INTERSTATE DOCUMENTS OF TITLE: THE NECESSITY FOR MODERNIZATION

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In the contemporary business environment, organizational survival depends in part upon alert adoption of any innovation which will either improve profits or reduce expenses. Virtually, every segment of the private sector endeavors to discover and implement technological innovations that conceivably alter cost-sales ratios. However, as modern business practices become increasingly more complex almost daily, a pursuit of judicial and legal practices indicates that courts and laws have failed to develop concurrently with rapidly changing commercial activities. But, this is not to suggest that constant change of laws constitutes a societal goal to accomodate the business sector. Modification of statutes to coincide with technological change could doubtlessly prove to be polemical to society.

Numerous examples could be employed to demonstrate how laws have a propensity to change over time to accomodate comprehensive adoption of technological innovation. These observations, however, do not embrace current legal pronouncements pertaining to interstate movements of merchandise. This is to say, fast, and more dependable modes of transportation have evolved which subsequently has enabled firms to develop viable marketing strategies emphasing customer service, inventory control, procurement, and traffic. Transportation progress has resulted in an ability to ship merchandise to distant points in a firm's channel of distribution and have the cosignment arrive well in advance of normal mail service. A substantial amount of goods in transit, moreover, fall within the jurisdictional purview of federal law because of their interstate commerce dimension. But, legal recognition of modern means of transportation exists only for shipments moving in intrastate commerce.

General adoption of the Uniform Commercial Code (forty-nine of fifty states) has definitely modernized intrastate commerce laws. Although this modernization process required a time-span of almost twenty-five years to become fully effective, a similar movement at the

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federal level has not occurred. In fact, interstate commerce is still governed by legislation such as: The Uniform Bills of Lading Act of *1909*; the Uniform Warehouse Receipts Act of *1906*; and the Federal Bills of Lading Act of 1916.

In a recent issue of a major legal journal,[1] an illustration was proferred regarding how the Uniform Commercial Code could be constructed to apply to cases involving interstate commerce in those circumstances where a discontinuity exists in normally appropriate law. In essence, the illustration depicted how federal law could be interpreted to permit the use of destination bills of lading in interstate commerce. Albeit businesses have employed complex legal techniques to circumvent the detrimental facets of antiquated legislation. A fundamental need exists to revise federal legislation and thereby eliminate the necessity of using tenuous legal routes to implement efficient technology in normal business transactions. This need, moreover, is manifest in the evolution of physical-logistics and marketing strategy.

The basic purpose of this paper is to establish a definitive need for modernizing federal legislation in certain select areas of interstate commerce. To accomplish this primary objective, the following subjects will be examined: (1) documents of title; (2) historical evolution of documents of title; (3) concept and need for the negotiability of documents of title; (4) risks associated with purchases of documents of title; (5) carrier liability; and (6) the need for modernization of restrictions of documents of title by business firms using high speed shipments of goods.

HISTORICAL EVOLUTION OF DOCUMENTS OF TITLE

The legal concept of title cannot be clearly attributed to any specific source. However, it appears that recognition of transfers of title can be said to have originated with Midieval "cash on the barrelhead sales". In those simple transactions, the time of passage of title was rather clear. Today, however, transactions are much more complex since sales execution has evolved from a face-to-face method to include modern facilitative elements such as deferred payment, deferred delivery, security agreements, and delivery by a third party as relatively common elements of negotiation. As business practices

1. Grant M. Davis, William P. Jackson, and Richard D. Nordstrom, "Destination Bills of Lading for Interstate Commerce," *The American Business Law Journal*, Fall 1974, pp. 58-63.

developed more sophistication, a more complex and less rigid concept of title was required.[2]

Most of the problems surrounding title to merchandise result from the fact that title lacks both form and substance. That is to say, title is simply a concept which has been developed by attorneys and is located or placed wherever judges decide it should be. Indeed, when the legal system endeavors to ajudicate sale pyrotechnics by searching for all prevading titles, numerous difficulties are encountered. For the most part, people do not care where title is located. They are only concerned that the law protects them, or that they have insurance against any damage or loss of goods. Sellers are concerned with title only when they must pay taxes or when confronted with a potential loss. Generally speaking, people become truly concerned with title only when they must pay taxes or when confronted with a potential loss. Realistically, people become truly concerned with title concepts only *after* a legal determination reveals that they have a problem which rests upon a decision as to who holds title to goods at the time of loss.

