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CHAPTER 2 BANKING, COMMERCIAL, & CONTRACT LAW

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I. INTRODUCTION

During 2006 the Kansas Supreme Court issued opinions addressing garnishment of bank accounts, financing statement requirements under revised Article 9 of the UCC, assignments under the UCCC, and the formation of contracts for the sale of computer software. The Kansas Court of Appeals also issued a number of interesting opinions addressing contractual limitations on assignment, seizure of collateral from a debtor's transferee, regulation of judgment interest under the UCCC, apparent authority, contractual statute of limitations provisions, and the property and contract elements of restrictive covenants. The 2007 Kansas Legislature passed revisions to Article 1 of the UCC, amendments to UCC Article 7, and laws limiting branch banks.

II. COURT DECISIONS

A. Banking Law

1. *Defining Ownership in Garnished Bank Account Funds*

When a bank receives a garnishment order covering a depositor's accounts, the depositor is given the opportunity to establish that the account funds are not the depositor's property and therefore not subject to garnishment. The Kansas Supreme Court, in *LSF Franchise REO I, LLC v. Emporia Restaurants, Inc.*, 283 Kan. 13, 152 P.3d 34 (2007), provides an excellent overview of Kansas garnishment law and then addresses what a debtor must prove in order to exclude funds in a bank account from a valid garnishment order.

The creditor in this case first argues for a bright-line test that would make all of a debtor's funds in a bank account subject to garnishment, unless the account has been expressly established as a trust account or as a "special" account with the funds payable only for a specified purpose. The Court rejects this approach, noting garnishment can reach only property owned by the debtor. Therefore, in garnishment proceedings, the debtor is allowed to prove he or she does not own the funds on deposit.

The trial court and Court of Appeals held the debtor had established that funds in its accounts did not belong to it: The debtor had established ownership in third parties through testimony that the funds on deposit were to be used for the payment of payroll taxes. The Kansas Supreme Court instead holds that at all relevant times the debtor had complete control over the funds at issue, and was therefore the "owner" of the funds on the date the garnishment order was served on the bank. The accounts were not restricted; nor were the account funds irrevocably committed to others at the time they became subject to the garnishment order. The Court reverses the trial court and Court of Appeals and concludes that the debtor failed to carry its burden of proof that the funds were not owned by the debtor on the critical date.

The Court's opinion clearly invites debtors to offer ownership evidence, even when it may run counter to the apparent ownership regime established by the documents creating the account. However, the debtor's "burden of proof" will not be satisfied by mere after-the-fact statements that the debtor intended to use funds in the account for a particular purpose.

2. *Assignment of Rights in Arbitration Claim Did Not Breach Contract*

The law promotes the free transfer of property, including contract rights. This is often accomplished through the rule that "restraints on alienation of property" should be "strictly construed against the party urging the restriction." This is of particular importance to lending institutions that often rely upon the transfer of rights to secure loans made to their borrowers. These principles are illustrated in the Court of Appeals' holding in *Missouri Bank & Trust Co. v. Gas-Mart Development Co.*, 35 Kan. App. 2d 291, 130 P.3d 128

(2006), where the agreement between Gas-Mart and its contractor, Cherry & Associates, Inc., stated:

> ASSIGNMENT. The parties hereto agree not to assign this Contract without the prior written consent of the other party hereto.

Gas-Mart disputed the amount of money it owed Cherry under a construction contract. Cherry filed a demand for arbitration under its contract with Gas-Mart. While the arbitration was pending, Cherry assigned to Missouri Bank "all of its right, title and interest in the claims of Assignor in that certain arbitration proceeding . . . in which Assignor made demand for the sum of $192,808,75 together with interest, attorney fees and costs . . . ." Gas-Mart claimed this was a violation of its contract with Cherry because the assignment was made "without the prior written consent" of Gas-Mart. Apparently Gas-Mart was never consulted regarding the assignment.

Relying upon the Supreme Court's analysis in *Bolz v. State Farm Mut. Inc. Co.*, 274 Kan. 420, 52 P.3d 898 (2002), the Court of Appeals holds an assignment of Cherry's rights in the arbitration "chose in action" was not an assignment of the "Contract" and therefore was not a violation of the restriction on assignment. The Court, like the court in *Bolz*, cites with approval the Restatement (Second) of Contracts § 322, which provides in pertinent part:

> (1) Unless the circumstances indicate the contrary, a contract term prohibiting assignment of "the contract" bars only the delegation to an assignee of the performance of the assignor of a duty or condition.
>
> (2) A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested,
>
> (a) does not forbid assignment of a right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation.

