
Fred H. Miller
ANNUAL SURVEY OF OKLAHOMA CONTRACT, CONSUMER, AND COMMERCIAL LAW: 2000-2002

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Introduction

This first annual survey of contract, consumer, and commercial law in Oklahoma spans a somewhat greater period than a year to provide an adequate scope to discuss current developments.

Oklahoma contract law, unfortunately, is codified extensively in a series of statutes — located in title 15 of the Oklahoma Statutes — that, at times, is more reminiscent of the past than of the modern law of contracts, such as reflected in the Restatement (Second) of Contracts and other sources. For example, Oklahoma’s statutory definition of what constitutes a contract has not changed since 1910. This means that a large part of the law is reflected in cases interpreting or applying a particular statute, which (1) seriously detracts from the purpose of codification in the first place; and (2) makes decisions from other jurisdictions, particularly those that develop the law, of less use than they may be in jurisdictions without extensive codification.

In contrast, Oklahoma consumer law — which can be viewed as specialized contract law governing particular aspects of certain types of transactions involving individuals who enter into transactions for personal, family, or household purposes — is reflected primarily in the Oklahoma Uniform Consumer Credit Code and the Oklahoma Consumer Protection Act. These statutes are of more modern vintage and have been kept more up-to-date.

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1. 15 OKLA. STAT. §§ 1-1024 (2001).
2. Id.
5. For example, when the federal Truth in Lending Act, 15 U.S.C. § 1601-1665b, and the federal Consumer Leasing Act, 15 U.S.C. § 1667-1667e, were passed, and regulations under them promulgated at 12 C.F.R. parts 226 and 213, the legislature amended Oklahoma law to keep Oklahoma’s creditors and lessors exempt from the need to comply with those laws as permitted by 15 U.S.C. §§ 1633, 1667e and 12 C.F.R. §§ 226.29 and 213.9. The legislature must update Oklahoma law as changes in federal law occur in order to preserve the exempt status.
They are, however, far from uniform with consumer law in other jurisdictions. Finally, Oklahoma commercial law — which likewise is a form of special contract law governing particular aspects of what are considered “commercial transactions” — comprises the Uniform Commercial Code (UCC). Oklahoma commercial law is both up-to-date and uniform for the most part with the UCC as enacted in other jurisdictions. This means that decisions from other jurisdictions interpreting the UCC have significant precedential value when applied to Oklahoma commercial law. Accordingly, some decisions of significance from other jurisdictions are discussed.

*Contract Law*

The consequences of the “ancient” codification of general Oklahoma contract law in title 15 of the Oklahoma Statutes is illustrated by litigation regarding the parol evidence rule. Section 155 of title 15 states: “When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, subject, however, to the other provisions of this article.” Oklahoma cases — including the recent case of *Duncan Oil Properties, Inc. v. Vastar Resources, Inc.* — generally adhere to the statutes. This may, but does not necessarily, result in a somewhat different

9. The Oklahoma Uniform Electronic Transactions Act, 12A OKLA. STAT. §§ 15-101 to -121 (2001), changes the writing requirement to one of a “record.” “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.” 12A OKLA. STAT. § 15-102(16) (2001). The purpose of the UETA is to broadly override outdated signature and writing requirements in general statutes so as to permit or facilitate transactions in electronic form. Whether the comparable federal law, the Electronic Signatures in Global and National Commerce Act, 15 U.S.C.A. §§ 7001-06, 7021, 7031 (West Supp. 2003) (“E-Sign Act”), applies due to the exemption from the federal act at 15 U.S.C.A. § 7002(a) (West Supp. 2003), is beyond the scope of this article, but on this point there is no difference.
10. See also 15 OKLA. STAT. § 154 (2001) (language of contract to govern if clear and explicit); id. § 156 (exception for fraud, mistake, or accident); cases cited infra note 12.
12. See, e.g., Dyco Petroleum Corp. v. Mesa Operating Co., 3 Fed. App. 951, 958 (10th Cir. 2001) (application of parol evidence rule); Pub. Serv. Co. of Okla. v. Burlington N. R.R. Co., 53 F.3d 1090, 1097 (10th Cir. 1995) (where there is no ambiguity, intent must be determined from words used); *Duncan*, ¶ 6, 16 P.3d at 467 (“If the terms of a contract are unambiguous, clear and consistent, they are accepted in their plain and ordinary sense.”); Jerry Chambers Exploration v. Headington Penn Corp., 1994 OK CIV APP 46, ¶ 9, 878 P.2d 385,
body of law than that governing contracts for the sale or lease of goods governed by the more liberally intended parol evidence rule in more modern statutes.\textsuperscript{13} However, the potential exists — even though it is not inevitable — for divergence because of the age of the Oklahoma codification. To illustrate further, the decisions on choice of law by agreement are much the same.\textsuperscript{14} However, in Oklahoma, in the absence of a time specification for performance in a contract, a reasonable time is allowed, whether the contract involves a sale of goods or other type of contract.\textsuperscript{15} Moreover, the "special" contract law in the Oklahoma Uniform Commercial Code\textsuperscript{16} is incomplete, and thus generally is supplemented by the contract law codified in title 15.\textsuperscript{17}

