.</p>	<p>These provisions are substantive rather than purely definitional. Accordingly, they have been relocated from former Section 1-201 to this section.</p>

<p>(f) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to the individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.</p>		
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<p>§ 75-1-203. Lease Distinguished From Security Interest.</p> <p>(a) Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case.</p> <p>(b) A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:</p> <p>(1) the original term of the lease is equal to or greater than the remaining economic life of the goods;</p> <p>(2) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;</p> <p>(3) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or</p> <p>(4) the lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.</p> <p>(c) A transaction in the form of a lease does not create a security interest merely because:</p> <p>(1) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into;</p> <p>(2) the lessee assumes risk of loss of the goods;</p> <p>(3) the lessee agrees to pay, with respect to the goods, taxes, insurance, filing, recording, or registration fees, or service or maintenance costs;</p> <p>(4) the lessee has an option to renew the lease or to become the owner of the goods;</p> <p>(5) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or</p> <p>(6) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.</p> <p>(d) Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised. Additional consideration is not nominal if:</p> <p>(1) when the option to renew the lease is granted to the lessee, the rent</p>	<p>§ 75-1-201. General Definitions.</p> <p>(37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation.</p> <p>(A) The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 75-2-401 is not a "security interest," but a buyer may also acquire "security interest," by complying with Article 9. Except as otherwise provided in Section 75-2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a "security interest," but a seller or lessor may also acquire a "security interest" by complying with Article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 75-2-401) is limited in effect to a reservation of a security interest.</p> <p>(B) Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and</p> <p>(i) The original term of the lease is equal to or greater than the remaining economic life of the goods,</p> <p>(ii) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,</p> <p>(iii) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or</p> <p>(iv) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.</p> <p>(C) A transaction does not create a security interest merely because it provides that:</p> <p>(i) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into,</p> <p>(ii) The lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods,</p> <p>(iii) The lessee has an option to renew the lease or to become the owner of the goods,</p> <p>(iv) The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the</p>	<p>This section is substantively identical to those portions of former Section 1-201(37) that distinguished "true" leases from security interests, except that the definition of "present value" formerly embedded in Section 1-201(37) has been placed in Section 1-201(28).</p>
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<p>is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed; or</p> <p>(2) when the option to become the owner of the goods is granted to the lessee, the price is stated to be the fair market value of the goods determined at the time the option is to be performed.</p> <p>(e) The “remaining economic life of the goods” and “reasonably predictable” fair market rent, fair market value, or cost of performing under the lease agreement must be determined with reference to the facts and circumstances at the time the transaction is entered into.</p>	<p>use of the goods for the term of the renewal at the time the option is to be performed, or</p> <p>(v) The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.</p> <p>(D) For purposes of this subsection (37):</p> <p>(i) Additional consideration is not nominal if:</p> <ol style="list-style-type: none"> 1. When the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or 2. When the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised; <p>(ii) “Reasonably predictable” and “remaining economic life of the goods” are to be determined with reference to the fact and circumstances at the time the transaction is entered into; and</p> <p>(iii) “Present value” means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.</p>	
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<p>§ 75-1-204. Value.</p> <p>Except as otherwise provided in Articles 3, 4, [and] 5, [and] 6, a person gives value for rights if the person acquires them:</p> <p>(1) in return for a binding commitment to extend credit or for the extension of immediately available credit, whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection;</p> <p>(2) as security for, or in total or partial satisfaction of, a preexisting claim;</p> <p>(3) by accepting delivery under a preexisting contract for purchase; or</p> <p>(4) in return for any consideration sufficient to support a simple contract.</p>	<p>§ 75-1-201. General Definitions.</p> <p>(44) "Value," except as otherwise provided with respect to negotiable instruments and bank collections (Sections 75-3-303, 75-4-208 and 75-4-209), a person gives "value" for rights if he acquires them:</p> <p>(A) In return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or</p> <p>(B) As security for or in total or partial satisfaction of a preexisting claim; or</p> <p>(C) By accepting delivery pursuant to a preexisting contract for purchase; or</p> <p>(D) Generally, in return for any consideration sufficient to support a simple contract.</p>	<p>Unchanged from former Section 1-201. These provisions are substantive rather than purely definitional, and accordingly, have been relocated from former Section 1-201 to this section.</p>
<p>§ 75-1-205. Reasonable Time; Seasonableness.</p> <p>(a) Whether a time for taking an action required by the Uniform Commercial Code is reasonable depends on the nature, purpose, and circumstances of the action.</p> <p>(b) An action is taken seasonably if it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.</p>	<p>§ 75-1-204. Time; Reasonable Time; "Seasonably."</p> <p>(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.</p> <p>(3) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.</p>	<p>This section is derived from subsections (2) and (3) of former Section 1-204. Subsection (1) of that section is now incorporated in Section 1-302(b).</p>
<p>§ 75-1-206. Presumptions.</p> <p>Whenever the Uniform Commercial Code creates a "presumption" with respect to a fact, or provides that a fact is "presumed," the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence.</p>	<p>§ 75-1-201. General Definitions.</p> <p>(31) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.</p>	<p>Stylistic changes only.</p>
<p>UCC – Part 3</p>	<p>MS – Part 3</p>	
<p>§ 75-1-301. Territorial Applicability; Parties' Power to Choose Applicable Law.</p> <p>(a) Except as otherwise provided 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.</p> <p>(b) In the absence of an agreement effective under subsection (a), and except as provided in subsection (c), the Uniform Commercial Code applies to transactions bearing an appropriate relation to this state.</p> <p>(c) If one of the following provisions of the Uniform Commercial Code specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:</p> <p>(1) Section 75-2-402;</p>	<p>§ 75-1-105. Territorial Application of the Code; Parties' Power to Choose Applicable Law.</p> <p>(1) 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.</p> <p>(2) Where one of the following provisions of this code specifies the</p>	<p>While the revised Section 1-301 is substantively identical to the former UCC Section 1-105, it differs greatly from Mississippi's current implementation of Section 1-105.</p> <p>At present, Section 1-105 of the Mississippi UCC prohibits the contractual choice of law of any state other than Mississippi to govern the rights and duties of the parties in regard to (a) disclaimers of implied warranties of merchantability or fitness, (b) limitations of remedies from breach of implied warranties of merchantability or fitness, and (c) the necessity for privity of contract to maintain a civil action for breach of implied warranties of merchantability or fitness. See the attached <i>Comment on Conflict of Laws Provision of Article 1 of the UCC</i> for more detail.</p>

