

CHANGES TO MISSISSIPPI'S UNIFORM COMMERCIAL CODE

Mississippi Senate Bill 2419 was signed by Governor Barbour on April 13, 2010. SB 2419 makes a number of changes to Mississippi's Uniform Commercial Code ("UCC") and related statutes. Below is a brief summary of the changes.

Revised UCC articles-SB 2419 adopts Revised UCC Article 1 (general provisions and definitions) and amends Article 3 (negotiable instruments), Article 4 (bank deposits and collections), and Article 4A (funds transfers) to reflect amendments to the uniform versions of these articles. Conforming amendments were made to the other articles. Some of the changes are stylistic to conform to changes in other articles, and to address new technologies such as online payments and electronic checks, and new federal statutes and regulations. Substantive changes in Article 1 include adoption of the objective standard of good faith that is the standard in the rest of the UCC, a broader description of course of performance, and tightening the standards for waiver of claims after breach. SB 2419 as originally introduced contained a non-standard choice of law provision in Article 1 that permitted two corporations to choose the law of any state to govern their contract. The bill was amended to conform to the uniform choice of law provision, which limits the parties' choice of law to a state that has a reasonable relationship to the transaction. The changes to Article 3 include addressing remotely created consumer items and changing the rules regarding subrogation claims. With these changes, Mississippi's version of the UCC is current with the uniform version of the UCC, except for the most recent amendments to Article 7, which governs documents of title, and Articles 2 and 2A. Revised Articles 2 and 2A were promulgated in 2003, but have not been adopted by any state primarily because of, among other things, issues in addressing the sale of goods in which software is embedded. Amendments to Article 9 to address problems with names of debtors in financing statements (as illustrated by *Peoples Bank v. Bryan Brothers Cattle Co.*, 504 F. 3d 549 (5th Cir. 2007)), currently are in the drafting stage.

Priority of deed of trust when real property turns personal-Miss. Code § 75-2-107, which is the uniform version of Section 2-107 of the Uniform Commercial Code, provides that the rights of a purchaser of goods severed from the land are subject to "third party rights provided by the law relating to realty records." SB 2419 amends Section 75-2-107(3) to add to the end of the quoted language the following: "including the priority of previously recorded deeds of trust under Section 89-9-5". This language is intended to make clear that if minerals or timber are severed from the land, the lien and priority of an existing deed of trust continues in the minerals or timber despite their severance. This incorporates the holding of a case of first impression on this issue decided by the Mississippi Court of Appeals, *Feliciano Bank & Trust Co. v. Manuel & Sessions, L.L.C.* 943 So.2d 736 (Miss. Ct. App. 2006).

Disclaimers of implied warranties-Miss. Code Ann. § 11-7-18 currently prohibits limitations of remedies or disclaimers of implied warranties of merchantability or fitness for a particular purpose by any seller. SB 2419 limits Section 11-7-18 to consumer goods purchased by consumers. Mississippi's non-standard UCC provisions regarding implied warranties—choice of law in Article 1 (Mississippi law always governs implied warranties); § 75-2-315.1 (no waivers of implied warranties by seller or manufacturer of consumer goods); § 75-2-719(4)(no limitation of remedies for breach of implied warranties)-remain unchanged.

Enforceability of anti-assignment provisions in corporate documents-Under Sections 75-9-406(d) and 75-9-408(a) of Mississippi's version of Article 9 of the UCC, a provision in a limited partnership agreement that prohibits assignment of a limited partner's partnership interest does not apply to any rights to income from that interest; in other words, a limited partner can pledge his rights to any income or distributions from his limited partnership interest as security for a loan despite the fact that the limited partnership agreement prohibits assignment. SB 2419 adds new sections to the limited partnership statutes (to be codified as new Section 75-14-706) and general partnership statutes (to be codified as new Section 79-13-505) making Sections 75-9-406 and 75-9-408 inapplicable to the anti-assignment provisions of an limited partnership or general partnership agreement. HB 683, the new Mississippi limited liability company bill, adds a new section (to be codified as new Section 79-29-711) that makes the same change regarding assignments of limited liability company interests. Delaware, Texas, Virginia, Colorado and Kentucky have put similar limitations on Sections 9-406 and 9-408.

Statute of limitations for non-negotiable notes-Under current Mississippi law, the statute of limitations on negotiable promissory notes is six years under Mississippi's version of Article 3, while the general three-year statute of limitations applies to non-negotiable promissory notes by default. This difference is an historical accident and not the result of any policy decision. One problem this raises is that whether a note is negotiable or not is often not always clear on the face of the note, and in fact is a matter about which attorneys can and do disagree. As recently as April 8, 2010, the Mississippi Supreme Court issued a decision on this issue. *Whitaker v. Limeco Corp.*, 2010 WL 1379991. SB 2419 adds a new statute, to be codified as new Section 15-1-81, that provides that the statute of limitations for non-negotiable notes is extended from three years to six years. Under the new law all promissory notes will have the same statute of limitations. One effect this change will have is that it will be easier to tell from the land records when a deed of trust begins to lose priority to third parties. Under Miss. Code Ann. § 89-5-19, a deed of trust begins to lose priority when the statute of limitations on the secured note runs. Since one usually cannot tell from the face of a deed of trust whether the secured note is negotiable or non-negotiable, one cannot tell whether the statute of limitations on the secured note is three years or six years, and so cannot tell when the deed of trust begins to lose priority.

SB 2419 becomes effective on July 1, 2010, except for the change to the statute of limitations on non-negotiable notes. The change to the statute of limitations for non-negotiable notes becomes effective on July 1, 2012 and will apply to all non-negotiable notes for which the statute of limitations in effect prior to the effective date has not run.

This summary was prepared by Rod Clement of Brunini, Grantham, Grower & Hewes, PLLC. Rod served as vice-chair of a group formed by Secretary of State of Delbert Hosemann to study proposed changes to the Uniform Commercial Code.