On the whole, because the Oklahoma contract statutes, including the UCC, can be viewed for the most part as "default" rules — meaning that normally the parties can specify, subject to overriding limitations,\textsuperscript{18} the rule to govern the matter\textsuperscript{19} — little potential exists for inconsistency in Oklahoma law; the statutes only supply the governing rule if the contract is silent or invalid as to the point at issue. Accordingly, few decisions involving general Oklahoma contract law are issued each year. Furthermore, the decisions that courts render tend to deal with issues to which the contract statutes speak only

\textsuperscript{389} ("[W]hile parol testimony cannot vary, modify, or contradict the terms of the instrument it is admissible to explain the meaning of words when there is a latent ambiguity."). \textit{But see} 15 OKLA. STAT. § 160 (2001) ("Words . . . are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage . . . ."); \textit{id.} § 161 ("Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate . . . ."); \textit{id.} § 163 ("A contract may be explained by reference to circumstances under which it was made . . . .").

13. 12A OKLA. STAT. §§ 2-202, 2A-202 (2001). Section 2-202, comment 1 of the Uniform Commercial Code states: "This section definitely rejects . . . (b) The premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used." U.C.C. § 2-202 cmt. 1 (2001). \textit{But see} C.F. Braun & Co. v. Okla. Gas & Elec. Co., 603 F.2d 132, 133 (10th Cir. 1979) (contract not ambiguous and trial court properly refused extrinsic evidence).


17. \textit{id.} § 1-103.


19. 15 OKLA. STAT. § 152 (2001) ("A contract must be so interpreted as to give effect to the mutual intention of the parties," consistent with legal principles).
generally, and thus require supplemental guidance. Current decisions include litigation about what contracts may violate the law;\textsuperscript{20} which contracts may contravene public policy;\textsuperscript{21} the appropriate application of the consideration requirement;\textsuperscript{22} issues relating to arbitration provisions\textsuperscript{23} and other aspects of contract enforcement;\textsuperscript{24} and other contract requirements.\textsuperscript{25}

\textit{Consumer Law}

Recent developments in Oklahoma consumer law\textsuperscript{26} cover a broad range of issues. First, in order to retain the exemption for Oklahoma transactions from the federal Truth in Lending and Consumer Leasing Acts,\textsuperscript{27} the Oklahoma legislature has added a variety of amendments to the Oklahoma Uniform Consumer Credit Code.\textsuperscript{28} Other amendments were made to the part that adjusts statutory dollar amounts.\textsuperscript{29} Additional noteworthy amendments were

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\textsuperscript{21} See, e.g., Herren, 2001 OK CIV APP 82, 26 P.3d 120; Obrien v. Dorrough, 1996 OK CIV APP 25, 928 P.2d 322.


\textsuperscript{24} See, e.g., Bohm, Inc. v. Michael, 2002 OK CIV APP 60, 46 P.3d 1286 (prejudgment interest rate).

\textsuperscript{25} 15 OKLA. STAT. § 2 (2001); Nat'l Envtl. Serv. Co. v. Ronan Eng'g Co., 256 F.3d 995 (10th Cir. 2001) (mutual consent to form contract); Dixon v. Bhuiyan, 2000 OK 56, 10 P.3d 888 (same); Lane v. Floorcraft Clyde Beherens, Ltd., 2001 OK CIV APP 103, 29 P.3d 1092 (statute of frauds).


\textsuperscript{27} See supra note 5.

\textsuperscript{28} For example, title 14A, sections 3-309.4 through 3-309.5 of the Oklahoma Statutes (and related definitions in section 1-301) were added to track amendments to Truth in Lending dealing with high rate/high fee mortgage loans and reverse mortgages. Another example is amended section 3-109, which better defines what constitutes a loan finance charge and follows a similar amendment in the federal law.

\textsuperscript{29} 14A OKLA. STAT. § 1-106 (Supp. 2002). The statute allows certain designated dollar
passed that (1) make changes in the statute in light of experience, such as authorizing new changes; 30 (2) clarify the law and overrule an unfortunate Supreme Court decision that followed a poorly reasoned opinion of the Attorney General; 31 and (3) update administrative procedure under the Act. 32

Largely because administrative examination—used to detect errors early on— and enforcement have been so effective, there has been little litigation in the consumer area. 35

As noted, developments also occurred with respect to other Oklahoma laws, including the other major Oklahoma consumer protection law, the Oklahoma Consumer Protection Act. 36 First, the legislature recently amended the Oklahoma Consumer Protection Act to add the Telemarketer Restriction Act, 37 which creates a registry for consumers desiring not to be bothered by unsolicited telemarketing calls. 38 Two other recent amendments include a restriction on the type of information that businesses can place on credit card receipts 39 and a provision making fraudulent e-mail messages unlawful. 40 Also, the violation of a number of other consumer protection laws now constitutes a violation of the Consumer Protection Act. 41


33. Id. §§ 3-506, 6-106.

34. Id. §§ 3-505, 6-105, 6-108 to 6-113. There also has also been considerable activity under the Oklahoma Consumer Protection Act, 15 Okla. Stat. §§ 751-763 (2001 & Supp. 2002), and by the Oklahoma Attorney General in the area of consumer protection.