<p>(2) Sections 75-2A-105 and 75-2A-106;</p> <p>(3) Section 75-4-102;</p> <p>(4) Section 75-4A-507;</p> <p>(5) Section 75-5-116;</p> <p>[(6) Section 6-103;] (Article 6 has been repealed in Mississippi)</p> <p>(7) Section 75-8-110;</p> <p>(8) Sections 75-9-301 through 75-9-307.</p>	<p>applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:</p> <p>Rights of creditors against sold goods (Section 75-2-402).</p> <p>Applicability of the Article on Leases (Sections 75-2A-105 and 75-2A-106).</p> <p>Applicability of the Article on Bank Deposits and Collections (Section 75-4-102).</p> <p>Governing law in the Article on Funds Transfers (Section 75-4A-507).</p> <p>Letters of credit (Section 75-5-116).</p> <p>Applicability of the Article on Investment Securities (Section 75-8-110).</p> <p>Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens (Sections 75-9-301 through 75-9-307).</p>	<p>Since MS has repealed Article 6 on Bulk Sales, this bracketed reference to Section 6-103 should not be included in this section if adopted in MS.</p>
<p>§ 75-1-302. Variation by Agreement.</p> <p>(a) Except as otherwise provided in subsection (b) or elsewhere in the Uniform Commercial Code, the effect of provisions of the Uniform Commercial Code may be varied by agreement.</p> <p>(b) The obligations of good faith, diligence, reasonableness, and care prescribed by the Uniform Commercial Code may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever the Uniform Commercial Code requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement.</p> <p>(c) The presence in certain provisions of the Uniform Commercial Code of the phrase “unless otherwise agreed”, or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section.</p>	<p>§ 75-1-102. Purposes; Rules of Construction; Variation by Agreement.</p> <p>(3) The effect of provisions of this code may be varied by agreement, except as otherwise provided in this code and except that the obligations of good faith, diligence, reasonableness and care prescribed by this code may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.</p> <p>(4) The presence in certain provisions of this code of the words “unless otherwise agreed” or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).</p>	<p>This section combines the rules from subsections (3) and (4) of former Section 1-102 and subsection (1) of former Section 1-204. No substantive changes are made.</p>
<p>§ 75-1-303. Course of Performance, Course of Dealing, and Usage of Trade.</p> <p>(a) A “course of performance” is a sequence of conduct between the parties to a particular transaction that exists if:</p> <p>(1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and</p> <p>(2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.</p>	<p>§ 75-1-205. Course of Dealing and Usage of Trade.</p> <p>(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.</p> <p>(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.</p>	<p>This section integrates the “course of performance” concept from Articles 2 and 2A into the principles of former Section 1-205, which deals with course of dealing and usage of trade. In so doing, the section slightly modifies the articulation of the course of performance rules to fit more comfortably with the approach and structure of former Section 1-205.</p> <p>There are also slight modifications to be more consistent with the definition of “agreement” in former Section 1-201(3). It should be noted that a course of performance that might otherwise establish a defense to the obligation of a party to a negotiable instrument is not available as a defense against a holder in due course who took the instrument without notice of that course of performance.</p>

