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There May be Consumer Laws ‘Lurking’ in Your Commercial Transaction

By Eric L. Johnson

As a business/commercial practitioner, you may never have thought you needed to concern yourself with the multitude and varied sets of laws applicable to transactions involving a consumer. After all, the laws applicable to a consumer transaction are distinct from those applicable to a business or commercial transaction, right? Even if you thought you only had to concern yourself with the rules in the Oklahoma Uniform Commercial Code 12A OKLA. STAT. §§1-101 *et seq.* (UCC) – you should know that there are rules within the UCC that may provide for a different outcome when dealing with a consumer transaction. In addition, there are rules outside of the UCC you should be acquainted with when a consumer is involved that could have an impact on your analysis. Finally, you should be aware of how one Oklahoma act that one may typically view as only being applicable to consumers may be used against your business clients, or that you may be able to use against other businesses.

INTRODUCTION

The general structure of law under the UCC contains two fairly distinct sets of legal principles 1) one set of rules that will apply in relationships between merchants and 2) another set of rules that will apply in relationships between merchants and consumers. There are several important differences between a commercial transaction and a consumer transaction. For example, a commercial transaction

usually involves most, if not all, of the following factors:

- (a) two knowledgeable parties;
- (b) contractual provisions which are relatively clear in meaning to the experienced parties;
- (c) contractual provisions which are bargained for or which are boilerplate; and

- (d) parties of sufficient position so that they are able to bargain with each other.

A consumer transaction generally involves the opposite of each of the above factors. Consumer transactions generally involve:

- (a) transactions that are principally for a personal, family or household purpose;
- (b) relatively unknowledgeable consumer;
- (c) forms that were drawn by the other party in technical or legal language seldom read or understood by the consumer; and
- (d) little or no bargaining by the consumer where the consumer is faced with a “take-it-or-leave-it” proposition.

Because of these inherent differences, special rules were developed to protect consumers. Legal rules were drafted, both at the federal and state levels, to protect consumers because it was perceived they could not protect themselves as merchants or business persons are able to do. If you were to visualize a transaction between a merchant and a consumer, you might think of a square bargaining table in a room, where a merchant sits at one end of the table and a consumer sits at the opposite end. Given the above factors, the bargaining table would be profoundly tilted in favor of the merchant. Over the past 40 to 50 years, Congress and state Legislatures have enacted legislation specifically designed to protect consumers and level the inequities at the bargaining table. As each new consumer protection is enacted, the bargaining table tilts a bit more in favor of the consumer.

Most of the federal and state consumer protection laws or rules modify the rules in the UCC either by pre-empting the rules or by supplementing the rules. Thus, it is important for a practitioner advising parties involved in transactions governed by the UCC to recognize that the UCC alone may not be the complete applicable law — and to consider laws outside of the UCC that may have an impact on the transaction, particularly when a consumer is involved in the transaction. Therefore, the purpose of this article is to describe in summary format some of the significant parts of the vast and diverse mix of laws at the federal and state levels that protect consumers and relate to the UCC, especially Article 9.

CONSUMER PROVISIONS IN THE OKLAHOMA UNIFORM COMMERCIAL CODE

The UCC is designed primarily to codify appropriate practices and to provide “default” rules in the absence of an agreement for commercial transactions between merchants. It is not designed to protect the weaker party to a commercial bargain. Therefore, freedom of contract is a basic principle of the UCC. However, how can these principles accommodate transactions that involve a consumer? The rules to protect consumers must be mandatory for the most part or the nonconsumer side will write them out, having both the power and incentive to do so. Consumer rules tend to protect a subset of transaction participants, usually at greater cost to or with less efficiency for other users, which is the reverse of normal UCC policy that attempts to codify the most efficient and least costly rule for the benefit of all. Because states view the need for most special consumer rules differently, a great deal of consumer protection law is found at the local level.

Application of the UCC to Consumer Transactions

The UCC does not exclude transactions between merchants and consumers. Rather, almost all articles of the UCC apply to consumer transactions. This requires an analysis of the UCC rule to determine if the rule is appropriate for a transaction in which one party is a consumer. If the rule is not appropriate, you should note that several options have been utilized in the UCC:

Option 1: The first option is that an exception can be made that excludes consumer transactions from UCC coverage. This option has seldom been used.

Option 2: The most common option is Option 2 which uses a particular rule in the UCC itself that creates a different rule for consumers than for commercial parties.

