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An Agricultural Law Research Article

Commercial Laws in the United States Relating to Bailments

by

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A National AgLaw Center Research Article

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PART I. INTRODUCTION

A. BAILMENT

1. Basic Definition. A bailment exists whenever one person delivers personal property in trust to another person under a contract, express or implied, for a specific purpose. The person who receives the personal property promises to redeliver, or to account for, the personal property to the person who delivered the property when the special purpose has come to an end.

2. Commercial Bailment as Focus of this Chapter. If an owner lends his automobile to his neighbor in order for the neighbor to use the car to take a trip, on the promise that the neighbor will return the car to the owner when the trip is over, the two persons have a bailment relationship. This is a private bailment that arises from the relationship between friends. This chapter does not focus on private bailments.

If an owner places his automobile in storage for safekeeping with a person who is in the business of providing storage, the two persons have a bailment relationship. The owner who places his automobile in storage agrees to pay storage fees to the person providing the storage service. The person providing the storage agrees to redeliver the automobile to the owner when the owner asks for the return of his automobile and pays the agreed fee. This is a commercial bailment that arises from the relationship between a customer and a person in the business of providing bailment for a fee. This chapter focuses on commercial bailments because trade and merchants depend heavily upon the bailment relationship to conduct business.

Personal property placed in a commercial bailment is most commonly referred to by the term "goods."

3. Common forms of commercial bailments.

a) **Warehouses; storage bailments.** Many commercial bailments arise out of the storage of goods.

i) *Nomenclature.* Persons who provide storage services for a fee are in the warehouse business and are called warehouses or warehousemen. The person who stores goods in a warehouse is called a bailor. The person providing the storage service who receives the goods into a warehouse is called a bailee.

ii) *Examples of warehouses.* Examples of warehouses that are common in the United States include: elevators for the storage of grains; cotton gins that store ginned cotton; tobacco warehouses that store tobacco; cold storage sheds that store perishable fruits and vegetables; warehouses for the storage of business inventory of every kind and description; natural underground basins for the storage of natural gas or petroleum products; terminal warehouses at seaports for the storage of goods that will be loaded onto ships for international and domestic trade; tank farms for the storage of petroleum products prior to shipment to a refinery.

iii) *Documents used.* The documents used in storage bailments include **warehouse receipts**, scale tickets, weight slips. Any other document that the warehouse business recognizes as equivalent to a warehouse receipt is also an acceptable bailment document regardless of the specific name used for the document.

b) **Trucks, trains, planes, ships, pipelines: transportation bailments.** Many commercial bailments arise out of the transportation of goods. While trucks, trains, planes and ships are easily recalled as transporters, one should not forget that in the modern world pipelines are also very important transporters.

i) *Nomenclature.* Persons who provide transportation services for a fee are in the transportation business and are called "carriers".¹ Carriers are equivalent to warehouse bailees. The person who delivers goods to a carrier for shipment is called the "shipper" or the "consignor". The shipper or consignor is equivalent to warehouse bailors. The person to whom the carrier ordinarily should deliver the goods is called the consignee.

ii) *Documents used.* The documents used in transportation bailments include **bills of lading**, dock receipts, marine bills of lading, air waybills, and train waybills. Any other document that the transportation business recognizes as equivalent to a bill of lading is also an acceptable bailment document regardless of the specific name used for the document.

4. **Business organization for warehouses and carriers.** Warehouses and carriers (the bailee in a bailment relationship) can be legally organized as an individual business, or a partnership, or a corporation, or a cooperative, or any other legal entity recognized by law. Most commercial warehouses are either corporations or agricultural cooperatives². Most

¹See Hoffman, "Motor Carrier Law", § 5, in this work, for description of various types of "carriage" in the U.S..

²An association of those in agriculture endeavor, such as farmers, dairymen, cattlemen, fruit-growers etc. -- who are permitted certain exemptions from antitrust laws to set prices for their products so long as such is done without predatory intent and so long as every member of the association has only one vote in the governance. 7 U.S.C. § 291

commercial carriers are corporations. For common forms of business organization see Kozyris, "Business Organizations", this work.

B. RELEVANT LAWS

5. Federal compared to state laws. In the United States of America, there are two layers of government -- the federal (national) layer and the state (local) layer. In a simplified statement relating to commercial laws, the federal government and its laws govern commercial relations between the various states, called interstate commerce, and commercial relations between the various states or the United States and other countries, called international commerce. A state government and its laws govern commercial relations that occur wholly and solely within that state itself, called intrastate commerce. Moreover, commercial relations are intrastate commerce only if these commercial relations have no significant impact upon interstate or international commerce.

If a commercial bailment occurs in intrastate commerce, one must look to the laws of the particular state, commonwealth, possession, or federal district to determine the rights and duties of the parties to the bailment. Throughout this chapter, the term "state" will be used as shorthand to refer to the states, the commonwealth, the possessions, and the federal district. For further discussion, see Garcia-Rodriguez "U.S. Constitutional Law of Special Concern to the Foreign Investor", this work.

6. Three types of commercial laws in the United States: common law, statutory law, uniform laws.

a) **Common law.** In a simplified explanation, common law refers to the body of case decisions rendered by courts which serve as precedents to resolve similar legal disputes in the future. Bailment is a relationship that the common law courts recognized as creating a legal relationship a long, long time ago. Hence, there is an old and substantial body of court decisions relating to bailment that provides the foundation for understanding commercial bailments. These common law court decisions have been significantly replaced in recent years by statutory law. The federal government has a court system; each of the states has a court system.

b) **Statutory law.** Statutory law comes from legislative enactments and administrative regulations. Legislatures and administrative agencies long ago adopted statutory laws that govern bailments. Statutory law concerning bailment exists at the federal layer of government and at the state layer of government. Once brought into being, statutory law ordinarily replaces common law decisions of the courts.

In the United States of America, courts have the power to interpret statutory law and court decisions interpreting a statutory law become a part of that statutory law. Consequently, lawyers who want to know about bailment law in the United States of America read the statutory law and the case decisions interpreting that statutory law to get a full understanding.

and see Kauper, "Anti-Trust Laws of the U.S." § 25(a) in this work.

c) **Uniform laws.** As travel and technology made it easier to conduct business in more than one state of the United States of America, lawyers and business people saw the need for providing greater uniformity between the laws of the various states. Business would be made easier and more certain if the various states had the same laws relating to commercial relationships. Consequently, an organization known as the National Conference of Commissioners on Uniform State Laws created a Uniform Commercial Code. The Uniform Commercial Code, commonly referred to as the UCC, does not become the law of any particular state until that state's legislature enacts the UCC. Every state of the fifty states of the United States of America now has the UCC, although with variations unique to each state. Once enacted in a particular state, the UCC substantially replaces common law and statutory law, if these two types of law conflict with the provisions of the UCC.

i) *UCC as similar to a civil code.* The UCC is similar to a civil code because the UCC organized the entire commercial law into a coherent code that is meant to be internally consistent and complete. The UCC differs from statutory law in two respects. First, the UCC is substantially uniform in each state that adopted it whereas statutory law is quite different from state to state. Secondly, the UCC is arranged in a codified format whereas statutory law is often piecemeal and lacks internal consistency and completeness. Like a civil code, the UCC has accompanying commentary which helps one to understand the specific provisions of the UCC.

ii) *UCC as dissimilar to a civil code.* The UCC differs from a civil code because courts render decisions interpreting the UCC provisions and these court decisions become part of the UCC jurisprudence. Consequently, lawyers in the United States of America cannot merely read the UCC and be certain they have found the relevant commercial law. Lawyers in the United States of American must consult both the relevant provisions of the UCC and the court decisions interpreting those decisions in order to get a full understanding of commercial law, including bailment.

d) **Federal statutes but no code.** There are many federal statutes governing commercial relations, including bailments. Federal statutes have supremacy over state statutory and uniform laws if the federal statutes conflicts with the state statutory and uniform law. However, there is no federal commercial code. The federal statutes governing commercial relations are fragmentary in scope and, at times, defer to state commercial law as the governing law. Consequently, state commercial law is very much alive and well in the United States of America.

7. **Brief description of specific laws relevant to bailment.**

a) **Uniform Commercial Code [UCC].** Article 1: "General Provisions" and Article 7: "Documents of Title" are the two parts of the Uniform Commercial Code that all states have adopted to govern commercial bailments. UCC Articles 1 and 7 are the most significant state commercial laws governing bailments. Although the states have adopted

UCC Articles 1 and 7, each state may have amended these two uniform articles for reasons particular to that state. Consequently, each state version of Articles 1 and 7 may have slight variations from Articles 1 and 7 in other states.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) drafted UCC Article 7: “Warehouse Receipts, Bills of Lading, and Other Documents of Title” in the 1950s. In the year 2000, NCCUSL and ALI appointed a drafting committee to revise UCC Article 7 in light of changes in business practices and technology since the 1950s. In the year 2003, NCCUSL and ALI adopted a Revised UCC Article 7: “Documents of Title” as part of the Uniform Commercial Code, thereby replacing the 1950s version of Article 7.

As of June 2004, six states had enacted Revised UCC Article 7 as part of that state’s commercial code. Within the next several years, it is expected that many more, if not all, states will enact Revised UCC Article 7. In light of this expectation, when this chapter discusses UCC Article 7 the chapter will be referring to Revised UCC Article 7 (2003). However, especially for the next few years, those with questions about documents of title under the UCC in a particular state should verify which version of Article 7 is the governing law – the 1950s version or the Revised Article 7 (2003).³ When a state adopts Revised UCC Article 7, the state will also amend its UCC Article 1 so that the two UCC articles are consistent, especially with respect to definitions of various terms.

UCC Article 7 focuses its provisions upon documents of title – both storage documents and transportation documents. UCC Article 7 does not set forth licensing or regulatory laws relating to warehouses or carriers.

NCCUSL and ALI most recently revised UCC Article 1 “General Provisions” in 2001. As of June 2004, seven states had enacted Revised UCC Article 1. Moreover, when UCC Article 7 was revised, as discussed in the preceding paragraphs, UCC Article 1 was amended to conform to the revisions in UCC Article 7. When this chapter refers to UCC Article 1, this chapter refers to the Revised UCC Article 1 (2001) as conformed to the Revised UCC Article 7 (2003).

At times this chapter will refer to other UCC articles – e.g. Article 2 Sales, Article 2A Leases, and Article 9 Secured Transactions. Whenever this chapter refers to other UCC articles, the chapter cites to those articles in the Uniform Commercial Code as of July 2004.

b) **Carriage of Goods by Sea Act [COGSA].** COGSA is a federal statute⁴ that governs ocean transportation between American ports and foreign ports. COGSA is the United States domestic law which implemented the international convention known as the Hague Rules.⁵ COGSA is the most important federal statute governing bailments in international commerce by ocean carriers from or to American ports with respect to issues relating to liability for loss or damage to goods.

In 1996, the Maritime Law Association of the United States of America proposed a significant revision of COGSA. As of June 2004, the federal Congress had not enacted any

³ For updated information on the enactment status of Revised Article 7, please consult <http://www.nccusl.org>.

⁴ Ch. 229, 49 Stat. 1207 (1936), codified as amended at 46 U.S.C. App. §§ 1300-1315 (2000).

⁵THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO BILLS OF LADING (1924).

amendments to COGSA that reflect the Maritime Law Association's revision. COGSA remains today very much as it has been since its adoption in 1936. Whether the federal Congress, in the future, will adopt revisions based on the Maritime Law Association's recommendations cannot be known.⁶

c) **Harter Act.** The Harter Act⁷ is a federal statute that governs transportation by ship or barge from one American port to another American port in interstate commerce whether on the ocean or domestic waterways. The Harter Act also applies to goods going into international maritime commerce before the goods are loaded and after the goods are unloaded at American ports. The Harter Act governs bailment relationships primarily with respect to liability for loss or damage to goods. It prohibits a carrier from excluding liability for its own negligence. If the proposed revisions to the Carriage of Goods by Sea Act, discussed in the preceding subsection 7(b), were to become law, the Harter Act would no longer have any governance over international maritime commerce.

d) **Pomerene Act.** The Pomerene Act is the popular name for the federal statute that is formally known as the Federal Bills of Lading Act⁸. The Pomerene Act applies to any bill of lading issued by a common carrier for the transportation of goods in international commerce that begins in the United States and interstate commerce.