<p>(b) A “course of dealing” is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.</p> <p>(c) A “usage of trade” is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.</p> <p>(d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.</p> <p>(e) Except as otherwise provided in subsection (f), the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:</p> <p>(1) express terms prevail over course of performance, course of dealing, and usage of trade;</p> <p>(2) course of performance prevails over course of dealing and usage of trade; and</p> <p>(3) course of dealing prevails over usage of trade.</p> <p>(f) Subject to Section 75-2-209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.</p> <p>(g) Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party.</p>	<p>(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.</p> <p>(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable, express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.</p> <p>(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.</p> <p>(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.</p>	
<p>§ 75-1-304. Obligation of Good Faith.</p> <p>Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.</p>	<p>§ 75-1-203. Obligation of Good Faith.</p> <p>Every contract or duty within this code imposes an obligation of good faith in its performance or enforcement.</p>	<p>Except for changing the form of reference to the Uniform Commercial Code, this section is identical to former Section 1-203.</p>
<p>§ 75-1-305. Remedies to Be Liberally Administered.</p> <p>(a) The remedies provided by the Uniform Commercial Code must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may be had except as specifically provided in the Uniform Commercial Code or by other rule of law.</p>	<p>§ 75-1-106. Remedies to Be Liberally Administered.</p> <p>(1) The remedies provided by this code shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this code or by other rule of law.</p>	<p>Other than changes in the form of reference to the Uniform Commercial Code, this section is identical to former Section 1-106.</p>

<p>(b) Any right or obligation declared by the Uniform Commercial Code is enforceable by action unless the provision declaring it specifies a different and limited effect.</p>	<p>(2) Any right or obligation declared by this code is enforceable by action unless the provision declaring it specifies a different and limited effect.</p>	
<p>§ 75-1-306. Waiver or Renunciation of Claim or Right After Breach.</p> <p>A claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record.</p>	<p>§ 75-1-107. Waiver or Renunciation of Claim or Right After Breach.</p> <p>Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.</p>	<p>This section changes former law in two respects. First, former Section 1-107, requiring the “delivery” of a “written waiver or renunciation” merges the separate concepts of the aggrieved party’s agreement to forego rights and the manifestation of that agreement. This section separates those concepts, and explicitly requires <i>agreement</i> of the aggrieved party. Second, the revised section reflects developments in electronic commerce by providing for memorialization in an authenticated record. In this context, a party may “authenticate” a record by (i) signing a record that is a writing or (ii) attaching to or logically associating with a record that is not a writing an electronic sound, symbol or process with the present intent to adopt or accept the record. See Sections 1-201(b)(37) and 9-102(a)(7).</p>
<p>§ 75-1-307. Prima Facie Evidence By Third-Party Documents.</p> <p>A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher’s or inspector’s certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party is prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.</p>	<p>§ 75-1-202. Prima Facie Evidence by Third Party Documents.</p> <p>A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher’s or inspector’s certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.</p>	<p>Except for minor stylistic changes, this Section is identical to former Section 1-202.</p>
<p>§ 75-1-308. Performance or Acceptance Under Reservation of Rights.</p> <p>(a) A party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as “without prejudice,” “under protest,” or the like are sufficient.</p> <p>(b) Subsection (a) does not apply to an accord and satisfaction.</p>	<p>§ 75-1-207. Performance or Acceptance Under Reservation of Rights.</p> <p>(1) A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as “without prejudice,” “under protest” or the like are sufficient.</p> <p>(2) Subsection (1) does not apply to an accord and satisfaction.</p>	<p>This section is identical to former Section 1-207.</p>
<p>§ 75-1-309. Option to Accelerate at Will.</p> <p>A term providing that one party or that party’s successor in interest may accelerate payment or performance or require collateral or additional collateral “at will” or when the party “deems itself insecure,” or words of similar import, means that the party has power to do so only if that party in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against which the power has been exercised.</p>	<p>§ 75-1-208. Option to Accelerate at Will.</p> <p>A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral “at will” or “when he deems himself insecure” or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.</p>	<p>Except for minor stylistic changes, this section is identical to former Section 1-208.</p>
<p>§ 75-1-310. Subordinated Obligations.</p> <p>An obligation may be issued as subordinated to performance of another obligation of the person obligated, or a creditor may subordinate its right to performance of an obligation by agreement with either the person obligated or another creditor of the person obligated. Subordination does not create a security interest as against either the common debtor or a subordinated creditor.</p>	<p>No corresponding provision.</p>	<p>This section is substantively identical to former Section 1-209. The language in that section stating that it “shall be construed as declaring the law as it existed prior to the enactment of this section and not as modifying it” has been deleted.</p>