The *Missouri Bank* holding is supported by subsection (2) of the Restatement. For transactions involving a sale of goods, UCC § 2-210(3) is similar, providing: "Unless the circumstances indicate the contrary, a prohibition of assignment of 'the contract' is to be construed as barring only the delegation to the assignee of the assignor's performance." Article 9 of the UCC goes even further, by preserving the ability to create security interests in "an agreement between an account debtor and an assignor or in a promissory note" by invalidating, subject to enumerated exceptions, any contract term which:

> Prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note . . . .

UCC § 9-406(d)(1) (this restriction was previously contained in former UCC § 9-318(4)).

B. Commercial Law

1. Debtor's Legal Name Must Be Used in Financing Statement

One of the best ways to learn "Revised" Article 9 is to compare the results that would be obtained under the revised provisions with those under the "old" Article 9. The Kansas Supreme Court, in *Pankratz Implement Co. v. Citizens National Bank*, 281 Kan. 209, 130 P.3d 57 (2006), observes that Revised Article 9 sections K.S.A. 84-9-506 and 84-9-503(a) were adopted to simplify the administration of financing statements by shifting the burden of filing accuracy onto the filers instead of the searchers.

Pankratz sold equipment to Rodger House and sought to perfect its security interest in the equipment by filing a financing statement with the Secretary of State. However, Pankratz misspelled Rodger's name by failing to include the "d" in Rodger. After this filing, Rodger obtained credit from Citizens National Bank that was secured by all equipment "that I now own and that I may own in the future." Citizens filed its financing statement, using the correct spelling of Rodger's name. Rodger later filed for bankruptcy, and the issue was whether the prior Pankratz financing statement was effective against Citizens' claim to the same collateral.

Pankratz argued that the misspelling was a minor error under K.S.A. 84-9-506. Citizens argued it was a "seriously misleading" error under § 84-9-506 and did not comply with K.S.A. 84-9-503(a)(5)(A), requiring the financing statement to provide the properly spelled legal name of the debtor. Relying upon *In re Kinderknecht*, 308 Bankr. 71 (B.A.P. 10th Cir. 2004), the Court holds that § 84-9-503(a)(5)(A) requires the use of the debtor's properly spelled legal name. Since Pankratz filed to use the proper spelling, the next issue is whether the error was "minor" or "seriously misleading."

The Court concludes that under § 84-9-506(b) the misspelling is "seriously misleading." Subsection (b) states: "Except as otherwise provided in subsection (c), a financing statement that fails sufficiently to provide the name of the debtor in accordance with K.S.A. 2003 Supp. 84-9-503(a) and amendments thereto, is seriously misleading." The final step in the analysis is to consider the "Except as otherwise provided in subsection (c)" "safe harbor" language.

Subsection (c) states:

> If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with K.S.A. 2003 Supp. 84-9-503(a) and amendments thereto, the name provided does not make the financing statement seriously misleading.

Application of this statute is complicated in Kansas because at all relevant times there were *two* search mechanisms available: (1) an unofficial "temporary internet search logic," which would have found the Rodger House financing statement using the misspelled term "Roger"; and (2) "the filing office's standard search logic," which would not have found the financing statement. However, the internet database contained the following disclaimer:

> Searches conducted on the internet are not official searches under Revised Article Nine of the Uniform Commercial Code. This search engine is intended to provide a more flexible search logic so as to identify UCC filings under the old law, which employed different name requirements. Therefore searches conducted on this page will not determine whether a name is seriously misleading under K.S.A. 84-9-506. If you want an official search using the correct and current search logic given in KAR 7-17-22, contact the Kansas Secretary of State's Office at (785) 296-4564.

Because the search under the "standard search logic" would not have identified the Pankratz financing statement with the "seriously misleading" name for Rodger House, it remains seriously misleading and ineffective against third parties, including Citizens National Bank.

2. *Seizing Collateral in Possession of Transferee Was Not a Conversion*

Ronald V. Odette purchased a tractor and loader from Jack Shields Sales and Service. Ronald entered into a retail installment sales contract and security agreement, which provided that Ronald "shall not sell, lease or otherwise dispose of, or transfer any interest in said property . . . without the prior written approval of the Seller." The contract also contained a cross-collateralization clause that granted a security interest in the property to secure any debts due Seller from Buyer.

