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COMMENT

Regulating in the Shadow of the U.C.C.: How Courts Should Interpret State Consumer Protection Laws

Uniform Commercial Code (U.C.C.) Article 9 governs the taking of security interests in personal property; all fifty states have consumer protection statutes, which *also* govern the taking of security interests in personal property. The requirements of these two statutes are often redundant or mutually exclusive. For secured creditors and borrowers, exactly which statute actually governs their transaction is often uncertain.

The U.C.C. theoretically has a solution to this problem. U.C.C. section 9-201 provides: "In case of conflict between this article and a rule of law, statute, or regulation described in subsection (b) [a state consumer protection law], the rule of law, statute, or regulation controls." If there is "conflict" between a consumer protection statute and U.C.C. Article 9, then the consumer protection statute should "control." Superficially, this is clear. In practice, it is not. When exactly is there a "conflict" between the U.C.C. and a consumer protection law? And what exactly does it mean for the consumer protection statute to "control"?

This level of confusion will soon increase. Revised Article 2 of the U.C.C. includes a new provision, section 2-108, that is the parallel of section 9-201.[1] Section 2-108 substitutes the word "govern" but is otherwise identical, providing that a consumer protection law that "conflicts" with Article 2 will "govern" in its place.

1. In this Comment, I repeatedly refer to the "former" and "revised" versions of Article 2 and Article 9. If I refer to a provision without using the words "former" or "revised," that means the provision under discussion is essentially the same under both versions.

The scope of this problem is large. Courts across the country have struggled with the meaning of section 9-201.[2] For lenders and borrowers, it is simply not clear which statute governs. And, as I will demonstrate, the U.C.C. and consumer protection statutes often impose radically different requirements. The confusion is harmful for both lenders and debtors. For lenders, it means added transaction costs and a concomitant decreased willingness to extend credit. For borrowers, it means weakened consumer protections. The expansion of this statutory arrangement to Article 2 will multiply the confusion. Article 9 applies only to secured transactions, while Article 2 applies to all purchases and sales, an even larger universe of transactions.

This Comment proposes a route out of this confusion. I present a method to define "conflict" and "control,"[3] dividing responsibility between the U.C.C. and state consumer protection laws in a way that will preserve and enhance state powers to protect consumers while also protecting the integrity and purpose of the U.C.C.

I. AN EXAMPLE: REPOSSESSION RULES

A sample case will illustrate the problem. In *Ford Motor Credit Co. v. Edwards*,[4] the Maryland Court of Appeals (that state's highest court) adjudicated the boundary line between the U.C.C. and a state consumer protection law. U.C.C. Article 9 governs security interests in personal property.

2. Here is a list of just some of the cases that have dealt with the issue of when the U.C.C. controls and when state consumer protection laws control: First Nat'l Bank of Boston v. Viking Maritec, Inc., No. 93-1336, 1993 WL 292996 (E.D. La. July 26, 1993); First Commercial Corp. v. First Nat'l Bancorporation, Inc., 572 F. Supp. 1430 (D. Colo. 1983); *In re* Smith, 401 B.R. 343 (Bankr. S.D. Ill. 2008); *In re* Cohrs, No. 07-21431A13G, 2007 WL 2050980 (Bankr. E.D. Cal. June 25, 2007); *In re* Anderson, 348 B.R. 652 (Bankr. D. Del. 2006); Bank of Am. v. Lallana, 960 P.2d 1133 (Cal. 1998); Suburbia Fed. Sav. & Loan Ass'n v. Bel-Air Conditioning Co., 385 So. 2d 1151 (Fla. Dist. Ct. App. 1980); Johnson Co. Auto Credit, Inc. v. Green, 83 P.3d 152 (Kan. 2004); Medling v. Wecoe Credit Union, 678 P.2d 1115 (Kan. 1984); Kelley v. Commercial Nat'l Bank, 678 P.2d 620 (Kan. 1984); Kline v. Cent. Motors Dodge, Inc., 614 A.2d 1313 (Md. 1992); B&S Mktg. Enter., LLC v. Consumer Protection Div., 835 A.2d 215 (Md. Ct. Spec. App. 2003); Dean v. Universal C.I.T. Credit Corp., 275 A.2d 154 (N.J. Super. Ct. 1971); Euclid Nat'l Bank v. Watson, C.A. No. 2481, 1977 WL 198763 (Ohio Ct. App. Jan. 26, 1977); Sterling Acceptance Co. v. Grimes, 168 A.2d 600 (Pa. Super. Ct. 1961); First Nat'l Bank of Millville v. Horwatt, 162 A.2d 60 (Pa. Super. Ct. 1960); GMC Superior Trucks, Inc. v. Irving Bank & Trust Co., 463 S.W.2d 274 (Tex. Civ. App. 1971).

