2024 BANKRUPTCY AT THE BEACH COMMERCIAL LAW UPDATE

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1. Update on 2022 UCC Amendments.[1]

In 2022, the Uniform Law Commission (ULC) published amendments to address "emerging technologies," including the lack of clarity in commercial rules for certain electronic transactions. The amendments include provisions addressing digital assets, tangible and electronic money, and block-chain technology, and upon adoption, the amendments would allow a state to regulate and facilitate modern commercial transactions.

The 2022 UCC Amendments were addressed in more detail in the materials for the 2023 Bankruptcy at the Beach conference. As an update, there are currently nineteen (19) states that have adopted the amendments and another ten (10) states that have introduced bills for their adoption.

Article 2: Sales

2. *Akai Custom Guns, LLC v. KKM Precision, Inc.*, -- F. Supp. 3d ---, No. 20-CV-61469-RS, 2023 WL 8449374 (S.D. Fla. Dec. 6, 2023).

Background: Plaintiff manufactures custom pistols used for shooting competitions in the United States. Defendant KKM manufactures firearm barrels and sells them to gun manufacturers and private citizens. KKM's website stated that it only manufactures barrels with Type 416R gun-barrel quality steel and that all barrels have a minimum Rockwell hardness of 42. The steel quality and Rockwell hardness number indicate the sulfur content and hardness of the steel. Defendant SCI sells KKM barrels through its own website, but the website did not include any details regarding the type of steel the barrels were made with or their Rockwell hardness, and SCI was not otherwise aware of that information.

Plaintiff purchased certain piston barrels from KKM through SCI's website after conversations between Plaintiff and KKM representatives about the steel composition. The purchased barrels were supposed to be made from Type 416R steel quality with a minimum Rockwell hardness of 42 RC. Subsequently, several of Plaintiff's customers began returning their custom pistols, stating that they were malfunctioning. Plaintiff performed an investigation and determined that the KKM barrels showed signs of failure, such as compacted surfaces, folded metal, or compacted metal. In

[1] *See* 2022 Amendments to UCC, Uniform Law Commission, https://www.uniformlaws.org/committees/community-home?communitykey=1457c422-ddb7-40b0-8c76-39a1991651ac#:~:text=The%202022%20amendments%20to%20the,intelligence%2C%20and%20other%20technological%20developments (last visited May 2, 2024).

addition, certain barrels were soft, flexible, and changing shape and dimensions. Further testing by a metallurgical laboratory indicated that many of the KKM barrels had a Rockwell hardness below 42 RC and had a sulfur content that was not consistent with Type 416R stainless steel. Plaintiff raised these issues to KKM, which responded that there is no single specification for Type 416R stainless steel, and that the "R" in Type 416R stainless steel means "restricted," such that it is restricted to certain elements and tolerances within those elements. KKM stated that it had never had a barrel test below specifications and requested a sample of the alleged soft barrels to perform its own testing. Plaintiff refused.

Plaintiff then announced a voluntary recall to repair and replace pistols made with barrels from an "unnamed manufacturer," but the referenced barrels were all KKM barrels. KKM then started receiving calls from customers about the recall, which disrupted KKM's operations and caused a decrease in revenues. Plaintiff subsequently sued KKM and SCI for, among other things, breach of express warranties, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and revocation of acceptance. The parties filed cross-motions for summary judgment.

UCC Application: The warranty claims were governed by Florida's UCC. With respect to SCI, the court found that there was no express warranty from SCI that Plaintiff could have relied on. SCI's website did not originally include any information on the steel quality or Rockwell hardness. However, the court denied summary judgment on the implied warranty claims against SCI, noting that whether SCI's terms and conditions could include language that clearly indicated there were no implied warranties was an issue of fact for the jury to decide.

With respect to KKM, the court noted that it was "well-settled" under Florida law that KKM was entitled to inspect, test, and sample the barrels in order for Plaintiff to maintain its breach of express warranty claim, stating: "[W]hen good are discovered not to answer the order given for them, or to be unsound, the purchaser ought immediately to return them to the vendor, or give him notice to take them back, and thereby rescind the contract; or he will be presumed to acquiesce in the quality of the goods." Plaintiff's refusal to return the goods to KKM constituted an acceptance of those goods under Fla. Stat. § 672.606(1)(a), and therefore Plaintiff was barred from asserting a breach of express warranty claim against KKM. The court also found that Plaintiff's breach of implied warranty and revocation of acceptance claims against KKM were barred because Plaintiff was deemed to accept the barrels when it refused to return them, as "it was improper for Plaintiff to maintain possession of the barrels yet bring a lawsuit for revocation of acceptance."