In violation of the contract, Ronald transferred the tractor and loader to the Odette Family Limited Partnership, which was made up of Andrew Todd Odette and the irrevocable trust of Ronald V. Odette. Jack Shields' rights were assigned to AGCO Finance, LLC. AGCO obtained a default judgment against Ronald and obtained a writ of special execution authorizing the sheriff to seize the tractor and loader. AGCO's agent, acting under the sheriff's authority, seized the tractor and loader that were in the possession of the Partnership. The Partnership sued, asserting AGCO converted the tractor and loader because it had no authority from the Partnership to take the equipment.

In *Odette Family Limited Partnership v. AGCO Finance, LLC*, 35 Kan. App. 2d 1, 129 P.3d 95 (2005) (publication ordered, published version filed February 23, 2006), the Court of Appeals holds AGCO's actions were proper because its security interest continued in the collateral after it was transferred to the Partnership. The Partnership was not a "buyer in the ordinary course of business" that could take free of the AGCO security interest and, in any event, Ronald was "in the business of farming, not selling farm equipment."

3. *Assignment of Real Estate Commissions Subject to UCCC*

Two real estate agents working as independent contractors with Reece & Nichols Realtors, Inc., assigned anticipated commissions from Reece & Nichols to Decision Point, Inc. When the commissions came due, despite notice of the assignments, Reece & Nichols paid the money to the assignor real estate agents instead of the assignee Decision Point. The real estate agents failed to pay Decision Point, which then sued Reece & Nichols for failing to pay the commissions directly to Decision Point.

If the transactions are governed by the Uniform Commercial Code, Reece & Nichols would be liable to Decision Point pursuant to K.S.A. 84-9-406(a), which requires an account debtor to discharge the debt by paying the assignee. However, if the transactions are governed by the Uniform Consumer Credit Code, K.S.A. 16a-3-305(1) prohibits an assignment of earnings to secure payment of a debt arising out of a consumer credit transaction. The assignment is "unenforceable by the assignee of the earnings and revocable by the consumer."

In *Decision Point, Inc. v. Reece & Nichols Realtors, Inc.*, 282 Kan. 381, 144 P.3d 706 (2006), the Kansas Supreme Court works through the statutory requirements and concludes the assignments met the UCCC definition of a "consumer loan" under K.S.A. 16a-1-301(17)(a) and qualified as a UCCC "consumer credit transaction." The Court then determines that the commissions paid by Reece & Nichols were "earnings" under the UCCC and therefore were encompassed by K.S.A. 16a-3-305(1), which invalidates an "assignment of earnings" to secure a debt arising out of a "consumer credit transaction." Therefore, the assignments were invalid and could not be enforced by Decision Point against Reece & Nichols.

This case provides a good example of the principle that drafting cannot change reality. Although parties have the freedom to structure and define the contours of their transactions, they cannot change the essential facts that will determine their rights. In this case the real estate agents signed a "Master Repurchase and Security Agreement" that stated "the transaction is 'not a loan or a consumer transaction, but the sale of a business account receivable at a discount for commercial purposes.'" This provision was not enforceable because the facts established it was a "loan or a consumer transaction" as defined by the UCCC.

Relying upon the Kansas Comment to § 16a-1-301(21), the Court concludes the Legislature intended "to include sums owed to independent contractors" in appropriate cases. In this case the commissions were the only compensation the real estate agents received from Reese & Nichols and functioned as their "earnings."

It appears Reese & Nichols intentionally chose not to honor the assignments their agents made to Decision Point. When the underlying terms of the loans are considered, there is good reason for real estate firms to be hostile to these sorts of arrangements. The loan charges were tied to how fast the real estate agent closes the transaction that will generate the commission. The charges in this case ranged from 8 percent to 14 percent of the commission. Although most real estate agents are naturally attuned to getting the deal closed, such outside financial incentives for agents may prompt them to do things not in the best interest of the buyer, seller, or the real estate firm. If this appears to be a common problem with real estate agents, the real estate firm may want to consider addressing the matter by contract when engaging their agents.