3. "Conflict" and "control" are replaced by "conflict" and "govern" in Article 2.

4. 485 A.2d 1010 (Md. 1985).

If a debtor holding secured property defaults, a secured creditor is usually entitled to repossess the property.[5] After fulfilling certain requirements, the creditor is allowed to sell the repossessed property, using the proceeds of sale to cover the debtor's debt.[6]

After repossessing the property, the secured creditor cannot immediately sell it. The U.C.C. requires that the secured creditor notify the debtor of the impending sale.[7] In the case of a public sale (for example, auction), former section 9-504 provided that "reasonable notification of the *time* and *place* of any public sale . . . shall be sent by the secured party to the debtor."[8]

Frequently, state statutes impose notice requirements with different language. Maryland's Retail Installment Sales Act (RISA)[9] statute, for instance, provides that, before any repossessed collateral may be sold, the secured creditor (and repossesser) must deliver a notice to the debtor informing her (1) that she has the right to redeem the repossessed goods upon payment; (2) that she may be liable for a deficiency after the goods are sold; and (3) of the location where the goods are stored.[10] Note that the Maryland statute, unlike the U.C.C., does not require notification of the time and place of a public sale. Rather, the RISA statute imposes its own, substantively different notification requirements.

Maryland's version of section 9-201 includes the usual "conflict" and "control" language, providing that "in the case of *conflict* between the provisions of this title [the U.C.C.] and any such [state consumer protection statutes], the provisions of such statute *control*."[11]

Superficially, the U.C.C. and RISA requirements do not "conflict." They are certainly redundant—and perhaps at cross-purposes—but at worst they supplement each other. Nevertheless, the existence of *both* the Maryland statute and the U.C.C. begs the following questions: Does a secured creditor have to comply with just one statute? Both? Parts of each? Does the consumer have a remedy if the lender chooses to comply selectively?

5. U.C.C. § 9-609 (2000) (revised).

6. *Id.* § 9-608.

7. *Id.* § 9-611.

8. U.C.C. § 9-504 (1996) (emphasis added). I am using former Article 9 for this example because that was the version enacted in Maryland at the time of this case.

9. RISAs are a common type of state consumer protection law.

10. MD. CODE ANN., COM. LAW, § 12-624 (LexisNexis 1975).

11. *Id.* § 9-203 (emphasis added).

The Maryland Court of Appeals decided that "conflict" meant that RISA, where relevant, totally displaced the U.C.C.[12] Therefore, the U.C.C. notice requirements had no significance in this case. The secured creditor only had to comply with the lesser RISA requirements, and did not have to inform the debtor of, for instance, the place where the collateral would be sold.

Another example will illustrate a different conception of "conflict" and "control." After a secured creditor has repossessed and then sold the debtor's collateral, the proceeds of the sale often do not cover the debt. In such cases, the debtor is liable for this deficiency.[13] In a small minority of cases, the sale of collateral will actually produce more money than the size of the debt. In these cases, under the U.C.C., the debtor is entitled to the surplus.[14]

Under some consumer protection statutes, the procedure is different. An example from a Pennsylvania case, *Whiteman v. Degnan Chevrolet, Inc.*,[15] is illustrative. At the time of the case in question, Pennsylvania's version of former U.C.C. section 9-504 provided that, after the secured party had repossessed the collateral and sold it, "the secured party must account to the debtor for any *surplus*."[16]

If there was a surplus after the disposition of the collateral, the secured creditor had to turn over any surplus to the debtor. Under Pennsylvania's Motor Vehicles Sales Finance Act (MVSFA), there was no provision requiring any surplus go to the debtor. Rather, Pennsylvania's MVSFA provided that, if the buyer did not redeem the repossessed car within fifteen days "the buyer shall forfeit all claim to such motor vehicle and collateral security."[17]

The MVSFA does mention what happens in the event of a deficiency (providing a procedure whereby the creditor can sue the debtor for it),[18] but there is no specific mention of a surplus. The closest mention is the excerpt quoted above, which may imply that the buyer has no right to any surplus (the language "forfeit all claim"), but which is, in any event, ambiguous. As in the Maryland case above, Pennsylvania's version of the U.C.C.[19] dictates that the state statute "controls" in the event of a "conflict."