3. *In re 3M Combat Arms Earplug Products Liability Litigation*, 679 F. Supp. 3d 1314 (N.D. Fla. June 22, 2023).

Background: Plaintiff brought suit against 3M, alleging that his hearing was damaged by his use of the Combat Arms Earplug version 2 during his military service. The evidence showed that the ear plug at issue had fit and variability problems, particularly when used by people with medium to large ear canals, and needed to be in a certain position in the ear when the wearer was at a shooting range or being exposed to continuous noise. 3M did not provide any written warnings to the U.S. Army or soldiers about the dangers associated with use of the earplugs, despite 3M having knowledge of such dangers.

Among the claims asserted by the plaintiff were breach of the implied warranty of merchantability under Alabama law. 3M moved for summary judgment, arguing that the implied warranty of merchantability claim was displaced by Alabama's Extended Manufacturer's Liability Doctrine ("AEMLD"), and that the record did not have evidence of pre-suit notice, privity, or proximate causation.

UCC Application: With respect to 3M's argument on the AEMLD, the court noted that the AEMLD does not replace implied warranties where there is evidence that the produce was unfit for the ordinary purposes for which it is used. In this case, the earplugs were intended to protect wearers' hearing by decreasing noise levels, and the evidence established that there were inadequacies with the earplugs such that they created a risk of hearing damage instead of preventing it. Therefore, there was a triable issue of material fact as to whether the earplug was unfit for its intended use to protect hearing.

With respect to 3M's causation argument, the court found that there was sufficient evidence from the plaintiff's causation expert that a) the earplugs caused the plaintiff's hearing damage, b) there were safer alternatives on the market that were cost-effective and did not contain the same design flaws, and c) 3M had failed to provide an adequate warning about the potential for injury from use of the earplugs.

With respect to 3M's privity argument, the court noted that Alabama does not have a privity requirement for a personal injury claim based on a breach of the implied warranty of merchantability. The implied warranty instead "extends to any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty." Ala. Code § 7-2-318. 3M sold millions of pairs of earplugs to the U.S. Army, and did not dispute that it was reasonable to expect that soldiers would use and be affected by the earplugs. Accordingly, the implied warranty extended to the plaintiff under Alabama law.

Finally, with respect to 3M's pre-suit notice argument, Ala. Code § 7-2-607 requires only buyers to give pre-suit notice before bringing a breach of implied warranty claim. The statute does not extend to warranty beneficiaries under Ala. Code § 7-2-318.

Article 3: Negotiable Instruments

4. *Mile High, LLC v. Flying M Aviation, Inc.*, No. CL-2023-0260, 2024 WL 57451 (Ala. Civ. App. Jan. 5, 2024).

Background: Flying M Aviation, Inc. ("FMA") sued Mile High, LLC, Pate Holdings, Inc., and Luther S. Pate (collectively, "Pate") for breach of contract. The parties entered into a settlement whereby Pate would pay FMA $50,000. Throughout the settlement negotiations, counsel for the parties had communicated via email in one email chain. After the settlement was reached, FMA's counsel sent Pate's counsel an email with the wiring instructions for the settlement payment. For unknown reasons, the email never reached Pate's counsel's inbox. Instead, Pate's counsel received an email, outside of the email chain, from a scammer with different wiring instructions. By all accounts, the email appeared to be from FMA's counsel and Pate's counsel had no reason to believe the email was inauthentic. Pate's counsel did not call FMA's counsel to confirm the wiring instructions before sending the wire with the settlement payment. After the settlement payment

was wired to the scammer's account, the scammer sent several emails to FMA's counsel indicating that the funds would be sent soon, thus further delaying discovery of the fraud.

Twelve days after the settlement payment was transferred, FMA's counsel called Pate's counsel to inquire about the status of the settlement payment, which had never been received by FMA. In that conversation, FMA's counsel told Pate's counsel that he discovered his email had been "spoofed" because other attorneys had informed him that they had received such emails. FMA's counsel sent the correct wire instructions to Pate's counsel, who responded that she would contact the bank to determine whether the settlement payment could be retrieved. After further investigation into the scam email, it was determined that neither counsels' email accounts had been compromised.