Comparison of Revised Uniform Commercial Code Article 1 with Current Mississippi Statutes

Prepared by Mississippi Secretary of State, Policy & Research Division

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Revised definitions, Uniform Commercial Code Section 1-201

Introduction. Of the following revised Article 1 definitions, most differ from prior versions only stylistically or in terms of their organization. However, some minor substantive changes have been adopted to particular definitions, most notably “bank,” “fault,” “organization,” “person” and “surety.” Adopting the revised Article 1 will also add definitions of “consumer,” “record” and “state,” none of which are currently contained in Mississippi’s implementation of the UCC. The most notable substantive change in this revision of Article 1 is contained in the revised definition of “good faith”: whereas the former definition defined good faith simply as honesty in fact, the revised definition adds the element of commercial reasonableness.

Some definitions in former Section 1-201 have been reformulated as substantive provisions and have been moved to other sections. See Sections 1-202 (explicating concepts of notice and knowledge formerly addressed in Sections 1-201(25)-(27)), 1-204 (determining when a person gives value for rights, replacing the definition of “value” in former Section 1-201(44)), and 1-206 (addressing the meaning of presumptions, replacing the definitions of “presumption” and “presumed” in former Section 1-201(31)). Similarly, the portion of the definition of “security interest” in former Section 1-201(37) which explained the difference between a security interest and a lease has been relocated to Section 1-203.

Two definitions in former Section 1-201 have been deleted. The definition of “honor” in former Section 1-201(21) has been moved to Section 2-103(1)(b), inasmuch as the definition only applies to the use of the word in Article 2. The definition of “telegram” in former Section 1-201(41) has been deleted because that word no longer appears in the definition of “conspicuous.”

Revised UCC	Current MS statute	Changes from prior version of Article 1
(1) “Action”, in the sense of a judicial proceeding, includes recoupment, counterclaim, set-off, suit in equity, and any other proceeding in which rights are determined.	(1) “Action” in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined. (Definition up to date)	Unchanged from the prior version.

<p>(2) “Aggrieved party” means a party entitled to pursue a remedy.</p>	<p>(2) “Aggrieved party” means a party entitled to resort to a remedy.</p> <p>(Definition up to date)</p>	<p>Unchanged from the prior version.</p>
<p>(3) “Agreement”, as distinguished from “contract”, means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in Section § 75-1-303.</p>	<p>(3) “Agreement” means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this code (Sections 75-1-205 and 75-2-208). Whether an agreement has legal consequences is determined by the provisions of this code, if applicable; otherwise by the law of contracts (Section 75-1-103). (Compare “Contract.”)</p>	<p>Revised definition derived from former Section 1-201. The revised definition does not appear to differ much in substance from Mississippi’s current definition.</p>
<p>(4) “Bank” means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company.</p>	<p>(4) “Bank” means any person engaged in the business of banking.</p>	<p>Revised definition derived from Section 4A-104. The new definition explicitly recognizes savings banks, savings and loan associations, credit unions and trust companies as banks.</p>
<p>(5) “Bearer” means a person in possession of a negotiable instrument, document of title, or certificated security that is payable to bearer or indorsed in blank.</p>	<p>(5) “Bearer” means a person in control of a negotiable electronic document of title or a person in possession of an instrument, negotiable tangible document of title, or certificated security payable to bearer or indorsed in blank.</p>	<p>Unchanged from the prior version, which was derived from § 191 of the Uniform Negotiable Instruments Law.</p>
<p>(6) “Bill of lading” means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods.</p>	<p>(6) “Bill of lading” means a document of title evidencing the receipt of goods for shipment issued by a person engaged in the business of directly or indirectly transporting or forwarding goods. The term does not include a warehouse</p>	<p>Revised definition derived from former Section 1-201. The revised definition does not appear to differ much in substance from Mississippi’s current definition.</p>

	receipt.	
(7) “Branch” includes a separately incorporated foreign branch of a bank.	(7) “Branch” includes a separately incorporated foreign branch of a bank. (Definition up to date)	Unchanged from the prior version.
(8) “Burden of establishing” a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence.	(8) “Burden of establishing” a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence. (Definition up to date)	Unchanged from the prior version.
(9) “Buyer in ordinary course of business” means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the	(9) “Buyer in ordinary course of business” means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in the ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of	Except for minor stylistic changes, identical to former Section 1-201.