The Pomerene Act focuses its governance on the documents used in transportation bailments in contrast to COGSA and the Harter Act which focus their governance on the legal issues relating to liability for loss or damage to the goods being transported. In other words, the Pomerene Act would ordinarily govern the transportation documents issued by carriers governed by COGSA and the Harter Act. While the Pomerene Act is a federal statute, its provisions relating to bills of lading are generally compatible with the provisions relating to bills of lading found in the state commercial law of Article 7 of the UCC.

e) **United States Warehouse Act [USWA].** The United States Warehouse Act was first enacted as a federal statute in 1916.⁹ The USWA was completely revised in 2000.¹⁰ This federal law only applies to warehouses storing agricultural goods. No federal law exists which governs warehouses for nonagricultural goods. Unlike the UCC Article 7 that focuses solely upon documents of title, the USWA has two different foci: licensing and storage documents.

i) *Licensing.* The USWA sets forth the statutory provisions providing the framework for the licensing and regulation of agricultural warehouses. The United States Department of Agriculture is the administrative agency that conducts the licensing and

⁶ See, REVISING THE CARRIAGE OF GOODS BY SEA ACT. Final Report of the Ad Hoc Liability Rules Study Group as Revised by the Ad Hoc Review Committee of the Maritime Law Association (February 9, 1996).

⁷ Ch. 105, 27 Stat. 445 (1893), codified at 46 U.S.C. App. §§ 190-196 (2000).

⁸ Ch. 415, 39 Stat. 58 (1916), codified as amended in 49 U.S.C. §§ 80101-80116 (2000).

⁹ Ch. 313, 39 Stat. 486 (1916), codified as amended at 7 U.S.C. §§ 241-273 (1980).

¹⁰ Pub.L. 106-472, Title II, § 201, 114 Stat. 2061 (2000), codified at 7 U.S.C. §§ 241-256 (2000).

regulation of agricultural warehouses. USWA does not require an agricultural warehouse to obtain a federal license. Owners of agricultural warehouses come within jurisdiction of USWA by voluntarily seeking a license from the federal government. Owner of agricultural warehouses usually have a choice between being a federally-licensed warehouse or a state-licensed warehouse. State licensing regulations are discussed below in subsection 7(g).

ii) *Storage documents.* USWA governs warehouse receipts and other storage documents of title that federal agricultural warehouses issue. While USWA is a federal statute, its provisions relating to storage documents are very similar to and compatible with the provisions relating to storage documents in state commercial law of Article 7 of the UCC¹¹.

f) **Carmack Amendment** . The Carmack Amendment is an amendment to the federal Interstate Commerce Act. More specifically, the Carmack Amendment address liability for loss, damage or delay in the transportation of property by rail carriers and motor carriers in interstate commerce and for international commerce from United States beginning points.¹² The Carmack Amendment is for rail carriers and motor carriers the equivalent law to COGSA and the Harter Act for maritime carriers. The Pomerene Act governs bills of lading that rail and motor carriers issue in these situations. Fuller discussion of laws governing truck transportation exists in K. Hoffman, Motor Carrier Law, this work.

g) **Warsaw Convention.** The Warsaw Convention is an international treaty ratified into United States law that governs international transportation (both passengers and freight) by air. Chapter II of the Warsaw Convention sets forth governing provisions relating to transportation documents, specifically passenger tickets, baggage checks, and air waybills. Baggage checks and air waybills are documents of title establishing a bailment relationship between the customer and the airline. Chapter III of the Warsaw Convention sets for the governing provisions relating to the liability of the carrier for loss, damage, or delay to goods in the bailment relationship between the customer and the airline.¹³

h) **Federal common law.** For truck transport coming into the United States, pipeline carriers, and air carriers solely in interstate commerce, no federal statutes comparable to COGSA, the Harter Act, the Carmack Amendment, or the Warsaw Convention exist. The Pomerene Act provides the controlling federal legislation for bills of lading issued by motor carriers, pipeline carriers and air carriers in these factual circumstances. Federal common law (cases decisions) would assuredly provide the governing law relating to the liability of motor carriers, pipelines, and air carriers for loss, damage, or delay to the goods being transported. In

¹¹ See, Drew L. Kershen, Comparing the United States Warehouse Act and UCC Article 7, 27 CREIGHTON L. REV. 735 (1994).

¹² Pub. L. 104-88, Title I, § 102(a), 109 Stat.847 (1995), codified at 49 U.S.C. § 11706 (2000) (rail carriers); Pub. L. 104-88, Title I, § 103, 109 Stat 907 (1995), codified at 49 U.S.C. § 14706 (2000 & Supp. 2003) (motor carriers).

¹³ The Warsaw Convention is printed in a note following 49 U.S.C. § 40105 (International negotiation, agreements, and obligations) (2000).

developing the federal common law, the courts would most likely interpret the federal common law similarly to the analogous provisions in the Carmack Amendment or the analogous provisions in UCC Article 7.¹⁴

i) **State warehouse license laws.** Many states of the United States of America require warehouses to obtain a license before the warehouse can become a commercial operation open to the public.

i) *Warehouses as public utilities.* Some states, Illinois being an example, consider commercial warehouses to be public utilities. As a public utility, Illinois law subjects warehouses to intensive regulations concerning their operation, their fees, their services. Owners of warehouses are perceived as providing a public service and being infused with a public interest which requires strict public scrutiny.

ii) *License as minimum standards in other states.* In contrast to Illinois, other states, Oklahoma being an example, license warehouses but impose relatively light regulations for obtaining and retaining the warehouse license. These states are concerned that warehouses be adequately financed, bonded, insured, equipped, and operated but these standards are set forth as minimum standards. In these states, once minimum standards for obtaining a license are met, the owners of the warehouse are relatively free to operate their business as the owners see fit free from public scrutiny. Indeed, the United States Warehouse Act follows this model of warehouse licensing that imposes minimal standards upon warehouses.

iii) *No license required.* Some states of the United States do not require any public license for a commercial warehouse to operate. In a state that does not require any public license an agricultural warehouse could voluntarily obtain a license under the United States Warehouse Act. If the agricultural warehouse did not voluntarily seek a USWA license, the agricultural warehouse would be allowed to operate in that state without being required to obtain any public license.

j) **Transportation: common carrier regulation.** Common carriers, specifically railroads, were among the first economic sectors to be heavily regulated by governmental administrative agencies in the United States of America.

i) *Federal regulation and deregulation of common carriers.* At the federal level, the federal government enacted the Interstate Commerce Act as early as 1887 and created the Interstate Commerce Commission to regulate railroads in interstate commerce.¹⁵ The Interstate Commerce Commission was the first administrative regulatory agency in the federal government of the United States of America.

¹⁴ E.g. *Ingram Micro, Inc. V. Airoute Cargo Express, Inc.*, 154 F. Supp.2d 834 (S.D. N.Y. 2001). Compare 49 U.S.C. § 14706 (2000) (motor carriers) with 49 U.S.C. § 15906 (2000) (pipeline carriers).

¹⁵ Ch. 104, 24 Stat. 379 (1887), codified as amended in 49 U.S.C. § 10101 et seq. (1996)

As new types of common carriers came into existence, such as trucks, pipelines, and airlines, the Interstate Commerce Commission or another federal regulatory agency (e.g. the Surface Transportation Board, the Federal Energy Regulatory Commission, and the Federal Aviation Administration) regulated these carriers in interstate commerce with respect to fees, routes, equipment, safety, employee relations, customer relations, etc. Before interstate common carriers could begin operation, they had to obtain a license to operate from the appropriate federal regulatory agency.

Beginning in the late 1970s and continuing through the present, the federal government has repealed many of these regulatory laws. When regulatory laws are repealed, Americans use the term "deregulation" to signify this action of repeal. The federal government passed statutes significantly deregulating interstate common carriers in the years 1978, 1980, 1983, 1994, 1995. Indeed, the Interstate Commerce Commission, in existence since 1887, was terminated and abolished as of January 1, 1996.¹⁶

ii) *State regulation and federal supremacy over common carriers.* Just as the federal government regulated interstate common carriers, so states also created state administrative agencies to regulate intrastate common carriers, particularly rail and truck transportation. State regulation of intrastate common carriers was quite similar to federal regulation of interstate common carriers -- fees, routes, equipment, safety, employee relations, customer relations, etc. Moreover, before a common carrier could begin operation in intrastate commerce, the common carrier had to obtain a license from the appropriate state administrative agency.

As the federal government began to deregulate the transportation sector of interstate commerce, so also many states began to deregulate common carriers operating in intrastate commerce. When states did not act fast enough to deregulate to satisfy the federal government, the federal government used the supremacy clause of the United States Constitution to preempt state regulation of intrastate common carriers. The federal government took this preemption action on the basis that continued state regulation of intrastate transportation would have a significantly undesirable impact on the deregulation of interstate transportation.¹⁷

8. **The laws upon which this chapter focuses.** This chapter will focus upon Article 7 of the Uniform Commercial Code, the Pomerene Act, the United States Warehouse Act, the Carriage of Goods by Sea Act, and the Carmack Amendment. By focusing upon these five, identified laws, the author can instruct the reader about the legal relationship between the bailor and the bailee with regard to bailment documents and with regard to liability for loss or damage to the goods bailed. This chapter will not focus upon licensing requirements for warehouses or common carriers nor upon regulatory laws that might apply once a warehouse or common carrier acquires a license. Moreover, as explained in the preceding subsection 7(j), the United States of America is in the process of repealing many regulatory laws.

PART II. WAREHOUSE OR CARRIER LIABILITY FOR GOODS

¹⁶ Pub. L. 104-88, 109 Stat. 803 (1995).

¹⁷ See, 49 U.S.C. § 14501 & § 41713 (2000 & Supp. 2003), and see Hoffman, "Law of Motor Carriers", § 6, this work.

A fundamental obligation of a warehouse or carrier is to protect the goods that have been entrusted to them as a bailee. For example, a customer (the bailor) does not want to entrust beautiful wood furniture to a warehouse or carrier and receive in return from the bailee broken pieces of wood. The customer wants every piece of the furniture returned in good condition. This Part II of this Chapter discusses the obligations between bailors and bailees with respect to loss or injury of goods while the bailee has possession of the goods.

A. STANDARD OF CARE

9. **Reasonably careful bailee standard.** The most common standard of care in the United States that bailees must satisfy is that bailees must exercise such care for the goods as a reasonably careful bailee would exercise in like circumstances. If the bailee exercises reasonable care but the goods suffer damage or loss despite the reasonable care of the bailee, the bailee has no liability for the damage to the goods, unless there is a statute imposing liability (see § 10, *infra*). Bailors bear the loss or injury to goods that occurs despite the exercise of reasonable care by the bailee.¹⁸ The "reasonably careful bailee" standard is a negligence standard. A bailee is legally responsible for loss or injury to bailed goods only if the bailee acted in a negligent manner regarding the care of the goods.

The "reasonably careful bailee" standard gains its concrete meaning on a case-by-case basis. How a bailee should have acted to be a reasonably careful bailee depends very heavily on the specific facts or circumstances in which loss or injury to the goods occurred. While statutory language sets forth the standard, American lawyers know that they can understand that standard only by consulting the case decisions rendered by American courts evaluating in specific factual settings whether a bailee has acted like a reasonably careful bailee.¹⁹

10. **Strict-liability standard.** During the time that warehouses and carriers were subject to heavy governmental regulation, some statutes and regulations imposed the standard of strict-liability upon warehouses and carriers in certain situations. If by statutory or regulatory law a bailee is strictly liable for loss or injury to goods, the bailee cannot avoid liability by showing that the bailee acted like a reasonably careful bailee would have acted. Under the strict liability standard, the bailee is liable for actual loss or injury to the goods regardless of how or why the goods were lost or damaged while in the bailee's possession. The standard of strict liability applies most often in the transportation industry under the Carmack Amendment.²⁰

UCC § 7-309 (about a carrier's duty of care) recognizes that strict liability is often the liability standard for carriers. Section 7-309(a) makes clear that another statute or regulation imposing strict liability upon a carrier prevails over the reasonably careful bailee standard. UCC §

¹⁸ UCC §§ 7-204(a) and 7-309(a); COGSA, 46 U.S.C. App. § 1304(1) and (2)(b)&(q) (2000).

