

MEMO: UCC7 Committee Members, Observers, Advisors

FROM: Henry D. Gabriel, Jr., Chair of the Drafting Committee
Drew Kershen, Reporter for the Drafting Committee

DATE: February 20, 2001

The drafting committee will meet Friday March 9th and Saturday March 10th. We will begin at 8:30 a.m. on Friday morning. The goal of our first meeting will be to articulate the areas that need updating and clarification, and to give the reporter direction in the production of a first working draft for next fall.

We have included on the agenda a fairly extensive list of topic for discussion. We hope to concentrate on the larger issues first. Obviously we will not be able to come to specific resolutions for many of the issues, but we hope to at least determine what further work needs to be undertaken by the committee to resolve these issues at a later time.

We have attached a copy of Linda Rusch's Report to the A.B.A. Article 7 Task Force. This report is an excellent survey and introduction to some of the issues that the committee will be discussing.

AGENDA

Drafting Committee to Revised Uniform Commercial Code Article 7: Documents of Title

March 9-10, 2001
Oklahoma City, Oklahoma

- A. Welcome and Introduction of the Drafting Committee
- B. Introductions of the Project: Charge to the Drafting Committee: Scope
 - 1. The scope of the Project
 - a. Charge to the Committee: “Update and to make necessary changes to Article 7 of the Uniform Commercial Code consistent with the report furnished to this Committee. The charge to the Drafting Committee should limit it to only those changes which are of significance or which considerably improve the law.”
 - b. Likely areas of revision and the need for the revisions: (update existing Article provisions and add new provisions for electronic documents of title)
 - 2. Timing for the Revisions
- C. Discussion of Potential Observers and the Need to Coordinate with Other Entities
 - 1. Particular need to coordinate with:
 - a. Federal legislation – USDA
 - i. Status of proposed revision to the United States Warehouse Act and its effect on Article 7
 - b. International Developments – U.S. State Department
 - c. Other entities – United Nations (e.g.)
 - 2. Other interested groups

D. Substantive Issues

1. Scope
 - a. Do we need a specific scope provision?
 - b. Is the current Article One definition of “Document of Title” adequate? Do we need a more expansive definition?
 - c. Do we need a more expansive concept of “delivery order” (see § 7-102(d)).
 - d. Should we be explicit about electronic transactions as a preliminary (scope) matter?
2. Jurisdiction
 - a. Should there be a section or comments about the jurisdictional coverage of Article 7 vis a vis federal law, or is this simply implicit?
3. Electronic Documents of Title
 - a. What are the current and evolving practices?
 - b. What current statutes or conventions are appropriate models?
4. Priority Questions with Article Nine
 - a. What problems exist about priority conflicts between Article 7 and Article 9, and how should they be resolved ?
5. Revised Article Nine
 - a. What changes are necessary to accommodate Revised Article Nine?
6. Definition of “Document of Title” in Article One
 - a. Is this definition inclusive enough? Should it include electronic documents of title? Do we need to resolve the issue created by cases that have held that if the document is not a “document of title” article 7 does not apply?
7. Negotiable Document: Words of Negotiability

- a. Under section 7-104, courts are split on the question of whether specific words of negotiability are necessary to make a document negotiable. Should we resolve this question, and if so, how?
- 8. Warehouse Receipt: Requirement of All terms under 7-202
 - a. The courts have split on the question of whether all terms listed in 7-202 are necessary for a valid Warehouse Receipt. Should we resolve this question, and if so, how?
 - b. The courts are also split on the question of whether a warehouse lien can arise in the absence of all of the required terms of 7-202 in the document. This is tied in to the question of whether all of the terms of 7-202 are necessary to have a valid warehouse receipt.
- 9. Specific Sanctions
 - a. Should Section 7-403, which provides specific obligations for bailees, also include specific sanctions for failure to meet these obligations? If we address the question of damages directly, what are the appropriate measures? To what extent is the failure of the “duty of care” a tort and not contract standard? Should we codify the duty of care, and if so, what if any, coordination is necessary with COGSA, the Carmack Amendment, and the Harter Act?
- 10. Indemnity
 - a. Should section 7-601 provide for non-court indemnity?
- 11. Explicit Right to Withhold Goods
 - a. Should 7-403(2) be explicit in the right of a bailee to withhold delivery of goods subject to the payment of the bailees lien?
- 12. Endorsements
 - a. Should the types of endorsements (special, in blank, bearer) be defined as opposed to assumed as to their meaning?
- 13. Burden of Proof
 - a. Should we remove the bracketed language of 7-403(1)(b)? Only a minority of states have adopted it, and it is not clear that these

questions of procedure are necessary in the commercial code.

14. Consequential Damages
 - a. The case law is sparse and inconsistent on the question of consequential damages. Should we take a position, and if so, what should it be?
15. Carrier Liability
 - a. Section 7-309 provides that the underlying common law standard of liability is not abrogated by the Code. Should we specify a standard of liability in the Code or continue to defer to other law?
16. Limitations on Liability: Warehouse Receipts 7-204
 - a. Article 7 (7-204) presently permits limitation of liability of a warehouse to a per unit or weight basis. There is some question whether this is too restrictive and whether it makes sense to provide other, broader ways to limit liability. [This is discussed more fully in Bill Towle's memo in the A.B.A. Task Force Report]
 - b. There is also a split in authority about whether a limitation of liability clause in a document need be conspicuous or made known to the bailor. Should this issue be resolved in the text, and if so, how?
17. Clarification of Meaning of Pro Rata in 7-207(2)
18. Remove Receipt of Warehouse Receipt Requirement in 7-209(1)
 - a. The lien created on 7-209(1) is a possessory lien, and therefore logically arises upon the physical receipt by the warehouse of the goods. However, 7-209(1) says the lien is created by the receipt of the warehouse receipt and not receipt of the goods. Should the lien be created upon the physical delivery of the goods instead of the receipt of the warehouse receipt? [This is discussed more fully Bill Towle's memo in the A.B.A. Task Force Report.]
19. Does 7-209 need to be clarified to provide expressly for processing charges and attorneys fees
 - a. Does 7-209 implicitly provide for processing charges and attorneys fees? If so, (or it should be) should this be stated expressly in the

section? (Pennsylvania has done this).

20. Attorneys fees And Costs for +Warehouseman in Interpleader Action [Kershen]

- a. Should 7-603, which covers interpleader actions, provide for costs and attorneys fees for warehousemen?

21. Duty of Care

- a. There are several issues that have arisen and have been litigated about the duty of care imposed on bailees in Article Seven that may warrant clarification in the Code
- b. Whether the bailee is liable for negligence even if no warehouse receipt is issued or if the receipt does not comply with the requirements of 7-202?
- c. Whether the bailor's contributory negligence precludes a negligence action against the bailee?
- d. Whether the failure to redeliver should be a presumption of negligence or conversion?
- e. Whether Article 7 should provide for which party bears the burden of proving the bailee's negligence, and if so, given the split authority on the question, how should the issues be resolved?

