**2021 Bankruptcy at the Beach**

**Commercial Law Update**

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**1. APPLICABILITY OF THE UCC.**

***Ayers v. Mays*, Case Nos. 2170639, 2170640, 2019 WL 3759100 (Ala. Civ. App. Aug. 9, 2019)**

Background: In January 2005, Mays took out a loan, secured by a mortgage on real property owned by Mays. Mays alleged that the note and mortgage were executed for the benefit of an LLC in which he had a membership interest. As the maturity date was approaching, Mays informed the other members that the loan had been taken for the benefit of the LLC and requested that the company pay the loan off. While the other members disputed that the loan was a corporate debt, they agreed to acquire the note by assignment in December 2006.

A mortgage assignment was recorded in the probate office in January 2007. In 2014, Ayers purchased the interest of the other LLC members in the note and mortgage, sent Mays a default notice, and foreclosed on the mortgaged property. Mays then filed suit, asserting claims of satisfaction, breach of contract, and declaratory judgment. Ayers filed a counterclaim asserting breach of contract, and Mays replied that the suit was barred by the statute of limitations under Ala. Code § 7-3-118.

UCC Application: Mays argued, among other things, that the six-year statute of limitations for actions to enforce notes payable pursuant to Ala. Code § 7-3-118 barred Ayers’s counterclaim. The appellate court found that the trial court properly determined that the note was due in January 2007, and thus a counterclaim filed in November 2014 was time barred. Ayers argued, however, that Ala. Code § 6-8-84, which allows a defendant to prosecute an otherwise time-barred compulsory counterclaim for recoupment, revived his claim, since Mays had filed a complaint seeking relief based on the note.

The appellate court concluded that Ala. Code § 6-8-84 did not revive Ayers’s claim, because “when a plaintiff seeks only a declaratory judgment regarding the enforceability and meaning of a negotiable instrument, the plaintiff is not making a demand on a claim for affirmative relief that triggers § 6-8-84 to revive a counterclaim arising from that instrument. In this case, Mays requested that the trial court enter a judgment declaring that the note had been satisfied and discharged or, if not, declaring the amount of principal and interest payable to Ayers on the note in order to establish how the proceeds of the foreclosure sale should be distributed. In doing so, Mays did not assert any ‘claim’ for affirmative relief based on the note against Ayers that would have revived Ayers’s counterclaim[.]”

Mays also challenged the amount of foreclosure sale proceeds to which Ayers was entitled, and specifically whether Ayers was entitled to any interest after the note matured in January 2007, as the note provided for interest during each year of the term of the loan but was silent as to interest thereafter. Ayers argued that the note required interest to be paid as long as the principal was outstanding, but even if the note was not clear on the interest, Ala. Code § 7-3-112 applied to impute interest at the judgment rate. The appellate court agreed with the trial court that this section did not apply, as it operated to set the interest rate only where the note provides for interest but does not clearly state the interest rate. Because the note contained no reference to interest after the maturity date, the section did not apply and Ayers was not entitled to any post-maturity interest.

***Bennett v. CIT Bank, N.A.*, Case No. 2:18-cv-00852-KOB, 2021 WL 2453981 (N.D. Ala. June 16, 2021)**

Background: The borrower executed a reverse mortgage, which included the borrower’s death as an event of default. Upon the borrower’s death, her will devised the home to her two children. Because of the death, the lender, through its servicer, noticed a foreclosure sale of the reverse mortgage. Prior to the foreclosure sale, the house caught fire. The children filed a declaratory judgment claim on who was entitled to the insurance proceeds. The court entered an order denying the children’s summary judgment motion, finding that there was a genuine issue of material fact as to whether the servicer had a valid assignment to service the note, and therefore the authority to foreclose the reverse mortgage. The court further found that the assignment issue could be avoided if there was no issue of fact that the servicer had possession of the mortgage note, endorsed in blank, because then the servicer would have had the authority to enforce the note as holder under the Alabama UCC.

UCC Application: On reconsideration, the court addressed the question of whether the reverse mortgage note was a negotiable instrument governed by the Alabama UCC, and found that it was not because it did not meet all of the requirements of Ala. Code § 7-3-104(a). Specifically, the note was not an unconditional promise to pay, was not for a fixed amount of money, and was not payable on demand or at a definite time.