12. *Ford Motor Credit Co. v. Edwards*, 485 A.2d 1010, 1013 (Md. 1985).

13. U.C.C. § 9-608 (2000). This provision exists in both former and revised Article 9.

14. *Id.*

15. 272 A.2d 244 (Pa. Super. Ct. 1970).

16. 12A PA. STAT. ANN. § 9-503 (West 1954) (emphasis added).

17. 69 PA. CONS. STAT. § 626 (2004).

18. *Id.* § 627.

19. Note that in this case Pennsylvania is working with former Article 9, in which 9-203(4) was analogous to revised 9-201.

The *Whiteman* court held that the MVSFA did not address the issue of a surplus. Therefore, the U.C.C. governed, and the debtor was entitled to the surplus. This reasoning is questionable, as the MVSFA does address the issue of deficiencies. To hold that the MVSFA does not speak to surpluses implies a strange asymmetry in the statute.

An interpretation that would seem more reasonable would hold that: (1) the MVSFA should control over Article 9; (2) the MVSFA does not provide for a surplus; and therefore, (3) a debtor is not entitled to a surplus. But that result is no less bizarre. The MVSFA, ostensibly a consumer protection statute, would leave the consumer worse off than under the U.C.C. Stranger still, under the MVSFA, the secured creditor is actually better off if the debtor defaults than if she pays—on default, the secured creditor gets to keep any extra value (what would normally be regarded as the debtor's equity in the car).

Both of these situations demonstrate the interpretive problem posed by state regulations set against the backdrop of the U.C.C. Revised section 9-201 and revised section 2-108 provide a way for states to create their own separate rules for consumers, but the relationship between the U.C.C. and these other statutes is uncertain. Such state statutes coexist uneasily with the U.C.C.

II. THE SOLUTION: CONTRADICTION OR DISPLACEMENT

A. *The Interpretive Solution*

In this Comment, I propose an interpretive schema to resolve this problem. In particular, I will try to assign meaning to the words "conflict" and "control."[20] I argue that "conflict" can have two essential meanings: contradict or displace. There are two ways that a consumer protection statute can "conflict" with the U.C.C. First, the consumer protection statute can expressly contradict a provision of the U.C.C. Or, second, the consumer protection statute can displace the U.C.C. (or a provision thereof).

To illustrate my proposal, if the Pennsylvania MVSFA statute, instead of not discussing the surplus issue at all, had read "the debtor is not entitled to any surplus resulting from the holder's disposition of collateral," then Article 9 would be contradicted. Pennsylvania's MVSFA, in that hypothetical, would affirmatively and expressly contradict the provision of the U.C.C. dealing with surplus. The two provisions cannot coexist. There would be a "conflict"

20. In the case of revised § 2-108, "govern" replaces "control."

between the Article 9 surplus provision and the consumer protection provision denying a surplus.

The principle is similar in the case of displacement.[21] I argue that a provision of a consumer protection statute can displace a provision of the U.C.C. if it occupies the same space as the U.C.C. provision. I argue that displacement can occur in two situations. First, displacement occurs when a consumer protection statute has an analogue to a U.C.C. provision. Second, displacement occurs when a consumer protection provision, if controlling, would prevent the functioning of a U.C.C. provision.[22]

The *Ford Motor Credit* case[23] above is an example of analogue displacement. The post-repossession, pre-sale notice requirements in Maryland's section 12-624 are very clearly an analogue of the Article 9 post-repossession, pre-sale notice requirements. As such, under my schema, Maryland section 12-624 would displace the U.C.C. provision. There would be a "conflict" between the two provisions.