NCCUSL MEMBERS

Henry Deeb Gabriel, Jr., *Chair*
Loyola University Law School
526 Pine Street
New Orleans, Louisiana 70118
504-861-5667
504-861-5894 (Fax)
gabriel@loyno.edu

Neal Ossen
Suite 201
21 Oak Street
Hartford, CT 06106
860-728-6635
860-244-2524 (Fax)
nossen@internet-95.com

Mike Hunter
2300 North Lincoln Boulevard
Suite 101
Oklahoma City, Oklahoma 73105-4897
405-521-6434
405-521-2031 (Fax)
mike.hunter@okla.state.ok.us

Sandra Stern
509 Madison Avenue
Suite 612
New York, New York 10022
212-207-8150
212-317-1030 (Fax)
SSternLaw@aol.com

Charles J. Tabb
University of Illinois
College of Law
504 East Pennsylvania Avenue
Champaign, Illinois 61820
217-333-2877
217-244-1478 (Fax)
ctabb@law.uiuc.edu

ALI MEMBERS

Edward V. Cattell, Jr.
Hollstein, Keating Cattell Johnson &
Goldstein PC
1608 Walnut Street
Suite 1602
Philadelphia, PA 19103-5410
215-893-1067
215-893-9480 (Fax)
evc@hkcjg.com

Linda Rusch
Hamline University School of Law
1536 Hewitt Avenue
St. Paul, Minnesota 55104
651-523-2118
651-523-2435 (Fax)
lrusch@gw.hamline.edu

STYLE MEMBER

James C. McKay, Jr.
Office of Corporation Counsel
6th Floor South
441 4th Street N.W.
Washington, D.C. 20001
202-724-5690
202-727-0431 (Fax)
jamescmckay@yahoo.com

REPORTER

Drew Kershen
University of Oklahoma Law Center
300 Timberdell Road
Norman, Oklahoma 73019-5081
405-325-4784
405-325-0389 (Fax)
dkershen@ou.edu

Linda J. Rusch
Professor of Law
Hamline University School of Law

This report updates a report that was originally submitted to Drew Kershen on August 2, 1993, regarding court cases that interpret Article 7 of the UCC. The focus of this report is on litigated issues that the PEB may want to consider in determining whether Article 7 should be revised.

I. Scope

Unlike other articles of the UCC, Article 7 has no scope section. This has created some litigation over whether or not Article 7 should be deemed to apply to a particular type of transaction. The two definitions that get litigated in terms of determining the scope of Article 7 are the definition of “warehouseman” and the definition of “document of title.” If someone is not a warehouseman or the document issued is not a document title, Article 7 has been held not to apply to the transaction.¹

II. Negotiable Documents

¹*Butler Manufacturing Co. v. Americold Corp.*, 835 F. Supp. 1274, 22 U.C.C. Rep. Serv. 2d 318 (D. Kan. 1993). (court held that person was in business of storing goods for hire was a warehouseman under Article 7 even though did not issue a warehouse receipt. Article 7 provisions not limited to warehousemen that issue warehouse receipts. Court then applied Section 7-204 re: duty of care and contract terms regarding liability for negligence in storing goods.); *International Business Machines Corp. v. Universal Transcontinental Corp.*, 595 N.Y.S. 2d 106, 20 U.C.C. Rep. Serv. 2d 1055 (App. Div. 1993) (not a warehouseman when temporarily stored goods while shipping); *Marantz Co. Inc. v. Clarendon Industries Inc.*, 670 F. Supp. 1068, 4 U.C.C. Rep. Serv. 2d 1161 (D. Mass. 1987) (inventory control company providing field warehouse service not a warehouseman, so can disclaim liability for negligence, Section 7-204 not apply); *Ferrex Intern., Inc. v. M/V Rico Chone*, 718 F. Supp. 451, 10 U.C.C. Rep. Serv. 2d 960 (D. Md. 1988) (shipper who stores goods to facilitate loading and unloading of goods from ships is a warehouseman under Article 7, even if don't have a state warehouse license) (court's analysis re: COSGA rejected in *Wemhoener Pressen v. Ceres Marine Terminals, Inc.*, 5 F.3d 734 (4th Cir. 1993)); *Jones v. A.E. Beavers*, 116 N.M. 634, 866 P.2d 362, 22 U.C.C. Rep. Serv. 2d 865 (N.M. App. Ct. 1993) (certificate of title for vehicle is not a document of title); *Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 24 U.C.C. Rep. Serv. 2d 209 (2nd Cir. 1994) (holding certificates representing a right to reclaim precious metal issued to a lessor of that metal by the lessee analogous to document of title and thus within Article 7, renting goods rather than storing goods does not make article 7 inapplicable); *Michigan Nat. Bank v. Michigan Livestock Exchange*, 432 Mich. 277, 439 N.W. 2d 884, 9 U.C.C. Rep. Serv. 2d 366 (1989) (trucker's receipt not a document of title).

Interpreting Section 7-104, the courts have confronted whether or not words of negotiability are necessary in order to make the documents negotiable. Some cases have held that the words “bearer” or “to the order of a named person” are required to make a document negotiable.² Other courts have held that words of negotiability are not required.³ This is an issue which should be resolved and for which there is precedent in Article 3 where words of negotiability are required. Given the rather minimal requirements of Section 7-104, it seems strange that the courts have not required words of negotiability so that it is clear to the persons who would take the documents that the documents were in fact negotiable.

III. Validity of Warehouse Receipt

Section 7-202 requires a warehouse receipt to have particular terms in it or the warehouseman is liable for damages caused by the omission of the term.⁴ Several courts have addressed whether or not a warehouse receipt must have the terms in order to qualify as a warehouse receipt with some courts holding that the omission does not affect the validity of the receipt⁵ and other courts holding that omission of terms precludes the receipt from qualifying as a valid warehouse receipt.⁶

Section 7-203 allows recovery for a good faith purchaser who is damaged by misdescriptions in the warehouse receipt. One court has held that a secured creditor cannot

²*R.E. Huntley Cotton Co. v. Fields*, 551 S.W. 2d 472, 21 U.C.C. Rep. Serv. 1157 (Tex. Civ. App. 1977) (document stated “to person or order, or bearer”-negotiable as bearer document); *In re Farmer’s Grain Exchange*, 1976 WL 23655, 20 U.C.C. Rep. Serv. 1054 (Bankr. D. Wis. 1976) (notes non negotiable when did not state deliverable to bearer or named person).

³*In re George B. Kerr, Inc.*, 25 B.R. 2, 35 U.C.C. Rep. Serv. 1280 (Bankr. D.S.C. 1981) *aff’d* 696 F. 2d 990 (4th Cir. 1982) (no requirement that word “bearer” appear in document if by document’s terms the goods are to be delivered to the bearer of the document. Document stated that goods would “be delivered only upon presentation of this receipt”); *Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 24 U.C.C. Rep. Serv. 2d 209 (2nd Cir. 1994) (“holding for account” is adequate substitute for “to be delivered” so certificates were negotiable).

⁴*See Fotos v. Firemans Insurance Co. of Washington D.C.*, 533 A.2d 1264, 5 U.C.C. Rep. Serv. 2d 1097 (D.C. 1987).

⁵*Ferrex Intern., Inc. v. M/V Rico Chone*, 718 F. Supp. 451, 10 U.C.C. Rep. Serv. 2d 960 (D. Md. 1988) (dock receipt); *In re Julien Co.* 136 B.R. 755, 16 U.C.C. Rep. Serv. 2d 1143 (Bankr. W.D. Tenn. 1991).