Option 3: A third option is to defer to consumer protection law outside of the UCC. In essence, the UCC invokes pre-emption of itself.

Option 3 is substantially employed in Article 9, even though most articles also follow Option 2 and contain some particular rules specific to consumer transactions. Option 3 also involves several issues that need to be addressed.

- *First*, unless a Legislature has written the reference to the law outside the UCC more explicitly, the reference to that law is somewhat general;
- *Second*, UCC §1-9-201(b) lists what sort of laws are contemplated, such as retail installment sales acts and small loan acts;¹ and
- *Third*, the references in UCC §1-9-201(b) to statutes or regulations that regulate the rates, charges, agreements and practices for loans, credit sales or other extensions of credit are more specific than the references in §1-103(b), which indicates that other laws outside the UCC supplement the UCC unless displaced by particular provisions of the UCC.²

Article 9-Secured Transactions

Article 9, like other articles of the UCC, defers to consumer protection laws and certain other laws, such as rate limits, charges, agreements and practices outside the UCC. *See* §1-9-201(b) and (c).³ However, Option 2 is employed throughout Article 9 whereby a rule for consumers may be created that is different than the treatment for commercial parties. A summary of the consumer provisions in Article 9 include:

- §1-9-102, which protects certain consumer consignments;
- §§1-9-103 and 1-9-626, which discusses the noncodification of either the “dual status” or “transformation” rules for determining whether a purchase-money security interest (PMSI) continues after a refinance of or other subsequent change in a consumer-goods transaction;
- §1-9-108, which provides that a description only by type of collateral is an insufficient description of consumer goods, a security entitlement or account, or a commodity account in a consumer transaction;
- §1-9-109, which excludes from Article 9 wage assignments and assignments of deposit accounts in a consumer transaction;
- §1-9-201, which subjects the rules of Article 9 to applicable consumer laws;
- §1-9-204, which limits an after-acquired property clause in its reach with respect to consumer goods;

- §1-9-309, which generally permits automatic perfection of a purchase-money security interest in consumer goods;
- §1-9-320, which protects consumer buyers at garage type sales;
- §1-9-337, which protects a nonmerchant buyer of goods (*i.e.* consumer) covered by a clean certificate of title even if there is a perfected security interest in them;
- §§1-9-403 and 1-9-404, which protect a consumer debtor’s ability to assert claims and defenses, §1-9-405 which allows a different rule with respect to modification of assigned contracts to trump the Article 9 rule in the case of a consumer and §1-9-406, which allows payment to the original obligee until notice of assignment;
- §1-9-602, which restricts waiver of certain protections for consumer debtors and obligors (*see also* §1-9-624);
- §1-9-612, which provides a separate timing rule for notice of disposition in a consumer transaction, §1-9-614, which provides a separate rule on what a notice of disposition must contain in a consumer-goods transaction and §1-9-616, which provides for an explanation in connection with a surplus or asserted deficiency in a consumer-goods transaction;
- §§1-9-620 — 1-9-622, which provide special protections and limitations on the ability of a secured party to retain collateral where the collateral is consumer goods or in a consumer transaction;
- §1-9-625, which provides particular sanctions for creditor violations of certain rules in the case of consumers; and
- §1-9-626, which leaves open the allowance or disallowance of a deficiency in consumer transactions.

FEDERAL ACTS AND REGULATIONS

The Federal Consumer Credit Protection Act

In addition to being aware of the consumer provisions in Article 9, a practitioner should also be cognizant of the federal rules outside of the UCC when a consumer is involved that may have an impact on one’s analysis. One such law is the federal Consumer Credit Protection Act⁴ (CCPA). The CCPA was passed by Congress in the late ‘60s and regulates con-

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sumer and some merchant-to-merchant transactions. Other laws were enacted by Congress under the CCPA such as: the Truth-in-Lending Act (TILA), consumer leasing, credit cards, Fair Credit Billing, Equal Credit Opportunity, Fair Debt Collection and Electronic Fund Transfers. Later, amendments added substantive provisions beyond disclosure, such as prohibiting use of the so-called “Rule of 78” (15 U.S.C. §1615), mandating “restitution” for some disclosure errors (15 U.S.C. §1607(e)), and limiting freedom of contract in connection with so-called “high-rate,” “high fee” mortgages and home equity plans (15 U.S.C. §§1639, 1647). The result was a “Swiss cheese” type effect on the state law which is pre-empted only if a person is subjected to both federal and state laws and could not comply with both. In many instances, the federal law allows a state to “opt out” of the federal law as determined by the Federal Reserve Board. In the case of TILA, five states, including Oklahoma, sought and obtained the opt out.⁵ For the opt out to occur however, the state law must be substantially similar to the federal law in terms of consumer protection and must provide adequate means for enforcement.