Early judicial decisions frequently neglected the intent of the parties even when provided with statements of intention by these parties involved.[3] This practice was not universal, as some justices manipulated concepts of title to produce sensible results. But, the judiciary failed to provide generally reliable results in many cases arising from business transactions involving shipping goods from a buyer to a seller.[4] Irrespective of any general stability, title of goods was a prime concept of the law of sales before the uniform commercial code. This is illustrated by the following statment from a precode textbook: "The approach of the prevailing sales doctrine is this: Unless cogent reason can be shown to the contrary, the location of title will govern every point which it can be made to govern. It will govern between the parties, risk, action for price, applicable law in an interstate transaction, . . ."[5]

Acting to alleviate this enigma in the law, drafters of the uniform commercial code found their attention on those important problems

2. Carter, "Acquisition and Loss of Rights of Buyers and Sellers of Goods Under tne Uniform Code" 6 B. C. IND. & Com. L. Rev. 169 (1964).

3. Low v. Pew, 108 MASS. 347 (1871). No West citation available.

4. Gilmore, "On the Difficulty of Codifying Commercial Law," 57 YALE L. J. 1341 (194); and R. J. Nordstrom, LAW AND SALES 374 (1970).

5. Llewellyn, "Through Title to Contract and Bit Beyond," 3 LAW: A CENTURY OF PROGRESS 80, 87 (1937).

surrounding title to merchandise. The purpose of Section 2-101 of the U.C.C. is: "To avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions of proof of words and actions of a tangible character."[6]

Widespread adoption of the U.C.C. reduced the contradictions and conflicts that existed prior to codification of the U.C.C. Hence, title no longer represents the primary tool for resolving sales controvrsies in states where the U.C.C. is in use.[7]

The genesis of efforts to combine ownership of rights and of goods to a document of title dates back to antiquity. In early common law, courts were influenced by the needs of merchants and bankers and thus cooperated by recognizing certain documents which were used as collateral. Thus, the Bill of Lading evolved to become a symbolic representation of goods involved in a transfer from a seller to a buyer. The document represented goods in the sense that transfer fixed the transferee's rights against both the person making delivery and third parties.[8] Documents of title have been the principle subject of five uniform laws, notably: The Uniform Warehouse Receipts Act, 1906 (Hereafter UWRA); The Uniform Bill of Lading Act, 1909 (Hereafter UBLA); The Federal Bills of Lading Act, 1916 (Hereafter FBLA) which supercedes the Uniform Bill of Lading Act but for the most part is identical to it; and the Carriage of Goods by Sea Act, 1936 which covers ocean bills of lading for both export and import shipments.

DOCUMENTS OF TITLE

A document of title basically serves three functions: a receipt for goods which have been transferred to the issuer, a contract between the issuer and the depositor, and a document of title. As a receipt, it identifies the goods and functions as evidence against any possible denial by the issuer regarding receipt of goods.

With respect to contract features, the document of title may contain terms defining obligations of the parties. Other papers, of course, may contain some of the same information. Prior to the Uniform

6. Uniform Commercial Code § 2-101, Comment.

7. All states except Louisiana have adopted the Uniform Commercial Code. Wilke v. Cummings Diesel Engines Inc., 252 Md. 611, 250 A 2nd 886 (1968).

8. A. R. Braucher, 4 UNIFORM COMMERCIAL CODE HANDBOOK, DOCUMENTS OF TITLE 6 (1968); 2 S. Williston, WILLISTON ON SALES 508 (revised 1948).

Commercial Code, commercial law recognized only bills of lading and warehouse receipts as documents of title. The code, however, has expanded the definition of documents title to include delivery orders. dock warrants, dock receipts, and other documents insofar as the "regular course" standard is met. But, a receipt becomes a document of title only if "in the regular course of business or financing," it is treated as adequately evidencing "that the personin possession of it is entitled to receive, hold, and dispose of the documents and the goods it covers" standard is met.

WAREHOUSE RECEIPTS

Under provisions of the Uniform Warehouse Receipts Act (UWRA) and the U.C.C., warehouse receipts may be issued by any warehouseman.[9] Unless the issuer is involved in the business of storing goods "for hire," however, documents he issues do not fall within the accepted definition of a warehouse receipt, thus an individual cannot issue a warehouse receipt for his own goods. The UWRA and the U.C.C. stipulate essential terms for warehouse receipts which include: (1) location of the warehouse; (2) date of issue; (3) number of the warehouse receipt in some consecutive numbering system; (4) designation of the "obligee;" (5) rate or fees; (6) description of merchandise; (7) signature of the warehouseman or his newly appointed agent; (8) disclosure of any ownership of the goods on the part of the warehouseman; and (9) a statement of any liabilities for which a lien is claimed. Some slight although insignificant differences may exist between the UCC and the UWRA, particularly, in the enumeration of essential ingredients contained in a warehouse receipt.[10]

