



STATE OF NEW JERSEY

NJLRC

NEW JERSEY LAW REVISION COMMISSION

FINAL REPORT AND RECOMMENDATIONS

Relating to

**UNIFORM COMMERCIAL CODE REVISED ARTICLE 7
DOCUMENTS OF TITLE**

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Introduction

The National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) promulgated for adoption in the states Revised Article 7 – Documents of Title in October 2003. The revision replaces the existing Uniform Commercial Code Article 7 – Documents of Title first promulgated in 1952 and adopted in New Jersey in 1961. The 1952 Article 7 replaced the Uniform Warehouse Receipts Act, the Uniform Bills of Lading Act, and Sections 27-40 of the Uniform Sales Act.¹ The 1952 Article contained important changes, but the continuity with prior law was more significant than were the changes. “[T]he overall picture [was] one of tidying up traditional concepts rather than of radical reform.”²

Likewise, Revised Article 7 does not make radical reforms to existing law. Rather, it has two primary objectives: (1) allowance of electronic documents of title, and (2) introduction of provisions to reflect trends at the state, federal and international levels. Adoption of the Revised Article requires the making of conforming amendments to several other Code sections and the Revised Article assumes for purposes of cross-references that the enacting state has enacted Revised Article 1, though it provides alternative conforming amendments for state law based on the original Article 1.³ Thirty-six states have adopted Revised Article 7 as of March 15, 2010: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia and Wisconsin.⁴

Key Features

“Revised Article 7 supplies a domestic legal framework [for documents of title] that conforms to international standards.” William F. Savino and David S. Widenor, *2002-2003 Survey of New York, Commercial Law*, 54 *Syracuse L. Rev.* 855 (2004). A “document of title”, defined in Revised Article 1, but not altered from the prior definition, is defined as:

“Document of title” includes bill of lading, dock warrant, dock receipt, warehouse receipt, or 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

¹ Robert Braucher, *The Uniform Commercial Code – Documents of Title*, 102 *U. Pa. L. Rev.* 831 (1954).

² *Id.* at 870.

³ See NCCUSL Website, <http://www.nccusl.org> (last visited Mar. 15, 2010).

⁴ NCCUSL Website, <http://www.nccusl.org> (last visited on Feb.. 10, 2012). Five 2012 introductions are listed: District of Columbia, Kentucky, Massachusetts, Michigan, and Washington.

purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.”

The definition is framed in terms of function to capture equivalent documents not yet used in commerce but that possibly may arise in the future. The essence of the definition is: the document “in the regular course of business or financing ... is treated as adequately evidencing that the person in possession or control of the document is entitled to deal with the document and the goods it covers.”⁵ A document of title is “issued by or to a bailee and covers goods in the bailee's possession”.⁶ Examples of documents of title are bills of lading and warehouse receipts.

Revised Article 7 also uses the term “bailee” as a “blanket term to designate carriers, warehousemen, and others who normally issue documents of title on the basis of goods which they have received.” *Official Comment*, Rev. Art. 7-102. Documents of title are distinguished from non-documents of title primarily by their chief characteristic of “evidencing that the person in possession is entitled to receive, hold and dispose of the document and the goods it covers.” Consequently, an air waybill is not a document of title as it constitutes only a receipt of the goods and the terms of the contract of carriage.⁷

Two important sub-classifications of documents of title exist: negotiable and nonnegotiable documents. *Rev. Art. 7-104*. Subsection (a) of that section provides that a document of title is “negotiable if by its terms the goods are to be delivered to bearer or to the order of a named person.” It follows that a document of title stating that the goods are consigned to a named person is a nonnegotiable document. In addition, a document is nonnegotiable if at the time it was issued it contained a legend that it is nonnegotiable. The standard example of a negotiable document of title is a bill of lading made out to order.⁸ It performs an important role in trade and finance by permitting goods to be sold in transit such as oil or grain that may be sold several times in a single day. In addition, if the transaction is to be financed through a letter of credit, the bank may hold the bill of lading as security. When the document of title is duly negotiated, the carrier loses certain defenses against a good faith holder of the document. *Revised Article 7-502*. Any other type of transfer, such as an assignment, does not clear the document of defects attached to the rights of an earlier holder. *Transcon Lines v. Lipo Chem, Inc.*, 193 N.J. Super. 456, 466 (L. Div. 1983). A transferee of a document of title not duly negotiated acquires only the title and rights that the transferor had the authority to convey. Revised Article 7-504(a).

Revised Article 7 provides for both tangible and electronic documents of title to establish a legal framework for the development of the electronic marketplace. Revised Article 7 derives its rules for electronic documents of title from the Uniform Electronic

⁵ William H. Henning and Linda J. Rusch, *Intersections of Articles 2, 7 and 9*, SK038 ALI-ABA 23, 25 (2004)

⁶ *Id.*

⁷ Drew L. Kershen, *Article 7: Documents of Title – 2001 Developments*, 57 Bus. L. 1733, 1734 n. 8 (2002).