Pate refused to pay FMA the settlement proceeds, arguing that because FMA's counsel had failed to inform Pate's counsel that his email account had been spoofed, Pate's counsel had no reason to question the authenticity of the wire instructions. Therefore, Pate argued, Pate's payment of the settlement funds to the scammer discharged Pate's obligations under the settlement agreement.

The circuit court considered, as an issue of first impression, who bears the loss when the fraudulent conduct of a third party causes a party to breach a contract. Applying the "imposter rule," the circuit court determined that Pate was in the best position to avoid the fraud under the facts at hand. Pate appealed.

UCC Application: Ala. Code § 7-3-404(d) provides: "With respect to an instrument to which subsection (a) or (b) applies, if a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss."

This "imposter rule" imposes the burden of funds lost through fraud who the party to was in the best position to avoid the fraud by exercising reasonable care. Here, Pate was "clearly defrauded" and "reasonably relied" on the spoofed email containing the fraudulent wiring instructions. However, Pate was in a better position to avoid the fraud, as Pate's counsel could have easily called FMA's counsel to confirm the wiring instructions. FMA's counsel, on the other hand, was completely unaware that the fraudulent wiring instructions had been sent to Pate's counsel in the spoofed email, and there was no evidence that FMA's counsel became aware that his email had been spoofed in time to prevent the fraud. Accordingly, the appellate court affirmed the circuit court's ruling, finding that Pate was in the best position to prevent the fraud.

5. *Eli Global, LLC v. Cieutat*, --- So. 3d ---, No. SC-2023-0058, 2023 WL 8291704 (Ala. Dec. 1, 2023).

Background: Appellants acquired certain healthcare companies that were founded and managed in large part by appellee Cieutat. As part of the sale, the parties entered into an equity purchase agreement that set forth the terms of the transaction, including that Cieutat, as the sellers' representative, would receive all payments made to the sellers under the equity purchase agreement and would allocate and distribute such amounts to the sellers as may be separately agreed between

Cieutat and the sellers. Appellants issued a promissory note to Cieutat, again as the sellers' representative, for the amounts payable under the equity purchase agreement. The note made reference to the equity purchase agreement, required payments to be made in five equal annual installments, and included a right of offset of amounts payable under the note against any amounts owed by the sellers under the equity purchase agreement. Appellants also engaged Cieutat as CEO for an initial term of five years as part of the purchase.

Appellants made the first payment under the note but failed to make any further payments. Appellants also terminated Cieutat for cause based on an alleged severe decline in the company's finances and because Cieutat had allegedly engaged in discriminatory conduct. The sellers filed suit for breach of contract, and appellants counterclaimed for fraud, intentional/negligent misrepresentation, and unjust enrichment, asserting that Cieutat failed to disclose his discriminatory conduct as part of the sale negotiations, which substantially reduced the value of the company. The sellers responded that appellants failed to make the note payments because they were short of cash due to the financing they obtained to finance the purchase of the companies and due to their financing of the defense of criminal charges against one of their principles.

The trial court entered summary judgment in favor of the sellers for the amounts due under the note, and appellants filed a Rule 59(a) motion, arguing, for the first time, that the judgment should be vacated because the note was a negotiable instrument under New York's UCC and the sellers had not presented evidence that they were the owner and holder of the note as required by statute. The trial court denied the Rule 59(a) motion, and appellants appealed.

<u>UCC Application</u>: Although appellants had not brought up this argument at any stage prior to their Rule 59(a) motion, they argued that the circuit court had discretion to consider new arguments in a post-judgment motion. The trial court's order indicated that it had considered the new arguments, but not whether it had considered the merits of such arguments, so the appellate court addressed the arguments on the merits.