4. *Charging Interest-on-Interest Violates UCCC*

The D.A.N. Joint Venture III, L.P. ("DAN"), obtained a judgment against Brad and Peggy Turk for failing to honor their payment obligations under a promissory note. The principal sum due was $4,526.76 and the annual percentage rate was 21.50%. DAN obtained a default judgment against the Turks for $8,396.98, which included principal, interest, late charges, and attorney fees. The judgment authorized post-judgment interest at the contract rate of 21.50%, which DAN calculated by applying it to the full $8,396.98 amount of the judgment. The Turks objected, arguing the interest should only be assessed against the unpaid principal.

In *D.A.N. Joint Venture III, L.P. v. Turk*, 36 Kan. App. 2d 353, 138 P.3d 1253 (2006), *rev. denied* (Nov. 8, 2006), the Court of Appeals agrees with the Turks, noting that K.S.A. 16-205(b)(1) states "[j]udgments upon interest-bearing contracts shall provide . . . that the *unpaid principal balance* shall draw the contract rate of interest . . . ." K.S.A. 16a-2-510(2) incorporates 16-205(b)(1) into the UCCC by providing that a judgment under the UCCC "shall be taken in accordance with the provisions of K.S.A. 16-205 . . . ." As part of the UCCC, violation of K.S.A. 16-205 can serve as a basis for awarding the consumer attorney fees under K.S.A. 16a-5-201(8) of the UCCC.

C. Contract Law

1. *Software As UCC "Goods" and the "Shrinkwrap" Sale*

The Kansas Supreme Court's 4/3 decision in *Wachter Management Company v. Dexter & Chaney, Inc.*, 282 Kan. 365, 144 P.3d 747 (2006), answers several basic questions regarding sales of computer software. First, a point on which there was no dispute among the justices, computer software can be "goods" as defined by Article 2 of the Uniform Commercial Code. The key inquiry, as in any situation where a transaction involves "goods" and "services," is whether the services are merely "incidental" to the sale of goods. In this case, the maintenance, training, and consulting services were incidental to the purchase of computer software. The Court therefore concludes this is a sale of goods governed by Article 2 of the UCC.

Although not discussed by the Court, Kansas has previously adopted the "predominant factor" test for determining when to apply Article 2 of the UCC to a goods-and-services "mixed contract" transaction. *Care Display, Inc. v. Didde-Glaser, Inc.*, 225 Kan. 232, 238, 589 P.2d 599, 605 (1979) (oral contract to produce trade show exhibits not subject to UCC statute of frauds because the sale of goods was incidental to the design and engineering services). Instead of applying general contract law to the "non-sales" component of a transaction, and Article 2 of the UCC to the "sales" component, the Court will determine which component "predominates," and will then apply that body of law to all aspects of the transaction.

Making computer software eligible for "goods" treatment under Article 2 of the UCC resolves for Kansas a major issue that commentators and courts have debated for over a decade: Should software be dealt with under the UCC or under a non-Article 2 general contract law regime? Those favoring non-Article 2 treatment have generally thought Article 2 to be too consumer-oriented. The Kansas Court of Appeals, in *Systems Design v. Kansas City P.O. Employees Credit Union*, 14 Kan. App. 2d 266, 272, 788 P.2d 878, 881 (1990), first applied Article 2 to a software sale; *Wachter* definitively resolves the issue in Kansas.

The area of disagreement among the justices in *Wachter* concerns the contract formation process. The issue in *Wachter* was whether a contractual choice of forum clause was binding on the purchaser of software. The parties negotiated regarding the purchase of computer software and incidental technical services. The document that was signed by the parties did not mention the "King County, Washing-

ton" choice of forum clause that was contained within the software licensing terms. This is where the dissenting justices would look to the cover letter, which stated the proposal included "modules and *licenses*." The majority held this was not sufficient to incorporate the software license terms that were subsequently revealed after the contract had been signed; the dissent would have held that it was sufficient. Because the license terms were not part of the parties' contract, the Washington choice of forum clause was not effective and therefore venue was proper in Kansas where the contract was formed.