¹⁹ See, Richard Helmholz, *Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care*, 41 KANSAS L. REV. 97 (1992).

²⁰ 49 U.S.C. § 11706(a) (2000) (rail carriers); 49 U.S.C. § 14706(a) (2000) (motor carriers). See also, the Warsaw Convention Article 18 (international air carriers) set forth in a note following 49 U.S.C. § 40105 (2000). For additional discussion of transportation carriers and their liability, see Hoffman, "Motor Carrier Law", in this work.

7-309(a) states in its last sentence: "This subsection does affect any statute, regulation, or rule of law that imposes liability upon a common carrier for damages not caused by its negligence."

Although rail and motor carriers face a strict liability standard under the Carmack Amendment, these carriers are permitted to establish certain common law defenses. More specifically, even under a strict liability standard, rail and motor carriers are not responsible for damages caused by an act of God, an act of a public enemy, an act of the shipper itself, a act of a public authority, or the inherent vice or nature of the goods themselves. These defenses are called common law defenses because courts have recognized these defenses in case decisions.²¹

11. **Contractual clauses in bailment documents relating to the standard of care for loss or injury to goods.**

a) **Disclaimers of liability nullified by law.** Warehouses and carriers facing liability for loss or injury to goods might decide that they will disclaim this legal liability by inserting a clause in the bailment contract which places the risk of loss or injury to goods upon the bailor. Statutes and regulations on bailment in the United States of America explicitly declare that contract clauses cannot disclaim the standard of care imposed by law. Any contract clause that disclaims the standard of care is a null and void clause in the contract.²²

b) **Contract clauses can increase the bailee's standard of care.** Even though a bailment contract cannot contain a clause disclaiming the standard of care, the parties to a bailment may reach an agreement whereby the bailee agrees to be accountable for a greater standard of care than the standard of care imposed by law. As a consequence, a bailee who would be accountable for loss or injury to goods due to negligence under the UCC, for example, may agree with the bailor that the bailee will be accountable for loss or injury to goods regardless of negligence.²³ If the bailor and bailee reached this contractual agreement, the bailee would be agreeing to increase its accountability from a negligence standard to a strict-liability standard. Obviously, bailees would agree to an increase in accountability for loss or injury to goods only if the bailor agreed to pay a significantly larger fee to the bailee for the bailment services.

c) **Contract clauses measuring performance of the standard of care.** The "reasonably careful bailee" standard is uncertain and imprecise. Bailees and bailors can fully know what this standard means only after a court renders a decision applying that standard to a specific factual situation. Consequently, bailees and bailors may desire to gain more certainty and precision as to precisely how the "reasonably careful bailee" standard will be applied in their bailment relationship. Parties to a bailment may legally agree to contractual clauses which measure the performance of reasonable care so long as such clauses are not manifestly

²¹ See e.g., *Missouri Pac. RR. Co., v. Elmore & Stahl*, 377 U.S. 134 (1964); *North American Van Lines, Inc. v. Pinkerton Security Systems Inc.*, 89 F.3d 452 (7th Cir. 1996).

²² See e.g., UCC § 1-302(b); COGSA, 46 U.S.C. App. § 1303(8) (2000).

²³ See, UCC § 7-204(a) second sentence "Unless otherwise agreed ..."

unreasonable.²⁴ The line between a clause which measures performance under the "reasonably careful bailee" standard (legally enforceable) and a clause which attempts to disclaim the standard of care as imposed by law (legally unenforceable) is often a very fine and very unclear line.

d) **Contract clauses can govern the presentation of claims for loss or injury to goods.** Under the UCC, bailors and bailees may agree upon the time and manner of presenting claims for loss or injury to goods. They may also agree upon the time within which a bailor must start an action for the recovery of damages due to the loss or injury to goods. These clauses are valid so long as the clauses satisfy one legal requirement: the clauses must set forth "reasonable" provisions. In other words, if bailees insist upon contract clauses that set forth procedures about the presentation of claims that unfairly favors the bailee, courts will not enforce these clauses on the basis that the clauses are manifestly unreasonable.²⁵ By contrast, the Carmack Amendment expressly prohibits carriers from setting the time period for notice of a claim at less than 9 months and for legal action at less than 2 years.²⁶

COGSA differs from both the UCC and the Carmack Amendment. COGSA has a provision that sets short periods of time for giving notice and for filing a claim. Under GOGSA, the claimant should file notice of the claim at the time of delivery or within three days if the damage was not apparent at the time of delivery. In any event, claimants must bring law suits within one year of the delivery of the goods or the date upon which the goods should have been delivered.²⁷

B. LIMITATION OF DAMAGES

12. **Limitation of damage provisions generally valid.** Bailees may not disclaim the standard of liability imposed by law upon them. However, bailees may gain protection from liability for an unlimited or unknowable amount of damages by a limitation of damages clause which exists in the statute, the tariff schedule, or the contract that governs the bailment relationship. For example, the COGSA statute provides that ships and carriers are not liable in an amount "exceeding \$500 per package lawful money of the United States" unless the carrier and the shipper agree to a higher maximum amount.²⁸ Similar specific limitations based on value (e.g. \$500 per package) or by weight (e.g. 60 cents per pound) are common in the tariff schedules of carriers. Carriers often incorporate the tariff limitation of damages into the bill of lading by making reference to the tariff.²⁹ If the law or the tariff schedule does not set forth a "limitation of damages" clause, the bailor and bailee by contract can reach agreement to include a "limitation of damages" clause in the bailment document -- the warehouse receipt or the bill of lading. There are, however several legal restrictions upon "limitation of damages" clauses.

²⁴ See, UCC § 1-302(b).

²⁵ UCC §§ 1-302(b), 7-204(c) and 7-309(c).

²⁶ 49 U.S.C. §§ 11706(e) and 14706(e) (2000).

²⁷ COGSA, 46 U.S.C. App. § 1303(5) (2000).

²⁸ COGSA, 46 U.S.C. App. § 1304(5) (2000).

²⁹ See Hoffman, "Motor Carrier Law", in this work.

13. **Opportunity to avoid required.** American statutes show an understanding of the fact that bailees make "limitation of damages" clauses a standard clause in their bailment documents. Hence, these statutes also provide that the bailor should have the opportunity to avoid the standard "limitation of damages" clause by requesting the bailee to increase its exposure to liability for loss or injury to goods. In return for the bailee's increased exposure to liability, the bailor will agree to pay a greater fee for the storage or transportation services. The bailor avoids the "limitation of damages" clause by declaring the nature and value of the goods and having the declared nature and value inserted into the warehouse receipt or the bill of lading.³⁰ When a bailor declares the specific nature and value of the bailed goods, the declared value supercedes the "limitation of damages" and the declared value, if correct, becomes the amount for which the bailee is liable.

When a loss occurs to goods, bailors commonly claim that the bailee did not give them an adequate opportunity to avoid the standard "limitation of damages" clause. Bailors are sometimes able to prove that they did not read the standard bailment document and, therefore, had no knowledge that the standard document contained a "limitation of damages" clause.

Faced with situations like this, American courts have generally drawn a distinction between a sophisticated user of warehouse or carrier services and an unsophisticated, ordinary consumer.

If the bailor who has suffered a loss is an unsophisticated, ordinary consumer, courts often require that the warehouse or carrier prove that the consumer clearly knew of the "limitation of damages" clause and specifically declined the opportunity to avoid the standard clause. If the warehouse or carrier cannot satisfy this proof, the courts are likely to void the standard "limitation of damages" clause and to hold the warehouse or carrier liable for the actual loss or injury to the goods.³¹

By contrast, sophisticated users of warehouses and carriers are ordinarily bound by the standard "limitation of damages" clause. Courts reason that sophisticated users are or should be aware that a "limitation of damages" clause is standard in warehouse receipts and bills of lading. In light of this standard business practice, courts emphasize and uphold the freedom of contract between bailors and bailees. Moreover, courts reason that sophisticated users have the opportunity to purchase property insurance for protection of their bailed property, as opposed to declaring a value and paying higher fees to the warehouse or carrier in order to avoid the "limitation of damages" clause.³²

14. **No "limitation of damages" clause for conversion to own use.** Even though the law is willing to recognize "limitation of damages" clauses, the law is not willing to let bailees convert the goods to their own use and pay only a limited amount of damages for having done so. "Limitation of damages" clauses should not become an incentive to bailees to take the

³⁰ See, UCC §§ 7-204(b) and 7-309(b); COGSA, 46 U.S.C. App. § 1304(5) (2000).

³¹ See e.g., *United Parcel Serv. Inc. v. Smith*, 645 N.E.2d 1 (Ind. Ct. App. 1994) and *Hall v. Aloha Int'l Moving Serv.*, 2002 U.S. Dist. LEXIS 14868 (D. Minn. 2002).

³² See e.g., *Kemper Ins. Co. v. Fed. Express Corp*, 252 F.3d 509 (1st Cir. 2001); *Siren, Inc. v. Estes Express Lines*, 249 F.3d 1268 (11th Cir. 2001); *Royal Ins. Co. v. Sea-Land Serv., Inc.*, 50 F.3d 723 (9th Cir. 1995); *Karnecki v. Wick's Air Freight, Inc.*, 869 P.2d 388 (Or. Ct. App. 1994).

property rights of bailors while only paying minimal damages for doing so. Consequently, if bailors can prove that bailees took dominion over the bailed goods for their own use, bailors can make bailees pay full damages for the bailee's act of conversion. "Limitation of damages" clauses are null and void when the bailee engages in conversion of the bailor's goods.³³ A mere failure to redeliver the goods to a bailor is not conversion to the warehouse's or the carrier's own use.³⁴

C. SPECIAL PROVISIONS RELATING TO LIABILITY FOR GOODS BY CARRIERS

15. **Carrier liability on a through bill of lading.** When a bailee delivers goods to a warehouse, the ordinary expectation is that the warehouse will keep the goods in its own storage until the bailee requests the warehouse to return the goods. By contrast, when a bailee delivers goods to a carrier for transport, it is often the expectation that the carrier to whom the goods are delivered will in turn use other carriers to complete the transport from the starting point to the ending point. In these situations, the carrier to whom the goods are initially delivered will often issue a through bill of lading -- i.e. a bill of lading that is meant to be the bailment document from the beginning of the transport to the end of the transport no matter how many different carriers are actually involved in the transportation.³⁵

a) **Liability of the carrier issuing the through bill of lading.** The carrier issuing the through bill of lading is accountable for loss or injury to the goods caused by any breach of the standard of care by any agent or performing carrier providing transportation for the goods under the through bill.³⁶ For example, Carrier A issues a through bill of lading in New York City and transports the goods to Chicago. In Chicago, Carrier A hands over the goods to Carrier B for transport from Chicago to Denver. In Denver, Carrier B hands over the goods to Carrier C for transport from Denver to the final destination in Colorado Springs, Colorado. Under UCC § 7-302(a), Carrier A is accountable for the breach of the standard of care for itself, Carrier B, and Carrier C. This liability cannot be reduced by a disclaimer of liability clause in the bill of lading.³⁷

Bailors gain a great benefit from this rule of law imposing liability upon the carrier issuing a through bill of lading. The bailor whose goods suffer damage need only sue the issuing carrier and has no obligation to determine which of the several carriers was the carrier who caused the loss or injury to the goods. In effect, the issuing carrier has joint and several liability with the other performing carriers for damage to goods occurring during the transportation.

³³See, UCC §§ 7-204(b) and 7-309(b).

³⁴ See e.g., *Kemper Ins. Co. v. Fed. Express Corp.*, 252 F.3d 509 (1st Cir. 2001); *Adams v. Ryan & Christie Storage, Inc.*, 563 F. Supp. 405 (E.D. Pa. 1983) aff'd 725 F.2d 666 (3rd Cir. 1983); *Art Masters Assoc., Ltd. v. United Parcel Serv.*, 77 N.Y.2d 200, 567 N.E.2d 226 (1990).

³⁵ See Hoffman, "Motor Carrier Law", in this work.

³⁶ UCC § 7-302(a); 49 U.S.C. § 14706(a)(1) (2000).