<p>seller under Article 2 may be a buyer in ordinary course of business. “Buyer in ordinary course of business” does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt.</p>	<p>the goods or has a right to recover the goods from the seller under Title 75, Chapter 2, may be a buyer in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in ordinary course of business.</p>	
<p>(10) “Conspicuous”, with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is “conspicuous” or not is a decision for the court. Conspicuous terms include the following:</p> <p>(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and</p> <p>(B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.</p>	<p>(10) “Conspicuous,” with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is “conspicuous” or not is a decision for the court. Conspicuous terms include the following:</p> <p>(A) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and</p> <p>(B) Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.</p> <p>(Definition up to date)</p>	<p>Unchanged from the prior version.</p>

<p>(11) “Consumer” means an individual who enters into a transaction primarily for personal, family, or household purposes.</p>	<p>Currently no corresponding definition in Mississippi’s implementation of the UCC.</p>	<p>Derived from Section 9-102(a)(25).</p>
<p>(12) “Contract”, as distinguished from “agreement”, means the total legal obligation that results from the parties’ agreement as determined by the Uniform Commercial Code as supplemented by any other applicable laws.</p>	<p>(11) “Contract” means the total legal obligation which results from the parties' agreement as affected by this code and any other applicable rules of law. (Compare “Agreement.”)</p>	<p>Except for minor stylistic changes, identical to former Section 1-201.</p>
<p>(13) “Creditor” includes a general creditor, a secured creditor, a lien creditor, and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor’s or assignor’s estate.</p>	<p>(12) “Creditor” includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.</p> <p>(Definition up to date)</p>	<p>Unchanged from former Section 1-201.</p>
<p>(14) “Defendant” includes a person in the position of defendant in a counterclaim, cross-claim, or third-party claim.</p>	<p>(13) “Defendant” includes a person in the position of defendant in a cross-action or counterclaim.</p>	<p>Except for minor stylistic changes, identical to former Section 1-201.</p>
<p>(15) “Delivery”, with respect to an instrument, document of title, or chattel paper, means voluntary transfer of possession.</p>	<p>(14) “Delivery” with respect to an electronic document of title means voluntary transfer of control and with respect to instruments, tangible documents of title, chattel paper, or certificated securities means voluntary transfer of possession.</p>	<p>Derived from former Section 1-201. The reference to certificated securities has been deleted in light of the more specific treatment of the matter in Section 8-301.</p>
<p>(16) “Document of title” includes bill of lading, dock warrant, dock receipt, warehouse receipt or</p>	<p>(15) “Document of title” means a record (i) that in the regular course of business or financing is</p>	<p>Unchanged from former Section 1-201.</p>

<p>order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee’s possession which are either identified or are fungible portions of an identified mass.</p>	<p>treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers and (ii) that purports to be issued by or addressed to a bailee and to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass. The term includes a bill of lading, transport document, dock warrant, dock receipt, warehouse receipt, and order for delivery of goods. An electronic document of title is evidenced by a record consisting of information stored in an electronic medium. A tangible document of title is evidenced by a record consisting of information that is inscribed on a tangible medium.</p>	
<p>(17) “Fault” means a default, breach, or wrongful act or omission.</p>	<p>(16) “Fault” means wrongful act, omission or breach.</p>	<p>Derived from former Section 1-201. “Default” has been added to the list of events constituting fault.</p>
<p>(18) “Fungible goods” means:</p> <p>(A) goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit; or</p> <p>(B) goods that by agreement are treated as equivalent.</p>	<p>(17) “Fungible” with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this code to the extent that under a particular agreement or document unlike units are treated as equivalents.</p>	<p>Derived from former Section 1-201. References to securities have been deleted because Article 8 no longer uses the term “fungible” to describe securities. Accordingly, this provision now defines the concept only in the context of goods.</p>
<p>(19) “Genuine” means free of forgery or</p>	<p>(18) “Genuine” means free of forgery or</p>	<p>Unchanged from former Section 1-201.</p>

counterfeiting.	counterfeiting. (Definition up to date)	
(20) “Good faith,” except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.	(19) “Good faith” means honesty in fact in the conduct or transaction concerned.	<p>The former version of Section 1-201(19) defined “good faith” simply as honesty in fact; the definition contained no element of commercial reasonableness. Over time, however, amendments to other articles of the UCC touching upon good faith began to incorporate the element of objective commercial reasonableness.</p> <p>Thus, the definition of “good faith” in this section merely confirms what has been the case for a number of years as articles of the UCC have been amended or revised – the obligation of “good faith,” applicable in each article, is to be interpreted in the context of all articles except for Article 5 as including both the subjective element of honesty in fact and the objective element of the observance of reasonable commercial standards of fair dealing.</p> <p>Of course, as noted in the statutory text, the definition of “good faith” in this section does not apply when the narrower definition of “good faith” in revised Article 5 is applicable.</p> <p>As noted above, the definition of “good faith” in this section requires not only honesty in fact but also “observance of</p>

		reasonable commercial standards of fair dealing.” Although “fair dealing” is a broad term that must be defined in context, it is clear that it is concerned with the fairness of conduct rather than the care with which an act is performed. This is an entirely different concept than whether a party exercised ordinary care in conducting a transaction. Both concepts are to be determined in the light of reasonable commercial standards, but those standards in each case are directed to different aspects of commercial conduct.
<p>(21) “Holder” means:</p> <p>(A) the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; or</p> <p>(B) the person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession.</p>	<p>(20) “Holder” means:</p> <p>(A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;</p> <p>(B) The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or</p> <p>(C) A person in control of a negotiable electronic document of title.</p>	Derived from former Section 1-201. The definition has been reorganized for clarity.
<p>(22) “Insolvency proceeding” includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved.</p>	<p>(22) “Insolvency proceedings” includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.</p>	Unchanged from the prior version.