As to the first point, negotiability was destroyed under Ala. Code § 7-3-106, because the note did not include the amount of the loan, but instead referenced the loan agreement for the amount. Further, the note stated that the borrower had no personal liability for payment, but instead the lender would look only to the property securing the note. As to the second point, the note failed to specify a fixed amount of money, but instead referenced that the borrower would repay all loan advances made under the loan agreement. As to the third point, the note did not state that it was payable on demand or have a specific date for repayment, other than a reference that the note was payable no later than October 15, 2075. Because of these deficiencies, the court found that the note was not a negotiable instrument under the Alabama UCC.

The lender argued that the servicer could still enforce the note outside of the Alabama UCC because it possessed the note endorsed in blank. However, the court was not convinced, as the servicer was not the owner of the debt or the true party in interest. Accordingly, the lender was directed to show at trial that the servicer had authority to foreclose through a valid assignment of the note in order for the lender to be entitled to the insurance proceeds.

***Coleman v. Boston Scientific Corp.*, Case No. 1:17-cv-439-TFM-C, 2020 WL 7090701 (S.D. Ala. Sept. 22, 2020)**

Background: The plaintiff had surgery to remove her spleen in February 2015. In March 2015, the catheter inserted in her abdomen was removed. The plaintiff subsequently suffered various symptoms, which led to exploratory surgery and the discovery that part of the catheter had broken off into her abdomen. The plaintiff filed an action in September 29, 2017 against the manufacturer of the catheter, asserting claims for breach of express and/or implied warranty, among other things.

UCC Application: The defendant asserted that the breach of warranty claim was barred by the four-year statute of limitations of Ala. Code. § 7-2-725(1) based on when tender of delivery was made to the hospital on September 16, 2013. The plaintiff argued that the catheter was a consumer good, such that the cause of action accrues when the injury occurs. Alternatively, the plaintiff argued that the applicable tender date was when the catheter was tendered to the plaintiff during her surgery in February 2015.

The court found that the catheter was not a “consumer good” under Ala. Code § 7-9A-102(a)(23), as the definition of that term does not appear to contemplate medical devices purchased by hospitals to provide medical services to patients. With respect to the tender date, the court noted that neither party cited any cases in support of their positions that the tender date was the date the catheter was delivered to the hospital or the date the catheter was inserted in the plaintiff. Further, there was no evidence in the record to establish the delivery date, so the court denied summary judgment on that basis.

***NTA Graphics South, Inc. v. Axiom Impressions, LLC*, 413 F. Supp. 3d 1164 (N.D. Ala. 2019)**

Background: The plaintiff and defendant printed newspaper advertising inserts and circulars. When the defendant’s facility was damaged by a roof collapse and fire, it reached an oral agreement with the plaintiff for the plaintiff to handle some of the defendant’s print jobs until the defendant’s facility was repaired. The parties did not contemplate that the agreement would need to exceed one year. The plaintiff subsequently made an error in one of the defendant’s print jobs for its customer AG Florida, whereby the plaintiff included pages from a completing grocer’s advertisement with the advertisement of one of AG Florida’s grocery customers.

The defendant alleged that (a) AG Florida demanded a credit for the error, which the defendant provided for fear of losing AG Florida as a customer, and (b) the defendant had to delay its plans to present a price increase to AG Florida because of the error. The parties had additional disputes over invoices for other jobs that the plaintiff printed for the defendant, and the defendant’s nonpayment of certain invoices led to the plaintiff filing suit for breach of contract. The defendant asserted counterclaims, including breach of contract and breach of express and implied warranty.

UCC Application: The court first considered whether the Statute of Frauds, Ala. Code § 7-2-201, operated to prevent enforcement of the parties’ agreement. Although courts have come to different conclusions on whether a contract for printed materials is a contract for goods or services, the court in this case determined that the oral agreement was a contract for services. Considering the “predominant purpose” test used by many courts but not yet adopted by the Alabama Supreme Court, the court noted that the defendant provided the graphics and instructions for all jobs, and 95% of the paper used. The plaintiff was only responsible for providing the printing presses and labor required to turn those items into the advertisement inserts. As a contract for services, the UCC and its Statute of Frauds did not apply to the parties’ oral contract. For these same reasons, the breach of express and implied warranty claims asserted under Ala. Code §§ 7-2-313 and 7-2-314 were not applicable. The general Statute of Frauds under Ala. Code § 8-9-2(1) also did not apply, as that statute does not apply to agreements for less than one year.