⁶*Nuclear Facilities, Inc. v. Advance Relocation and Storage, Inc.*, 173 A.D. 2d 802, 571 N.Y.S. 2d 36, 15 U.C.C. Rep. Serv. 2d 1290 (N.Y.A.D. 1991); *In re Charter Co.*, 56 B.R. 91, 42 U.C.C. Rep. Serv. 280 (Bankr. M.D. Fla. 1985).

recover under this section because it knew of irregularities in the transaction and of missing endorsements so as to not be acting in good faith.⁷

IV. Duty of Care for Stored Goods

Many issues have been litigated under this section:

1. Whether the bailee is liable for negligence even if no warehouse receipt is issued or the receipt does not comply with Section 7-202;⁸
2. Whether the bailor's contributory negligence precludes recovery for the bailee's negligence;⁹
3. Whether the failure to redeliver results in a presumption of conversion¹⁰ or whether the failure to redeliver results in a presumption of negligence;¹¹

⁷*Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21, 22 U.C.C. Rep. Serv. 1026 (1977).

⁸*Georgia Ports Authority v. Servac Intern.*, 202 Ga. App. 777, 415 S.E. 2d 516, 17 U.C.C. Rep. Serv. 2d 869 (1992); *Tate v. Action Moving & Storage, Inc.*, 95 N.C. App. 541, 383 S.E.2d 229, 10 U.C.C. Rep. Serv. 2d 1379 (1989) (wilful violation when refuse to release goods when enough tendered to satisfy warehouse lien); *Kearns v. McNeill Bros. Moving and Storage Co., Inc.*, 509 A.2d 1132, 1 U.C.C. Rep. Serv. 2d 856 (D.C. App. 1986).

⁹*Fugate v. Brockway, Inc.*, 937 F.2d 960, 15 U.C.C. Rep. Serv. 2d 1018 (4th Cir. 1991) (on facts bailor not contributory negligence, court cites cases where bailor's negligence may preclude recover for bailee's negligence-*i.e.* bailor actual knowledge of unsuitable nature of storage facility); *Continental Group, Inc. v. Lincoln Land Moving and Storage, Inc.*, 710 F.2d 368, 36 U.C.C. Rep. Serv. 611 (7th Cir. 1983) (finding of no contrib. negl. on facts affirmed, express doubts in footnote re: applicability of contrib. negl. analysis).

¹⁰*Colgate Palmolive Co. v. S/S Dart Canada*, 724 F.2d 313, 1984 A.M.C. 305, 37 U.C.C. Rep. Serv. 864 (2nd Cir. 1983) *cert. denied* 466 U.S. 963 (1984); *Joseph H. Reinfeld, Inc. v. Griswold and Bateman Warehouse Co.*, 189 N.J. Super. 141, 458 A.2d 1341, 36 U.C.C. Rep. Serv. 262 (1983) (to rebut presumption, bailee must explain disappearance of goods and then bailor ultimate burden to prove negligence or conversion); *I.C.C. Metals, Inc. v. Municipal Warehouse Co.*, 50 N.Y.2d 657, 409 N.E.2d 849, 431 N.Y.S.2d 372, 29 U.C.C. Rep. Serv. 217 (1980) (to rebut presumption, bailee must explain disappearance of goods and then bailor ultimate burden to prove negl. or conversion); *Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 24 U.C.C. Rep. Serv. 2d 209 (2nd Cir. 1994); *National Resources Trading, Inc. v. Trans Freight Lines*, 766 F.2d 65, 41 U.C.C. Rep. Serv. 948 (2nd Cir. 1985).

¹¹*Kearns v. McNeill Bros. Moving and Storage Co. Inc.*, 509 A.2d 1132, 1 U.C.C. Rep. Serv. 2d 856 (D.C. App. 1986); *Western Min. Corp., Ltd. v. Standard Terminals, Inc.*, 577 F. Supp. 847, 37 U.C.C. Rep. Serv. 1273 (W.D. Pa. 1984) *aff'd* 745 F.2d 49 (3rd Cir. 1984); *Sanfisket, Inc. v. Atlantic Cold Storage Corp.*, 347 So.2d 647, 21 U.C.C. Rep. Serv. 1155 (Fla. App. 1977); *Ferrex Intern., Inc. v. M/V Rico Chone*, 718 F. Supp. 451, 1989 A.M.C. 1109, 10

4. Who bears the burden of persuasion regarding the bailee's negligence with several cases holding that the bailor has the burden of persuasion¹² and others holding that the bailee has the burden of persuasion to show it was not negligent;¹³
5. What type of clause is a prohibited disclaimer of negligence. While it is pretty clear that a bailee cannot disclaim liability for its negligence¹⁴ a clause disclaiming liability under a force majeure clause is not a disclaimer of liability for negligence and is enforceable.¹⁵

Section 7-204 allows a warehouseman to limit damages by item or weight for loss or damage to the goods. Some courts say that the limitation must be by item or weight in order to be valid¹⁶ whereas other courts allow a multiple of daily storage charges with a cap to be

U.C.C. Rep. Serv. 2d 960 (D. Md. 1988); *Inland Metals Refining Co. v. Ceres Marine Terminals, Inc.*, 557 F. Supp. 344, 36 U.C.C. Rep. Serv. 266 (N.D. Ill. 1983); *International Nickel Co., Inc. v. Trammel Crow Distribution Corp.*, 803 F.2d 150, 2 U.C.C. Rep. Serv. 2d 594 (5th Cir. 1986); *Refrigeration Sales Co., Inc. v. Mitchell-Jackson, Inc.*, 770 F.2d 98, 41 U.C.C. Rep. Serv. 955 (7th Cir. 1985); *Lonray, Inc. v. Azucar, Inc.*, 775 F.2d 1521, 42 U.C.C. Rep. Serv. 537 (11th Cir. 1985); *Hacohen v. Bolliger, Ltd*, 108 A.D.2d 357, 489 N.Y.S.2d 75, 41 U.C.C. Rep. Serv. 1402 (N.Y.A.D. 1985).

¹²*Commodities Reserve Corp, v. Belt's Wharf Warehouses, Inc.*, 310 Md. 365, 529 A.2d 822, 4 U.C.C. Rep. Serv. 2d 560 (1987) (relying on Section 7-403(1) optional language); *Joseph H. Reinfeld, Inc. v. Griswold and Bateman Warehouse Co.*, 189 N.J. Super. 141, 458 A.2d 1341, 36 U.C.C. Rep. Serv. 262 (1983) (if bailee provides rebuttal of *prima facie* case of conversion by failure to deliver); *I.C.C. Metals, Inc. v. Municipal Warehouse Co.*, 50 N.Y.2d 657, 409 N.E.2d 849, 431 N.Y.S.2d 372, 29 U.C.C. Rep. Serv. 217 (1980) (if bailee provides rebuttal of *prima facie* case of conversion by failure to deliver); *Singer Co. v. Stott & Davis Motor Exp., Inc.*, 79 A.D.2d 227, 436 N.Y.S. 2d 508, 31 U.C.C. Rep. Serv. 658 (N.Y. A.D. 1981).

¹³*Royster v. Pittman*, 691 S.W.2d 305, 41 U.C.C. Rep. Serv. 574 (Mo. App. 1985); *Irving Pulp & Paper, Ltd. v. Dunbar Transfer & Storage Co., Inc.*, 732 F.2d 511, 38 U.C.C. Rep. Serv. 312 (6th Cir. 1984); *cf. W.A. Taylor & Co. v. Griswold & Bateman Warehouse Co.*, 754 F. Supp. 1260, 14 U.C.C. Rep. Serv. 2d 861 (N.D. Ill. 1990) (rejects argument that bailee bears burden of persuasion).