Under New York law, a promissory note is a negotiable instrument under the UCC. Among other things, it must contain an unconditional promise to pay. However, the promissory note at issue was not unconditional, but instead subject to, or dependent upon, the equity purchase agreement. The note stated that it was "issued pursuant to" the equity purchase agreement, and contained a right of offset based on certain terms of the equity purchase agreement. Additionally, one of the conditions to closing under the equity purchase agreement was that the note must have been issued. Appellants argued that these terms did not made the note nonnegotiable, as Section 3-105 and the official comments make clear that a note is not made nonnegotiable by a reference to another agreement. However, the official comments also explain the negotiability issue as follows:

> The distinction is between a mere recital of the existence of the separate agreement or a reference to it for information, which under paragraph (c) of subsection (1) will not affect negotiability, and any language which, fairly construed, requires the holder to look to the other agreement for the terms of payment. The intent of the provision is that an instrument is not negotiable unless the holder can ascertain all of its essential terms from its face.

The setoff provision in the note made it potentially contingent on the terms of the equity purchase agreement. Accordingly, the court found that because the note was part of a larger transaction and all essential terms of the note where not contained therein, it was not negotiable and the sellers did not have to prove who possessed the note in order to enforce it.

Article 4A: Funds Transfers

6. *Kent Group Partners, LLC v. Citizens Bank., N.A.*, No. 23-3743, 2024 WL 945239 (6th Cir. Mar. 5, 2024).

Background: Plaintiff Kent Group Partners wired $6.25 million to an account in the name of Sprint at defendant Citizens Bank. Unbeknownst to Kent, the account was created by hackers who had intercepted emails between Kent and Sprint in which they discussed an upcoming wire to Sprint's account. Pretending to be Sprint employees, the hackers provided the account number for their Citizens Bank account, and Kent sent transfer instructions to Citizens Bank with Sprint's name and address but the hackers' account number. The hackers promptly withdrew the funds once Citizens Bank made the wire transfer.

Kent sued Citizens Bank, alleging violations of Article 4 of the UCC. Kent argued that Citizens Bank violated the law by accepting the transferred funds and that the bank should better screen its customers. The district court dismissed Kent's claims, and Kent appealed.

UCC Application: The Sixth Circuit affirmed the district court's dismissal. With respect to the UCC claims, Section 4A-207 of the UCC provides that where there is a discrepancy between the name and account number of the intended beneficiary in wire transfer instructions, the bank may rely on the account number for proper identification of the beneficiary if the bank does not know that the name and account number refer to different parties. Where the bank so relies, a plaintiff must prove that the bank had actual knowledge of the discrepancy to establish liability. The statute is so structured in order to take into account the reality that wire transfers are generally processed through automated means and not by individuals. In this case, Kent failed to allege any facts that would show that Citizens Bank knew of a discrepancy in the instructions, and instead relied on a mere recitation of the elements of the claim that the bank "knew or should have know" of the discrepancy. Further, Kent failed to allege any facts that would show that Citizens Bank had any knowledge of or actively participated in the hackers' scheme.

7. *Ekopel D.O.O. v. Citibank, N.A.*, --- F. Supp. 3d ---, No. 22-2554 (JDB), 2024 WL 519648 (D.D.C. Feb. 9, 2024).

Background: Plaintiff is a Slovenian company that exports medical equipment, and was the intended beneficiary of two payments from Ukrainian companies in March 2022. Plaintiff banked at the Slovenian subsidiary of Sberbank Europe AG, which was under sanctions from the U.S. Department of Treasury's Office of Foreign Assets Control following Russian's invasion of Ukraine in February 2022. The sanctions took effect on March 26, 2022, and prohibited U.S. banks from, among other things, processing transactions with sanctioned institutions. Sberbank Europe AG sold its Slovenian subsidiary on March 1, 2022 to a Slovenian bank that has never been under U.S. sanctions. The Sberbank subsidiary's bank code remained the same when it was acquired by the Slovenian bank.

The two payments to Plaintiff were sent by wire through the SWIFT system, which is a global, interbank financial messaging service that can involve multiple intermediate banks. In the SWIFT system, banks are identified by certain identifier codes. One of the intermediate banks that received the transfers to Plaintiff was defendant Citibank, which stopped both transfers for sanctions screening based on the bank code that was associated with sanctioned Sberbank. Although Citibank said the transfers had cleared the sanctions review and been released, Citibank held the payments for months before returning them to the originators.

Plaintiff filed suit against Citibank, asserting common law claims for fraudulent misrepresentation, fraudulent concealment, conversion, intentional interference with a beneficial business relationship, and unjust enrichment. Citibank moved to dismiss, asserting, among other things, that Plaintiff's claims were precluded by the UCC's provisions on commercial electronic funds transfers.