	(Definition up to date)	
N/A	(21) To “honor” is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.	This provision, based on former Article 1 provision was deleted from current version of Article 1. See “Introduction.”
(23) “Insolvent” means: (A) having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute; (B) being unable to pay debts as they become due; or (C) being insolvent within the meaning of federal bankruptcy law.	(23) A person is “insolvent” who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.	Derived from former Section 1-201 and reorganized.
(24) “Money” means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.	(24) “Money” means a medium of exchange authorized or adopted by a domestic or foreign government and includes a monetary unit of account established by an intergovernmental organization or by agreement between two (2) or more nations.	Substantively identical to former Section 1-201.
(25) “Organization” means a person other than an individual.	(28) “Organization” includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two (2) or more persons having a joint or common interest, or any other legal or	The former definition of this word has been replaced with the standard definition used in acts prepared by the National Conference of Commissioners on Uniform State Laws.

	commercial entity.	
(26) “Party”, as distinguished from “third party”, means a person that has engaged in a transaction or made an agreement subject to the Uniform Commercial Code.	(29) “Party,” as distinct from “third party,” means a person who has engaged in a transaction or made an agreement within this code.	Substantively identical to former Section 1-201.
(27) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.	(30) “Person” includes an individual or an organization (see Section 75-1-102).	The former definition of this word has been replaced with the standard definition used in acts prepared by the National Conference of Commissioners on Uniform State Laws.
(28) “Present value” means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain by use of either an interest rate specified by the parties if that rate is not manifestly unreasonable at the time the transaction is entered into or, if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into.	(37)(D)(iii) “Present value” means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.	This definition was formerly contained within the definition of “security interest” in former Section 1-201(37).
(29) “Purchase” means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.	(32) “Purchase” includes taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.	Derived from former Section 1-201. The form of definition has been changed from “includes” to “means.”

N/A	(31) “Presumption” or “presumed” means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.	Previous definition moved to Section 1-206 (see other UCC chart, first column).
(30) “Purchaser” means a person that takes by purchase.	(33) “Purchaser” means a person who takes by purchase. (Definition up to date)	Unchanged from the prior version.
(31) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.	Currently no corresponding definition in Mississippi’s implementation of the UCC.	Derived from Section 9-102(a)(69).
(32) “Remedy” means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.	(34) “Remedy” means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal. (Definition up to date)	Unchanged from the prior version.
(33) “Representative” means a person empowered to act for another, including an agent, an officer of a corporation or association, and a trustee, executor, or administrator of an estate.	(35) “Representative” includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.	Derived from former Section 1-201. Reorganized, and form changed from “includes” to “means.”
(34) “Right” includes remedy.	(36) “Rights” includes remedies.	Except for minor stylistic changes, identical to former Section 1-201.
(35) “Security interest” means an interest in personal property or fixtures which secures payment or performance of an obligation. “Security interest” includes any interest of a	(37) “Security interest” means an interest in personal property or fixtures which secures payment or performance of an obligation.	The definition is the first paragraph of the definition of “security interest” in former Section 1-201, with minor stylistic changes. The remaining portion of that definition has been