35. But see Hardison v. Balboa Ins. Co., 4 Fed. Appx. 663 (10th Cir. 2001). This lack of litigation is notwithstanding provisions for private enforcement by consumers that have produced considerable litigation under the federal statutes. See, e.g., 14A Okla. Stat. §§ 5-203, -204 (2001) (also amended to track changes in the federal law); id. § 5-206 (also added to track changes in the federal law).

36. See supra note 4.

37. 15 Okla. Stat. § 775B.1-7 (Supp. 2002).


40. Id. § 776.1 (2001).

41. For example, a violation of the Oklahoma Health Spa Act, 59 Okla. Stat. §§ 2000-
Various decisions have interpreted the Act, including *Conatzer v. American Mercury Insurance Co.*,\(^{42}\) in which the court held that title laundering, designed to avoid salvage title requirements for a vehicle, constitutes a deceptive trade practice;\(^{43}\) *Patterson v. Beall*,\(^{44}\) holding that a demand for payment for an appraisal that was neither requested nor performed could be a deceptive trade practice, unless there was no capacity to deceive;\(^{45}\) and *Walls v. American Tobacco Co.*,\(^{46}\) determining who can recover or bring an action as an "aggrieved consumer" or on another basis.\(^{47}\)

Finally, in 2002 the Oklahoma legislature amended the Oklahoma Credit Services Organization Act\(^{48}\) to provide that any extension of credit brokered or arranged by a credit services organization, on behalf of a buyer of the services of the credit services organization, must comply with the Oklahoma Uniform Consumer Credit Code and the Credit Services Organization Act.\(^{49}\) With this amendment the legislature attempted to regulate local, small-loan lenders through whom small, high-rate loans are given by out-of-state federal financial institutions not subject to state law.\(^{50}\)

**Commercial Law**

The most recent amendment to Oklahoma commercial law in the Uniform Commercial Code\(^{51}\) is the enactment in 2000 of revised Article 9, dealing with secured transactions. One important aspect of the change is the incorporation in the "commercial statute" of a number of consumer-orientated provisions — including an affirmative repudiation of the so-called "waiver of defenses" clauses in consumer chattel paper, such as a lease of goods or a retail


42. 2000 OK CIV APP 141, 15 P.3d 1252.

43. Id. ¶ 16, 15 P.3d at 1256 (interpreting 15 Okla. Stat. § 752(11) (Supp. 1999)).

44. 2000 OK 92, 19 P.3d 839.

45. Id. ¶ 35, 19 P.3d at 847.

46. 2000 OK 66, 11 P.3d 626.

47. Id. ¶ 16, 11 P.3d at 630; see also Dean Baily Olds, Inc. v. Richard Preston Motor Co., 2000 OK 89, 32 P.3d 816 (defendant car seller could recover attorney's fees); Tibbetts v. Sight 'N Sound Appliance Ctr., Inc., 2000 OK CIV APP 47, 6 P.3d 1064 (consumers could recover costs and attorneys fees as prevailing party even if no actual damages).


https://digitalcommons.law.ou.edu/olr/vol56/iss2/17
installment sales contract. Revised Article 9 incorporates the Federal Trade Commission "notice," allowing the obligor to assert claims and defenses even if the chattel paper does not actually contain the notice. Thus, both state law and the FTC rule\textsuperscript{52} are violated by the omission.\textsuperscript{53}

Revised Article 9 also "fudges" on other important consumer issues, perhaps allowing consumers to litigate issues to establish a rule otherwise repudiated for commercial transactions. For example, although Article 9 adopts the so-called "dual status" rule for changes in purchase money transactions,\textsuperscript{54} the determination of the proper rule for a consumer-goods transaction is left to the courts.\textsuperscript{55} Fortunately in Oklahoma, existing case law under former Article 9 — which arguably also left the issue open — has correctly rejected the so-called "transformation rule," which causes the loss of purchase money status.\textsuperscript{56} Consequently, Oklahoma courts are unlikely to adopt the rejected rule for consumer goods transactions under revised Article 9. Sanction for commercially unreasonable conduct by the secured

\textsuperscript{52} 16 C.F.R. § 433 (2002).

\textsuperscript{53} 12A OKLA. STAT. § 1-9-403(d)(2001); see also id. § 1-9-404(d). Uniform Commercial Code Comment 5 states that this effectively renders a waiver of defense clause ineffective. Under the FTC rule, a waiver in the contract is a violation of the rule, but if there is a violation in not putting the FTC notice in, what is one more violation in putting in a waiver, particularly if it follows Oklahoma law, discussed infra this note. However, a waiver may well mislead the consumer, and thus it may be legally ineffectice (but see infra this note) but have an effect practically. Doing so should not only violate the FTC rule, but violate title 15, sections 751 through 764.1 of the Oklahoma Statutes, the Oklahoma Consumer Protection Act. 15 OKLA. STAT. § 751-764.1 (2001 & Supp. 2002).