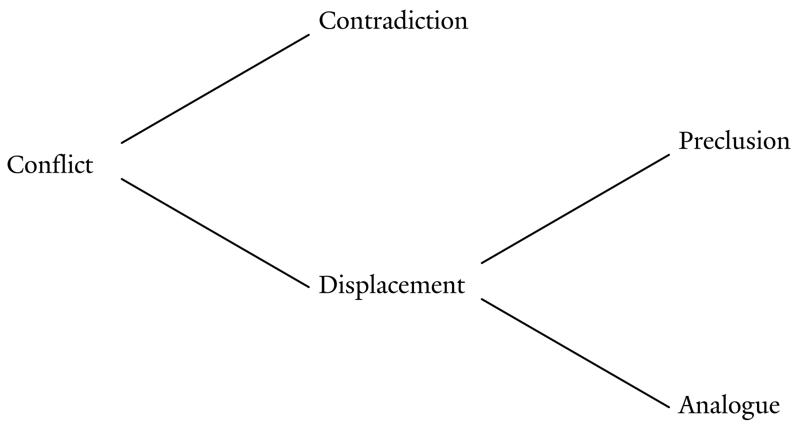
For an example of the second type of displacement, what I will call "preclusion displacement," imagine that a consumer protection law requires a secured creditor, before repossession of collateral, to have pre-arranged a buyer for the repossessed collateral (to have, in effect, already made the sale). After the repossession, this hypothetical law requires the creditor to transfer the collateral to the buyer immediately (and the proceeds of the sale would be used against the debt). Under such a regulation, Article 9's post-repossession, pre-sale notice provisions would have no place. To require a creditor to provide notice to the debtor after the creditor had seized the collateral but before disposing of it would not be possible—no such period of time would exist. The consumer protection provision would preclude the functioning of the U.C.C. provision. Here too, the consumer protection provision would displace the U.C.C. provision, and there would be a "conflict" between the two.

21. This idea borrows slightly from the notion of "occupying the field" in the doctrine of implied preemption. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (discussing conflict and "occupy the field" preemption).

22. The three ways that I propose a state consumer protection provision can displace a U.C.C. provision (contradiction, analogue displacement, and preclusion displacement) are roughly comparable, in the field of federal-state preemption, to express preemption, implied conflict preemption, and implied "occupy the field" preemption. It is a mistake, though, to overstate the similarities between the two issues. Federal preemption involves laws passed by two distinct sovereign bodies (the states and the federal government), whereas the U.C.C. and state consumer protection laws are passed by the same sovereign body (the states).

23. Ford Motor Credit Co. v. Edwards, 485 A.2d 1010 (Md. 1985).

To summarize, the following chart may be useful:



There is a "conflict" between a consumer protection law and the U.C.C. when there is contradiction (when a consumer protection provision expressly contradicts a provision of the U.C.C.), or when there is displacement. There is displacement when a consumer protection provision precludes the operation of a U.C.C. provision, or when the consumer protection provision provides a complete analogue to a particular U.C.C. provision.

Determining the meaning of "control" in revised section 9-201 and "govern" in revised section 2-108 is easier than determining the meaning of "conflict" in those provisions. Using my schema, once a "conflict" is determined to exist, the conflicted U.C.C. provisions are no longer relevant. The transaction is solely governed by the consumer protection provisions with which those U.C.C. provisions conflicted. In the immediately preceding example, the consumer protection law's pre-arranged sale requirement would "conflict" (by preclusion displacement) with the U.C.C. post-repossession, pre-sale notice provision. The consumer protection provision would, therefore, "control," meaning that the secured creditor would only have to comply with the consumer protection provision and would have no duty to give post-repossession, pre-sale notice to the debtor.

B. Why This Statutory Interpretation Is Justified

I shall make four arguments in favor of this schema, each grounded in the language of the U.C.C. First, in its own text, the U.C.C. instructs courts that the U.C.C. "must be liberally construed."[24] Unless a competing state statute includes similar language, a proper reading of the statutory text of the U.C.C. and the state statute would favor giving extra deference and broader construction to the U.C.C. The comments to section 1-103 suggest that courts should not let the U.C.C. be "hampered in their effects by later acts of limited scope."[25]

Second, section 1-103 specifically directs courts to construe the U.C.C. liberally to promote its underlying "purposes and policies," which include "to make *uniform* the law among the various jurisdictions." The value of uniformity is to promote commerce across jurisdictions.[26] Under the U.C.C., commercial parties need less legal research before deciding whether to do business in another state. The U.C.C. enhances trade and promotes commercial activity across state borders. This virtue is compromised by variation. The more state statutes are allowed to control in place of the U.C.C., the less uniform commercial law will become. The U.C.C.'s express goal to promote uniformity may entitle the U.C.C. to special deference when construed together with other statutes.