³⁷ UCC § 7-302(a) and Official Comment 1. But see, Carmack Amendment, 49 U.S.C. § 14101(b) (2000). The UCC and the Carmack Amendment appear to differ on whether carriers issuing through bills of lading may disclaim liability for acts of performing carriers.

i) *International shipments.* A carrier issuing a through bill of lading has the same obligations for agents and performing carriers if the carriage will involve transportation to overseas ports or in territory not contiguous to the United States. However, the UCC permits the issuing carrier and its bailor to agree that the issuing carrier will not have liability for the agents and performing carriers in these international (overseas and non-contiguous) destinations.³⁸

Whether the carrier receiving the goods issues a through bill of lading is also extremely important in deciding which country's law will govern the liability issues for international shipments between the Canada, Mexico, and the United States. For shipments to Canada or Mexico from the United States, if the carrier issues a through bill of lading for this shipment, United States courts will likely apply the Carmack Amendment as the governing law. By contrast, if shipments originate in Canada or Mexico under a through bill of lading, the U.S. courts will likely apply the liability laws for carriers of the county of origin of the shipment.³⁹

ii) *Indemnification between the carriers.* If the issuing carrier is held liable for loss or injury to goods, the issuing carrier is entitled to recover the damages paid and the reasonable expenses incurred in defending the claim from the performing carrier whose breach actually caused the damages.⁴⁰

b) **Liability of the performing carriers or agents under through bills of lading.** While carriers issuing the through bill of lading are accountable for the breach of any performing carrier or agent, whether performing carriers or agents are accountable only for their own performance likely depends on the governing law. Under the UCC, performing carriers or agents under a through bill of lading are not liable for the breaches of any other carrier or the issuer.⁴¹ By contrast, the Carmack Amendment imposes joint and several liability also upon performing truck carriers.⁴²

D. ISSUER LIABILITY FOR DESCRIPTION OF THE GOODS

Any warehouse or carrier who issues a document of title (a warehouse receipt or a bill of lading) must include a description of the goods covered by the document of title on the document of title itself.⁴³

16. **Carrier liability for description on the bill of lading.** The carrier who issues a bill of lading has the basic obligation to count the packages, ascertain the kind and quality of bulk goods, weigh bulk goods, load the goods being shipped, and accurately describe the goods on the bill of lading. If the consignee or the holder of the negotiable bill of lading to whom

³⁸ UCC § 7-302(a) (second sentence).

³⁹ See Hoffman, "Motor Carrier Law", in this work.

⁴⁰ UCC § 7-302(c) and Official Comment 3.

⁴¹ UCC § 7-302(b).

⁴² 49 U.S.C. § 14706(a)(1) (2000). See Hoffman, "Motor Carrier Law", in this work.

⁴³ UCC §§ 7-202(b)(6), 7-203 & 7-301; Pomerene Act, 49 U.S.C.A. § 80113(a)&(d) (2000).

duly negotiated relies on the description, count, load, or weight as set forth in the bill of lading, the consignee or the holder may recover damages from the issuing carrier if not all the goods are received or if the goods received do not match the description in the bill of lading.⁴⁴

Carriers may well be reluctant to accept this liability for the description on a bill of lading because carriers truthfully may not know what the packages contain and may not have been involved in the loading and weighing of the shipped goods. In many instances, carriers depend upon the shipper for the description, number, and weight that appears on the bill of lading.⁴⁵ If the shipper provided the description information on the bill of lading, the carrier issuing the bill of lading may legally disclaim its liability to the consignee or the holder by informing them on the face of the bill of lading that the shipper is truthfully the source of the description. Carriers often make this disclaimer by using on the face of the bill of lading such phrases as: "contents or condition of contents of packages unknown," "said to contain," or "shipper's weight, load and count."⁴⁶

17. **Warehouse liability for description on the warehouse receipt.** Like carriers, warehouses too are liable to those who have relied upon the description of the goods in the warehouse receipt that the warehouse issued. If the person to whom the goods are redelivered discovers that he did not receive the number or the type of goods as set forth in the description, the warehouse is liable (barring some other valid excuse for non-delivery) for the non-receipt or misdescription. Also like carriers, however, warehouses can disclaim this liability by conspicuously indicating on the bailment document that the warehouse does not vouch for the description. Warehouses often make this disclaimer by including on the bailment document phrases such as the following: "contents, condition, and quality unknown," or "said to contain."⁴⁷

PART III. DOCUMENTS OF TITLE

A. FUNCTIONS SERVED BY BAILMENT DOCUMENTS

18. **Documents of title are the most common type of bailment documents.** Documents of title, such as warehouse receipts and bills of lading, often serve several distinct functions in the relationship between a bailor and a bailee.

a) **Contractual function.** Documents of title may serve as contractual documents --i.e. a document which sets forth the terms of the bailment agreement between the bailor and the bailee. These terms relate to fees, the liability standards as discussed in Part II of this chapter, the mode of handling the goods, the length of time that the bailment relationship will last, and any other agreements that the bailor and the bailee have reached about their relationship. Many documents of title do not set forth the full contractual agreement

⁴⁴ UCC § 7-301; Pomerene Act, 49 U.S.C.A. § 80113(a)&(d) (2000).

⁴⁵ UCC § 7-301(e).

⁴⁶ UCC § 7-301(a)&(d); Pomerene Act, 49 U.S.C.A. § 80113(b)&(c) (2000).

⁴⁷ UCC § 7-203.

between the bailor and bailee. A separate document that is a contract of bailment may exist which is not a document of title. See § 19(a), *infra*.

b) **Receipt function.** Documents of title may serve as receipts for the acceptance of goods into the bailment or as evidence of the redelivery of the goods out of the bailment relationship. For example, when a warehouse receives goods into the warehouse, the warehouse issues a warehouse receipt evidencing that the goods have been received. By law, commercial warehouses may be prohibited from issuing a warehouse receipt except when goods have actually been received into the warehouse.⁴⁸ By contrast, when the warehouse redelivers the goods to the bailor, the warehouse must in some instances ask for the surrender of the warehouse receipt so that it can be canceled and kept as evidence that the goods have been redelivered to the bailor.⁴⁹ If a warehouse issues a warehouse receipt without receiving goods or fails to ask for the surrender of a warehouse receipt when the warehouse redelivers goods, the warehouse might face civil liability for damages, or criminal sanctions, or administrative penalties including the revocation of a license to act as a commercial warehouse.

c) **Ownership function.** Probably the most important function that a document of title serves is the ownership function -- i.e. to establish who can claim the goods that are in the bailment relationship. Documents of title function as evidence of the ownership of the goods in the bailment relationship. The remaining parts of this chapter, except for Part VI on liens, focus on discussing and explaining this ownership function of documents of title.

19. **Other developments in bailment documents.**

a) **Storage agreements and transportation agreements.** Traditionally, warehouses and carriers have issued documents of title (warehouse receipts and bills of lading, respectively) for single transactions of storage and carriage. Each document of title covered specific goods placed into storage or delivered for transport. Each document of title for the single transaction could easily serve as the contractual document, the receipt document, and the ownership document.

In more recent times, warehouses and bailors or carriers and shippers have developed on-going relationships in which goods are moving constantly between the parties. For these on-going relationships, warehouses-bailors and carriers-shippers have developed bailment documents called storage agreements or transportation agreements. Storage agreements and transportation agreements create the contractual relationship between the parties and set forth its terms. If warehouses-bailors or carriers-shippers have entered a storage agreement or transportation agreement, courts will most likely consider any particular document of title issued by the warehouse or the carrier to be solely a receipt for goods delivered and redelivered. Serving solely as a receipt, the document of title will not establish the contractual terms, e.g. relating to liability

⁴⁸ E.g. United States Warehouse Act, 7 U.S.C. § 250(b) (2000).

⁴⁹ E.g. United States Warehouse Act, 7 U.S.C. § 751(c)&(d) (2000) as implemented by regulations in 7 C.F.R. §§ 735.110(c)&(d) and 735.300(b)(7)&(8) (2004); UCC § 7-403(c).

for damages. Courts will look to the storage agreement and transportation agreements for the terms of the contractual relationship.⁵⁰

b) **Electronic documents.** Statutes and regulations governing commercial bailments are being adapted to authorize the use of electronic documents of title. Rail and water carriers in the United States may now issue bills of lading electronically.⁵¹ Agricultural warehouses may issue electronic warehouse receipts for any agricultural commodity in storage.⁵² UCC Article 7 acknowledges and authorizes electronic documents of title.⁵³

Electronic documents of title do not change, and are not meant to change, the substantive law of bailment.⁵⁴ Rather, electronic documents of title allow warehouses and carriers the option of using technology to improve their business operations and to accommodate the needs of customers for timely, accurate transactions. Since the mid-1990s, the cotton industry has successfully used electronic warehouse receipts and today uses electronic warehouse receipts for the great majority of transactions in the buying and selling of cotton. Moreover, electronic documents of title open the possibility of merging storage documents and transportation documents seamlessly into one electronic document that serves both the storage and transportation segments of the movement of goods in bailment relationships.

c) **Model documents in international trade.** Global trade is increasing in volume and in the speed with which transactions occur. The speed with which transactions occur has been facilitated by technological changes in the modes of transportation of goods and in the modes for the transfer of information. Both goods and information travel much faster today than even ten years ago. As a consequence of these technological changes, warehouses, carriers, and their customers realize that predictability and efficiency in the use of bailment documents is important for enhanced participation in international trade. For example, the United Nations has efforts currently underway to seek harmonization in private international law relating to maritime bills of lading.

The Organization of American States has also responded to these needs of international trade through its working groups on private international law.⁵⁵ Specifically in February 2002, the OAS Sixth Inter-American Specialized Conference on Private International Law approved two model documents for use in road transportation: the Non-Negotiable Inter-American Uniform Through Bill of Lading for the International Carriage of Goods by Road; and, the Negotiable Inter-American Uniform Through Bill of Lading for the International Carriage of Goods by Road.⁵⁶ As model documents, OAS member states will encourage their road transport industries

⁵⁰ See, *J.W.S. Delavau, Inc. v. Eastern American Transport & Warehousing, Inc.*, 810 A.2d 672 (Pa. Super. Ct. 2002) and *Continental Stock Transfer and Trust Co. v. Sher-Del Transfer and Relocation Services, Inc.*, 750 N.Y.S.2d 8 (N.Y. App. Div. 2002). See also, UCC § 7-204(b) and Official Comment 5; UCC § 7-309(b) and Official Comment 1.

⁵¹ 49 C.F.R. § 1035.1(b) (2004).

⁵² 7 U.S.C. § 250(e) (2000) as implemented by 7 C.F.R. § 735.303 (2004).

⁵³ UCC § 7-106 and Official Comments.

⁵⁴ See, 7 U.S.C. § 250(e)(4) (2000); 49 C.F.R. § 1035.2 (2004).

⁵⁵ For a discussion of the reasons behind this OAS project, read Paul B. Larsen, *International Carriage of Goods by Road in the Americas: Time to Revise the Inter-American Convention?*, IV (New Series) *UNIFORM LAW REVIEW* 33 (1999)

⁵⁶ OEA/Ser.K/XXI.6;CIDIP-VI/doc.w24/02 rev. 2;CIDIP-VI/Res. 8/02 (5 March 2002) pp. 47-68.

to use these standardized documents as a *de facto* harmonization of private international law for road transport. It is expected that the model non-negotiable document, which is almost identical to the NAFTA model bill of lading for road transport, will be used primarily in North America because North American carriers historically have used non-negotiable bills of lading almost exclusively. By contrast, it is expected that the model negotiable document will be used primarily in South America where carriers have historically used a negotiable bill of lading as the transport document.