<p>consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9. “Security interest” does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under Section 75-2-401, but a buyer may also acquire a “security interest” by complying with Article 9. Except as otherwise provided in Section 75-2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a “security interest”, but a seller or lessor may also acquire a “security interest” by complying with Article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under Section 75-2-401 is limited in effect to a reservation of a “security interest.” Whether a transaction in the form of a lease creates a “security interest” is determined pursuant to Section 75-1-203.</p>	<p>(A) The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 75-2-401 is not a “security interest,” but a buyer may also acquire “security interest,” by complying with Article 9. Except as otherwise provided in Section 75-2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a “security interest,” but a seller or lessor may also acquire a “security interest” by complying with Article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 75-2-401) is limited in effect to a reservation of a security interest.</p> <p>(B) Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and</p> <p>(i) The original term of the lease is equal to or greater than the remaining economic life of the goods,</p>	<p>moved to Section 1-203.</p>
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	<p>(ii) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,</p> <p>(iii) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or</p> <p>(iv) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.</p> <p>(C) A transaction does not create a security interest merely because it provides that:</p> <p>(i) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into,</p> <p>(ii) The lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods,</p> <p>(iii) The lessee has an option to renew the lease or to become the owner of the goods,</p>	
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	<p>(iv) The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed, or</p> <p>(v) The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.</p> <p>(D) For purposes of this subsection (37):</p> <p>(i) Additional consideration is not nominal if:</p> <ol style="list-style-type: none"> 1. When the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or 2. When the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised; <p>(ii) “Reasonably predictable” and “remaining economic life of the goods” are to be determined</p>	
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	<p>with reference to the fact and circumstances at the time the transaction is entered into; and</p> <p>(iii) “Present value” means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.</p>	
<p>(36) “Send” in connection with a writing, record, or notice means:</p> <p>(A) to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances; or</p> <p>(B) in any other way to cause to be received any record or notice within the time it would have arrived if properly sent.</p>	<p>(38) “Send” in connection with a writing, record, or notice means:</p> <p>(A) To deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances; or</p> <p>(B) In any other way to cause to be received any record or notice within the time it would have arrived if properly sent.</p> <p>(Definition up to date)</p>	<p>Derived from former Section 1-201. Compare with “notifies.”</p>

(37) “Signed” includes using any symbol executed or adopted with present intention to adopt or accept a writing.	(39) “Signed” includes any symbol executed or adopted by a party with present intention to authenticate a writing.	Derived from former Section 1-201. Former Section 1-201 referred to “intention to authenticate”; because other articles now use the term “authenticate,” the language has been changed to “intention to adopt or accept.”
(38) “State” means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.	Currently no corresponding definition in Mississippi’s implementation of the UCC.	This is the standard definition of the term used in acts prepared by the National Conference of Commissioners on Uniform State Laws.
(39) “Surety” includes a guarantor or other secondary obligor.	(40) “Surety” includes guarantor.	This definition makes it clear that “surety” includes all secondary obligors, not just those whose obligation refers to the person obligated as a surety.
(40) “Term” means a portion of an agreement that relates to a particular matter.	(42) “Term” means that portion of an agreement which relates to a particular matter.	Unchanged from the prior version.
N/A	(41) “Telegram” includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.	This provision, based on former Article 1 provision was deleted from current version of Article 1. See “Introduction.”
(41) “Unauthorized signature” means a signature made without actual, implied, or apparent authority. The term includes a forgery.	(43) “Unauthorized” signature means one made without actual, implied or apparent authority and includes a forgery.	Unchanged from the prior version.
(42) “Warehouse receipt” means a receipt issued by a person engaged in the business of storing goods for hire.	(45) “Warehouse receipt” means a document of title issued by a person engaged in the business of storing goods for hire.	Unchanged from the prior version.
(43) “Writing” includes printing, typewriting, or any other intentional reduction to tangible form.	(46) “Written” or “writing” includes printing, typewriting, or any other intentional reduction to	Unchanged from the prior version.

<p>“Written” has a corresponding meaning.</p>	<p>tangible form.</p>	
<p>N/A</p>	<p>(44) “Value,” except as otherwise provided with respect to negotiable instruments and bank collections (Sections 75-3-303, 75-4-208 and 75-4-209), a person gives “value” for rights if he acquires them:</p> <p>(A) In return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or</p> <p>(B) As security for or in total or partial satisfaction of a preexisting claim; or</p> <p>(C) By accepting delivery pursuant to a preexisting contract for purchase; or</p> <p>(D) Generally, in return for any consideration sufficient to support a simple contract.</p>	<p>This provision was moved to Section 1-204. (see other UCC chart, first column).</p>

Exhibit Y

MEMORANDUM

To: UCC Study Group Members

Re: Choice of law provision for Revised Article 1

Date: September 23, 2009

Attached are (a) a draft of a change to Section 75-2-315.1 that addresses the ability of a retailer to assert implied warranties against his seller if a consumer asserted a breach of implied warranties against the retailer, and (b) memo on choice of law.

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.

§ 75-2-315.1. Exclusion or Modification of Consumer Warranties; Unenforceability

(1) Any oral or written language used by a seller of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, is unenforceable. However, the seller may recover from the manufacturer any damages resulting from breach of the implied warranty of merchantability or fitness for a particular purpose.

(2) Any oral or written language used by a manufacturer of consumer goods, which attempts to limit or modify a consumer's remedies for breach of the manufacturer's express warranties, is unenforceable.

(3)(a) The provisions of this section do not apply to a motor vehicle:

(i) Required to be titled under the state law;

(ii) That is over six (6) model years old or that has been driven more than seventy-five thousand (75,000) miles; and

(iii) If, at the time of the sale of the motor vehicle, the seller gives the purchaser notice of the inapplicability of this section on the form prescribed by the State Attorney General.