<u>UCC Application</u>: New York (whose law applied to this dispute) has adopted Article 4-A of the UCC, which "governs the procedures, rights, and liabilities arising out of commercial electronic funds transfers." Section 4-A-402 of the New York UCC provides: "If the sender of a payment order pays the order and was not obliged to pay all or part of the amount paid, the bank receiving payment is obliged to refund payment to the extent the sender was not obliged to pay. Except as provided in Sections 4-A-204 and 4-A-304, interest is payable on the refundable amount from the date of payment." As the court noted, Section 4-A-204 has a privity requirement and does not create obligations between all parties in a funds transfer generally. The official comments to the section explain:

> [U]nder the Article 4A structure, the issuance and acceptance of payment orders create rights and obligations only as between the sender of the payment order and its receiving bank (e.g., between originator and originator's bank as to the originator's payment order), between the originator's bank and an intermediary bank as to the originator's bank's payment order, between the intermediary bank and the beneficiary bank as to the intermediary bank's payment order, and finally as between the beneficiary bank that has accepted a payment order and the beneficiary . . . . [T]he originator does not have any claim against the intermediary bank for return of the value in the event the funds transfer is not completed. Rather, the only party with a claim against the intermediary bank is the sender to that bank, which is typically the originator's bank. In an uncompleted funds transfer, it is the originator's bank that must refund value to the originator.

In light of these UCC provisions, the court held that Plaintiff's claims of conversion and unjust enrichment fell within Article 4-A, and where therefore precluded since neither the originator nor the beneficiary has a claim against an intermediary bank for an uncompleted transfer. Plaintiff's only response was that the Electronic Fund Transfer Act, 15 U.S.C. § 1693, *et seq.*, applied instead of the UCC. The court rejected this argument, noting that the primary purpose of that law is to protect consumer rights and not govern transfers between financial institutions.

The court further held that although Plaintiff's other claims were not precluded by the UCC, Plaintiff had failed to state a claim as to any of them, such that summary judgment was to be granted in favor of Citibank.

8. *Kazak v. Truist Bank*, --- F. Supp. 3d ---, No. 2:23-CV-40-SPC-KCD, 2023 WL 5860613 (M.D. Fla. Sept. 11, 2023).

Background: Plaintiffs sued Truist Bank in connection with an alleged fraudulent wire transfer involving Plaintiffs' bank accounts at Truist. On January 18, 2022, one of the Plaintiffs received a call from what she believed was the Truist fraud department, followed by an email stating their accounts were enrolled in wire transfer services, despite not initiating any transfers themselves.

After realizing the potential compromise, immediate steps were taken to alert Truist, including contacting the local branch's relationship manager and attempting to notify the fraud department. Plaintiffs' accounts were eventually accessed by third parties, resulting in a loss of over $112,000.

Despite alleged assurances of reimbursement from Truist, the money was not refunded, and it was later revealed that the fraud department did not receive the case until three days after the initial alert. Plaintiffs filed suit against Truist for breach of contract, breach of contractual obligation of good faith and fair dealing, breach of fiduciary duty, noncompliance with security procedures, and negligence. Truist moved to dismiss the claims and argued, in part, that Plaintiffs' claims were pre-empted by UCC Article 4A.

UCC Application: In moving to dismiss Plaintiffs' claims, Truist argued that all common law claims were preempted by Article 4A of the UCC. The court disagreed and applied *Regions Bank v. Provident Bank, Inc.*, 345 F.3d 1267 (11th Cir. 2003) for the proposition that Article 4A is only the exclusive means of redress when a claim concerns the mechanics of how a funds transfer was conducted. The court distinguished these types of "wire mechanics" claims from claims accusing Truist of failing to act at a time when it could prevent the damage from an unauthorized wire transfer. The latter, according to the court, did not concern "wire mechanics" and could state a claim for relief, whether posed as negligence, breach of fiduciary duty, or otherwise.

Article 8: Investment Securities

9. *Est. of Malkin v. Wells Fargo Bank, NA*, No. 19-14689, 2022 WL 2285884 (11th Cir. June 23, 2022).

Background: Plaintiff in this case was the estate of a deceased elderly woman who, along with her husband, were introduced to Larry Bryan and his company, Simba, which engaged in premium financing of life insurance. Simba targeted healthy seniors with excess wealth who wanted to make money off their life insurance capacity. Ms. Malkin, who did not need or want life insurance, was interested in Simba's "risk-free opportunity to make money."