Before considering the Court's mutual assent analysis, it should be noted that this case presents a minimal burden on software marketers who, in future transactions, want to ensure the deal is on their terms. As part of my Commercial Drafting course last year, students were presented with the issues addressed in *Wachter* and the cases relied upon by the majority and dissenting justices. The issue and solution they arrived at were stated as follows: "*How can INS* [the hypothetical client] *ensure its licensing terms are obtained when a consumer buying its software uses the software?* **By giving advance notice of the license terms.**" This was based upon *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000), which followed an analysis similar to the majority in *Wachter*. In our hypothetical, we were trying to deal with the more difficult situation of a purchase of software at a retail outlet. The *Wachter* situation is easier to control because the software seller could have easily placed the necessary language in its offer form. To put the "giving advance notice" technique into practice, we came up with the following statement to be prominently displayed on the outside of the software box:

TERMS OF OUR CONTRACT

When you purchase this software product you are entering into a legally binding contract which includes the following terms:

(1) Buyer agrees to use this software in strict compliance with Seller's Licensing Agreement ("License"), the particulars of which are specified by Seller in the software and are presented when the software is first used; **(2)** Seller agrees to license the use of this software to Buyer and provide Buyer with the rights of a licensee under the License; and **(3)** Buyer agrees to enter into the License, and comply with the obligations it imposes on Buyer as a licensee under the License.

The License is a detailed legal document that defines the rights and obligations of the parties in the software and includes terms designed to protect Seller's rights, while limiting Buyer's rights, including such things as limits on Seller's liability to Buyer and limits on Buyer's remedies. **The complete License terms you will be required to accept before you will be permitted to use this software can be reviewed at:** www.INS.com.

After entering into this Contract, if Buyer finds the License terms objectionable in any way, Buyer can, within thirty days from the date of purchase, terminate this Contract by using the enclosed postage-paid, addressed, return envelope to return the purchased software, with the original sales receipt, for a full and prompt refund from Seller.

IF THESE CONTRACT TERMS ARE UNACCEPTABLE, DO NOT PURCHASE THIS PRODUCT.

As we discussed in class, the marketing department may have some problems with our proposed solution, but, from a contract formation point of view, it should accomplish the seller's goals.

In the *Wachter* case the problem was that a contract had been formed *before* there was any mention of licensing terms. When the licensing terms were first presented to the software purchaser, *after* it already had a contract to buy the software, it became a matter of seeking a new contract from the purchaser; in this case a contract to "amend" the existing contract.

The Court discusses K.S.A. 84-2-207, the classic UCC "battle of the forms" provision, regarding "additional and different" terms. However, since the "additional and different" terms were not tendered until after a contract was formed, UCC 2-207 did not apply unless the subsequent terms could be viewed as a "confirmation." Instead, the *Wachter* case concerns an offer to modify an existing contract that is governed by K.S.A. 84-2-209.

The most notable change provided by UCC 2-209 is that a modification to a contract can be effective without consideration. This modifies the common law "pre-existing duty" rule that would require new consideration to support a change in existing contract terms. Official Comment #2 to UCC 2-209 makes it clear that any modification under UCC 2-209 must be made in "good faith." But, as the majority notes in *Wachter*: "UCC 2-209 requires express assent to the proposed modifications." The Court refuses to find the purchaser's necessary assent through the acts of installing and using software it had already unconditionally purchased from the seller.

Returning to my students and the Commercial Drafting course, when addressing the mutual assent issue, this is what they found:

> *How is a contract formed between manufacturer and consumer when goods are purchased at a retail store?* **By mutual assent.** Contract formation is governed by Kan. Stat. Ann. § 84-2-204(1) (1996) which states: "A contract for sale of goods may be made in any manner sufficient to show agreement . . . ." The issue is whether a contract is formed at the time the product is purchased or at the time the purchaser is asked to assent to the specific licensing terms. INS can either: (1) manipulate the offer and acceptance process using Kan. Stat. Ann. § 84-2-206(1)(a) (1996) to delay acceptance until assent is obtained to the license; or (2) create a contract at the time of purchase and then rely upon Kan. Stat. Ann. § 84-2-311(1) (1996) which "leaves particulars of performance to be specified by one of the parties [in this case INS]."

UCC 2-311(1) provides: "An agreement for sale which is otherwise sufficiently definite . . . to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties." UCC 2-311 could assist the dissent in arguing the reference in the cover letter that "[t]he proposal includes modules and licenses" was sufficient to alert the buyer that "particulars of performance" (the software licensing terms) remained to be specified by the seller.

To prevent UCC 2-311(1) from becoming a blank check for the seller, the next sentence requires: "Any such specification must be made in good faith and within limits set by commercial reasonableness." This means the next issue would be whether the choice of law and choice of forum provisions were "made in good faith" and, in any event "commercially reasonable." In such a setting these standards may be measured by whether the buyer would be "surprised" by the terms contained in the license. To avoid these issues, an approach similar to the solution developed by my Commercial Drafting students could be used.