B. DOCUMENTS OF TITLE DISTINGUISHED FROM OTHER OWNERSHIP DOCUMENTS

20. **Documents of title defined.** For a document to be a document of title, the document must purport to be issued by a bailee for goods in a bailment relationship to a bailor as adequate evidence that the bailor is entitled to receive, hold, and dispose of the document and the goods it covers. The two most common documents of title are warehouse receipts and bills of lading. A document may also qualify as a document of title if it is issued to a bailee for goods already in a bailment relationship and directing the bailee to deliver the goods to a person who thereafter is entitled to receive, hold, and dispose of the document and the goods it covers. The most common document of title directed to a bailee is a delivery order.⁵⁷

21. **Certificates of title distinguished.** In the United States, public documents called certificates of title exist for automobiles, trucks, boats, aircraft, and other vehicles. These public documents evidence the ownership of the vehicle for which the certificate is issued. These certificates of title are not documents of title. These certificates are issued by public agencies as part of the licensing and registration of vehicles, significantly for the purpose of identification to prevent theft. No bailment relationship exists between the public agency issuing the certificates of title and the owner of the vehicle. Certificates of title are not documents of title because documents of title relate to a bailment relationship.

22. **Breed registration papers distinguished.** In the United States, various livestock organizations issue breed registry documents to authenticate the lineage of livestock as purebred animals. For example, the Jockey Club of New York is recognized as the entity which registers and recognizes horses as thoroughbreds. If a stallion or a mare does not have registration papers from the Jockey Club as a thoroughbred, the thoroughbred industry will not recognize the horse as a thoroughbred. Similar registries exist for every other livestock (cattle, hogs, sheep, dogs, goats, etc.).

Breed registry documents are not documents of title. The livestock organization that issues the registration papers does not have a bailment relationship with the person requesting registration for a particular animal. As no bailment relationship exists, these registration papers are outside the scope of this chapter which addresses issues relating to documents of title in commercial bailments.

⁵⁷ See definitions, UCC §§ 1-201(b)(6) [bill of lading], (b)(16) [document of title], (b)(42) [warehouse receipt]; UCC § 7-102(a)(5) [delivery order].

C. NEGOTIABLE AND NON-NEGOTIABLE DOCUMENTS OF TITLE

23. **Distinction between negotiable and non-negotiable documents of title of critical importance.** Documents of title are of two types -- negotiable documents of title and non-negotiable documents of title. With regard to the ownership function of documents of title, this distinction between negotiable documents and non-negotiable documents is the distinction of fundamental importance.

24. **Negotiable documents created by specific words.** Negotiable documents must be recognizable as negotiable documents on the face of the document by the terms of the document itself. In other words, any person who reads a document of title must be able to know from the terms of the document itself that the document is negotiable. In light of this requirement, certain terms have come to be recognized as the terms of negotiable documents. Any other terms are unacceptable and do not make a document a negotiable document.

a) **Bearer documents.** A document of title which on its face states that the goods covered by the document are to be "delivered to bearer" is a negotiable document. The legally important words are the words in quotation marks – “delivered to bearer”.⁵⁸

If a document of title is a bearer document, the document of title is quite similar to money currency -- whoever has the document (the money) in possession is presumed to be the owner of the document (the money) and the goods it covers. One must safeguard bearer documents as carefully as one safeguards money.

b) **"Order" documents.** A document of title which on its face states that the goods covered by the document are to be "delivered to the order of a named person" is a negotiable document.⁵⁹

Bills of lading that use this "delivered to the order of" language have traditionally been known as "order" documents. In the transportation industry an "order" document was the common name for a negotiable document.

c) **By agreement of the parties the document is non-negotiable.** Even if the document of title has the words of negotiability – “delivered to bearer or to the order of a named person” – the bailor or bailee may agree that a particular document of title will not be a negotiable document. The parties must reach this agreement before issuance of the document. The parties evidence their agreement that a document will not be a negotiable document by adding a conspicuous legend to the face of the document stating that the document is non-negotiable. The usual way the parties add the conspicuous legend is for them to stamp the document **NON-NEGOTIABLE**.⁶⁰

⁵⁸ See, UCC § 7-104(a); R.E. Huntley Cotton Company v. Fields, 551 S.W.2d 472 (Tex. Civ. App. 1977).

⁵⁹ See, UCC § 7-104(a); Pomerene Act, 49 U.S.C. § 80103(a)(1)(A) (2000); Bank of New York v. Amoco Oil Company, 831 F. Supp. 254 (S.D. N.Y. 1993), *affirmed by* 35 F.3d 643 (2nd Cir. 1994).

⁶⁰ See, UCC § 7-104(c) and Official Comment 2; Pomerene Act, 49 U.S.C. § 80103(a)(1)(B) (2000).

25. **Non-negotiable documents -- all others without special words.** Any document of title which lacks the “bearer” or “order” language described in Paragraph 24 is a non-negotiable document no matter what the document says on its face. For instance, if the document says that goods are to be “delivered to a named person,” the document is a non-negotiable document. For instance, if the document says that goods are to be “delivered to a named person upon that person's endorsement and surrender of the document,” the document is a non-negotiable document despite the endorsement and surrender requirements before the bailee must deliver the goods to the name person.⁶¹

In the transportation industry, non-negotiable bills of lading have commonly been called "straight bills of lading". It is also common, mandatory in the transportation industry under the Pomerene Act, for non-negotiable documents of title to carry a legend on their face: "Nonnegotiable" or "Not Negotiable."⁶²

26. **The ownership function: comparing negotiable and non-negotiable documents of title.** By law and legal perspective, negotiable documents of title embody the goods that the negotiable document covers. In other words, a negotiable document of title is considered to be the goods covered by the document -- i.e. the goods have lost their separate identity and become embodied in the negotiable document of title. Consequently, one who possesses a negotiable document of title is, in most instances, legally considered to be in possession of the goods themselves. Once a negotiable document of title issues for goods, the bailor, the bailee, and third parties to the bailment relationship thereafter must relate to one another through the negotiable document itself because the negotiable document is (embodies, reifies) the goods.

By contrast, non-negotiable documents of title do not embody the goods covered by the document. Non-negotiable documents give rights in the goods. Persons entitled to non-negotiable documents of title have claims to the goods represented by the non-negotiable document of title through the non-negotiable document of title. However, bailors, bailees, and third parties to the bailment relationship may still relate to one another through the goods themselves. Non-negotiable documents of title create claims to the goods bailed but non-negotiable documents of title are not the goods.

D. NEGOTIATION COMPARED TO TRANSFER

27. **Negotiation of a negotiable tangible document: endorsement and/or delivery by voluntary transfer of possession.** Only a negotiable document of title can be "negotiated". If the negotiable tangible document is a bearer document, negotiation occurs by delivery of the document to another person. Delivery alone is sufficient for negotiation of a tangible bearer document. If the negotiable tangible document is "to the order of a specific person," negotiation occurs when the specific person endorses the document with his or her

⁶¹ See, UCC § 7-104(b) and Official Comment 1 and UCC § 7-501(c)&(d); Pomerene Act, 49 U.S.C.A. § 80103(b)(1) (2000).

⁶² See, Pomerene Act, 49 U.S.C.A. § 80103(b)(2) (2000).

signature and delivers the document. If the specific person endorses in blank -- i.e. by simply signing his or her name, the signature in blank turns the negotiable tangible document into a bearer document. After endorsement in blank, negotiation occurs by delivery alone of the tangible document to another person. If the specific person endorses by signature to the order of a second specific person, negotiation occurs when the endorser delivers to the second specific person. Once in the hands of the second specific person, the second specific person can further negotiate the negotiable tangible document in accordance with the rules set forth in this paragraph relating to signature and delivery.⁶³

With respect to tangible documents of title, the word “delivery” means the voluntary transfer of possession.⁶⁴

When a first person negotiates a negotiable document of title to a second person, the first person hands on his ownership claims in the document of title and the goods the document represents to the second person. PART V of this chapter provides fuller discussion of the ownership claims that documents of title give to various persons.

28. Negotiation of a negotiable electronic document: delivery by voluntary transfer of control. Only a negotiable document of title can be “negotiated”. If a negotiable electronic document of title is a bearer document or to the order of a named person, the negotiable electronic document is negotiated by delivery alone. There is no endorsement (signature) requirement for the negotiation of a negotiable electronic document of title.⁶⁵

With respect to electronic documents of title, delivery means voluntary transfer of control.⁶⁶ Revised UCC Article 7 (2003) adopted the concept of control for electronic documents of title from the Uniform Electronic Transactions Act § 16. UCC § 7-106(a) sets forth the general rule of control as follows: “A person has control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred.”⁶⁷

Control of an electronic document of title substitutes for endorsement and possession that apply in the context of tangible documents of title. When a person controls a negotiable electronic document of title, the person negotiates the electronic document through delivery, which means the voluntary transfer of control, without regard for endorsement and possession.⁶⁸

When a first person negotiates a negotiable document of title to a second person, the first person hands on his ownership claims in the document of title and the goods the document represents to the second person. PART V of this chapter provides fuller discussion of the ownership claims that documents of title give to various persons.

⁶³ See, UCC § 7-501(a); Pomerene Act, 49 U.S.C.A. § 80104 (2000).

⁶⁴ UCC § 1-201(b)(15).

⁶⁵ UCC § 7-501(b)(1).

⁶⁶ UCC § 1-201(b)(15).

⁶⁷ UCC § 7-106(a) and Official Comments 1 & 3. UCC § 7-106(b) sets forth a safe harbor test of a system that satisfies the general rule stated in subsection (a). UCC § 7-106(b) and Official Comment 4.

⁶⁸ UCC § 7-106 Official Comment 2; UCC § 7-501 Official Comment 1. Compare Negotiation of a negotiable electronic document of title [par. 28] with Negotiation of a negotiable tangible document [par. 27].

29. **Electronic documents of title: comparing the UCC and the USWA.**

Statutes, regulations, and case decisions are just now beginning to authorize, explicate, and resolve legal issues and legal concepts arising from the use of electronic documents of title in bailment relationships. Paragraphs 27 and 28 of this chapter explain the contrast between negotiable tangible documents of title and negotiable electronic documents of title as set forth in the UCC Article 7 (2003). UCC Article 7 relies on the concept of control.

By contrast, the United States Warehouse Act (USWA) facilitates the use of electronic warehouse receipts for agricultural commodities in ways both similar to and different from the UCC Article 7 approach. Like UCC § 7-106, the USWA authorizes electronic documents of title so long as maintained in a system that meets the regulatory requirements that the Secretary of Agriculture has promulgated for this purpose.⁶⁹ Unlike UCC § 7-106, the USWA mandates that the “person designated as the holder” of an electronic document shall be considered, as a matter of law, “in possession” of the electronic document.⁷⁰ Thus, under the USWA, the holder of a negotiable electronic document of title will be considered in possession of the electronic document.

The Secretary of Agriculture’s regulations for systems for the maintenance of electronic documents appear completely compatible with UCC § 7-106(b) that establishes criteria for systems employed for evidencing the transfer of interests in electronic documents.

The USWA considers the holder of the electronic document to be in possession of the document whereas the UCC Article 7 replaces possession with the concept of control for electronic documents. The USWA and the UCC conceptual approaches to electronic documents are both relatively new. No disputes have arisen that would require courts to compare and contrast these two conceptual approaches. However, courts are likely to interpret the legal concepts of the USWA and the UCC Article 7 as compatible concepts. Courts are likely to conclude that a holder in possession of an electronic document under the USWA and a person in control of an electronic document under the UCC Article 7 have identical ownership rights and ownership claims.

30. **"Holder" of a negotiable document distinguished from "transferees" of non-negotiable document.** UCC Article 7 makes a distinction between a holder of a negotiable document by negotiation and transferee of a non-negotiable document. A person in possession or control of a **negotiable** document who has the document by negotiation – either by delivery by voluntary transfer of possession, by endorsement and delivery by voluntary transfer of possession, or by delivery by voluntary transfer of control -- is a "holder". The term "holder" applies only to those possessing or controlling negotiable documents after negotiation.⁷¹

The Pomerene Act and the United States Warehouse Act use the term “holder” more broadly to include any person who possesses a document of title and claims a property right in the document and the goods covered by the document.⁷² However, the Pomerene Act clearly

⁶⁹ USWA, 7 U.S.C. § 251(e)(2) (2000). The Secretary has published appropriate regulations for providers of systems for electronic documents in 7 C.F.R. §§ 735.400-735.404 (2004).

⁷⁰ USWA, 7 U.S.C. § 251(e)(3) (2000). See also the implementing regulation, 7 C.F.R. § 735.303(b) (2004).