At the time of this writing, the CCPA covers the following federal acts and implementing regulations:

- Truth in Lending Act and Regulation Z;
- Fair Credit Billing Act and Regulation Z;
- Consumer Leasing Act and Regulation M;
- Fair Credit Reporting Act;
- Equal Credit Opportunity Act and Regulation B;
- Fair Debt Collection Practices Act;
- Electronic Fund Transfers Act and Regulation E;
- Garnishment restrictions; and
- Credit Repair Organizations.

Other Federal Legislation

In addition to the CCPA, there are other federal acts and regulations that may apply to a commercial transaction as well as a consumer transaction:

- Truth in Savings Act;
- Real Estate Settlement Procedures Act and HUD’s Regulation X;
- Magnuson-Moss Act;
- Expedited Funds Availability Act and Regulation CC;
- Bankruptcy Code provisions;
- Interstate Land Sales Full Disclosure Act; and
- Federal Regulation (*i.e.* the Depository Institutions Deregulation and Monetary Control Act of 1980).

Some of these acts and regulations contain features that have a dual application to both consumer and commercial transactions. For example, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, the Expedited Funds Availability Act, certain Bankruptcy Code provisions and the Interstate Land Sales Full Disclosure Act have features that may apply to both a commercial and a consumer transaction.

STATE LAW

Oklahoma Uniform Consumer Credit Code

A practitioner should also be aware of other state rules outside of the UCC that will apply when a consumer is involved. The Oklahoma Uniform Consumer Credit Code, 14A OKLA. STAT. §§1-101 to 9-101 (U3C) is one such set of rules. The U3C is supplemented by the provisions of the UCC. Section 1-103 of the U3C, *Supplementary General Principles of Law Applicable*, provides that:

Unless displaced by the particular provisions of this act, the Uniform Commercial Code and the principles of law and equity, including the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause, supplement its provisions.

The U3C applies to sales, leases and loans “made” in Oklahoma and to modifications, including refinancings, consolidations, and deferrals, made in Oklahoma, of sales, leases, and loans, wherever made.⁶ In addition, the U3C provides rate regulation for two types of commercial purpose transactions:

1) *Sales Other than Consumer Credit Sales (Other Sales)*. U3C §§2-601 and 2-605 cover sale transactions that do not qualify as consumer credit sales (U3C §2-104). There is no limit (except subject to a possible claim of unconscionability) on the rate in this type of transaction. The parties may contract for any annual percentage rate. However, the parties may, by agreement, contract for the consumer credit sale rules of the U3C to apply. Otherwise, none of the general provisions of the U3C apply to *Other Sales*.

2) *Loans Other than Consumer Loans (Other Loans)*. U3C §§3-601 and 3-605 cover transactions that do not qualify as consumer loans (U3C §3-104). The annual percentage rate cannot exceed 45 percent in this type of transaction.⁷ However, the parties may, by agreement, contract for the consumer loans rules of the U3C to apply. Otherwise, none of the general provisions of the U3C apply to *Other Loans*.

Oklahoma Consumer Protection Act

Another set of state rules outside of the UCC that a commercial law practitioner should be aware of is the Oklahoma Consumer Protection Act, 15 OKLA. STAT. §§751-764.1 (OCPA). Although the name implies the primary purpose of the act is to protect consumers, which it does, the OCPA also applies to commercial purpose transactions. The OCPA can be used as a sword or shield in commercial transactions.