Note that the next subsection, title 12A, section 1-9-403(e), provides that it is subject to other law, which establishes a different rule for a consumer. See, for example, section 1-9-201(b), and particularly subsection (c) of section 1-9-201. The problem is title 14A, section 2-404 of the Oklahoma Statutes, which provides a less protective rule for consumers in a consumer credit sale or lease. Arguably — and notwithstanding title 12A, sections 1-9-403(e) and 1-9-201(b) and (c) — the intent is clear, and, therefore, the later enactments, sections 1-9-403(d) and 1-9-404(d), should control, rather than the title 14A consumer rule, to which Article 9 must otherwise defer.

There are numerous other affirmative consumer provisions in revised Article 9, including additional sanctions for violations of Article 9. See, e.g., 12A OKLA. STAT. § 1-9-109(d)(13) (2001) (excluding from Article 9 assignments of consumer deposit accounts); id. § 1-9-625 (sanctions).

\textsuperscript{54} 12A OKLA. STAT. § 1-9-103(f) (2001). The law provides further important protections. See, for example, a payment allocation rule in subsection (c), and a rule in § 1-9-103(b)(2) to avoid the result in Southtrust Bank of Alabama v. Borg-Warner Acceptance Corp., 760 F.2d 1240 (11th Cir. 1985), which discusses the loss of purchase money status.

\textsuperscript{55} 12A OKLA. STAT. § 1-9-103(h) (2001).

party provides another example. For commercial situations, Article 9 adopts the so-called "rebuttable presumption" rule where a surplus or deficiency is at issue.\footnote{12A OKLA. STAT. § 1-9-626(a) (2001).} In a consumer transaction, however, the issue is again left to the courts.\footnote{Id. § 1-9-626(b).}

The Oklahoma Comments to various revised or amended Code Articles — written by members of the Oklahoma Bar Association after the revisions or amendments are enacted — discuss litigation under the prior law that either remains valid or that the legislature has changed. Other than those lawsuits brought under Articles 2 and 9, few cases have been litigated in Oklahoma during the 2000-2002 period. Only a few cases prior to that period merit mentioning, those decided under UCC Articles that have not yet been revised or amended. One of those cases, \textit{W.R. Grimshaw Co. v. First National Bank \& Trust Co. of Tulsa},\footnote{1977 OK 28, 563 P.2d 117; see also Cent. Nat'l Bank \& Trust Co. of Enid v. Cmty. Bank \& Trust Co. of Enid, 1977 OK 141, 528 P.2d 710.} serves as a reminder that the UCC is not the only law that may apply to a commercial transaction; law not displaced by the Code supplements the UCC.\footnote{12A OKLA. STAT. ANN. § 1-9-625 Okla. cmts. (West 2001).} Another case, \textit{Goss v. Trinity Savings \& Loan Ass'n},\footnote{1991 OK 19, 813 P.2d 492. A similar case is Sesow v. Swearingen, 1976 OK 97, 552 P.2d 705.} emphasizes the common-sense application of the UCC, recognizing its policies, principles, and commercial practice background.\footnote{See 12A OKLA. STAT. § 1-106(1), 1-106(2).}

An area of "older" law also worth mentioning relates to the duty of good faith that exists in every contract and is imposed by the UCC with regard to contract performance and enforcement.\footnote{1990 OK 55, 813 P.2d 492.} Most Oklahoma cases correctly treat this duty as creating a standard against which to measure performance or enforcement and do not normally find a cause of action, tortious in nature, for breach of an independent duty of good faith and fair dealing.\footnote{See Roberts v. Wells Fargo AG Credit Corp., 990 F.2d 1169, 1174 (10th Cir. 1993); Frontier Fed. Sav. \& Loan Ass'n v. Commercial Bank, N.A., 1990 OK CIV APP 105, ¶ 14, 806 P.2d 1140, 1142.} One case, however, did;\footnote{Beshara v. S. Nat'l Bank, 1996 OK 90, ¶ 28, 928 P.2d 280, 288.} it may be a hard case that makes bad law. Another area of

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57. 12A OKLA. STAT. § 1-9-626(a) (2001). But see id. §§ 1-9-615, 1-9-625(a)-(d).
58. Id. § 1-9-626(b). Oklahoma, under the former Article 9, rejected the so-called "absolute bar" rule, which, in essence, constitutes an impermissible penalty under section 1-106(1), and thus, Oklahoma courts would no doubt reject that approach under section 1-9-626(b). However, the prior Oklahoma law treating conduct by a secured party as conversion when the conduct is not commercially reasonable, interferes with the debtor's rights in the collateral, and thus leads to damages for loss of use or collateral value, still remains valid and could be utilized. See 12A OKLA. STAT. ANN. § 1-9-625 Okla. cmts. (West 2001).
60. 12A OKLA. STAT. § 1-103 (2001).
63. Id. § 1-203.
64. See Roberts v. Wells Fargo AG Credit Corp., 990 F.2d 1169, 1174 (10th Cir. 1993); Frontier Fed. Sav. \& Loan Ass'n v. Commercial Bank, N.A., 1990 OK CIV APP 105, ¶ 14, 806 P.2d 1140, 1142.
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older law worth mentioning concerns the scope of UCC Article 2, generally designated as "transactions in goods." Of course, many contracts involve the sale of goods and services or other property. Most courts in these cases apply what is known as the "predominant purpose test," and rather sparse Oklahoma authority would seem to agree.