⁷¹ For the definition of "holder", see UCC § 1-201(21)

⁷² Pomerene Act, 49 U.S.C. § 80101(4) (2000); USWA, 7 U.S.C. § 241(6) (2000).

distinguishes between negotiated documents and transferred documents.⁷³ Hence, even under the federal statutes, one must distinguish between holders of negotiable documents by negotiation and transferees of non-negotiable documents.

31. **Transferee of a non-negotiable document.** A non-negotiable document, by its nature, cannot be negotiated. A non-negotiable document, by its terms, is to a specific person and only that specific person. Hence, even if the specific person named in the non-negotiable document endorses the non-negotiable document, the endorsement and delivery do not constitute a negotiation of the non-negotiable document.

Although it is legally impossible to negotiate a non-negotiable document, the specific person named in the non-negotiable title may transfer the non-negotiable document by sale or gift. Consequently, if the specific person were to endorse or deliver the non-negotiable document to another person, the endorsement and delivery may mean that the specific person has sold or gifted the non-negotiable document to the other person. The other person to whom the non-negotiable document of title is transferred is a "transferee". One should not confuse a transferee with a "holder" because these are different legal categorizations. Transferees and "holders" have different ownership claims to the document and the goods covered by the document. These ownership claims for holders and transferees are more fully discussed in Part V of this chapter.

32. **Transfer of a negotiable tangible document: compelling endorsement.**

If a negotiable tangible document is to the order of a specific person, the specific person may transfer the negotiable tangible document by sale or gift to another person by delivery (by voluntary transfer of possession) alone but without endorsement. The person who receives the negotiable tangible document lacking an endorsement is a transferee of the document. The person who receives the negotiable tangible document only becomes a holder of the tangible document when, and if, the endorsement occurs. If the person who receives the negotiable tangible document lacking an endorsement has paid value for the document, that transferee has the legal right to compel the specific person to endorse the document in order for that transferee to become a holder of the tangible document by negotiation.⁷⁴

PART IV. WAREHOUSE OR CARRIER OBLIGATION TO REDELIVER GOODS

33. **Bailee has strict liability for failure to re-deliver as per the bailment document.** Bailees have two fundamental obligations to bailors. The first fundamental obligation is the obligation to care for the bailed goods, as discussed in Part II of this chapter. The second fundamental obligation of warehouses and carriers is the obligation to redeliver the goods to the person who is entitled to the goods as per the document of title -- the person entitled under the document.⁷⁵

⁷³ Pomerene Act, *compare* 49 U.S.C. § 80105 Title and rights affected by negotiation with 49 U.S.C. § 80106 Transfer without negotiation (2000).

⁷⁴ See, UCC § 7-506 and Official Comments; Pomerene Act, 49 U.S.C.A. § 80106(a)&(b) (2000).

⁷⁵ UCC § 7-102(a)(9) gives the definition of a "person entitled under the document" as "the holder, in the case of a negotiable document of title, or the person to which delivery of the goods is to be made by the terms of, or pursuant to

For example, when a bailor places goods into a warehouse bailment relationship, the bailor, as a general rule, has the legal right to demand that the bailee (the warehouse) return the goods to the bailor as per the terms of the document of title.

For another example, when a consignor places goods into a transportation bailment relationship, the consignee,⁷⁶ as a general rule, has the legal right to demand that the bailee (the carrier) redeliver the goods to the consignee as per the terms of the document of title.

Although there are a few legal excuses to be discussed in PART IV.C of this chapter, see §§ 40-42, *infra*, which protect a bailee from legal liability when the bailee has redelivered to the wrong person, the basic legal obligation to redeliver to the correct person is an absolute liability. Bailees who redeliver to the wrong person are accountable for the tort of conversion⁷⁷ -- i.e. wrongful interference with the property of another person. Bailees cannot escape liability for failing to redeliver as per the terms of the document of title by proving that they made a reasonable mistake when they redelivered; bailees cannot escape liability by proving that they redelivered to the wrong person because that person perpetrated a fraud upon the bailees. As a general rule, bailees must redeliver to the correct person as per the terms of the document of title or accept legal responsibility for the misdelivery.⁷⁸

The general rules stated in this § 33 are more precisely explained in §§ 34-37 *infra*.

A. WHO IS THE CORRECT PERSON TO WHOM REDELIVERY IS OWED BY A BAILEE

34. **Holder of a negotiable document of title.** If the bailee (the warehouse or the carrier) issues a negotiable document of title, the bailee must redeliver the goods to whomever the negotiable document of title is negotiated. If the negotiable document is a bearer document, the bailee must redeliver to the bearer of the document who asks for the return of the goods. If the negotiable document is a document "to the order of a specific person," the bailee must redeliver the goods to that specific person, or to whomever that specific person has endorsed and delivered the negotiable tangible document, or to whomever that specific person has delivered the negotiable electronic document. Holders of negotiable documents are entitled to demand that bailees return the goods to them.⁷⁹

35. **Others to whom delivery can be made without liability.** As a general rule, which includes the discussion in § 34 *supra* and § 36 *infra*, bailees may redeliver to persons entitled under the document -- i.e. in accordance with the terms of the document -- without

instructions in a record under, a non-negotiable document." Although the USWA and the Pomerene Act do not have a defined term of a "person entitled under the document," the USWA, 7 U.S.C. § 251(a) (2000), and the Pomerene Act, 49 U.S.C. § 80110(a) (2000), are compatible with the UCC.

⁷⁶ UCC § 7-102(a)(3) defines "consignee" as "a person named in a bill of lading to which or to whose order the bill of lading promises delivery."

⁷⁷ See Dobbs, "U.S. Law of Torts", this work, § 31 .

⁷⁸ See generally, UCC § 7-403; USWA, 7 U.S.C. § 251 (2000); Pomerene Act, 49 U.S.C.A. §§ 80110-80111 (2000).

⁷⁹ See, UCC §§ 7-102(a)(9) and 7-403(a); Pomerene Act, 49 U.S.C.A. §§ 80110(b)(3), 80111(a) (2000).

liability.⁸⁰ Persons entitled under the document includes holders of a negotiable document (see § 34, *supra*) and the following persons:

a) **Persons to whom delivery is to be made by the terms of a non-negotiable document of title -- the person named in the non-negotiable document itself.**

Bailees can redeliver to the bailor of a non-negotiable warehouse receipt. Bailees can redeliver to the consignee of a non-negotiable bill of lading. When the warehouse receipt and the bill of lading are non-negotiable, the terms of the document indicate that the bailor and the consignee are the person to whom the document is issued. Consequently, under the terms of the document, the bailor and the consignee are entitled to the redelivery of the goods because they are the person entitled under the document.⁸¹

b) **Persons to whom delivery is to be made pursuant to written instructions under a non-negotiable document -- delivery orders.** As discussed in § 31 *supra*, although a non-negotiable document cannot be negotiated, it can be transferred. If the bailor or the consignee named in the non-negotiable document of title has transferred the non-negotiable document, the bailee may redeliver the goods to the transferee if the transferee can present to the bailee written instructions, from the bailor or the consignee named in the non-negotiable document of title, directing the bailee to deliver to the transferee.⁸² These written instructions are called "delivery orders".⁸³

If a person demanding redelivery from the bailee claims to be a transferee because the demanding person has possession of the non-negotiable document of title and a contract for purchase of the goods covered by the document, the warehouse or carrier should be very reluctant to deliver the goods to the demanding person until that person can produce delivery orders from the bailor or the consignee named in the non-negotiable document of title. Until the bailee sees delivery orders, the bailee would be redelivering to a person who is not, per the terms of the document, a person entitled under the document. Even though the bailee might have an excuse for delivering to the demanding person,⁸⁴ until a person who is not named in the document of title has delivery orders from the bailor or consignee named in the non-negotiable document of title, the person is not a person entitled under the document. Bailees may safely redeliver without liability only to person entitled under the document.⁸⁵

⁸⁰ UCC §§ 7-403(a), 7-404; Pomerene Act, 49 U.S.C. §§ 80110(b)(2)-(3), 80111(a)(1) (2000).

⁸¹ UCC, § 7-102(a)(9); Pomerene Act, 49 U.S.C. § 80110(b)(2) (2000).

⁸² UCC §§ 7-102(a)(9), 7-403(1).

⁸³ UCC § 7-102(a)(5).

⁸⁴ UCC § 7-403(a)(1) states: "The bailee shall deliver the goods to a person entitled under a document of title . . . , unless and to the extent that the bailee establishes any of the following: (1) delivery of the goods to a person whose receipt was rightful as against the claimant. . . ." Pomerene Act, 49 U.S.C. § 80110(b)(1) (2000) is similar to UCC § 7-403(a)(1). The bailee should avoid placing itself in the position of deciding who is the rightful claimant when there are conflicting claims. See § 37 *infra*.

⁸⁵ But see, Pomerene Act, 49 U.S.C. § 80111(a)&(b) (2000). For discussion of situations when bailors face conflicting claims to bailed goods, see § 37 *infra*.

36. **Bailee protected from liability for redelivery in good faith.** If the bailee redelivers the goods to a holder of a negotiable document of title, a bailor or consignee of a non-negotiable document of title, or a transferee of a non-negotiable document of title who also has a delivery order, the bailee is protected from liability for misdelivery so long as the bailee has acted in good faith. The UCC defines “good faith” as “honesty in fact and the observance of reasonable commercial standards of fair dealing.”⁸⁶

Consequently, a bailee who acts in good faith is protected from liability for misdelivery even if it is factually true that the holder, bailor, consignee, or transferee was not the actual owner of the goods or otherwise entitled to the goods.⁸⁷ In other words, a bailee is protected from liability if the bailee redelivers to the person entitled under the document even though as a factual matter the person entitled under the document is not the actual owner of the goods. Under these circumstances, the actual owner has no legal claim against the bailee for having misdelivered. Several illustrations help explain these legal principles:

a) **Thief of goods.** If a thief stole a truckload of furniture and stored the furniture in a warehouse under a non-negotiable warehouse receipt, the warehouse would be free of liability to the true owner of the furniture if the warehouse redelivered the goods to the thief in accordance with the terms of the warehouse receipt. This is true so long as the warehouse acted in good faith. The warehouse would be acting in good faith, as an example, if the warehouse was not acting in collusion with the thief and if the warehouse had no information about the true owner’s claim prior to the redelivery under the warehouse receipt.

b) **Child with bearer documents.** A woman stores several expensive fur coats in a warehouse and receives a bearer (negotiable) warehouse receipt from the warehouse at the time of the delivery into storage. Several weeks later, a 10-year old child comes to the warehouse with the bearer receipt and asks the warehouse to redelivery the coats to him. Even though the child possesses the bearer documents, the warehouse should probably not redeliver the fur coats to the child. If the warehouse gave the fur coats to the child, the warehouse would likely not satisfy the requirement that the warehouse make redelivery in accordance with good faith. Warehouses that redeliver to persons who are obviously unlikely to be the owners of the bailed goods have probably failed to observe reasonable commercial standards of fair dealing.⁸⁸

c) **Transferee who notifies a bailee of transferee's claim to the goods.** If a transferee of a document of title notifies the warehouse or carrier of the transfer, and therefore of the transferee’s claim to the goods,⁸⁹ the warehouse or carrier should be reluctant to redeliver the goods to the bailor or the consignee in whose name the non-negotiable document of title was issued.⁹⁰ Once the transferee has given the bailee notice of the transfer, the bailee who

⁸⁶ UCC § 7-102(b)(20).

⁸⁷ UCC § 7-404; Pomerene Act, 49 U.S.C. §§ 80110(f) and 80111(a)(1) (2000).

⁸⁸ Pomerne Act, 49 U.S.C. § 80111(a)(3) (2000).

⁸⁹ See UCC § 7-504(b); Pomerene Act, 49 U.S.C. §§ 80106(a)&(c) and 80111(a)(2)-(3)&(b) (2000).