¹⁴*Butler Manuf. Co. v. Americold Corp.*, 835 F. Supp. 1274, 22 U.C.C. Rep. Serv. 2d 318 (D. Kan. 1993) (Section 7-204 is nonvariable rule).

¹⁵*Butler Manuf. Co. v. Americold Corp.*, 1993 WL 406730, 23 U.C.C. Rep. Serv. 2d 197 (D. Kan. 1993) (clause that disclaimed liability for force majeure is not a disclaimer of liability for negligence and thus enforceable).

¹⁶*Modela, Inc v. Rose Warehouse, Inc.*, 5 U.C.C. Rep. Serv. 1004 (N.Y. Sup. 1968) (flat limit of \$50 per delivery is invalid); *Butler Manuf. Co. v. Americold Corp.*, 1993 WL 406730, 23

enforced.¹⁷ The courts have considered the issue of whether or not a limitation of damages clause applies to nonnegligence causes of action. Some courts hold that a damage limitation can control actions other than for conversion to the bailee's own use¹⁸ whereas other courts have held that a limitation of damages does not apply to gross negligence or willful conduct.¹⁹ What counts as a conversion so that the damage limitation does not apply has also been litigated. Courts have held that a mere breach of the storage contract is a conversion²⁰ and other courts have held that a misdelivery is conversion.²¹

Some courts have held that a bailor must have knowledge of the damage limitation clause or a justifiable belief that the bailor had knowledge of the clause in order to enforce the limitation clause.²² Other courts have held that the limitation of damages clause need not be conspicuous or pointed out to the bailor.²³

U.C.C. Rep. Serv. 2d 197 (D. Kan. 1993) (no minimum damage liability required as long as limit by item or weight, it is enforceable); *Houston v. Security Storage Co. of Washington*, 474 A.2d 143, 39 U.C.C. Rep. Serv. 262 (D.C. Ct. App. 1983) (limitation by value of item up to maximum of \$1000 if value not declared otherwise enforced) .

¹⁷*In re SLT Warehouse Co.*, 130 B.R. 79, 15 U.C.C. Rep. Serv. 2d 1291 (Bankr. E.D. Mo. 1991) (limitation by multiple of daily storage charges with cap of gross amount enforced); *Sun Valley, Inc. v. Southland Bonded Warehouse Inc.*, 319 S.E.2d 91, 39 U.C.C. Rep. Serv. 984 (Ct. App. Ga. 1984) (same as *SLT*).

¹⁸*In re SLT Warehouse Co.*, 130 B.R. 79, 15 U.C.C. Rep. Serv. 2d 1291 (Bankr. E.D. Mo. 1991) (no proof of conversion to bailee's use, contract applied to limit liability for negligence and fraud).

¹⁹*Butler Manuf. Co. v. Americold Corp.* 1993 WL 406730, 23 U.C.C. Rep. Serv. 2d 197 (D. Kan. 1993); *International Nickel Co., Inc. v. Trammel Crow Distribution Corp.*, 803 F.2d 150, 2 U.C.C. Rep. Serv. 2d 594 (5th Cir. 1986) (misrepresentation claim).

²⁰*Fotos v. Firemen's Insurance Co. of Washington, D.C.*, 533 A.2d 1264, 5 U.C.C. Rep. Serv. 2d 1097 (D.C. Ct. App. 1987) (moving goods breached contract, bailee exercising unlawful dominion over goods-conversion).

²¹*Lipman v. Petersen*, 223 Kan. 483, 575 P.2d 19, 23 U.C.C. Rep. Serv. 997 (1978) (conversion to own use means any conversion); *Joseph H. Reinfeld, Inc. v. Griswold and Bateman Warehouse Co.*, 189 N.J. Super. 141, 458 A.2d 1341, 36 U.C.C. Rep. Serv. 262 (1983).

²²*Griffin v. Nationwide Moving and Storage Co., Inc.*, 187 Conn. 405, 446 A.2d 799, 34 U.C.C. Rep. Serv. 970 (1982).

²³*Sanfisket, Inc. v. Atlantic Cold Storage Corp.*, 347 So.2d 647, 21 U.C.C. Rep. Serv. 1155 (Fla. App. 1977); *Strom Intern., Ltd. v. Spar Warehouse and Distributors, Inc.*, 69 Ill. App.

In the absence of an enforceable damage limitation clause, the question is what are the damages for negligence or conversion of the goods. One court has held that a price realized for the goods in the absence of the bailee's negligence is the remedy for negligence.²⁴ The liability for conversion is generally the market value of the goods.²⁵ But there is some dispute about when the market value of the goods should be measured, some courts have held the date when the bailor knew the goods were destroyed,²⁶ or when the conversion takes place which is when the turnover is demanded and denied.²⁷ If no market value for the goods can be ascertained such as when the goods are household goods, a court has found that the value is the reasonable value to the owner.²⁸ There is some controversy about whether or not consequential losses are recoverable under this section in light of section 1-106 of Article 1.²⁹

Finally, courts have addressed the effect of a clause in a warehouse receipt stating a time limitation for bringing actions. Some courts have held that the time limitation clause applies to

3d 696, 388 N.E.2d 108, 27 U.C.C. Rep. Serv. 233 (1979); *Keefe v. Bekins Van & Storage Co.*, 36 Colo. App. 382, 540 P.2d 1132, 17 U.C.C. Rep. Serv. 1286 (1975).

²⁴*Lonray, Inc. v. Azucar, Inc.*, 775 F.2d 1521, 42 U.C.C. Rep. Serv. 537 (11th Cir. 1985) (price realized for goods by bailor if bailee not negligent).

²⁵*Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 24 U.C.C. Rep. Serv. 2d 209 (2nd Cir. 1994); *Fremont National Bank and Trust Co v. Collateral Control Corp.*, 724 F.2d 1410, 37 U.C.C. Rep. Serv. 1267 (8th Cir. 1984); *Griffin v. Nationwide Moving and Storage Co., Inc.*, 187 Conn. 405, 446 A.2d 799, 34 U.C.C. Rep. Serv. 970 (1982) (credited owner's testimony as to market value).

²⁶*Federal Compress & Warehouse Co. v. Reed*, 339 So. 2d 547, 20 U.C.C. Rep. Serv. 722 (Miss. 1976) (date when bailor knew goods destroyed).

²⁷*Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 24 U.C.C. Rep. Serv. 2d 209 (2nd Cir. 1994) (date when conversion takes place, when turnover demanded and denied).

²⁸*Keefe v. Bekins Van & Storage Co.*, 36 Colo. App. 382, 540 P.2d 1132, 17 U.C.C. Rep. Serv. 1286 (1975) (reasonable value to owner).