Another issue of scope is whether Article 2 applies to a software license that, for example, is embodied in a CD-ROM disc. Some courts nationally have applied Article 2 in this context, including the otherwise well-reasoned case of ProCD, Inc. v. Zeidenberg. In a recent Oklahoma decision regarding the issue, the U.S. District Court for the Northern District of Oklahoma, in NMP Corp. v. Parametric Technology Corp., applied the predominant purpose test — perhaps not illogically in the absence of Oklahoma authority and given some authority applying Article 2 directly or indirectly — and found that the licensing agreement constituted a sale of goods. Nonetheless, the court erred by missing two crucial points.

First, software, no matter what its medium of delivery, is the value in a license; it is information and not a good, any more than engineering plans — or other commercially valuable data — are goods merely because they exist on paper. Furthermore, a license is not a sale, although it is a "transaction". Second, applying the rules of Article 2 to information transactions is inappropriate in many instances. The application can invoke the "first sale" doctrine and substantially destroy the value of the intellectual property to its creator. It can involve warranty liability conflicts with First Amendment considerations in information. Furthermore, the application can result in a nonsensical remedy structure.

67. Dunn Buick, Inc. v. Belle Isle Plumbing, Heating & Air Conditioning Co., 9 U.C.C. Rep. Serv. (CBC) 827 (Okla. Ct. App. 1971). The court does not discuss the issue but does apply Article 2 without comment to a contract where the main value clearly was in the sale of goods and not in the provision of services.
68. 86 F.3d 1447, 1452 (7th Cir. 1996). The case is perhaps better known for its upholding contracts with terms included after the product is purchased and delivered. Id. Again, there is a difference of opinion about such terms. If the situation is, as it was in this case (the vendor proposed a contract that the licensee could accept or reject, and the licensee chose not to reject), or involves a situation where the licensee knows the vendor does not propose to contract until later terms are accepted by failure to return or use, then the analysis in ProCD, Inc. is clearly correct. Note that Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc., 1979 OK 144, 604 P.2d 849, is not inconsistent, as there the court held that a contract existed prior to delivery of the product. Old Albany Estates, ¶ 15, 604 P.2d at 853. The subsequent acceptance of the product did not constitute an acceptance of the terms. Id.
70. Id. at 1542.
It is submitted that a court facing this issue would be on sounder ground if it applied the common law and fashioned the common law rule after the most advanced thinking on the topic, found in the Uniform Computer Information Transactions Act.\textsuperscript{71}

Turning to more current decisions, the issue in \textit{Allen v. Lynn Hickey Dodge, Inc.},\textsuperscript{72} was whether a car dealer or the driver owned an automobile when an automobile accident occurred.\textsuperscript{73} Under title 12A, section 2-401(2) of the Oklahoma Statutes, title to goods sold can pass by a term in the contract, or pursuant to a statutory default rule in subsection (2). Unfortunately, as it often does, the Oklahoma Supreme Court remanded the case on a procedural issue rather than providing a decision of precedential value, even though the lower courts had decided it on the facts. The case may have turned on the contract itself, however, and so may have been of little value.

The Oklahoma Court of Civil Appeals reached a much more important decision in \textit{Christensen Aviation, Inc. v. State Bank, N.A.}\textsuperscript{74} The court held that the statutory provision in UCC section 4-207(c) — permitting recovery of expenses for breach of transfer and presentment warranties in the check-collection process — does not authorize recovery of attorney fees.\textsuperscript{75} While some courts disagree with this interpretation, the decision probably is correct given the extensive explicit legislation in Oklahoma specifying when recovery of attorney’s fees is authorized\textsuperscript{76} and given that the issue does not require uniformity.

\textit{In re Shirel}\textsuperscript{77} constitutes another significant decision in the area. In the case, Chapter 7 debtors claimed, without objection, that their refrigerator was exempt under Oklahoma law and therefore moved to avoid a secured party’s security interest in the refrigerator. In its response, the creditor objected to the claim of exemption and opposed the debtor’s motion. The Bankruptcy Court held that Oklahoma law applied to the parties’ transaction, despite the parties’ contractual choice of Georgia law because Georgia had no relation to the transaction,\textsuperscript{78} the phrase “all merchandise” did not sufficiently describe the

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  \item \textsuperscript{71} See, e.g., Rhone Poulenc Agro, S.A. v. DeKalb Genetics Corp., 284 F.3d 1323, 1330-31 (Fed. Cir. 2002) (UCITA provides guidance on the proper common law rule; and makes clear that the bona fide purchaser rule of the UCC should not apply to the licensing of intellectual property); see also Specht v. Netscape, 306 F.3d 17 (2d Cir. 2002) (although it did not govern, the court found UCITA’s provisions offered insight).
  \item \textsuperscript{72} 2001 OK 93, 39 P.3d 781.
  \item \textsuperscript{73} Id. \S 1, 39 P.3d at 783.
  \item \textsuperscript{74} 2001 OK CIV APP 19, 20 P.3d 170.
  \item \textsuperscript{75} Id. \S 9, 20 P.3d at 172.
  \item \textsuperscript{76} E.g., 12 OKLA. STAT. §§ 936-939 (2001 & Supp. 2002).
  \item \textsuperscript{77} 251 B.R. 157 (Bankr. W.D. Okla. 2000).
  \item \textsuperscript{78} See 12A OKLA. STAT. \S 1-105(1) (2001).
\end{itemize}
collateral and, thus, the debtor's credit card application did not create a security interest in the refrigerator under the Oklahoma Uniform Commercial Code. The court's analysis on this last point is flawed and may be overruled by title 12A, sections 1-9-108 and 1-9-504 of the Oklahoma Statutes. It is noteworthy that the court described adhesion contracts as standardized contracts prepared entirely by one party that, because of the disparity in bargaining power, must be accepted on a "take it or leave it basis" and cautioned that they should therefore be carefully scrutinized.