⁹⁰ The warehouse or carrier should also be equally reluctant to redeliver to the person demanding the goods as transferee in this situation, as explained in § 34(b) concerning delivery orders.

redelivers to the bailor or the consignee named in the non-negotiable document of title may not be acting in accordance with good faith. Bailees should not choose between these competing claimants on the hope that they are making the correct choice⁹¹ or that they are acting in accordance with good faith.⁹² Bailees should act as discussed in § 37 *infra*.

d) **True owner who notifies a bailee of the true owner's claim to the goods.** As explained in § 36(a) *supra*, in certain circumstances a bailee may be free from liability to a true owner of goods even when the bailee has redelivered the goods to a thief. However, if the true owner, prior to the redelivery, notifies the bailee that a thief has stored the true owner's goods with the bailee, the bailee is at risk of liability for redelivering to the person (the thief) to whom the bailee issued the document of title. Once the true owner gives this notice to the bailee, the bailee who redelivers to the person named in the document of title is likely not acting in good faith.⁹³ Bailees should act as discussed in § 37 *infra*.

37. **Bailees who face competing claims to the bailed goods.** In the four illustrations in § 36 above, bailees could face competing claims to the bailed goods. Consider the illustrations in § 36(a) and (d). A person could tell the warehouse that he is the owner of the stolen furniture and demand that the warehouse give the furniture back. How does the warehouse know that this claimant is the true owner rather than a second thief? How does the warehouse know that the person accused of being a thief is really a thief rather than someone who bought the furniture for cash from this claimant without receiving a bill of sale in return?

If bailees face demands for redelivery from two or more credible competing claimants to bailed goods, bailees should not redeliver until the dispute is resolved. Bailees should be reluctant to resolve the dispute between credible claimants. If the bailee redelivers to the incorrect person, the bailee is at risk of liability for the misdelivery through the tort of conversion.⁹⁴ Bailees facing multiple credible claims to bailed goods should take advantage of the procedure of interpleader in the courts. Through an interpleader action, the bailee may ask a court to settle the dispute between the competing claimants with the promise that the bailee will abide by the judgment and will redeliver to whomever the court renders the favorable judgment. Both the UCC and the Pomerene Act have specific provisions for bailees to use when facing conflicting claims to bailed goods.⁹⁵

When a bailee initiates an interpleader action, the bailee incurs costs and attorney's fees. Moreover, the bailee may have a lien to assert against the bailed goods. The UCC and Pomerene

⁹¹ See UCC § 7-403(a)(1); Pomerene Act, 49 U.S.C. § 80110(b)(1) (2000).

⁹² UCC § 7-404.

⁹³ UCC § 7-404; Pomerene Act, 49 U.S.C. § 80111(a)(2)-(3) (2000).

⁹⁴ If a bailee redelivers to one of the credible competing claimants, a bailee could choose correctly and redeliver to the person entitled to possession of the bailed goods. Thus, a bailee would be legally protected but also lucky to have resolved the competing claims correctly. A bailee will likely learn that it had resolved the dispute correctly only after defending its resolution in a law suit brought by the spurned claimant. UCC § 7-403(a)(1) and Official Comment 2; Pomerene Act, 49 U.S.C. § 80110(b)(1) (2000).

⁹⁵ UCC § 7-603; Pomerene Act, 49 U.S.C. § 80110(d),(e),(f) (2000). See, Pomerene Act, 49 U.S.C. § 80111(a)&(b) (2000). See also, *Petroleum Products, Inc. v. Mid-America Pipeline Company*, 815 F. Supp. 1421 (D. Kan. 1993); *Siderpali v. Judal Industries, Inc.*, 833 F. Supp. 1023 (S.D.N.Y. 1993).

Act interpleader procedures do not address whether the bailee may recover the costs and attorney's fees associated with the interpleader action or whether the bailee may assert a lien in the interpleader action. These issues of costs, attorney's fees, and liens are issues that the federal or state process of interpleader address and resolve.⁹⁶

B. WHEN TO REDELIVER AND THE CONDITIONS OF REDELIVERY

38. **On demand and the conditions of demand redelivery.** Bailees must redeliver to the correct person entitled to the bailed goods upon the demand of the person entitled to the goods.⁹⁷ When a proper demand for redelivery is made, several conditions exist before the bailee legally must comply with the redelivery demand.

a) **Payment of the charges owed the bailee.** The bailee may lawfully insist that the person properly demanding redelivery pay any charges or fees owed to the bailee for providing bailment services. Indeed, under some American laws, bailees are prohibited by law from redelivering until the charges and fees are paid.⁹⁸

b) **Return of negotiable document for cancellation or notation of partial redelivery.** If the person making the proper demand for redelivery possesses a negotiable document of title, the bailee should not redeliver unless the person making the demand surrenders the negotiable document to the bailee. If the bailee redelivers all the bailed goods, the bailee should cancel the negotiable document and remove it from further circulation as a negotiable document. If the bailee only redelivers a part of the bailed goods, the bailee should either cancel the original negotiable document and issue a new negotiable document for the goods remaining in the bailment, or conspicuously note the partial delivery on the face of the negotiable document before it is returned to the person entitled to the document.⁹⁹

If a bailee redelivers goods covered by a negotiable document of title without taking up the negotiable document for cancellation or notation of partial delivery, the bailee is responsible to any person who buys the negotiable document for value in good faith. The bailee is accountable to the good faith purchaser of the negotiable document because the bailee failed to take actions to remove the negotiable document, now containing incorrect information about the bailed goods, from circulation. As between a bailee who could have prevented an incorrect negotiable document remaining in circulation and a purchaser for value in good faith, bailment law protects the purchaser for value in good faith.¹⁰⁰

c) **Receipt for redelivery.** Bailees should insist that the person to whom the goods are redelivered signs a receipt evidencing the return of the goods. As a practical matter, the returned negotiable document stamped with the legend "CANCELLED" often serves

⁹⁶ See UCC § 7-603 Official Comment 2.

⁹⁷ See, UCC § 7-403(a); USWA, 7 U.S.C. § 251(a) (2000); Pomerene Act, 49 U.S.C. § 80110(a) (2000).

⁹⁸ See, UCC § 7-403(b); USWA, 7 U.S.C. § 251(b) (2000); Pomerene Act, 49 U.S.C. § 80110(a)(1) (2000).

⁹⁹ See, UCC § 7-403(c); USWA, 7 U.S.C. § 251(c)&(d) (2000); Pomerene Act, 49 U.S.C. § 80110(a)(2) (2000).

¹⁰⁰ See, UCC § 7-403(c)(2); Pomerene Act, 49 U.S.C. § 80111(c) (2000).

as the receipt for redelivery against a negotiable document. If bailees redeliver against a non-negotiable document of title, bailees ordinarily should insist upon a separate signed receipt evidencing the redelivery of the bailed goods. Bailees should keep the canceled negotiable documents and the signed receipts as evidence of what goods were redelivered, to whom they were redelivered, and when they were redelivered. Indeed, regulatory laws usually require that bailees keep adequate records of redelivery.¹⁰¹

39. **Warehouse termination of the bailment relationship.** Warehouses may give notice to bailor that the bailor must remove the goods from the warehouse at the end of the contractual period of the bailment. If no contractual period exists, the warehouse can insist that the bailor take redelivery of the goods by a certain date in the future if that date is at least thirty days after the notification. Warehouses may also terminate the relationship in a shorter period of time if the goods are deteriorating, declining in value to less than the warehouse charges, or become hazardous. If the bailor does not remove the goods as requested, within a reasonable time period requested, the warehouse has the power of sale over the goods subject to holding the proceeds of the sale, less the storage charges and fees, for delivery to the person to whom the warehouse would have been bound to deliver the goods.¹⁰²

C. EXCUSES FOR FAILURE TO REDELIVER

40. **Burden of proof on bailee.** As has already been discussed in Part II and in this Part IV, warehouses and carriers have two fundamental obligations: to take reasonable care of bailed goods; and, to redeliver the bailed goods to the correct person upon proper demand. Warehouses and carriers, however, have several legally recognized excuses if they fail to redeliver the bailed goods in the same amount or number and in the same condition as when the goods entered the bailment. When warehouses or carriers claim one of these excuses as protection from liability, the warehouse or the carrier almost always has the burden of proving that the excuse applies to the situation.¹⁰³

41. **Recognized excuses for non-delivery.** There are situations in which the person entitled under the document of title to redelivery is legally not the person who rightfully is entitled to the goods covered by the document of title. Some of these situations will be discussed later in this chapter in Part V relating to ownership claims to goods. However, the easiest such situation to comprehend is where a thief has stored goods in a warehouse. The thief is entitled to redelivery of the goods under the document of title. The warehouse may redeliver to the thief if the warehouse acts in good faith. However, the person rightfully entitled to the goods is the true owner of the goods. If the warehouse can prove that it redelivered stolen goods to the true

¹⁰¹ See, USWA, 7 U.S.C. § 246 (2000); Pomerene Act, 49 U.S.C. § 80110(a)(3) (2000).

¹⁰² UCC § 7-206 and Official Comments. If the bailor fails to reclaim the goods (as requested) or if the goods become hazardous, the warehouse may dispose of the goods. If the person entitled under the document were later to demand redelivery, the warehouse has a lawful excuse for failure to redeliver. See, UCC § 7-403(a)(6)-(7); Pomerene Act, 49 U.S.C. § 80111(d)(3)-(4) (2000).

¹⁰³ See, UCC § 7-403(a); Pomerene Act, 49 U.S.C. §§ 80110(a) and 80111(d) (2000).

owner of the goods, the warehouse has a legal excuse for not redelivering in accordance with the terms of the document when the thief demands redelivery.¹⁰⁴ For fuller understanding of this excuse, see §§ 34-37 *supra*.

a) Loss or injury to the goods for which the bailee is not responsible.¹⁰⁵ In most instances, warehouses and carriers must act with reasonable care to protect the bailed goods from loss or injury. If the loss or injury occurs from reasons beyond the reasonable care of the bailee, the bailee is not responsible for the loss or injury to the goods. Even if the standard of care for the bailee is a strict liability standard, bailees may claim common law defenses if the goods are lost or damaged. Common law defenses include, among others, an act of public authority, an act of the shipper itself, and inherent vice or nature of the goods themselves. When the bailee is not responsible for the loss or injury, the bailee has a legally-recognized excuse for not redelivering the goods in the same condition as when the goods entered the bailment. For fuller understanding of this excuse a), read PART II of this chapter.

b) Bailee's right of sale.¹⁰⁶ Under certain circumstances bailees have the legal right to sell bailed goods. If a bailee does not redelivery the goods at the time of a demand because the bailee lawfully sold the goods, the bailee has a legally-recognized excuse for not redelivering. There are two situations in which bailees have the legal right to sell bailed goods: (1) in lawful enforcement of a warehouse lien or carrier lien; and (2) in lawful exercise of the power of sale after a lawful termination of the bailment relationship by the warehouse. See Part VI of this chapter for a discussion of Warehouse and Carrier Liens; see § 39 of this chapter for a discussion of lawful termination of the bailment relationship by the warehouse.

c) Rights of sellers, consignors, or others over goods in transit.¹⁰⁷ There are several circumstances in which the bailee may receive instructions from persons who are not entitled under the document of title to the redelivery of the goods, but who are legally empowered to give instructions to the bailee as to whom the bailee must redeliver the goods.

i) Diversion which defeats redelivery to the consignee. It is a common commercial practice in the transportation industry for consignors of goods to instruct carriers to deliver the goods to someone other than the consignee named in the non-negotiable bill of lading. The carrier has a lawful excuse, if the carrier follows these instructions from the consignor, for not redelivering the goods to the consignee even though the consignee may be able to sue the consignor to obtain the goods. In other words, even though the consignee, when compared to the consignor, is the rightful person who can ultimately claim the goods, carriers are given the legal excuse to abide by the consignor's instructions about redelivery. Carriers have

¹⁰⁴ UCC § 7-403(a)(1); Pomerene Act, 49 U.S.C. § 80110(b)(1) (2000).

¹⁰⁵ UCC § 7-403(a)(2); COGSA, 46 U.S.C. App. § 1304(2) (2000).

¹⁰⁶ UCC § 7-403(a)(3); Pomerene Act, 49 U.S.C. § 80111(d)(2)-(4) (2000).