Without further comment, the majority opinion states: "The proposal did not contain an integration clause or any provision indicating that it was the final and complete agreement of the parties, nor did the proposal contain any provision indicating that additional terms might be required." This suggests the Court was not relying upon a parol evidence rule analysis to exclude the reference to "licenses" in the cover letter accompanying the contract. Instead, the Court apparently concluded the reference, even if considered, was not sufficient to put the buyer on notice of its present agreement to terms the seller would reveal to them in the future.

Wachter provides attorneys with a clear guide for drafting future agreements. It also provides my Commercial Drafting students with a sense of professional accomplishment by knowing they were able to identify the unresolved issues and develop workable drafting solutions for their client.

2. *Apparent Authority to Bind Principal to Commercial Lease*

Apparent authority is a remedy employed to enforce a contract when there has been a failure to secure the required actual authority. The study of apparent authority cases reminds us that a basic requirement for any enforceable agreement is the *capacity* to contract. In *Town Center Shopping Center, LLC v. Premier Mortgage Funding, Inc.*, 37 Kan. App. 2d 1, 148 P.3d 565 (2006), *review denied*, (March 27, 2007), the Court of Appeals considers the capacity of Nancy Bayer, an employee of Premier, to bind Premier to a lease of commercial retail space with Town Center. Bayer lacked actual authority to execute the lease. When Town Center sought to enforce the lease against Premier, Premier argued Bayer lacked authority to contract on behalf of Premier.

Bayer and Town Center negotiated the lease and then Bayer returned the signed lease to Town Center along with a "To Whom It May Concern" letter prepared by Premier indicating Premier had a branch office in good standing located in Town Center and that Bayer was the branch "manager." Town Center has the burden of establishing the Bayer/Premier agency relationship by "clear and satisfactory evidence." Acknowledging the letter did not constitute actual authority, the Court of Appeals examines apparent authority stating:

> Kansas recognizes the doctrine of apparent or ostensible agency: "An ostensible or apparent agency may exist if a principal has intentionally or by want of ordinary care induced and permitted third persons to believe a person is his or her agent even though no authority, either express or implied, has been actually conferred upon the agent.". . . In determining whether an apparent agency existed, the court will look to the intentional acts or words of the principal to a third party and if those acts or words reasonably induced the third party to believe that an agency relationship existed.

Premier argued the letter was targeted at mortgage lenders, not landlords; Town Center argued that, under the facts, it reasonably informed Town Center that Bayer had the apparent authority to act on Premier's behalf. Noting

"apparent authority in this case is not as obvious as in some cases," the Court of Appeals nevertheless concludes that the letter, under the circumstances, was sufficient to establish apparent authority.

Town Center also argued that Premier *ratified* Bayer's actions by accepting the benefits under the lease. The Court of Appeals concludes Premier was not aware that Bayer was purporting to enter into the lease as Premier's representative. Instead, Premier assumed Bayer was following Premier's standard business practices, under which all branch office leases were the personal obligation of the branch manager. The Court notes: "The key to ratification is knowledge of the unauthorized act; without a showing of the principal's knowledge, the principal cannot be deemed to have ratified the act." Premier's knowledge of Bayer's unauthorized act was not established by the evidence.

The *Town Center* case reminds us that in any significant transaction, the party dealing with a purported agent should obtain written proof of the purported agent's authority, and conduct the due diligence necessary to confirm the authenticity of the agent's authority. An agent's authority can never be established by the mere representations of the agent. Representations of authority must come from the principal. *Town Center* also reminds principals that they must be careful about the documents they provide their employees. For example, the Court of Appeals observes that if the letter provided Bayer had been addressed "To All Mortgage Lenders" instead of "To Whom It May Concern," "[t]his simple act would have explicitly limited Bayer's authority and put the recipient of the letter (Town Center) on notice as to its purpose."

3. *Contract Clause Regarding Statute of Limitations Enforceable Against Hospital*

Contracts are frequently used to allocate risks among the parties. In *Newman Memorial Hospital v. Walton Construction Company*, 37 Kan. App. 2d 46, 149 P.3d 525 (2007), the defendant project architect, Everton Oglesby Askew Architects ("EOAA"), sought to limit its exposure to contract and warranty claims by defining when the applicable statutes of limitations would begin to run. The clause at issue states:

> Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion, or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion.