²⁹The following cases hold that consequential losses are recoverable: *Irving Pulp & Paper, Ltd. v. Dunbar Transfer & Storage Co., Inc.*, 732 F.2d 511, 38 U.C.C. Rep. Serv. 312 (6th Cir. 1984) (additional storage that accrued due to negligence of warehouse in allowing retrieval of the goods after roof collapse is recoverable by bailor); *Georgia Ports Authority v. Servac Intern.*, 202 Ga. App. 777, 415 S.E. 2d 516, 17 U.C.C. Rep. Serv. 2d 869 (1992); *Indemnity Marine Assur. Co., Ltd., v. Lipin Robinson Warehouse Corp.*, 99 Mich. App. 6, 297 N.W.2d 846, 30 U.C.C. Rep. Serv. 658 (1980). One court held that consequential loss is not recoverable: *Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 24 U.C.C. Rep. Serv. 2d 209 (2nd Cir. 1994) (since can't recover consequential losses, Section 1-106, then no need for plaintiff to mitigate).

conversion actions.³⁰ Other courts have held that the time limitation clause for bringing claims does not apply to conversion actions.³¹ Finally one court has applied equitable tolling principles to a time limitation contained in a warehouse receipt.³²

Section 7-207 requires that the warehouseman who stores fungible goods is separately liable to each owner for that owner's share and that if there is a shortage, the holders of negotiable warehouse receipts have priority over other holders of warehouse receipts. One court has held that this section is inapplicable when a bank holds warehouse receipts as security for a loan, when the bank did not deposit any goods represented by the warehouse receipt and the warehouse receipt did not really represent goods.³³

Finally, one court held that the bailee owed a third party a duty of care when the third party did not own the bailed goods and was not a party to the storage contract. The third party was a manufacturer of food that was improperly stored and then recalled when the food caused illness. The manufacturer suffered harm to its reputation and expenses of the recall.³⁴

V. Warehouse Liens

³⁰*Styling Plastics Co., Ltd. v. Neptune Orient Lines, Ltd.*, 666 F. Supp. 1406, 1988 A.M.C. 351, 4 U.C.C. Rep. Serv. 2d 1542 (N.D. Cal. 1987); *Refrigeration Sales Co., Inc. v. Mitchell-Jackson, Inc.*, 770 F.2d 98, 41 U.C.C. Rep. Serv. 955 (7th Cir. 1985); *Amenip Corp. v. Ultimate Distribution Systems, Inc.*, 200 N.J. Super. 109, 490 A.2d 371, 40 U.C.C. Rep. Serv. 1367 (1985); *Phillips Bros., v. Locust Industries, Inc.*, 760 F.2d 523, 40 U.C.C. Rep. Serv. 606 (4th Cir. 1985).

³¹*Continental Metals Corp. v. Municipal Warehouse Co., Inc.*, 112 Misc. 2d 923, 447 N.Y.S. 2d 849, 33 U.C.C. Rep. Serv. 660 (N.Y. Sup. 1982) *aff'd* 459 N.Y.S. 2d 406, 35 U.C.C. Rep. Serv. 1608 (N.Y.A.D. 1983).

³²*Irving Pulp & Paper, Ltd. v. Dunbar Transfer & Storage Co., Inc.*, 732 F.2d 511, 38 U.C.C. Rep. Serv. 312 (6th Cir. 1984).

³³*In re Farmer's Grain Exchange, Inc.*, 1976 WL 23655, 20 U.C.C. Rep. Serv. 1054 (Bankr. W.D. Wis. 1976) (Warehouse documents issued to bank as security for loan when bank didn't deposit any goods with warehouse insufficient to let bank share in distribution under this section with farmers who had deposited corn with warehouse.).

³⁴*Cargill, Inc., v. Boag Cold Storage Warehouse, Inc.*, 71 F.3d 545, 28 U.C.C. Rep. Serv. 2d 38 (6th Cir. 1995).

The courts are uniform that a warehouse receipt must be issued in order to have a lien under Section 7-209.³⁵ However, the courts are divided on whether or not omission of terms required by Section 7-202 to be included in the warehouse receipt precludes the lien from arising. Some courts hold that the lien still arises³⁶ whereas other courts hold that the warehouse receipt that does not comply with Section 7-202 precludes the lien from arising.³⁷

Several courts have confronted what language is sufficient to create a lien for storage of goods other than goods stored under the receipt issued holding that merely stating “all charges” is insufficient.³⁸ The lien for charges and expenses does not cover breach of contract damages other than charges for storage³⁹ and does not include attorney’s fees for enforcing or defending the

³⁵*In re Knoware, Inc.*, 57 B.R. 163, 42 U.C.C. Rep. Serv. 998 (Bankr. D. Mass. 1986) (had to mail receipt to the recipient in order to have a lien); *Grundey v. Clark Transfer Co., Inc.*, 42 N.C. App. 308, 256 S.E.2d 732, 27 U.C.C. Rep. Serv. 530 (1979) (mailing receipt to correct address necessary to have a lien); *McCauseland v. Tide-May Flower Moving and Storage*, 499 So. 2d 1378, 2 U.C.C. Rep. Serv. 2d 1642 (Ala. 1986); *Richwagen v. Lilienthal*, 386 So. 2d 247, 29 U.C.C. Rep. Serv. 964 (Fla. App. 1980); *In re Weikel*, 1995 WL 126598 (Bankr. N.D. Ohio 1995); *In re Celotex Corp.*, 134 B.R. 993, 16 U.C.C. Rep. Serv. 2d 482 (Bankr. M.D. Fla. 1991); *In re Aerospace Technologies, Inc.*, 199 B.R. 331, 30 U.C.C. Rep. Serv. 2d 933 (Bankr. M.D. N.C. 1996).

³⁶*In re Julien Co.*, 136 B.R. 755, 16 U.C.C. Rep. Serv. 2d 1143 (Bankr. D. Tenn. 1991); *Evergreen Intern. Services Corp. v. Wallant Intern. Trade, Inc.*, 228 N.J. Super. 477, 550 A.2d 175, 7 U.C.C. Rep. Serv. 2d 1603 (1988); *Kearns v. McNeil Bros. Moving and Storage Co.*, 509 A.2d 1132, 1 U.C.C. Rep. Serv. 2d 856 (D.C. App. 1986); *Smithers v. Tru-Pak Moving Systems, Inc.*, 121 N.C. App. 542, 468 S.E.2d 410, 30 U.C.C. Rep. Serv. 2d 926 (1996).

³⁷*In re Siena Publishers Assoc.*, 149 B.R. 359, 19 U.C.C. Rep. Serv. 2d 1139 (Bankr. S.D.N.Y. 1993); *In re Celotex Corp.*, 134 B.R. 993, 16 U.C.C. Rep. Serv. 2d 482 (Bankr. M.D. Fla. 1991); *In re Charter Co.*, 56 B.R. 91, 42 U.C.C. Rep. Serv. 280 (Bankr. M.D. Fla. 1985); *In re Aerospace Technologies, Inc.*, 199 B.R. 331, 30 U.C.C. Rep. Serv. 2d 933 (Bankr. M.D.N.C. 1996).

³⁸*In re Julien Co.*, 141 B.R. 359, 18 U.C.C. Rep. Serv. 2d 871 (Bankr. W.D. Tenn. 1992); *In re Julien Co.*, 136 B.R. 765, 18 U.C.C. Rep. Serv. 2d 897 (Bankr. W.D. Tenn. 1992).

³⁹*In re Julien Co.*, 136 B.R. 743, 16 U.C.C. Rep. Serv. 2d 1130 (Bankr. W.D. Tenn. 1991).

lien.⁴⁰ A warehouseman loses the lien if it delivers the goods without insisting on getting paid but that does not preclude the warehouseman from getting compensated for storage.⁴¹

Several courts have discussed with or not a warehouseman has a lien when the goods are seized from the owner of the goods pursuant to judicial process and stored. In states that have subsection (3)(b) of Section 7-209 courts generally hold that the lien is good as against the owner who is attempting to reclaim the goods from the warehouse.⁴² However, some courts have held that there is no valid lien when household goods are not involved or when the state does not have

⁴⁰*Import Systems Intern., Inc. v. Houston Central Industries*, 752 F. Supp. 745, 13 U.C.C. Rep. Serv. 2d 1239 (S.D. Tex. 1990); *National Cold Storage Co. v. Tiya Caviar Co.*, 52 Misc. 2d 289, 276 N.Y.S. 2d 57, 3 U.C.C. Rep. Serv. 1075 (1966).