BILLS OF LADING

The Code incompasses all bills of lading covered by the uniform bills of lading act or the federal bills of lading act; in addition to an express inclusion of air bills, air consignment notes, and airway bills. The UCC is more comprehensive in its coverage than either the UBLA or the FLBA in that common carrier; contract carriers, and freight forwarders are[11] subject to provisions of the Code. Yet, the

9. Braucher, "Uniform Commercial Code: Documents of Title," 102 U. PENN L. REV. 831 (1953).

10. Uniform Warehouse Receipts Act § 1, § 58; Uniform Commercial Code § 7-401, § 7-102, comment.

11. Uniform Warehouse Receipts Act § 2.

UCC differs from the UBLA and the FBLA in another important area; namely, a unique set of provisions is contained in the Code which was created to govern through bills of lading, bills in the set, and permit distination bills of lading.[12] Essential terms for a bill of lading are almost always identical to those for a warehouse receipt.

Common carriers are legally compelled to issue bills of lading and are required to have their bill of lading forms sanctioned by the Interstate Commerce Commission (hereafter, ICC). Furthermore, a common carrier is required to use only approved forms for all customer shippers without any discrimination. In fact, the ICC possesses a statutory authority to supervise and prescribe forms for common carriers subject to its jurisdiction. This authority has been employed by the Commission for many carriers.[13] In most instances, forms filed by common carriers are used without discrimination in both inter and intrastate commerce; the net affects of the acts establishing bills of lading uniformity is to bind both shippers and carriers to some rights and duties, even though no bill of lading is in fact issued.

FREIGHT FORWARDER BILLS

Freight forwarders combine numerous less-than-car-load and less-than-truck-load shipments into full carload and full truck load shipments to benefit from less expensive volume breaks. Even though originating with railroads, freight forwarders have expanded into other modes of transportation. In order to resolve rate controversies, the Interstate Commerce Act was amended in 1942 to include Part IV. This ammendment brought many freight forwarders under the jurisdiction of the ICC.[14] One section of this statue requires freight forwarders regulated by the Commission to issue bills of lading, and rules governing the issuance of bills of lading are determined by that agency. In 1950, surface forwarders were required to comply with the FBLA by ammendment to Part IV of that act which defines freight forwarder as "common carriers."[15]

MISCELLANEIOUS DOCUMENTS TITLES

Most documents of title are either warehouse receipts or bills of

12. Uniform Commercial Code, § 7-302, 304, and 305.

13. 14 I.C.C. 346 (1908); 4 S. Williston, WILLISTON ON CONTRACTS 1073 (revised 1936).

14. INTERSTATE COMMERCE ACT, 49 U.S.C. § 13 (2) (1887).

15. Pomerine Bills of Lading Act, 49 U.S.C. § 81 (1916).

lading, but the name of the document does not determine its true character. For example, a "dock warrant" may, or may not, be construed to be a warehouse receipt, depending upon the nature of the business of the issuer, not on the nature of the paper itself. Similarly, documents evidencing the receipt of goods for shipment are within the Uniform Commercial Code's definition of a bill of lading, event though a contract carrier is the issuer. Caution should be exercised with respect to "way bills," because these instruments appear to be restricted to instructions or operating procedures passed on from one carrier to a connecting carrier and are not usually considered documents of title.[16]

UNIFORM COMMERCIAL CODE - DOCUMENTS

The Code provides for "through bills of lading," while the FBLA does not. Also, the UCC creates a novel bill of lading designed to facilitate commerce which is designated "a destination bill of lading;" but the FBLA neither specifically permits, nor prohibits this form of a bill of lading.[17] While the FBLA prohibits bills of lading from being issued in sets, except to Alaska, the UCC progresses one step further and prohibits bills in a set for either negotiable or non-negotiable bills of lading.[18] All export bills of lading are governed by federal law, in this case, the FBLA, because of the Commerce Clause of the Constitution. It is exactly this type of modernization that is needed in federal laws governing interstate commerce. Recognition of the exigencies restricting efficient commerce resulted in modernization of state laws. The passage of time, moreover, has compounded the need for updating federal legislation under which economic activity is regulated.

NEGOTIATION

There are several important differences between documents of title which are negotiable and those which are non-negotiable. The primary distinction, however, is that negotiable instruments are more definite symbols of the goods they represent since the carrier or bailee is under a duty to surrender the document upon delivery of those

16. Southern Express v. R.S.C. Motor Lines, 200 F. 2d 797 (1952).
17. Uniform Commercial Code, § 7-305.
18. Federal Bills of Lading Act § 4; U.S.C. § 84.

goods.[19] On the other hand, non-negotiable documents need not be surrendered on delivery, and in fact, goods may be delivered on a detached written authority.