Third, U.C.C. section 1-104 reads: "The Uniform Commercial Code being a *general* act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided."[27] The U.C.C. is a "general act." The implication of this statutory language (again duly enacted by the state legislatures) is that the U.C.C., as a "general act," deserves some kind of special priority relative to other nongeneral acts. The comment to section 1-104 bears quoting in its entirety:

> This section [1-104] embodies the policy that an act that bears evidence of carefully considered permanent regulative intention should not lightly be regarded as impliedly repealed by subsequent legislation. The Uniform Commercial Code, carefully integrated and intended as a uniform codification of permanent character covering an entire "field" of law, is to be regarded as particularly resistant to implied repeal.

24. U.C.C. § 1-103 (1953).

25. *Id.* § 1-103 cmt.1.

26. For a Supreme Court case discussing the uniformity rationale, see Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 623 (1978). For a general discussion of the value of uniformity, see Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1631 (2008).

27. U.C.C. § 1-104 (2005) (emphasis added).

The U.C.C. has likely been more "carefully considered" and "carefully integrated" than other state statutes. The drafters of the U.C.C. spent much more time drafting the U.C.C. than did the drafters of state RISA statutes.[28] The difference means that the U.C.C. is generally more coherent than idiosyncratic consumer protection statutes. As such, it should be given a greater level of deference.

The final argument favoring the U.C.C.'s special interpretive status is one for certainty. Going back to the text of section 1-103: "(a) [The U.C.C.] must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions." The U.C.C. should be construed so as to "clarify" and "simplify" commercial law. The U.C.C. should be "liberally construed" to accomplish those objectives. It follows naturally that the U.C.C.'s scope should be interpreted broadly where failure to do so would promote unclear law and complexity. That is exactly the situation faced by courts applying both the U.C.C. and a consumer protection statute. Construing the U.C.C. coequally with the other statute (or even as having a lesser priority) would promote unclarity and confusion. Construing the U.C.C. weakly will leave contracting parties uncertain as to how a court will judge their behavior. A secured creditor in Pennsylvania (where the *Whiteman* surplus case was decided) cannot be sure if she is entitled to keep the debtor's surplus or not. Operating only under consumer protection, she may. But a secured creditor must fear that a court will apply the U.C.C., and the court will accordingly give the debtor damages for the creditor's failure to turn over a surplus.

CONCLUSION

The harms of the current system are clear. The present confusion hurts both lenders and borrowers. For lenders, there are added transaction costs and uncertainties about the legal treatment of any secured lending transaction involving consumers. For consumers, a legislature's accidental failure to include a provision in a consumer protection statute (for example, the surplus provision at issue in *Whiteman*) can result in the consumer protection statute, ostensibly enacted for the benefit of consumers, actually lowering protections for them. Also, the added transaction costs of lending are borne, at least to some extent, by the consumers. The uncertainty about which law governs

28. On the drafting process of the U.C.C. consumer protection provisions, see Jean Braucher, *Politics and Principle in the Drafting of UCC Consumer Protection Provisions*, 29 U.C.C. L.J. 68 (1996).

makes it more difficult and expensive to litigate. As the costs of litigation rise, it becomes more expensive for consumers to hire counsel to defend themselves against claims by their creditors. Ambiguous consumer protection laws risk encouraging larger, better-funded corporate parties to take advantage of that ambiguity. Lenders may violate the rules because it is not clear what exactly the rules are, and the costs of litigating an alleged violation are too high for most consumers to bear.

This Comment has attempted to deal with the difficult question of how courts should solve this problem, and how the courts should balance the liberal construction of the U.C.C. commanded by sections 1-103 and 1-104 against the deference mandated by sections 9-201 and revised 2-108. My answer is an interpretive schema that looks at the U.C.C. as a whole, taking account of its overall text, structure, and purpose.

To solve the confusion that has resulted from this problem, I have proposed and advocated a schema that gives the U.C.C. special deference. Under my schema, "conflict" between the U.C.C. and other state statutes exists only in a limited number of situations—specifically, when the U.C.C. is contradicted or displaced. This special deference is justified due to the statutory construction rules within the text of the U.C.C.

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