In another recent decision, Alexander v. Smith and Nephew, P.L.C., a patient brought a products liability suit against the manufacturer of a spinal rod system that was implanted into her back. As to the defendants' motions for summary judgment and to exclude or limit the testimony of plaintiff's medical causation expert, the District Court held that the manufacturer could not be held liable under Oklahoma products liability or negligence law absent expert testimony establishing medical causation. The court also held that Oklahoma warranty law does not find the manufacturer of a device to be found in breach of warranty without evidence that the device caused the injury.

Another UCC Article 2 case is Sutton v. Snider. In Sutton, a motorcycle owner, who had allowed a dealer to display the motorcycle for sale, sued the purchaser of the motorcycle from the dealer to replevin the motorcycle. The District Court granted summary judgment in favor of the purchaser. The owner appealed. The Oklahoma Court of Civil Appeals cited title 12A, section 2-403 of the Oklahoma Statutes and held that the motorcycle purchaser "[was] an innocent purchaser for value and . . . the rightful owner of the motorcycle" because he had no notice of dealings or agreements between the dealer and the former owner. The court also held that where one party must suffer loss because of a third party's actions, the party who makes the action possible should bear the loss.

A final Article 2 case is Elmore v. Doenges Bros. Ford Inc., in which a car buyer brought an action against the dealership alleging breach of warranty of title. The jury awarded the buyer $25,000. The Oklahoma Court of Civil Appeals held that (1) sufficient evidence supported the jury verdict because the defendant's breach of the warranty of title left the plaintiff— who held a

80. Id. at 1318-19.
82. Id. ¶ 10, 33 P.3d at 313.
83. Id. ¶ 10, 33 P.3d at 312-13.
84. 2001 OK CIV APP 27, 21 P.3d 65.
85. Id. ¶ 4, 21 P.3d at 68-69.
defective title — unable to sell the car; and (2) the award of $25,000 damages was not excessive because the evidence indicated that the value of the car with the defective title was only $100 to $200.86

Finally, a noteworthy Article 9 case is North Texas Production Credit Ass'n v. McCurtain County National Bank.87 In the case, a credit association sued a bank and the bank's officers, asserting that it held a superior lien on the debtors' livestock and the proceeds received by the bank from the sale. Thus, the association sought to avoid the bank's lien on the livestock. The Oklahoma Court of Appeals held that the association failed to adequately prove that it had a purchase-money security interest in the cattle sold by the debtors to establish its priority interest in the proceeds of sale under Oklahoma law.88 The court further held that the secured creditor did not assume a first priority position as to collateral simply because a previously filed financing statement of another creditor was missing from the public record. The court reasoned that a secured party does not bear the risk of another's improper filing or indexing.

Because decisions under the UCC from any jurisdiction provide precedent given the uniformity in this area of the law,89 several significant decisions from outside Oklahoma will be mentioned to conclude this survey.

Much UCC litigation arises in bankruptcy; indeed, the trustee in bankruptcy often is the Article 9 secured creditor's biggest threat.90 More than one court — the most recent of which is the Eleventh Circuit in In re Kalter91 — has held that a repossessed vehicle is not property in the debtor's bankruptcy estate; rather, after repossession, title passes to the secured party leaving only

86. Id. ¶ 10, 21 P.3d at 69-70. The car with good title would have been worth $10,300 more. The court allowed, however, the difference ($14,700) as consequential damages due to loss of employment that resulted from the loss of transportation. Id. ¶ 13, 21 P.3d at 70. Yet, there was no evidence this loss (1) could have been foreseen; or (2) could not have been mitigated. See 12A OKLA. STAT. § 2-715 (2001). Thus, the court's extremely tenuous analysis voided the dealer's contract exclusion. See id. § 2-719.
87. 222 F.3d 800 (10th Cir. 2000).
88. Id. at 809-10.
89. 12A OKLA. STAT. § 1-102(1)-(2) (2001); see also Nat'l Envtl. Serv. Co. v. Ronan Eng'g Co., 256 F.3d 995, 1004 (10th Cir. 2001) ("Because the UCC is intended to be applied uniformly across the various states, courts routinely turn to decisions from other states when there is no case law on point within the relevant jurisdiction."); see supra note 8.
90. A security interest valid under Oklahoma law may be invalidated in bankruptcy in various ways. See, e.g., 11 U.S.C. §§ 547, 522(f) (2000). When revised Article 9 was enacted in Oklahoma, title 47, section 1110 of the Oklahoma Statutes was amended to allow a twenty-five-day "grace period" to perfect a security interest in a titled vehicle. While that may be valid against a trustee under 11 U.S.C. § 544, unfortunately it is five days longer than the protection from a preference attack by the trustee under Bankruptcy Code section 547.
91. 292 F.3d 1350 (11th Cir. 2002); see also In re Lewis, 137 F.3d 1280 (11th Cir. 1998).
a right to redeem in the trustee.\textsuperscript{92} While the analysis and facts in \textit{Kalter} initially appear persuasive, it is doubtful whether state law controls or even was correctly interpreted.\textsuperscript{93} The risk is violation of the automatic stay,\textsuperscript{94} and as the opinion in \textit{Eskanos \& Adler v. Leetien}\textsuperscript{95} demonstrates, such a violation can be very serious.\textsuperscript{96} In \textit{Leetien}, a creditor filed a state-court action to collect the debt after bankruptcy and failed to promptly dismiss the action, despite information and requests from the debtor’s counsel. The bankruptcy judge found that the creditor committed a willful violation and imposed a sanction.