The Uniform Commercial Code eliminates the possibility of confusing a negotiable and non-negotiable document by requiring that all negotiable documents by printed on white paper and all non-negotiable documents be printed on yellow paper.[20] Both the UCC and the FBLA determine negotiation by the term of the document: thus, negotiable documents are deliverable to either the bearer or to the order of a named person.[21] This in effect, makes documents of title similar to other commercial paper in that they frequently are negotiable instruments. In summary, documents of title are distinguished from commercial paper in that the former represent goods and the latter represent money.

CONCEPT OF DUE NEGOTIATION

Transactions do not necessarily terminate with the passage of goods from a seller to a buyer. A third party can gain title to goods by a subsequent sale. Documents of title are provided and provide a convenient instrument for the transfer of title and thereby they accomodate commerce. The document of title permits parties to deal with papers involved while leaving unchanged actual possession of the property in question. The purchaser of a negotiable document of title acquires a legally preferred position only in the event that the document was obtained through due negotiations. This basically means that the document must be in such condition that it can be negotiated either by delivery or by endorsement. "Delivery of the document will operate as a negotiation when no further endorsements are required to pass title."[22] The FBLA requires delivery of goods and endorsement of the person entitled to the goods through the document title but the UCC does not mention any holder in defining due negotiations. A second facet of due negotiation is that the purchaser must be a purchaser in good faith, which implies that the buyer must not have been given any notice of existence of a prior claim. Finally,

19. Federal Bills of Lading Act § 14; Uniform Commercial Code § 7-403 (3).

20. 4 Braucher, UNIFORM COMMERCIAL CODE HANDBOOK¢ DOCUMENTS OF TITLE 12 (1968).

21. Uniform Commercial Code § 7-104; Uniform Warehouse Receipts Act § 4, § 5; Uniform Bills of Lading Act § 4, § 5.

22. Boshkoff, "Documents of Title: A Comparison of the Uniform Commercial Code and Other Uniform Acts," 59 MICH. L. REV. 711 (1960).

due negotiation cannot exist unless the transaction is customary in the trade. The uniform commercial code indicates that due negotiation will not exist where a person attempting to negotiate a document of title is outside of the trade or outside the regular course of business or financing.[23]

RISK IN PURCHASING DOCUMENTS OF TITLE

The purchaser of a document of title is subject to risk that the goods may not be available when the document is surrendered to the holder. Or, the holder may be confronted with a risk that the goods are subject to a lien or a claim by a third person. Both the FBLA and the UCC depend upon the buyers classification to determine possibility of a loss. If he is a buyer in good faith, for value, and without notice of prior claims, his risk will be dependent on whether or not the instrument acquired in negotiable. His risk will also be dependent on whether or not a valid claim to due negotiation can be substantiated.[24]

Additional risk may be faced if goods are tendered to a common carrier which may belong to someone else. Provisions contained in both the UCC and the FBLA stipulate the person "to whom documents have been duly negotiated acquires title to the goods and documents," a situation which is no better than title held by an individual who deposited the goods for transfer. This risk is the dame for either a negotiable or non-negotiable document of title.[25]

The practice of issuing bills of ladings in sets is prohibited both by the FBLA and the UCC. The purpose of this proscription is to eliminate any risk of having sets separated so that apparently two or more negotiable documents are circulating for the same goods. In no way does this mean that substitute documents cannot be obtained in the event that the original document is lost or destroyed.

COMMON CARRIER OBLIGATIONS

Although common carriers have many legal obligations, this paper deals only with obligations concerning documents of title. It is significant to note that the issuer of a document of title, such as a bill of lading, is charged to "exercise the degree of care in relation to the

23. Uniform Commercial Code, § 7-501, comment.

24. Boshkoff, "Documents of Title: A Comparison of the Uniform Commercial Code and Other Uniform Act," 59 MICH. L. REV. 711 (1960).

25. "Id." 730.

goods which a reasonably careful man would exercise under like circumstances."[26] Failure to exercise reasonable care by a common carrier normally results in some form of loss or damage claim.