Newman filed suit against EOAA, project contractors, and certain subcontractors, on July 31, 2002, asserting a breach of contract, breach of express and implied warranties, negligence, and strict liability. EOAA asserted that Newman's claims were barred by the applicable statutes of limitations. The "Certificate for Payment" referenced in the contract clause was issued on February 18, 1997, and "Substantial Completion" occurred not later than March 1997. Applying the most generous 5-year statute of limitations for a written express contract, the cause of action was barred prior to the July 2002 filing date.

The contract clause eliminates issues regarding discovery, notice, and similar risks the limitations period may be extended under a given set of facts.

Newman argued K.S.A. 60-521 prevents a statute of limitations from running against the hospital as a governmental entity. However, the Court holds Newman was engaged in a proprietary function, not a governmental function, and therefore it was subject to EOAA's limitations defense.

4. *At the Intersection of Property and Contract Law: Restrictive Covenants*

In 1978, the Jordans conveyed land to the Dallingas by what the Court of Appeals describes as an "indenture" form of conveyance, which had signature lines for the grantors and the grantees. However, the deed was only signed by the grantors, the Jordans. The deed was delivered and recorded by the Dallingas who entered into possession of the conveyed land. The deed contained covenants restricting the land to residential use. Jeremiah 29:11, Inc., obtained the Dallinga land in 1999. Seifert owns property adjacent to Jeremiah; Seifert's source of title is also from the Jordans. When Jeremiah sued the Seiferts over a boundary dispute, the Seiferts counterclaimed to enforce the residential-only covenants in Jeremiah's chain of title. There was an allegation that Jeremiah had been using its land for nonresidential purposes, which arguably violated the restrictive covenants in its deed.

Jeremiah argued that, because the original conveyance was in the form of an "indenture" as opposed to a "deed poll," the Dallingas never consented to the restrictive covenants in the deed. A deed poll is a conveyance signed only by the grantor. An indenture is a conveyance signed by the grantor and grantee, usually when there are reciprocal rights being transferred. The trial court held that, although the deed was effective to convey the land to the Dallingas, the restrictive covenants were not binding on the Dallingas because they did not sign the deed. In *Jeremiah 29:11, Inc. v. Seifert*, 36 Kan. App. 2d 19, 136 P.3d 957 (2006), *rev. granted* (Nov. 8, 2006), the Court of Appeals reverses, holding that the deed complied with the requirements for an effective conveyance, and that the covenants ran with the

land binding Jeremiah as the Dallingas' successor in interest.

This case can be summed up with the words of Professors Stoebuck and Whitman: "[T]he common law's technicality is no longer with us, but much of its phraseology remains." WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 810 (3d ed. 2000). Whatever function the "indenture" and "deed poll" distinctions once served, they have been eclipsed by K.S.A. 58-2203, which states that only the grantor needs to sign the deed. This requirement is more precisely stated in K.S.A. 58-2209, which provides: "*All* deeds or other conveyances of lands, or of any estate or interest therein, shall be subscribed *by the party granting the same* . . . ." (Emphasis added.)

As the Court of Appeals observes, the Dallingas' acceptance of the deed takes the place of their signatures. The restrictive covenants in the deed became part of the baggage the Dallingas' assented to when they accepted the deed. Although there may be some cautionary benefits of having the grantees sign the deed, it is not necessary when the grantee accepts the conveyance. This is where a property analysis can be used to make contractual obligations binding on a party that has not signed the document. For example, there are thousands of oil and gas "leases" in Kansas that grant development rights to the "lessee" but also impose numerous covenants on the lessee. Rarely will you find an oil and gas lease which is signed by anyone other than the landowner granting the lease. Instead, the process of delivery and acceptance is relied upon to bind the lessee to performance of its lease covenants. *See* 1 DAVID E. PIERCE, KANSAS OIL AND GAS HANDBOOK § 5.08 (1986) (discussing "acceptance").

Jeremiah also argues it was unaware of the restrictive covenants. That is the normal state of affairs for most property owners regarding restrictive covenants. Typically the restrictions are created at the time the land is subdivided and are found in the document initially conveying the burdened land. Subsequent conveyances may refer to them in a vague manner ("subject to any restrictions of record") or not at all. An important service attorneys can provide is to ensure their client obtains and reviews any restrictive covenants before they become obligated to purchase a property.