Through this "risk-free" program, Ms. Malkin provided Simba access to her medical records. In turn, Coventry, a company that acted as a program administrator and servicing agent of the premium finance company, used her medical records to assess her life expectancy and the potential value of life insurance policies on her life. Coventry submitted incomplete applications for pre-approvals from insurers and received pre-approvals for three separate policies totaling $13 million in coverage. With these approvals in hand, Coventry, Simba, and Ms. Malkin completed the applications and were approved for coverage.

At the same time, Coventry required Ms. Malkin and her husband to grant a power of attorney for all life insurance policies. As a part of this process, Ms. Malkin agreed to and did establish a trust to hold the life insurance policies, and a sub-trust to apply for and receive a non-recourse premium finance loan from LaSalle Bank. Coventry used the funds of the loan to pay the premiums due under the policies.

When the loan matured, Coventry demanded repayment from Ms. Malkin, and subsequently sent a notice of foreclosure to the sub-trust. In response, Ms. Malkin agreed to relinquish all rights to the policies. Subsequently, the Malkins resigned as co-trustees of the trust, and Wilmington Trust transferred all rights related to the trust to Coventry.

With respect to the $4 million policy issued by AIG (the "AIG Policy"), Coventry sold and assigned the AIG Policy to an affiliated entity. After several more assignments, the AIG Policy was assigned one final time to an affiliate named LST Holdings Ltd. ("LST Holdings"). Wells Fargo was later named securities intermediary and became the owner and beneficiary of the policy on behalf of LST Holdings and Coventry. Approximately one year later, Berkshire Hathaway purchased the AIG Policy, together with a number of life insurance policies from Coventry. In the governing documents, Coventry represented that to its knowledge, none of the policies was originated in connection with a stranger-originated life insurance ("STOLI") policy. Wells Fargo continued to serve as securities intermediary for Coventry, LST Holdings, and Berkshire Hathaway.

After Ms. Malkin's passing, AIG paid the death benefits to Wells Fargo, which credited the amount to Berkshire Hathaway's account. Ms. Malkin's estate filed suit to recover the AIG policy proceeds, arguing that the policy lacked an insurable interest at inception and was therefore void. The Southern District of Florida found Berkshire Hathaway and Wells Fargo liable to Ms. Malkin's estate for the proceeds of a $4 million life insurance policy, holding that the policy was an illegal STOLI policy that was void under 18 Del. Code § 2704—Delaware's insurable interest statute. Wells Fargo and Berkshire Hathaway filed appeals.

<u>UCC Application</u>: Prior to deciding the appeal, the Eleventh Circuit Court of Appeals certified a question to the Delaware Supreme Court as to whether Berkshire Hathaway and Wells Fargo could assert the bona fide purchaser defense under Section 8-502 of the UCC or the securities intermediary defense under Section 8-115.

The Delaware Supreme Court held that Section 8-502 of the Delaware UCC does not offer a viable defense to an estate's claim under Section 2704(b) against a downstream purchaser of a STOLI policy who later receives death benefits paid on that policy. The court reasoned that the action to recover death benefits under Section 2704(b) does not constitute an "adverse claim" as defined by UCC § 8-102(a)(1). They emphasized that STOLI policies are *void ab initio* on constitutional, statutory, and public policy grounds, and thus never come into legal existence. Additionally, even if the appellants were bona fide purchasers of the policy, they never acquired the right to receive the death benefit, as the policy was void from the outset. Therefore, the court concluded that Section 2704(b) defendants cannot assert a UCC § 8-502 defense because they are not faced with an "adverse claim" as defined by the Delaware UCC.

Relying on the ruling that a claim under Section 2704(b) is not an "adverse claim," the Delaware Supreme Court further held that Section 8-115 is not available as a defense to liability. However, the court noted that this does not necessarily mean a securities intermediary will be liable to pay an estate under Section 2704(b). If the securities intermediary merely acts on the instructions of the beneficial owner of a STOLI policy and credits the policy proceeds to the beneficial owner's account, it is unlikely to face ultimate liability under Section 2704(b). Instead, it may find protection from sources such as general principles of agency law or its contract with its customer, the beneficial owner of the policy. Therefore, while defendants may not assert a UCC § 8-115 defense in a Section 2704(b) claim, they may still be able to avoid ultimate liability.