(b)(i) An exclusion or modification of an implied warranty of merchantability, or any part of a warranty under this subsection shall be in writing, mention merchantability, and be conspicuous.

(ii) An exclusion or modification of the implied warranty of fitness shall be in writing and conspicuous.

(iii) Any exclusion or modification of either warranty shall be separately acknowledged by the signature of the buyer.

(4) If a remote purchaser who is a consumer asserts a claim of breach of an implied warranty of merchantability or fitness for a particular purpose against an intermediate buyer under this Chapter, the intermediate buyer can assert a claim of breach of implied warranty against its seller, regardless of any waiver or disclaimer of implied warranty by the intermediate buyer in the contract between the intermediate buyer and its seller and regardless of the choice of law in the contract between the intermediate buyer and its seller. For purposes of this subsection, “intermediate buyer” means a buyer that enters into a contract with the seller, and “remote purchaser” means a person that buys or leases goods from an intermediate buyer or other person in the normal chain of distribution.

Nothing in this section shall prohibit the express disclaimer or express modification of any implied warranties of merchantability and fitness for a particular purpose or any express limitation of remedies for breach of such warranties concerning computer hardware, computer software, and services performed on computer hardware and computer software which are sold between merchants.

Exhibit Z

MEMORANDUM

To: UCC Study Group Members

Re: Amendment to Section 75-2-107

Date: September 23, 2009

Attached is a memo regarding an amendment to Section 75-2-107

Enclosure

MEMORANDUM

TO: Cheryn Baker
FROM: Rod Clement
DATE: July 28, 2009
RE: Proposed amendment of Miss. Code Ann. § 75-2-107

The purpose of this memorandum is to suggest an amendment to Miss. Code Ann. § 75-2-107 regarding the priority of deeds of trust and goods severed from land.

The definition of “goods” in Article 2, Miss. Code Ann. § 75-2-105(1), includes “identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107) [§ 75-2-107].” Under Section 75-2-107(2), a contract for sale of timber to be cut is a contract for the sale of goods. This statute provides as follows:

(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this chapter if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this chapter whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an

interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

I suggest that we consider amending Section 75-2-107(3) by adding the following underlined language:

The provisions of this section are subject to any third party rights provided by law relating to realty records, including the priority of previously recorded deeds of trust under Miss. Code Ann. § 89-5-5, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

The purpose of the proposed amendment is to clarify the relative priority of an existing deed of trust encumbering timber and minerals and the priority of a purchaser of timber and minerals. The Mississippi Court of Appeals recently addressed this issue in *Felician Bank & Trust v. Manuel & Sessions, L.L.C.*, 943 So.2d 736 (Miss. Ct. Appeals 2006). In this case, a bank had a deed of trust on land in Wilkinson County, Mississippi. After the deed of trust was recorded, the owner of the land signed a contract for sale of the timber and sold the timber to a third party. One of the issues in the case was whether the purchaser took free of the bank's deed of trust. The Circuit Court of Wilkinson County relied on the definition of "goods" in Article 9, which provides in relevant part that "goods" include "standing timber that is to be cut and removed under a conveyance or contract of sale." The Circuit Court held that since the timber to be cut became personal property at the time of the contract of sale, and since the bank only had an interest in the real property and not personal property, the bank's deed of trust did not encumber the timber once the contract was signed, and the purchaser therefore took title to the timber free and clear of the bank's deed of trust.

On appeal by the bank, the Mississippi Court of Appeals, in the decision by Justice Southwick, reversed the Circuit Court and held that the severed timber remained subject to the bank's deed of trust. Under pre-UCC case law, a deed of trust encumbered the timber on the land as well as the dirt, unless the timber was specifically excepted. According to the Court, nothing suggests that the legislature intended to change this long-established first to file priority rule for real estate, codified in Miss. Code Ann. § 89-5-5, when it enacted the Uniform Commercial Code. The fact that the subsection (3) states that the provisions of Section 75-2-107 are subject to third party rights under realty records indicated that the legislature intended to retain the existing "first to file" rule.

The *Felician* court noted that its holding is consistent with the Article 9 treatment of fixtures in Miss. Code Ann. § 75-9-334. Subsection (c) of Section 75-9-334 provides that a security interest in fixtures is subject to the priority of an existing deed of trust on the real estate unless specific actions are taken.

My research suggests that the *Feliciano* case is a case of first impression. The reason may be that the holding in the *Feliciano* case seems obvious given the “subject to” language in Section 75-2-107(3). It nevertheless is worrisome that a trial court was persuaded to hold otherwise. I think that the proposed language will clarify that a lender with a deed of trust covering timber or minerals does not lose its interest in the timber or minerals if the owner of the land subsequently sells the timber or minerals. This proposed amendment is only intended to be a clarification of existing law and is not intended to be a substantive change in the law.