⁸ The bill of lading serves three purposes: (1) receipt for the goods, (2) evidences the contract of carriage, and (3) document of title.

Transactions Act § 16 on transferable records and from Article 9-105 concerning control of electronic chattel paper. Revised Article 7-106 sets forth the criteria for electronic documents of title substituting the concept of control for endorsement and possession of a tangible instrument. As Henning and Rusch state, “Revised Article 7 adopts the concept of control for electronic documents of title as the functional equivalent of possession and indorsement of a tangible document of title.”⁹ The system employed must reliably establish that the person to whom the electronic document of title was issued or transferred has control of that document. Third party registration systems satisfy this requirement although Revised Article 7 does not preclude the development of different systems. The system simply must meet the requirements of §7-106. In addition, Revised Article 7 allows parties to reissue the document of title from one medium to another, that is, an entitled person holding an electronic document of title can request a substitute tangible document and vice-versa. In such cases, the person entitled under original document surrenders possession and warrants that he or she was the person entitled under the original document of title. The substitute document also bears a legend stating that it was issued in substitution of the original.

In recognition of the fact that other law regulates documents of title, Revised Article 7 has amended existing law “in light of state, federal and international developments.” *Prefatory Note* to Official Text (2003). For example, revised Article 7 has deleted obsolete references to tariffs, classifications and regulations that no longer track modern commercial practice. Documents of title may interface with federal and international law. For example, bills of lading are governed by the United States enactment of the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315, which is a statutory codification, with slight variations of the “Hague Rules” and the Federal Bill of Lading Act (Pomerene Act).¹⁰

Revised Article 7 also deals with other important issues, for example: (1) permissible contractual limitations of liability, though the duty of care is not subject to party autonomy, (2) negotiation and transfer, (3) lien of the carrier or warehousemen on the goods and right to enforce lien in a commercially reasonable manner, (4) altered, lost and stolen instruments and (5) the effects on holders resulting from insolvency of the bailee. Revised Article 7 codifies rules for documents of title, very few mandatory, within the context of contract law. It does not deal with tort liability of bailees and does not deal with criminal liability for conversion of goods.

Adoption of Revised Article 7 requires adoption of conforming amendments to Articles 1 (General Provisions), 2 (Sales), 2A (Leases), 4 (Bank Deposits and Collections), 5 (Letters of Credit), 8 (Investment Securities) and 9 (Secured Transactions). Where applicable, the appendix of conforming amendments contains alternatives depending upon whether the state has adopted recent revisions of other code articles.

⁹ William H. Henning and Linda J. Rusch, *supra* note 5 at 25.

¹⁰ 49 U.S.C. §§ 80101-80116.

Existing and Revised Article 7: Main Differences

The language of the Official Text is gender neutral and is clearer than existing law. In addition, the provisions have been extensively rewritten. The Official Text also contains several new provisions, dealing mainly with electronic documents of title. As already noted, these changes accommodate the emergence of electronic documents of title and are technologically neutral to permit marketplace development. The Revised Article 7 adopts the new definition of good faith –“honesty in fact and observance of reasonable commercial standards of fair dealing.” This change is not revolutionary and reflects the standard of “good faith” adopted in most countries with advanced legal systems. These changes are explained below.

Revised 7-102 (definitions) is an example of a provision with new subsections not contained in New Jersey law that could appear to be substantive changes. The following subsections were added: “carrier” in 7-102(a)(2); “good faith” in 7-102(a)(6); “person entitled under the document” in 7-102(a)(9) [moved from 7-403]; “record” in 7-102(a)(10); “sign” in 7-102(a)(11) and “shipper” in 7-102(a)(12). Revised Article 7 deletes the definition of “document of title” found in existing New Jersey law at 7-102(1)(e). That definition has been moved to Revised Article 1. With the exception of the definition of “good faith,” the effects of which have already been discussed, the substantive differences are insignificant. The terms “shipper” and “carrier” are clarifications; the terms “record” and “sign” are accommodations to electronic systems.

Revised 7-103 “Relation of Article to Treaty or Statute” illustrates a difference based upon style changes to language and additional references to E-SIGN and UETA that are germane to electronic document of title systems. While a comparison shows that the Revised section and existing law differ substantially in textual language, there is nothing objectionable about the changes. In effect, they state the obvious - Article 7 is subject to treaties, Federal law and relevant state law and regulation. Article 7 does not alter law imposing requirements on the form or content of documents of title; Revised Article 7 modifies E-Sign and, if there is a conflict between UETA and Revised Article 7, the latter prevails. The latter is simply an expression of the principle *lex specialis*.