One of the important issues relative to obligations concerns failure to deliver goods tendered and accepted by a common carrier. A common carrier who creates a document of title is normally considered to be strictly liable for the delivery of the goods in his care. There are, however, seven circumstances in which the carrier is relieved of their liability in the event of nondelivery. The uniform commercial codes treates excuses for delivery failures in a comprehensive manner in lieu of fragmented treatment given under the BLA and the FBLA.[27] Thus, a common carrier must deliver consigned goods unless one of the seven defenses can be established.[28]

A warehouseman is legally charged to exercise due care when storing property. This obligation, however, does not extend to an indefinite storage of goods. Provisions of the UWRA specify three conditions wherein goods stored in a public warehouse may be terminated: (1) when they are perishable; (2) when they will deteriorate in value; (3) because of owner, leakage, inflamability, or explosive nature of the goods and injury to other property is likely to be incurred.[29]

IMPACT OF TECHNOLOGY

Ascertaining appliable law in most cases involving documents of title poses little problem. But, some provisions of the UCC bear investigation. For example, the Code provides for a unique bill of lading designated a "destination bill of lading."[30] which is specifically designed to facilitate rapid delivery of goods. No comparable form of a bill of lading exists in federal law. Traditionally, bills of lading have been issued by common carrier at the point of shipment. With modern means of transportation, merchandise frequently is able to reach its destination well ahead of the bill of lading, particularly if the bill of lading is mailed to the buyer.

Often, sellers of goods desire cash payment on delivery, in this situation, the shipment may be sent C.O.D. or a draft may be drawn on the buyer and transmitted to a collection agent along with a nego-

26. Uniform Commercial Code § 7-309.

27. Gregues, "Developments In the Law of Documents of Title," 15 BUS. LAWYER 986 (1957).

28. Uniform Commercial Code § 7-403, comments (1) & (2).

29. Uniform Warehouse Receipts Act § 34.

30. Uniform Commercial Code § 7-305.

tiable bill of lading. When the seller desires to conduct business by a draft, it is then the goods are apt to be delayed while waiting on arrival of the bill of lading. In an attempt to eliminate this possible delay, drafters of the UCC designed, or perhaps invented, destination bills of lading. This form of innovation or modification is advocated for federal legislation.

The UCC innovation, destination bill of lading, permitted a carrier to issue a destination bill of lading at the request of the seller, or "to any person entitled to the goods under an already issued bill of lading."[31] (in the latter case, the outstanding bill of lading would be removed from circulation and the destination bill issued in its place). The carrier could then issue a receipt to the seller of goods which would contain the carriers promise to issue the bill of lading to the buyer of the goods at the point of eventual delivery. In turn, the carrier notified his agent at destination, usually by wire, to issue an appropriate bill of lading to the sellers agent. Meanwhile, the seller notified his agent, commonly a bank, to draw a draft on the buyer. By employing this process, the transaction could be completed promptly to the advantage of all parties concerned. It is important to recognize that this form of bill of lading is unique to the UCC and Intrastate Commerce. Federal legislation, FBLA, governing Interstate Commerce fails to provide for his form.

Another significant provision of the UCC is the acceptance of the "through bill of lading."[32] The Carmack amendment to the Interstate Commerce Act requires common carrier to "issue a receipt of bill of lading," and the initial carrier is responsible for damage caused by it or caused by a connecting carrier "when transported on a through bill of lading."[33]

CONCLUSIONS

Unequivocally, the uniform acts were sincere attempts to modernize law regarding contemporary business functions. One element of commercial law, documents of title, directly affects wide segments of business practices. But, a substantial amount of commodity consignments occur in interstate commerce where little, or no effort toward modernization has taken place. This lack of modification will continue to exacerbate business practices given spatial relationships in

31. Supra note 22 at 720.
32. Uniform Commercial Code § 7-302.
33. Supra note 9 at 839.

the private sector.

Most states have enacted the UCC which continues a significant advancement toward modernizing commercial law. However, no comparable action has occurred at the federal level. In this regard, Eli Goldston and Paul J. McKenzie observed: "Commercial law will become realistic, flexible, and modern only if the bar and bench become so, too."[34]

Business firms that have adopted the "systems concept" of business, together with market strategy that require high levels of customer service, are compelled to conduct their operations in such a manner to avoid litigation; agree to circumvent troublesome areas of law, or discover means of evasion. A congruous modification in interstate federal law is needed inasmuch as more and more firms are adopting marketing strategies that require rapid transportation and high levels of customer service.

Congress is obviously myopic regarding the necessity for modernizing interstate law dealing with transportation and documents of title. There is a need at the federal level, moreover, for comprehensive restatements of prior commercial law. If there were no need to reconstruct the law in this important area, the UCC would not have received such widespread acceptance by almost all of the states.

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34. Goldston & McKenzie, "Documents of Title: Article 7 of the U.C.C.," 23 OHIO ST. L. J. 280 (1962).