Another bankruptcy case, \textit{In re Cohen},\textsuperscript{97} involved a loan for a mobile home guaranteed by the debtor’s wife. The debtor sold the mobile home and spent the proceeds. The debtor then delivered a cashier’s check — as to which he was at best only a remitter who could not enforce it — to the lender in settlement. The check had been purchased with the wife’s funds at a time when she was insolvent. She later filed for bankruptcy, and the trustee brought an action against the lender for the amount of the check, claiming the check was a fraudulent conveyance.\textsuperscript{98} The issue turned on Bankruptcy Code section 550,\textsuperscript{99} and the court granted recovery. The court held the lender to be an initial transferee, and that the transfer of the wife’s funds had not been for a reasonably equivalent value. One wonders if the result would differ if the check had been payable to the debtor or his wife and then indorsed over to the lender so the lender may not have qualified as “an initial transferee.”

Cases from other jurisdictions representing three other legal areas conclude this survey. First, numerous cases protect a secured party in possession of stock collateral from liability if the value of the securities declines so as to

\textsuperscript{92} \textit{Kalter}, 292 F.3d at 1356.

\textsuperscript{93} \textit{Cf. In re Bialac}, 712 F.2d 426 (9th Cir. 1983) (so long as debtor has a right to redeem, it remains property of the estate). Contrast title 12A, section 1-9-617 of the Oklahoma Statutes, which provides that disposition transfers debtor’s rights in collateral, which does not then permit redemption from the security interest.


\textsuperscript{95} 309 F.3d 1210 (9th Cir. 2002).

\textsuperscript{96} \textit{Id.} at 1214 (“A party violating the automatic stay, through continuing a collection action in a non-bankruptcy forum, must automatically dismiss or stay such proceeding or risk possible sanction for willful violations.”)

\textsuperscript{97} 300 F.3d 1097 (9th Cir. 2002).


\textsuperscript{99} Title 11 U.S.C. § 550(a) states that, to the extent a transfer is avoided under § 548, “the trustee may recover, for the benefit of the estate, the property transferred, or . . . the value of such property” from (1) the initial transferee; (2) the entity for whose benefit the transfer was made; or (3) any immediate or mediate transferee of the initial transferee. 11 U.S.C. § 550(a) (2000). The trustee may not recover from a transferee for value or from any immediate or mediate good faith transferee of such transferee. \textit{Id.} § 550(b).
result in a deficiency before the disposal of the collateral. This analysis is sound, unless the debtor adequately protects the lender, if the debtor’s judgment proves erroneous. However, in FDIC v. Caliendo, the court, expressing “equitable” concerns, went the other way and found that section 9-207 requires a secured party to sell when the party sees the market value of the stock collateral plummet. A later case, Solfanelli v. Corestates Bank, N.A., reached the same result, but under that court’s analysis, the failure to sell breached the obligation of good faith and rendered the sale commercially unreasonable. Both cases seem to place more responsibility on the lender than they should — absent exculpation from the debtor against a later suit second-guessing the lender.

A second unfortunate change in the law is evidenced by Any Kind Checks Cashed, Inc. v. Talcott. In Talcott, the court held that a check-cashing service that (1) cashed a check much larger than it normally cashed; (2) from a small businessman that presumably would normally use a bank; and (3) was informed by the customer that speed was important, was not a holder in due course because these red flags did not comport with modern reasonable commercial standards of fair dealing. Thus, a debate that was thought to be settled more than 100 years ago re-emerges. The additional obligation to observe reasonable standards of fair dealing should not be read in this context either to impose a duty of inquiry or to establish a quasi-negligence standard, but rather to codify the case law that finds bad faith if one deliberately closes one’s eyes to avoid gaining knowledge of a problem. The result is not an objective standard, but a subjective one in that the trier of fact can determine was or was not met using an objective measure.