⁴¹*Associated Bean Growers v. Chester B. Brown, Co.* 198 Neb. 775, 255 N.W. 2d 425, 21 U.C.C. Rep. Serv. 1418 (1977); *Bluebonnet Warehouse Co-op v. Bankers Trust Co.*, 89 F.3d 292, 30 U.C.C. Rep. Serv. 2d 306 (6th Cir. 1996) *cert. denied* 519 US 1112 (1997) (need to have a contract between the parties to be liable for storage charges when warehouse loses lien, assigning the warehouse receipt to secured party does not make the secured party contractually liable for the storage unless show assumed duties under the assigned contract, nature of security interest makes that unlikely that secured party assumed duties to pay for storage absent a warehouse lien).

⁴²*Peasley Transfer & Storage Co. v. Smith*, 1999 WL 130178 (Idaho 1999) (sheriff was legal possessor and thus warehouse had a lien when goods seized from premises pursuant to execution writ were third parties goods as opposed to debtor's goods); *Lang v. Burleigh County Sheriff's Department*, 496 N.W.2d 24, 20 U.C.C. Rep. Serv. 2d 1057 (N.D. 1993) (warehouse had valid lien when sheriff stored goods seized upon eviction of tenant from house); *Abimola-Alli v. Bester Bros. Transfer and Storage Co. Inc.*, 1995 WL 379134 (Minn. Ct. App. 1995) (unpublished) (landlord who seized goods in eviction is legal possessor and can store household goods, lien enforceable against owner); *Smithers v. Tru-Pak Moving Systems, Inc.*, 121 N.C. App. 542, 468 S.E.2d 410, 30 U.C.C. Rep. Serv. 2d 926 (1996) (sheriff who evicted people pursuant to mortgage foreclosure was legal possessor so that warehouse lien arose and enforceable against owner).

this subsection of 7-209.⁴³ One court has held that even though the lien does not arise, the warehouse can still sell the goods pursuant to Section 7-206 even without the lien.⁴⁴

Finally, there has been litigation about the priority of the warehouse lien as against an Article 9 security interest in the goods that the bailor has granted to a third party. Two basic fact scenarios are relevant here. Each will be discussed in turn.

First, assume the secured party has a properly perfected security interest in goods. The debtor bails the goods with the warehouse. The warehouse asserts a lien against the secured party. The issue is the relative priority of the secured party's perfected security interest in the goods and the warehouse lien.

Article 9 provides in Section 9-201 that except as provided in the Act, the security interest is good as against all third parties. Section 9-310 provides that statutory liens asserted by a person in the ordinary course of their business furnishing services and materials with respect to the goods has priority over a properly perfected security interest, unless the statute providing for the statutory lien expressly provides otherwise. The Article 7 warehouse lien is a statutory lien within the meaning of 9-310. The issue is whether anything in Article 7 regarding warehouse liens provides that the warehouse lien is subordinate to the secured party's interest.

Section 7-209(3)(a) provides that the lien is effective against any person who entrusted the bailor, here the debtor, with possession of the goods so that a pledge by the bailor/debtor to a good faith purchaser would have been valid. That subsection also provides that the lien of the warehouse "is not effective against a person as to when the document confers no right in the goods" under Section 7-503. Comment 3 to Section 7-209 provides that this subsection of 7-209 comes within the meaning of the phrase "expressly provides otherwise" in Section 9-310.

The cases construing these provisions have held that the security interest in this situation has priority over the warehouse lien.⁴⁵ The courts used the comment to Section 7-209 to hold

⁴³*SouthTrust Mobile Services, Inc. v. Whitaker*, 693 So. 2d 496, 34 U.C.C. Rep. Serv. 2d 1112 (Ct. App. Ala. 1997) (no warehouse lien for storage and towing charges when landlord had mobile home towed off lot in eviction proceeding); *Moore v. Republic Moving and Storage, Inc.*, 548 N.E.2d 1121, 11 U.C.C. Rep. Serv. 2d 193 (Ct. App. Ind. 1990) (state that hasn't adopted Section 7-209(3) no warehouse lien when sheriff stores tenant's goods after eviction and could not use Section 7-210 to enforce payment for storage charges).

⁴⁴*Young v. Warehouse No. 2 Inc.*, 540 N.Y.S.2d 654, 9 U.C.C. Rep. Serv. 2d 204 (N.Y. City Civ. Ct. 1989) (no lien when landlord stores evicted tenant's goods, but warehouse can sell goods pursuant to Section 7-206 even without a warehouse lien).

⁴⁵*In re Siena Publishers Assoc.*, 149 B.R. 359, 19 U.C.C. Rep. Serv. 2d 1139 (Bankr. S.D.N.Y. 1993); *Curry Grain Storage, Inc. v. Hesston Corp.*, 120 Idaho 328, 815 P.2d 1068, 16

that the implication of Section 7-209 was that the warehouse lien was subordinate to the second party's interest unless the secured party entrusted the goods to the bailor or acquiesced in procurement of the warehouse lien. The cases are extremely sketchy on the facts regarding entrustment or acquiescence. In *Curry Grain*, the court stated entrustment is not based upon the secured party's consent. Even though the secured party might have consented to storage, the secured party did not entrust the goods to the bailor.

In the second scenario the secured party takes a perfected security interest in negotiable documents by filing or possession and the warehouse asserts a lien for storage. There have been no reported cases of this scenario. Two possible avenues of analysis can be used to determine the relative priority of the secured party's interest and the warehouse lien.

The same analysis as outlined above using Section 9-310 and Section 7-209 would lead to the same result. The secured party's interest would have priority over the warehouse lien. If the secured party took possession of the negotiable document to perfect the security interest instead of filing to perfect the security interest, it is hard to argue that the secured party is entrusting the bailor with possession of the goods given that the right to possession of the goods is bound up with the negotiable document which is in the hands of the secured party. This result leads to a conflict with Section 7-403(2) which gives the bailee the right to payment of the lien before releasing the goods if someone is using the document to obtain the goods. If the secured party uses the document to claim the goods, even though Section 7-209 has been read to support the secured party's priority, the secured party under Section 7-403 would have to satisfy the lien to have a right to the goods.

On the other hand, when the secured party takes a security interest in the document, the secured party's interest is co-extensive with the bailor/debtor's interest in the property and the bailor/debtor's interest is subject to the warehouse lien under Section 7-209(1). Under this analysis the security interest would be subordinate to the warehouse lien and no conflict arises with Section 7-403(2).

Section 7-209 should be redrafted to explicitly set forth when a secured party's interest in goods covered by a document is subordinate to or superior to the warehouse lien.