Article 9: Secured Transactions

10. *United States v. Dunn*, No. 22-CV-1152-JAR, 2023 WL 8599389 (D. Kan. Dec. 12, 2023).

Background: West Plains Transport, Inc. ("West Plains") accrued unpaid federal taxes between 2013 and 2017, resulting in notices of federal tax liens from the IRS. At some time after the IRS had filed liens against West Plains, the company leased eight commercial vehicles from BMO Harris Bank ("BMO"). In 2018, West Plains, in two separate transactions, purchased the vehicles from BMO, with BMO retaining a security interest on the financed portion of the vehicles. The Kansas Department of Revenue ("KDOR") issued electronic certificates of title showing West Plains as the owner and BMO as the lienholder. BMO did not mail or deliver a notice of security interest ("NOSI"), pursuant to K.S.A. § 8-135(c)(5), for any of the vehicles to the KDOR Division of Vehicles ("Division").

West Plains defaulted and BMO repossessed and sold the vehicles, applying the proceeds to the secured obligation. The IRS then sued BMO for conversion, arguing that its tax lien had priority over BMO's security interest.

UCC Application: Following suit, BMO moved for summary judgment, arguing that its claimed purchase money security interest ("PMSI") in the vehicles held priority over the government's federal tax lien.

In ruling for BMO, the court recognized that while federal law generally prioritizes tax liens over security interests, a concession exists for valid PMSIs under local law.

The IRS contended BMO's PMSI wasn't "valid under local law" due to BMO having not delivered NOSIs within thirty (30) days of the sale of the vehicles or the Division having not issued certificates of title within twenty (20) days, as required by Kansas' version of the UCC. However, the court disagreed, holding that the deadlines referenced by the IRS did not apply to federal tax liens, but to competing secured creditors only. Given this, the court found that that the delay in perfection did not matter under federal law, and the security interest needed to be perfected only before the collateral was sold, which it was.

Article 12: Controllable Electronic Records

11. *Vital Pharmaceuticals, Inc. v. John H. Owoc (In re Vital Pharmaceutical)*, 652 B.R. 392 (Bankr. S.D. Fla. Jun. 16, 2023).

Background: This case concerned the ownership of social media accounts, particularly three accounts used to promote Vital Pharmaceuticals Inc. ("Vital") products, known as the "CEO Accounts." These accounts, initially created and managed by the company's former CEO John H. "Jack" Owoc and his wife Megan, were instrumental in marketing Vital's products, including Bang energy drink. The dispute arose when Vital terminated the Owocs, leading to a disagreement over the ownership of the CEO Accounts.

During Vital's bankruptcy, Vital asserted ownership of the CEO Accounts, arguing that they were created to promote the company's brand and generate revenue. Mr. Owoc, on the other hand, claimed that he owned the CEO Accounts, contending that they were created during his tenure and are associated with his personal brand as an "explosive, high-intensity, unstoppable leader."

While Mr. Owoc maintained the passwords for the CEO Accounts, Vital employees had access and posted content on them. The majority of the content on these accounts was related to marketing Vital's products, with only a small portion being personal posts by Mr. Owoc.

When Mr. Owoc would not turn over access to the CEO Accounts, Vital brought an adversary proceeding, seeking a court declaration that the CEO Accounts were property of the debtors' estates and subject to turnover.

UCC Application: Ruling in a summary judgment posture, the court's analysis solely addressed the question of whether social media accounts associated with a business are considered property of the bankruptcy estate. The court rejected the framework established in a previous case, *In re CTLI, LLC*, 528 B.R. 359 (Bankr. S.D. Tex. 2015), as outdated due to the evolution of social media and influencer culture. Instead, the court proposed a new framework for determining ownership rights to social media accounts, focusing on documented property interest, control over access, and use of the accounts.

In evaluating "control over access," the court relied on the standard for establishing "control" articulated by the Uniform Law Commission in new Article 12 of the UCC. Even though Florida has not adopted Article 12, the court applied the Article 12 standard for assessing control over an electronic record in evaluating whether Vital had proven that it had "control over access." Ultimately, the court ruled that neither party established that they had "control over access." However, based on other factors unrelated to the UCC, but which were weighed in favor of Vital, the Court found that the CEO Accounts were property of Vital.