1) Important Definitions

Under the OCPA, “person” means a natural person, corporation, trust, partnership, incorporated or unincorporated association, or any other legal entity. “Consumer transaction” means the advertising, offering for sale or purchase, sale, purchase or distribution of any services or any property, tangible or intangible, real, personal, or mixed, or any other article, commodity, or thing of value wherever located, for purposes that are personal, household, or **business oriented** (emphasis added). As noted, the definition of a “consumer transaction” is not limited to consumer transactions and includes business purpose transactions as well. “Deceptive trade practice” means a misrepresentation, omission or other practice that has deceived or could reasonably be expected to deceive or mislead a person to his detriment. The practice may occur before, during or after a consumer transaction and may be oral or

written. “Unfair trade practice” means any practice that offends established public policy or if the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.⁸

2) Unlawful Practices

Section 753 of the OCPA provides a laundry list of unlawful practices that are declared to be unlawful under the OCPA. Note that the unlawful practices described in §752(1) to (11) are described in subjective tests as well as objective tests; *i.e.* “with reason to know.”

3) Additional Unlawful Practices

Section 752A of the OCPA contains some additional unlawful practices related to credit and debit cards that are not included in the laundry list above. A person who accepts credit cards or debit cards for a consumer transaction is prohibited from printing more than the last five digits of the account number or the expiration date on any receipt provided to the cardholder. However, this section only applies to electronically printed receipts, not those that are handwritten or where an imprint or copy of the card is made.⁹

4) Exceptions to the OCPA

The OCPA does *not* apply to publishers, broadcasters, printers or other similar persons, who are involved in the dissemination or reproduction of information on behalf of others without the knowledge that it is unlawful. In addition, the OCPA does not apply to actions or transactions regulated under laws administered by the Corporation Commission or any other regulatory body or officer acting under statutory authority, or acts done by retailers or other persons acting in good faith on the basis of information supplied by others and without knowledge of the deceptive nature of the information.¹⁰

5) Enforcement

Actions by Public Officials

The attorney general or a district attorney may bring an action to: 1) obtain a declaratory judgment that an act or practice violates the OCPA; 2) enjoin, or to obtain a restraining order against a person who has violated, is violating, or is likely to violate the OCPA; 3) recover actual damages and, in the case of unconscionable conduct, penalties as provided by the OCPA, on behalf of an aggrieved consumer, in an individual action only, for

violation of the OCPA; or 4) recover reasonable expenses and investigation fees.¹¹

Consent Judgment

In lieu of instigating or continuing an action or proceeding, the attorney general or a district attorney may accept a consent judgment with respect to any act or practice declared to be a violation of the OCPA. The consent judgment has to provide for the discontinuance of the violation of the OCPA, may provide for the payment of reasonable expenses and investigation fees incurred and may include a stipulation for restitution and for specific performance. The consent judgment will not operate as an admission of the violation unless the judgment does so by its terms. The judgment must also be approved by the court and entered as judgment, and once such approval is received, any breach of the conditions of the consent judgment will be treated as a violation of the court order subjecting a party to all penalties provided by law.¹²

Power of the Court

In any action brought by the attorney general or a district attorney, the court may: 1) issue restraining orders; 2) order compensation for damages; 3) reform the transaction in accordance with a consumer's reasonable expectations; 4) appoint a master or receiver or order sequestration of assets and assess expenses of the master or receiver against the violator; 5) revoke any license or certificate authorizing the violator to engage in a business in Oklahoma; 6) enjoin any person from engaging in business in Oklahoma; or 7) grant other appropriate relief.¹³

Investigations

The attorney general or a district attorney may investigate if they have reason to believe a violation of the OCPA has occurred and an investigation is in the public interest.¹⁴ The investigation demand may include production of documents. Finally, subpoenas may be issued and hearings may be held.¹⁵

6) Liability Under the OCPA

Consumer Actions

The commission of any act or practice declared to be a violation of the OCPA will render the violator liable to the aggrieved consumer under a private right of action for the payment of actual damages sustained by the

customer and cost of litigation, including reasonable attorney fees. In that private action for damages, after adjudication, on motion of the prevailing party, the court may determine that a claim or defense asserted by the nonprevailing party was asserted in bad faith, was not well grounded in fact, or was unwarranted by existing law or a good faith argument for the extension, modification or reversal of existing law. On so finding, the court can enter a judgment ordering the nonprevailing party to reimburse the prevailing party up to \$10,000 for reasonable costs and attorney fees incurred with respect to the claim or defense.¹⁶