VI. Sales to Enforce the Warehouse Lien

Section 7-210 sets forth the requirements for enforcing the warehouseman's lien in terms of the sale and notice requirements. There has been litigation under subsection (2) about whether sales by a nonmerchant bailee must be commercially reasonable and whether the requirements of

U.C.C. Rep. Serv. 2d 191 (1991); *K Furniture Co. v. Sanders Transfer & Storage Co., Inc.*, 532 S.W.2d 910, 17 U.C.C. Rep. Serv. 1092 (Tenn. 1975); *In re Sharon Steel Corp.*, 176 B.R. 384, 25 U.C.C. Rep. Serv. 2d 503 (Bankr. W.D. Pa. 1995) (where secured party knew of storage practices and knew that debtor incurring storage charges, warehouse lien priority over secured party security interest --implicitly holding entrustment took place).

the section must be strictly complied with even if there is no prejudice to the bailor. Courts hold that sales under subsection (2) must be commercially reasonable⁴⁶ and that the subsection requirements be strictly complied with so that the bailee is liable for the failure to comply even if the bailor is not harmed.⁴⁷

Other issues have also been addressed in the cases. Two cases discussed whether or not a bailee has a general obligation to act in good faith coming to opposite conclusions.⁴⁸ A court has also determined that the notice required under these sections is insufficient if the bailee doesn't send notice to alternate addresses specified on the storage document for sending notices.⁴⁹ If a law enforcement official or landlord stores goods after seizing them with legal process, the owner gets to take advantage of this section in terms of enforcing its requirements.⁵⁰ The warehouse has no obligation to enforce the lien in order to stop the running of the storage charges, in other words the bailee is not obligated to mitigate damages.⁵¹

If there is a violation of this section, the statute provides that the warehouseman is liable for damages caused by failing to comply and if there is a willful violation the warehouseman is liable for conversion. One court has determined that failure to comply with the statutory

⁴⁶*Owen v. Treadwell*, 11 Kan. App. 2d 127, 715 P.2d 1040, 1 U.C.C. Rep. Serv. 2d 198 (1986); *Bradford v. Munizer*, 498 F. Supp. 1384, 29 U.C.C. Rep. Serv. 1597 (N.D. Ill. 1980).

⁴⁷*Owen v. Treadwell*, 11 Kan. App. 2d 127, 715 P.2d 1040, 1 U.C.C. Rep. Serv. 2d 198 (1986); *Hughes v. Accredited Movers, Inc.*, 190 N.J. Super. 71, 461 A.2d 1203, 36 U.C.C. Rep. Serv. 938 (1983); *Scott v. Hurd-Corrigan Moving & Storage Co., Inc.*, 103 Mich. App. 322, 302 N.W.2d 867, 30 U.C.C. Rep. Serv. 1649 (1981).

⁴⁸*Mitchell v. Bailey and Selover, Inc.*, 96 Nev. 147, 605 P.2d 1138, 28 U.C.C. Rep. Serv. 508 (1980) (bailee obligation to act in good faith); *Abimola-Alli v. Bester Bros. Transfer and Storage Co., Inc.*, 1995 WL 379134 (Minn. Ct. App. 1995) (unpublished) (no obligation to act in good faith in enforcing lien, no bad faith when comply with statutory requirements and only bidder at sale for \$1).

⁴⁹*Hoffman v. U-Haul Co. of Alabama, Inc.*, 680 So. 2d 343, 32 U.C.C. Rep. Serv. 2d 237 (Ct. App. Ala. 1996).

⁵⁰*Grant v. Superior Moving & Storage, Inc.*, 182 B.R. 709, 27 U.C.C. Rep. Serv. 2d 569 (Bankr. E.D. Pa. 1995).

⁵¹*DuPont v. Joedon & Co.*, 486 N.Y.S.2d 946, 40 U.C.C. Rep. Serv. 1022 (N.Y.A.D. 1985).

requirements results in a damage award but doesn't invalidate the sale⁵² and the courts have discussed what is a willful violation in order to be liable for a conversion.⁵³

VII. Section 7-402

In a unique case, the court rejected an argument that the ability to have duplicate documents recognized by this section is an authorization to present fraudulent documents to obtain payment on a letter of credit.⁵⁴

VIII. Bailee's Obligation to Deliver

Section 7-403 governs the bailee's obligation to deliver to a person. The following decisions have been made under this section. First, the bailee's duty under this section is to the one who bailed the goods even if that person is not the owner of the goods.⁵⁵ Second, a person who accepts a delivery order takes on the obligations of a bailee under this section.⁵⁶ Third, a lawful excuse for not delivering is competing claims for the goods stored.⁵⁷ Fourth, delivery to someone who is not entitled under the document constitutes a conversion⁵⁸ and delivering not in accordance with the instructions of the bailor is a misdelivery and a conversion.⁵⁹

⁵²*Grundey v. Clark Transfer Co., Inc.*, 42 N.C. App. 308, 256 S.E.2d 732, 27 U.C.C. Rep. Serv. 530 (1979).

⁵³*Grant v. Superior Moving & Storage, Inc.*, 182 B.R. 709, 27 U.C.C. Rep. Serv. 2d 569 (Bankr. E.D. Pa. 1995) (No wilful violation when didn't know of requirements of statute); *Bradford v. Munizer*, 498 F. Supp. 1384, 29 U.C.C. Rep. Serv. 1597 (N.D. Ill. 1980) (wilful means deliberate or intentional act taken with knowledge of statute requirements and disregard of those requirements); *Miller v. Henshaw*, 808 P.2d 715, 14 U.C.C. Rep. Serv. 2d 542 (Ct. App. Okla. 1991).

⁵⁴*Boston Hides & Furs, Ltd., v. Sumitomo Bank, Ltd.*, 870 F. Supp. 1153, 25 U.C.C. Rep. Serv. 2d 896 (D. Mass. 1994).

⁵⁵*Met-Al, Inc., v Hansen Storage Co.*, 828 F. Supp. 1369, 21 U.C.C. Rep. Serv. 2d 1107 (E.D. Wis. 1993).

⁵⁶*Soto v. Sea-Road International, Inc.*, 942 S.W.2d 67, 34 U.C.C. Rep. Serv. 2d 484 (Ct. App. Tex. 1997).

⁵⁷*Corrigan Dispatch Co. v. Casa Guzman, S.A.*, 696 F.2d 359, 35 U.C.C. Rep. Serv. 589 (5th Cir. 1983) (warehouse filed interpleader to resolve conflicting claims to stored goods).

⁵⁸*Teague Brothers Transfer & Storage Company, Inc. v. Kinloch*, 441 So.2d 968, 37 U.C.C. Rep. Serv. 1676 (Ct. App. Ala. 1983).

⁵⁹*Fremont National Bank and Trust Company v. Collateral Control Corp.*, 724 F.2d 1410, 37 U.C.C. Rep. Serv. 1267 (8th Cir. 1984).

IX. Section 7-404

Several courts have addressed the good faith protection for delivery pursuant to a warehouse receipt provided under Section 7-404 and have determined that an auction house is not a bailee so that the auction house does not get the protection of this section.⁶⁰ One case held that a buyer of goods is not a bailee entitled to the protection of this section.⁶¹

X. Due Negotiation

Section 7-501 requires that a negotiable document may be negotiated by delivery or by delivery and endorsement and that the requirements of this section have to be fulfilled to duly negotiate the document to a holder who purchases it for value and in good faith without notice of any defense or claim. Under this section, courts have held that due negotiation requires delivery of a document to another person⁶² and have tried to figure out whether or not the negotiation took place without notice of a defense or claim.⁶³ Those cases came to conflicting decisions about the transferee's duty to investigate and what constituted actual knowledge or whether or not Article 3 principles applied to determine whether a document was taken without notice of the defense or claim.