***Patterson v. Johnson’s Heavy Salvage, Inc.*, Case No. 1:20-cv-00259-ECM, 2021 WL 2169477 (M.D. Ala. May 27, 2021)**

Background: The parties reached an oral agreement for the defendant to pay the plaintiff $100,000 to remove all salvage from the plaintiff’s property within a year. The defendant paid part of the amount due and removed most, but not all, of the salvage it agreed to take. The plaintiff demanded full payment and performance, but neither occurred. The plaintiff filed suit to enforce the terms of the agreement, and the defendant failed to respond.

UCC Application: Upon consideration of the plaintiff’s motion for default judgment, the court applied the “predominant purpose” test to determine whether the contract was one for goods or services and found that the contract was one for goods. Notably, the allegations suggested that the defendant wanted to purchase the salvage materials from the plaintiff, with the removal of such materials being part of the payment. As such, the Alabama UCC, and its Statute of Frauds, applied. Although the parties did not appear to have a written contract, Ala. Code § 7-2-201 permitted enforcement of their oral contract because they were both merchants in the sale of salvaged parts and the defendant had received written confirmation of the written contract from the plaintiff but did not object. Additionally, the defendant had partially performed under the oral agreement. Accordingly, the contract was not voided by the Statute of Frauds, and the plaintiff was entitled to judgment in its favor for breach of contract.

***Export Development Canada v. Shore Acres Plant Farm, Inc.*, Case No. 1:20-cv-00599-KD-B, 2021 WL 1015852 (S.D. Ala. Mar. 16, 2021)**

Background: A third party executed a credit agreement with the defendant. The defendant ordered agricultural goods from the third party and accepted the goods when delivered by the third party. When the third party sent invoices to the defendant for the goods, the defendant failed to pay. The plaintiff, the third party’s insurer under a credit insurance policy, paid the third party for the goods, and in return was assigned the third party’s rights to its claims against the defendant related to the goods. The plaintiff asserted claims against the defendant for action for the price, breach of contract, account stated, and restitution/quasi-contract. When the defendant failed to respond, the plaintiff moved for a default judgment.

UCC Application: With respect to the plaintiff’s “action for the price” claim under Ala. Code §§ 7-2-709 and 7-2-607(1), the plaintiff pointed to the credit agreement as an alleged contract for the sale of goods. The court found, however, that the credit agreement was not a contract for the sale of goods, but instead just an agreement to extend the line of credit to the defendant. As such, the credit agreement was a services agreement and Ala. Code § 7-2-709 was not applicable pursuant to the credit agreement.

The court then considered whether there was an oral contract for the sale of goods that prompted the issuance of the invoices from the third party to the defendant. Under Ala. Code § 7-2-201(1), there had to be “some writing” to satisfy the Statute of Frauds. The written invoices were not sufficient because they were not signed by the defendant. However, because the defendant had accepted the goods for which the invoices were issued, the exception of Ala. Code § 7-2-201(3)(c) applied. The written invoices coupled with the defendant’s acceptance of the goods gave the plaintiff a claim for “action for the price” under Ala. Code § 7-2-709, and liability was determined based on the allegations in the plaintiff’s complaint.

With respect to damages, the court awarded the plaintiff the price of the goods accepted, but denied the plaintiff’s request for interest at 1.5% per month and attorneys’ fees. Because the credit agreement could not be the basis for a claim under Ala. Code § 7-2-709, the plaintiff was not entitled to amounts due thereunder but instead only for “incidental damages” recoverable under Ala. Code § 7-2-710, which include damages “incurred in connection with stopping delivery, transportation, care and custody of goods after the buyer’s breach, or the return or resale of the goods[.]” No such damages were present in this case, as the attorneys’ fees and costs sought by the plaintiff were not included in the definition of “incidental damages.” While the plaintiff was entitled to interest on the contract pursuant to Ala. Code § 8-8-8, it was limited to the maximum rate allowed by Ala. Code § 8-8-1—not more than 6% per annum.