Revised 7-104 “Negotiable and Nonnegotiable Document of Title” illustrates a reworded provision containing new subsections but does not result in important substantive changes. This section lays out the basic rules: a negotiable document of title is one by whose terms the goods are to be delivered to bearer or to order of a named person. The same rule is found in existing law. A document of title that does not meet these requirements is nonnegotiable. The default rule is that a document of title is not negotiable unless it meets the foregoing prerequisites. Subsection (c) of Revised Article 7-104, derived from section 3-104(d), provides that an issuer may place a legend on a document that it is not negotiable, even if it otherwise meets the requirements of negotiability. In that case, it is not negotiable. Once issued, negotiable documents cannot be made nonnegotiable. Likewise, nonnegotiable documents of title cannot be made negotiable by placing a stamp that the document is negotiable.

Revised Articles 7-105 “Reissuance in Alternative Medium” and 7-106 “Control of Electronic Document of Title” are new articles not found in existing law as they pertain to the phenomenon of electronic documents of title, a format that did not exist when the original article was adopted. They do not raise controversial issues. The rules of Revised 7-106 to establish control derive from UETA section 16. Control of an electronic document is a substitute for possession and indorsement of a tangible document of title. A person with an electronic document of title transfers the document by voluntarily relinquishing control of the document. These transactions are likely to occur in third part registry systems that maintain a single, authoritative, and unalterable, copy of the document of title. A record consisting of information stored in an electronic medium evidences the electronic document of title.

Revised 7-501 and 502 continue the rules applicable to due negotiation and its effects, except that they comprehend electronic documents of title. In general, a transferee may obtain greater rights than its transferor if the purchase is made for value, in good faith and without notice of defenses or claims unless the negotiation is not in the regular course of business.

Part 7 of Revised Article 7 contains no counterpart in existing law. Part 7 contains miscellaneous provisions dealing with when the revision becomes applicable to a transaction, a statement that the former law is repealed, and a savings clause. In addition, Revised Article 7 contains several conforming amendments to other statutes.

New Jersey Law

New Jersey does have an extensive history of litigation under existing Article 7. The most litigated provision of Article 7 is N.J.S.A. 12A:7-204 entitled “Duty of Care; contractual limitation of warehouseman’s liability”. In the context of consumer transactions, two recent cases have refused to enforce the warehouseman’s limitation of liability contained in the storage contract: *Jasphy v. Osinsky*, 364 N.J. Super. 13 (App. Div. 2003) (finding that limitation of liability to \$1 per garment was unconscionable when furs valued at approximately \$18,000 were destroyed in fire due to negligence of the warehouseman), and *Gonzalez v. A-1 Self-Storage, Inc.*, 350 N.J. Super. 403 (L. Div. 2000) (finding unconscionable a limitation of liability clause in storage contract when personal property was destroyed by water leak due to negligence of warehouseman). Both *Jasphy* and *Gonzalez* rely on theories of contract of adhesion, inequality of bargaining power and lack of effective notice of the limitation clause. In short, in a consumer transaction, unless the warehouseman puts the consumer specifically on notice of the limitation clause, offers and opportunity to declare a higher value and insurance, the limitation of liability is likely to be found unenforceable as unconscionable.

Revised Article 7-204 contains style but not substantive changes from the existing New Jersey statute. However, enactment should not result in a difference in case law opinion. In consumer transactions, there is nothing in the revision to compel New Jersey courts to interpret the provisions differently. The New Jersey judiciary will continue to maintain that a warehouseman may not exclude its duty of care and will continue to

police limitation of liability clauses to determine whether they violate public policy to protect the inferior party. The case law under existing Article 7-204 is an extension of New Jersey's *Henningsen v. Bloomfield Motors*, 32 N.J. 358 (1960) (finding that limitations on liability clauses are generally unenforceable unless bargained for).

Conclusion

The adoption of Revised Article 7 in thirty-six states indicates that there is a significant trend among the states to adopt this Revised Article. The literature does not indicate the presence of substantial opposition to its provisions. Because the revision uses modern statutory language, has updated provisions to reflect commercial practice, interfaces with state federal and international regulation and provides explicit rules for electronic documents of title, it is recommended that New Jersey enact Revised Article 7.

It also is recommended that New Jersey adopt Revised Article 1 (excluding the new choice of law clause, but including the new definition of good faith) and the necessary conforming amendments to other articles.¹¹ As to the former, the Commission recommends retention of the existing rule, requiring that the transaction bear a reasonable relationship to the legal regime selected by the parties, as now codified in § 1-105. The adoption of the two articles is logical as Revised Article 7 incorporates revisions made to Revised Article 1. Adoption of Revised Article 1 and 7 require conforming amendments to other parts of the Uniform Commercial Code.

Attachment

The attachment contains the entire text of Revised Article 7 containing amendments required by Revised Article 1. Brackets indicate material to be omitted from New Jersey text.

¹¹ Revised Article 7 includes the expanded definition of good faith, that is, "observance of reasonable commercial standards of fair dealing." The only article that does not contain that definition is Article 5. Opposition to the expanded definition of good faith in Revised Article 1 is not based on sound arguments.