104. 203 F.3d 197 (3d Cir. 2000).
105. Id. at 200.
106. 48 U.C.C. Rep. Serv. (CBC) 800 (Fla. Dist Ct. App. 2002). A similar, perhaps revolutionary, case is Maine Family Federal Credit Union v. Sun Life Assurance Co., 1999 ME 43, 727 A.2d 335, denying the credit union holder in due course status when it allowed immediate credit on checks that turned out not to be good. Id. ¶ 23, 727 A.2d at 342.
108. That is, if no one else would have acted as the claimed holder in due course did, the trier of fact can question whether there was an honest belief that no problem existed or was recognized. The analysis should perhaps be different only if there is an express statement in the UCC that inquiry may be required. See, e.g., 12A OKLA. STAT. ANN. § 1-9-331 official cmt. 5 (West 2001).
Finally, recent changes in Article 3 abandoned, for the first time, the long-standing doctrine of placing fraud loss on the party who had the last chance to prevent it, in favor of a comparable negligence standard, where fraud loss is apportioned on the basis of degree of failure to exercise ordinary care.\textsuperscript{109} This approach satisfies cases that fall within the provisions that recognize it, but several fact patterns, easily created by inventive crooks, do not. Thus, because the changes simply suggest another way to accomplish a fraud, pressure exists to allocate loss on a comparative fault basis in those instances where the changes do not apply as well, by arguing that the UCC provisions can be supplemented by other law.\textsuperscript{110} An illustrative case is \textit{Southwest Bank v. Information Support Concepts, Inc.},\textsuperscript{111} in which a dishonest employee stole checks payable to her employer and deposited them in her account without any forged indorsement. The court, in the suit by the employer against the bank for conversion, refused to allow the bank to assert a statute outside the UCC on proportionate responsibility. The statute, if applied, would have allocated some of the loss to the employer for failing to adequately supervise the employee. If the employee had forged the indorsements, the UCC would have allowed a comparative negligence analysis.\textsuperscript{112} This \textit{dissimilarity} of treatment by the UCC of apparently \textit{similar} situations became the subject of discussion during the latest round of amendments to UCC Articles 3 and 4 promulgated in 2002. However, the drafters included no amendments to address the matter because of the lack of any consensus among interested parties as to whether the issue merited that much attention.\textsuperscript{113} Accordingly, the courts seem correct

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\item\textsuperscript{109} 12A OKLA. STAT. §§ 3-404, 3-405, 3-406, 4-406 (2001). The thought was that the change would promote settlement and therefore reduce litigation, because one would seldom obtain a "clean" win.
\item\textsuperscript{110} Id. § 1-103. The issue then becomes whether the UCC displaces the other law. A similar effort can also arise when a winning case within the UCC provisions would be precluded by the other law, and so the party attempts an "end run" using that law. \textit{Compare} Heche v. Chase Manhattan Bank, 45 U.C.C. Rep. Serv. 2d (CBC) 549 (Conn. Super. Ct. 2001) (allowing a common law conversion claim even though a claim under the UCC was precluded for forged checks) \textit{with} White Sands Forest Prods., Inc. v. First Nat’l Bank of Alamogordo, 50 P.3d 202, 206 (N.M. Ct. App. 2002) (UCC preempts all common law claims to resolve forged check cases).
\item\textsuperscript{111} 85 S.W.3d 462 (Tex. App. 2002).
\item\textsuperscript{112} 12A OKLA. STAT. § 3-405 (2001). A similar case is \textit{Cassello v. Allegiant Bank}, 288 F.3d 339 (8th Cir. 2002). Two variants of the theme include situations where the bank itself is made payee and the dishonest employee directs the funds to his or her own account, or where UCC section 3-307 may be applicable.
\item\textsuperscript{113} Persons who perhaps are more thoughtful disagree. \textit{See, e.g.}, \textit{CLARK’S BANK DEPOSITS & PAYMENTS MONTHLY}, Nov. 2002, at 5-6. To the best of this author’s recollection, as a member of the drafting committee that worked on the revision of Article 3, the committee simply failed to focus on this issue.
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in using supplementary law, as it completes a UCC policy.\textsuperscript{114} The narrow and short-term view of the parties involved in the 2002 amendments on this issue unfortunately is symptomatic of an all-too-common approach to law reform today. That approach not only increases legal, and thus business, costs, but ultimately may produce non-uniformity and then diminution of state law when the matter becomes sufficiently acute.\textsuperscript{115} This author has expressed an opinion on this state of affairs elsewhere,\textsuperscript{116} and will not repeat it here. Suffice it to say, more than a failure of law reform is involved, because as state law becomes outdated and irrelevant — or an impediment, so federal law will, and must, fill the gap. Our federal system, which has served us so well for over 200 years, thus is weakened.

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  \item\textsuperscript{114} 12A Okla. Stat. §§ 1-102(1)-(2), 3-404 to 3-406, 4-406 (2001). A possible difficulty may arise if the non-UCC state law is inconsistent with the UCC approach of "pure" comparative fault (once a threshold level of "substantial contribution" is met). A court perhaps simply could carry the analysis to its logical conclusion and interpret other state law to accommodate the UCC approach. However, in the cases noted \textit{supra} note 110, courts should hold that the UCC displaces other law, as those cases are "end run" attempts.
  \item\textsuperscript{115} For an excellent example of the narrow view, see the exchange of letters in the September and October 2002 issues of the \textit{UCC Bulletin}, volumes 47, Release 4 and 48 Release 1, at 1.
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