Jeremiah's ignorance regarding the covenants is no defense. The 1978 deed containing the covenants was properly recorded and therefore Jeremiah is deemed to have notice of its contents — including the restrictive covenants. K.S.A. 58-2222 (recorded deed "shall . . . impart notice to all persons of the contents thereof; and all subsequent purchasers . . . shall be deemed to purchase with notice.").

The Court of Appeals rejects Jeremiah's statute of frauds argument under K.S.A. 33-106, which imposes a writing requirement on any *contract* for the sale of lands. It appears the statute applicable to this situation is not K.S.A. 33-10*6*, but rather K.S.A. 33-10*5* which states: "No leases, estates or interests of, in or out of lands . . . shall at any time hereafter be assigned or granted, unless it be by deed or note, in writing, *signed by the party so assigning or granting the same* . . . ." (Emphasis added). Section 33-105 employs a "property" analysis while § 33-106 employs a "contract" analysis.

Although the Court of Appeals upholds the restrictive covenants, it remands the case so the trial court can evaluate the legal effect of a "Release of Covenants" executed by the Jordans in 2002; some 24 years after they had conveyed the burdened land. In a concurring opinion, Judge Greene reasons that, because the release was part of the record on appeal, the issue was ripe for decision. He would give no effect to the release because it was given long after the Jordans had conveyed away their interest in the land. Judge Greene observes: "It is a fundamental principle of property law that one cannot convey an interest greater than one possesses in said property on the date of the purported conveyance." According to the concurrence, since the Jordans had no interest in the land, their purported release had no effect.

The Supreme Court granted review of this decision and heard argument on March 14, 2007. The Court has not yet issued its opinion, and thus the advance sheets bear watching.

III. LEGISLATIVE DEVELOPMENTS

A. "2001 Revisions" to the UCC

The major legislative development impacting Banking, Commercial, and Contract Law is the adoption of amendments to Article 1 of the Uniform Commercial Code, which apply to all articles of the UCC. This package of amendments is often referred to as the "2001 Revisions" because they were initially promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) and the American Law Institute (ALI) in 2001. On April 9, 2007, Senate Bill 183 was approved by the Governor. To allow for a period of transition, this law will take effect on July 1, 2008.

One of the more significant changes is revision of the definition of "good faith" to include an objective component as well as a subjective component. The existing definition states: "'Good faith' means honesty in fact in the conduct or transaction concerned." UCC § 1-201(19). The new definition states: "'Good faith,' except as otherwise provided in article 5 of chapter 84 of the Kansas Statutes

Annotated, and amendments thereto, means honesty in fact *and the observance of reasonable commercial standards of fair dealing*." UCC § 1-201(20) (emphasis added). Because this Article 1 definition applies to Article 2 transactions, the definition of "good faith" found at UCC § 2-103(b) is deleted. This was the "merchant" definition of good faith which incorporated "the observance of reasonable commercial standards of fair dealing in the trade." With the expanded definition of good faith in § 1-201(20), merchants and nonmerchants will be subject to the same definition of good faith.

Senate Bill No. 183 repeals UCC § 1-206, which established a statute of frauds for "personal property" worth more than $5,000 "in amount or value" that is not otherwise encompassed by the specific statute of frauds for the sale of goods, securities, or security agreements. The 2001 Revisions proposed by NCCUSL and ALI increase the sale of goods statute of frauds amount from $500 to $5,000. However, the Kansas amendments do not increase the current $500 limit established in UCC § 2-201.

Another 2001 Revision not adopted in the Kansas amendments concerns choice of law. The Kansas amendments require that any choice of law provision must select a state to which the "transaction bears a reasonable relation . . . ." UCC § 1-301.

All the operative provisions regarding course of performance, course of dealing, and usage of trade are found in new UCC § 1-303. This consolidates provisions currently found in the UCC §§ 1-205 and 2-208.

B. Limits on Branch Banks

Senate Bill No. 137 prohibits a bank from having a branch located on property owned by an affiliate, if the affiliate is engaged in "commercial activities" on the same property. "Commercial activities" are defined as those things a bank may not engage in under federal or state law.

C. Amendments to UCC Article 7

Senate Bill No. 308 amends Article 7 of the UCC to facilitate the use of electronic documents of title to transfer rights in goods.