**2. ARTICLE 4A.**

***Simple Helix, LLC v. Relus Technologies, LLC*, 493 F. Supp. 3d 1087 (N.D. Ala. 2020)**

Background: The plaintiff and defendant Relus had a multi-year business relationship. In May 2017, the plaintiff’s CEO initiated a wire transfer from the plaintiff’s bank account at FirstBank to Relus’s bank account, which included approximately $150,000 for materials, supplies, and services provided by Relus and an approximately $500,000 overpayment. The plaintiff’s CEO then emailed Relus from a fictitious corporate email account, requesting a refund over the overpayment to be sent to an account maintained by defendant Wells Fargo. After confirming the wire instructions through email, Relus initiated the transfer to Wells Fargo via a payment order bearing the plaintiff’s name and the CEO’s personal Wells Fargo bank account number. Wells Fargo accepted the transfer and credited the CEO’s account. When Relus would not refund the overpayment to the plaintiff, the plaintiff sued Relus and Wells Fargo, asserting various claims in an attempt to recover the overpayment.

UCC Application: Among other things, the plaintiff alleged that Wells Fargo violated Ala. Code § 7-4A-207 by crediting the CEO’s account, even though the transfer information indicated that the funds were intended for the plaintiff. The court found that the plaintiff did not have standing to bring a claim under that section. For purposes of the discussion, the court accepted as true that Wells Fargo had actual knowledge of the discrepancy between the name and bank account listed on the payment order. Because Wells Fargo paid the CEO, who was not entitled to receive the payment, no person had a right as beneficiary under Ala. Code § 7-4A-207(b)(2). Accordingly, Wells Fargo never “accepted” the transfer, and this “nonacceptance” only triggered rights in favor of the parties to the payment orders, namely Relus, Relus’s bank, and Wells Fargo. While Relus’s bank, as the originator’s bank, could seek a refund from Wells Fargo, the plaintiff had no rights to do so or to otherwise recover the funds from Wells Fargo. The court found that the UCC’s silence as to any rights of the plaintiff as a third party to the payment order was consistent with Arcitle 4A’s stated purpose, specifically: “In the drafting of [Article 4A’s] rules, a critical consideration was that *the various parties to funds transfers* need to be able to predict risk with certainty, to insure against risk, to adjust operational security procedures, and to price funds transfer services appropriately.”

The plaintiff also alleged conversion and money had and received claims against Wells Fargo. The court found that neither claim was preempted by Article 4A, finding that the statutes does not address the situation alleged in this case that not only did Wells Fargo know of the discrepancy in the payment order, but also knew that Relus intended to pay the plaintiff via the payment order. Nevertheless, the court found that the plaintiff had not alleged plausible claims for conversion or money had and received against Wells Fargo because Wells Fargo did not receive or keep the funds for its own benefit.

**3. ENFORCEMENT ISSUES.**

***Nelson v. Nationstar Mortg., LLC (In re Nelson)*, 607 B.R. 685 (Bankr. N.D. Ala. 2019)**

Background: The debtors challenged Nationstar’s standing to file a proof of claim for the debtors’ home mortgage loan. Nationstar serviced the loan on behalf of FreddieMac, who had acquired the note after a series of assignments. The debtors argued that the endorsements for each of the assignments were undated and that there was no evidence that the rubber stamp endorsements were placed on the note by the individuals or organizations they purported to represent. FreddieMac had owned the note since 2007, and Nationstar had possession of the note, endorsed in blank, since 2013, either directly or through a document custodian.

UCC Application: The bankruptcy court considered Article 3 of the Alabama Uniform Commercial Code as the applicable non-bankruptcy law on who was entitled to enforce the mortgage note. Under that law, the note could be enforced by (1) the holder of the note, (2) a nonholder who was in possession of the note and who had the rights of the holder, or (3) a person not in possession of the note who was entitled to enforce it. Where the note is endorsed in blank, it may be negotiated by transfer of possession alone. Because the evidence established that Nationstar was in possession of the note, either directly or through a document custodian, which note was endorsed in blank, Nationstar was the holder of the note under the Alabama UCC. As such, Nationstar was entitled to enforce the note as agent for FreddieMac.

***In re Womack*, 616 B.R. 420 (Bankr. M.D. Ala. 2020)**

Background: The debtor entered into a pawn contract, pledging her vehicle as collateral. The debtor subsequently filed for bankruptcy and proposed to repay the debt owed over the life of the plan. The creditor objected to the proposed treatment, arguing that the vehicle was not property of the bankruptcy estate once the redemption period, as extended by 11 U.S.C. § 108(b), expired.