Unconscionability

The commission of any act or practice declared to be a violation of the OCPA, if such act or practice is also found to be unconscionable, will render the violator liable to the aggrieved customer for the payment of a civil penalty, recoverable in an individual action only, up to \$2,000 for each violation. In determining whether an act or practice is unconscionable, the following circumstances will be taken into consideration by the court: 1) whether the violator, knowingly or with reason to know, took advantage of a consumer reasonably unable to protect his or her interests because of his or her age, physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factor; 2) whether, at the time the consumer transaction was entered into, the violator knew or had reason to know that the price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by like consumers; 3) whether, at the time the consumer transaction was entered into, the violator knew or had reason to know that there was no reasonable probability of payment of the obligation in full by the consumer; and 4) whether the violator knew or had reason to know that the transaction he or she had induced the consumer to enter into was excessively one-sided in favor of the violator.¹⁷

7) Violation of the OCPA or an Injunction

Any person who is found to be in violation of the OCPA in a civil action or who willfully violates the terms of an injunction or an order issued pursuant to the OCPA must forfeit and pay a civil penalty up to \$10,000 per violation in addition to other penalties that may be imposed by the court, all as determined by the court.¹⁸ The action to recover such penalties may be

maintained by the attorney general or a district attorney, acting in the name of the state. Recovered penalties may be retained by the attorney general or a district attorney and used for the furtherance of their duties and activities under the OCPA.¹⁹ Actions may apparently be maintained by a consumer as well.

8) Criminal Penalties

In addition to other penalties provided by the OCPA, a person convicted of violating the OCPA is guilty, on a first offense, of a misdemeanor and is subject to a fine up to \$1,000 and/or imprisonment in the county jail for up to one year. If the value of the money or property involved is \$500 or more, or is a subsequent violation, then the convicted person is guilty of a felony and subject to a fine of up to \$5,000 and imprisonment in a state penitentiary for up to 10 years.²⁰

CONCLUSION

These materials are intended to be only a summary of the impact of consumer laws on commercial law transactions. When a consumer is involved, a practitioner should be aware of the rules in the UCC that may provide for a result that is different than one in commercial transactions. Further, you should also become familiar with the federal and state rules outside of the UCC that may have an impact on your commercial transaction. Finally, you should be alert to the impact the OCPA may have on not only transactions involving consumers, but on business transactions as well. The laws and rules discussed in this article play an important role in protecting the consumer in consumer transactions. However, you may not be aware that these traditional consumer protection type laws may also be "lurking" in your commercial transaction.

1. UCC §1-9-201(b) provides: "A transaction subject to this article is subject to any applicable rule of law which establishes a different rule for consumers, and any other statute or regulation that regulates the rates, charges, agreements and practices for loans, credit sales or other extensions of credit."

2. UCC §1-103(b) provides: "Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."

3. UCC §1-9-201(c) provides: "In case of conflict between this article and a rule of law, statute or regulation described in subsection (b) of this section, the rule of law, statute or regulation controls. Failure to comply with a statute or regulation described in subsection (b) of this section has only the effect the statute or regulation specifies."

4. 1968 Pub. L. No. 90-321, 82 Stat. 146 (May 29, 1968), codified at 15 U.S.C. 1601 *et seq.*

5. The five states are: Connecticut, Maine, Massachusetts, Oklahoma and Wyoming. Credit or lease transactions subject to the Oklahoma Consumer Credit Code are exempt from Chapters 2 and 5 of the federal act. However, the exemption does not apply to sections 132 through 135 of the federal act, nor does it apply to transactions in which a federally chartered institution is a creditor or lessor. *See* 12 C.F.R. pt. 226, *supp.* I, §226.29(a) cmt. 4.

6. 14A OKLA. STAT. §1-201(1). *See also* the extraterritorial application in 14A OKLA. STAT. §1-201A.

7. 14A OKLA. STAT. §§3-605 and 5-107(2). Commercial practitioners who have given usury opinions may be familiar with this application of the U3C to commercial loans.

8. 15 OKLA. STAT. §752.

9. 15 OKLA. STAT. §752A.

10. 15 OKLA. STAT. §754.

11. 15 OKLA. STAT. §756.1A.

12. 15 OKLA. STAT. §756.1B.

13. 15 OKLA. STAT. §756.1C.

14. 15 OKLA. STAT. §757.

15. 15 OKLA. STAT. §758.

16. 15 OKLA. STAT. §761.1A.

17. 15 OKLA. STAT. §761.1B.

18. 15 OKLA. STAT. §761.1C.

19. 15 OKLA. STAT. §761.1D.

20. 15 OKLA. STAT. §761.1E.

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