Once a document is duly negotiated, Section 7-502 gives the rights that are acquired by due negotiation. In order to have rights under this section, the person must have possession of the document.⁶⁴

⁶⁰*Michigan Nat. Bank v. Michigan Livestock Exchange*, 432 Mich. 277, 439 N.W.2d 884, 9 U.C.C. Rep. Serv. 2d 366 (1989) (common law rule re: liability of auction house continues); *Johnson v. New Holland Sales Stable, Inc.*, 11 U.C.C. Rep. Serv. 2d 323 (Pa. Com. Pl. 1989); *Ensminger v. Burton*, 805 S.W.2d 207, 14 U.C.C. Rep. Serv. 2d 900 (Mo. Ct. App. 1991).

⁶¹*First Nat'l Bank of LeCenter v. Farmers Union Marketing and Processing Ass'n*, 371 N.W.2d 22, 41 U.C.C. Rep. Serv. 646 (Minn. Ct. App. 1985).

⁶²*In re Julien Co.*, 141 B.R. 359, 18 U.C.C. Rep. Serv. 2d 871 (Bankr. W.D. Tenn. 1992).

⁶³*Cleveland v. McNabb*, 312 F. Supp. 155, 7 U.C.C. Rep. Serv. 1226 (W.D. Tenn. 1970) (duty to investigate if liens on goods covered by document not satisfied by inquiry to the debtor when person who took documents had on file landlord's lease for ground on which crops grown and landlord's law gives a lien); *R.E. Huntley Cotton Co. v. Fields*, 551 S.W.2d 472, 21 U.C.C. Rep. Serv. 1157 (Tex. Civ. App. 1977) (had to have actual knowledge of facts re: bad faith before due negotiation defeated); *Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 24 U.C.C. Rep. Serv. 2d 209 (2nd Cir. 1994) (applied Article 3 principles and determined that bank qualified as holder in due course as did not have any knowledge of breach of underlying contract when took the certificates).

⁶⁴*Scallop Petroleum Co. v. Banque Trad-Credit Lyonnais France S.A.*, 690 F. Supp. 184, 6 U.C.C. Rep. Serv. 2d 1573 (S.D.N.Y. 1988) (when secured party surrendered bill of lading, no longer could claim security interest by virtue of the bill of lading).

XI. Entrustment of Goods

Section 7-503 governs the priority of a security interest or other interest in the goods as against a document of title holder when the interest in the goods arose prior to the acquisition of the document of title. Several courts have held that this section does not apply to rights under nonnegotiable documents.⁶⁵ When the security interests in the goods is acquired prior to the issuance of the negotiable document, the security interest will win over the rights under a negotiable document unless the secured party entrusts the goods to the bailor with actual or apparent authority to ship, store, or sell, or otherwise has a power of disposition under another section of the code. The courts have struggled with what constitutes entrustment.⁶⁶ It is also unclear if the courts are applying the same concept of entrustment under this section as under Section 7-209.

XII. Section 7-504

This section governs the rights under the shelter principle applicable to documents that are not duly negotiated. The shelter principle of this section is used most often when the owner of the goods bails the goods and then the bailee pledges the goods to a secured party. Two cases give the edge to the owner (bailor) and one case gave priority to the bailee's secured party.⁶⁷ In another set of cases, the courts said that this section does not determine priority as between a secured party who perfected via a non negotiable document of title versus a secured party who

⁶⁵*Douglas-Guardian Warehouse Corp. v. Esslair Endsley Co.*, 10 U.C.C. Rep. Serv. 176 (W.D. Mich. 1971); *Philadelphia National Bank v. Irving R. Booty Co. Inc.*, 1 U.C.C. Rep. Serv. 560 (Arb. 1963).

⁶⁶*In re Jamestown Farmers Elevator, Inc.*, 49 B.R. 661, 41 U.C.C. Rep. Serv. 578 (Bankr. D.N.D. 1985); *U.S. v. Hext*, 444 F.2d 804, 9 U.C.C. Rep. Serv. 321 (5th Cir. 1971) (dicta in footnote); *In re R.V. Segars, Co.*, 54 B.R. 170 (Bankr. D.S.C. 1985).

⁶⁷*Citizens Bank & Trust Co. v. SLT Warehouse Co.*, 368 F. Supp. 1042, 14 U.C.C. Rep. Serv. 472 (M.D. Ga. 1974) *aff'd* 515 F.2d 1382 (5th Cir. 1975) (bank took as security non negotiable warehouse receipts, lost as to true owners of goods when debtor (who was entrusted the goods by the true owner) stole the goods out of the warehouse, warehouse was not negligent. Bank couldn't recover from warehouse); *Lofton v. Mooney*, 452 S.W. 2d 617, 7 U.C.C. Rep. Serv. 824 (Ky. 1970) (farmers who stored grain with debtor who granted security interest lose to bank, implicit finding of debtor have rights in collateral); *Midland Bean Co. v. Farmers State Bank of Brush*, 37 Colo. App. 452, 552 P.2d 317, 20 U.C.C. Rep. Serv. 171 (1976) (court found document of title (delivery drafts by buyer) were non negotiable and issued prior to security interest attaching to rights of seller of beans, document holder had priority as against secured party).

has an interest in the goods prior to issuance of the warehouse receipt. The priority contest between those two secured parties was determined by Article 9.⁶⁸

XIII. Warranty

Two courts have discussed the warranties contained in Sections 7-507 and 7-508 holding that a secured party is an intermediary and gives the warranty under Sections 7-508 not 7-507.⁶⁹ The other court held that the warranty under Section 7-508 only runs to the immediate purchaser of the documents or the issuer of the letter of credit, not to the customer on the letter of credit.⁷⁰

XIV. Conflicting Claims

Two courts have discussed Section 7-603 which excuses the bailee from delivery if there are adverse claims or allows the bailee to bring an action such as an interpleader to determine claims to goods. The section doesn't apply unless there are actually competing claimants⁷¹ and the bailee must act within a reasonable time under this section in order to justify nondelivery.⁷²

⁶⁸*Douglas-Guardian Warehouse Corp. v. Esslair Endsley Co.*, 10 U.C.C. Rep. Serv. 176 (W.D. Mich. 1971) (secured party who perfected via non-negotiable document of title vs. secured party with interest in goods prior to issuance of warehouse receipt, priority determined by Section 9-312); *Philadelphia National Bank v. Irving R. Booty Co.*, 1 U.C.C. Rep. Serv. 560 (Arb. 1963) (same as Douglas Guardian).

⁶⁹*Ziraat Bankasi v. Standard Chartered Bank*, 619 N.Y.S. 2d 690, 25 U.C.C. Rep. Serv. 2d 212 (N.Y. 1994) (Secured party holding document as collateral is an intermediary and gives warranty under Sections 7-508, not 7-507).

⁷⁰*Cenlin Taiwan Ltd. v. Centon, Ltd.*, 5 F.3d 354, 21 U.C.C. Rep. Serv. 2d 1091 (9th Cir. 1993) (warranty under Section 7-508 only runs to immediate purchaser of documents (issuer of letter of credit) not to the customer on the letter of credit).

⁷¹*Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 24 U.C.C. Rep. Serv. 2d 209 (2nd Cir. 1994).

⁷²*Security Storage Co. of Washington v. Cave*, 528 A.2d 880, 5 UCC Rep. Serv. 2d 426 (D.C. Ct. App. 1987).