UCC Application: Noting that Alabama law applied to the determination of whether the vehicle was part of the debtor’s bankruptcy estate, the court found that under the Alabama Pawnshop Act, the creditor only has a lien in the collateral until the borrower defaults, at which time title to the collateral passes to the creditor. Because the debtor filed for bankruptcy before she defaulted, the vehicle became part of the bankruptcy estate and the creditor was merely a lienholder with respect to the vehicle. The court further found that the creditor had a perfected UCC lien on the vehicle with its lien notated on the certificate of title, noting that a pawnbroker may obtain both types of liens in the same collateral for the same transaction. Because the creditor had a lien on the vehicle, the lien was modifiable pursuant to 11 U.S.C. § 1322(b)(2).

***AgGeorgia Farm Credit, ACA v. Wynn (In re Wynn)*, 627 B.R. 192 (Bankr. M.D. Ga. 2021)**

Background: The debtor, Wilson Jerry Wynn, executed a loan agreement and security agreement for the purchase and financing of a John Deere tractor. Deere filed a UCC financing statement listing the debtor as “Jerry W Wynn.” The debtor subsequently executed a note payable to AgGeorgia, which was secured by a lien on farm equipment, specifically including the John Deere tractor. After the debtor filed a chapter 12 petition, AgGeorgia filed a complaint to determine the validity and priority of the competing liens in the John Deere tractor.

UCC Application: Looking to Georgia’s Uniform Commercial Code, the bankruptcy court noted that Georgia law requires the financing statement to list the debtor’s name as listed on his driver’s license, but if a search of the debtor’s correct name using the filing office’s standard search logic would disclose a financing statement filed under the incorrect name, the error is not considered to be seriously misleading. Deere submitted an affidavit with a certified search of the name “Wilson Wynn,” which disclosed Deere’s financing statement. AgGeorgia submitted an affidavit with an exact name search, which did not disclose Deere’s financing statement. The exact name search was used by the filing office, and, because it would not have disclosed Deere’s financing statement, the bankruptcy court found that Deere’s security interest was not perfected until it subsequently amended the financing statement to correct the debtor’s name. AgGeorgia’s financing statement that was filed before Deere’s amendment therefore gave AgGeorgia priority over Deere. The bankruptcy court further found that AgGeorgia’s actual notice of Deere’s lien did not affect the priority of the parties’ liens or alter the “first-to-perfect” rule under Georgia law.

**4. REMEDIES AFTER ARTICLE 9 SALE.**

***Atlas MF Mezzanine Borrower, LLC v. Macquarie Texas Loan Holder LLC*, 174 A.D. 3d 150 (N.Y. App. Div. 2019)**

Background: The debtor, a developer of multi-family housing, defaulted on its mezzanine loan, and the secured creditor noticed a nonjudicial public sale of the equity interests in the parent company. The creditor published notice of the sale in two newspapers twelve days before the sale was to occur. The debtor submitted documentation to register as a bidder at a sale. The creditor allegedly changed the bidding requirements such that the debtor’s documentation was not sufficient to qualify it as a bidder, but the debtor was ultimately permitted to bid at the sale. After several rounds of bidding at the auction, a third party was selected as the successful bidder with a lower bid than the debtor’s final bid, based on the third party’s ability to close. The creditor transferred ownership of the parent company to the successful bidder, and the debtor challenged the validity of the sale.

UCC Application: On appeal of the secured creditor’s motion to dismiss, the debtor argued that UCC § 9-617’s language of “subject to the debtor’s rights in the collateral” meant that if there was a bad faith transferee, the debtor retained ownership of the collateral such that the court could set aside a sale as void and invalid. The court noted that UCC § 9-617 discusses the rights of transferees, but not the debtor’s rights if there is a bad faith transferee. While the UCC does not expound on the “subject to the debtor’s rights in the collateral” language, the court found that the statute’s inclusion of only rights and not remedies suggested that the “subject to” language did not permit the court to set aside the sale. Further, UCC § 9-625 does address the remedies available to the debtor where the secured creditor fails to comply with Article 9, but only provides for injunctive relief where the sale has not already occurred. After the sale, the debtor is only entitled to monetary damages, even if the third party was a bad faith transferee.