¹⁰⁷ UCC § 7-403(1)(d)-(e).

discretion to comply with the consignor's instructions. Carriers are not required to settle disputes between consignors and consignees about who should receive the goods.¹⁰⁸

Carriers may also abide by instructions from a holder of a negotiable bill of lading to deliver to someone other than the holder. If carriers desire to abide by the holder's instructions, carriers should request the holder to surrender of the negotiable bill and to provide a delivery order. If the carrier allows the negotiable bill to remain in circulation, the carrier is at risk of being held accountable to the terms of the negotiable bill, if it is duly negotiated to a third person.¹⁰⁹

ii) Seller or lessor exercising right to stop delivery. Under certain circumstances set forth in UCC § 2-705 (Article 2 Sales) and UCC § 2A-526 (Article 2A Leases), sellers and lessors may stop delivery of goods in transit to a buyer or to a lessor. Under §§ 2-705 and 2A-526, sellers and lessors may also stop delivery of goods in storage for a buyer or a lessor to pick up from a warehouse. Carriers and warehouses who respond to these instructions from sellers and lessors have a legal excuse for failing to redeliver to buyers or lessors. Even if buyers or lessors ultimately prove that the seller or the lessor lacked lawful reasons for stopping the redelivery, the bailee has immunity from liability for misdelivery by following proper instructions.¹¹⁰

d) Bailee has a personal defense against the claimant.¹¹¹ Bailees may have a lawful excuse for refusing to redeliver to a particular claimant which is personal to that claimant. Two simple examples help to explain this legal excuse of a personal defense against the claimant. These examples serve as illustrations of personal defenses against claimants; these examples do not exhaust the possible personal defenses that bailees may be able to assert as a defense for failure to redeliver.

i) Bailee has already redelivered the bailed goods to a authorized agent of the bailor. The bailee redelivered the goods to an authorized agent of the bailor of a non-negotiable warehouse receipt. After redelivery, the agent stole the bailor's goods. If the bailor later demanded redelivery under the non-negotiable document of title, the bailee has a personal defense against the bailor by showing, through a receipt signed by the authorized agent, that the bailee has already redelivered the goods.

ii) Bailee and bailor have an agreement that bailor is not entitled to redelivery. The bailor owed the bailee a debt related to the storage charges for the bailed goods covered by a non-negotiable warehouse receipt. The bailor reached an agreement

¹⁰⁸ See, UCC § 7-303(a)(2) and Official Comments; UCC § 7-504(c) and Official Comment 3. Under UCC § 7-303(a)(3)-(4), consignees may also instruct the bailee to redeliver the bailed goods to someone other than the consignee named in the non-negotiable bill of lading. When a consignee gives such instructions to the bailee, these instructions are termed "delivery orders." See § 35(b) *supra*.

¹⁰⁹ UCC § 7-303(a)(1) and (b).

¹¹⁰ UCC §§ 2-705, 2A-526, and 7-504(d).

¹¹¹ UCC § 7-403(a)(6). See also, § 39 *supra* discussing the circumstances under which the warehouse may terminate the bailment relationship.

with the bailee that the bailee may keep the bailed goods as full satisfaction of the storage charges. If the bailor later demanded redelivery of the goods under the warehouse receipt, the bailee has a personal defense for failure to redeliver to the bailor based on the previous agreement about the satisfaction of the storage charges.

42. Bailee failed to redeliver in obedience to a court order. As discussed in § 37 of this chapter, bailees may face competing demands for redelivery from several claimants with reasonable claims to the bailed goods. Bailees in this situation should use the court procedure of interpleader to have a court decide to whom redelivery should be made. Once a court orders redelivery to a particular claimant, the bailee may redeliver in obedience to the court order without fear of liability for failing to redeliver to any other competing claimant.

Similarly, courts may issue orders to bailees to redeliver the goods to a particular person when the bailee would otherwise not be legally authorized to redeliver the goods to that particular person. If the bailee obeys the court order to a particular person, the bailee is protected from liability to any others for failure to redeliver to them.¹¹² There are two common situations in which a court may issue an order to bailees to redeliver to a particular persons not otherwise entitled to the goods by the terms of the document.

a) Lost and missing documents. A bailee may issue a document of title, either negotiable or non-negotiable, which is then lost, stolen, or destroyed. Particularly with respect to negotiable documents of title, bailees must be very hesitant to believe that the document is in fact lost, stolen, or destroyed. Hence, bailees should be very reluctant to redeliver unless the person making the demand for redelivery has the original document. In circumstances such as this, a court may order the bailee to redeliver the goods and the bailee may comply with the court order without fear of liability to other persons. Courts are quite likely to require the person, to whom the court orders delivery, to post security to indemnify the bailee or anyone else who suffers damages because the bailee obeyed the court order about redelivery.¹¹³ If the bailee delivers to a person claiming that the original document is lost, stolen, or destroyed without a court order, the bailee is at risk of liability for misdelivery.¹¹⁴

b) Judicial liens. A third party may win a lawsuit against a bailor of goods represented by a document of title, either negotiable or non-negotiable. The third party may then ask the court to attach the goods represented by the document of title to satisfy the judgment won in the lawsuit. If the court grants the attachment, the court has created a judicial lien against the goods represented by the document of title. While the bailee must obey the court order attaching the goods, the precise timing for the bailee's obedience depends upon whether the goods are represented by a non-negotiable or a negotiable document of title.

i) With respect to goods covered by a non-negotiable document of title. As to these goods, the bailee can comply with the judicial lien and redeliver the

¹¹² UCC § 7-403(a)(7); Pomerene Act, 49 U.S.C. § 80111(d)(1) (2000).

¹¹³ UCC § 7-601(a); Pomerene Act, 49 U.S.C. § 80114 (2000).

¹¹⁴ UCC § 7-601(b). Cf., Pomerene Act, 49 U.S.C. § 80114(b) (2000).

goods to the third party who won the lawsuit against the bailor. In this instance, the court deals with the goods directly to attach them and the bailee can obey the attachment. If the bailor later tried to insist that the bailee honor the non-negotiable document of title, the bailee could lawfully respond that the bailee had a lawful excuse for not redelivering the goods to the bailor under the non-negotiable document of title.¹¹⁵

ii) *With respect to goods covered by a negotiable document of title.* In this factual situation with a negotiable document of title, the court does not deal directly with the goods because the goods are embodied in the negotiable document of title. The court can grant the third party's attachment only by dealing with the negotiable document of title. Hence, the judicial lien only attaches to the goods after the court has obtained control over the negotiable document of title. The court can obtain control over the negotiable document of title by ordering the bailor, the person who lost the lawsuit, to surrender the negotiable document of title to the bailee, or the court can impound the negotiable document of title from the bailor.¹¹⁶ Once the court gains control over the negotiable document of title to take it out of potential circulation to other persons, the bailee must then comply with the court order to redeliver the goods to the third party who won the lawsuit. In other words, with respect to goods covered by a negotiable document of title, the bailee has an excuse for honoring the judicial lien only after surrender or impoundment of the negotiable document of title.

PART V. OWNERSHIP CLAIMS TO GOODS

A. MARKETING AND FINANCING FUNCTION OF DOCUMENTS OF TITLE

43. Introductory statement. In this chapter, thus far, the focus of the discussion has been on the relationship between bailees (warehouses and carriers) and persons claiming the bailed goods covered by the document of title (bailors, holders, and transferees). Part V differs because its focus is not on the bailment relationship itself. Part V focuses on competing ownership claims between the bailor of the goods and various third parties who have had commercial dealings with the bailor concerning the bailed goods. These third party claims arise from the fact that bailors may use documents of title -- as ownership documents -- to market bailed goods to third parties or to gain financing by using bailed goods as collateral for loans from third parties. Documents of title, because they are so often used for marketing and financing of bailed goods, are commonly called "commodity paper."¹¹⁷

¹¹⁵UCC § 7-403(a)(1) and (a)(7); Pomerene Act, 49 U.S.C. § 80110(b)(1) (2000). See also, Pomerene Act, 49 U.S.C. § 80106(c)(1)(A) (2000).

¹¹⁶UCC § 7-602; Pomerene Act, 49 U.S.C. § 80115(2000). See also, Pomerene Act, 49 U.S.C. § 80110(f) (2000).

¹¹⁷ For a fuller discussion of these ideas, read JOHN F. DOLAN, COMMERCIAL LAW: ESSENTIAL TERMS AND TRANSACTIONS, Chapter 32, The Documents of Title (2nd ed. 1997).

B. DISTINGUISHING A HOLDER TO WHOM A NEGOTIABLE DOCUMENT HAS BEEN DULY NEGOTIATED FROM A HOLDER OR A TRANSFEREE

44. Fundamental importance of the distinction between the three statuses of "holders". A holder of a document of title can have any one of three statuses: (1) a Holder to Whom a Negotiable Document Has Been Duly Negotiated, (2) a mere "Holder", and (3) a Transferee. Holders to whom a negotiable document has been duly negotiated receive the greatest protection that the commercial law gives to third parties such as buyers and financiers. Holders to Whom a Negotiable Document Has Been Duly Negotiated are commonly called "Holders by Due Negotiation". As will be explained later in this Part V, through specific factual patterns, Holders by Due Negotiation often times can claim goods even ahead of the rightful owners of the goods. In other words, Holders by Due Negotiation have a protected legal status that imposes losses upon rightful owners rather than upon Holders by Due Negotiation. Holders by Due Negotiation are often better off under bailment law than if they had dealt with the goods (the commodity represented by the negotiable document of title) directly. By contrast, holders and transferees are often worse off under bailment law -- because they dealt through documents of title that were not duly negotiated -- than if they had dealt with the goods directly. For the distinction between "holders" and "transferees," read § 30 *supra*.

45. Requirements to attain the status of a Holder by Due Negotiation. The law provides great protection to Holders by Due Negotiation. In order to obtain this great protection, however, a person must meet stricter requirements to attain the status of a Holder by Due Negotiation than the requirements to become a holder or a transferee of documents of title. There are seven requirements for attaining Holder by Due Negotiation status. Failure to satisfy any one of these seven requirements means that the person with the document of title is not a Holder by Due Negotiation.¹¹⁸

a) Negotiable document. Only negotiable documents can be negotiated. Non-negotiable documents cannot be negotiated. Non-negotiable documents can be transferred to transferees but, because the document itself is non-negotiable, these transferees can never attain the status of a Holder to Whom a Negotiable Document Has Been Duly Negotiated. See §§ 23-26 *supra* for discussion of how to distinguish, linguistically and conceptually, negotiable documents of title from non-negotiable documents.

b) Negotiation or negotiated. Holders by Due Negotiation must receive the negotiable tangible document by a proper negotiation – i.e. delivery (which means

¹¹⁸ See, UCC 7-501(a)(5) [negotiable tangible documents of title] and (b)(3) [negotiable electronic documents of title] and Official Comments. A recent case that discusses several of these seven requirements for acquiring the status of Holder by Due Negotiation is *Thypin Steel Co. v. Certain Bills of Lading issued for Cargo of 3017 Metric Tons, More or Less, of Hot Rolled Steel Plate Laden on Board the M/V Geroy Panfilovsky*, 2002 U.S. Dist. LEXIS 21306, 48 U.C.C. Rep. Serv.2d (West) 1443 (S.D. N.Y. 2002).

voluntary transfer of possession) with proper endorsement. If a negotiable tangible document is delivered without the proper endorsement, the person receiving the document becomes a transferee but that person is not a Holder by Due Negotiation. Until the proper negotiation occurs or is compelled, the person receiving the negotiable tangible document remains a transferee of a negotiable tangible document of title. By contrast, negotiable electronic documents do not have an endorsement requirement. Negotiation of negotiable electronic documents occurs solely by delivery (which means voluntary transfer of control). *See* §§ 27-32, *supra*, for an explanation of negotiation.

These first two requirements – a negotiable document [§ 45(a)] that has been properly negotiated [§ 45(b)] – are necessary for the person possessing the negotiable tangible document or the person controlling the negotiable electronic document to qualify as a holder of a negotiable document. However, the person has not yet attained the status of a Holder by Due Negotiation until the person satisfies the following five additional requirements [§ 45(c)-(g).]

c) Good faith. Good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing.¹¹⁹ Good faith is a separate element of the Holder by Due Negotiation status although good faith is often intertwined with the requirements discussed in subparagraphs "d", "f", and "g" *infra*.

d) Without notice of any other defense or claim. Holders by Due Negotiation must not have any knowledge, nor have received any notification, nor have reason to know that any other person has a defense to the transfer of the negotiable document by negotiation or a claim to the bailed goods or document.¹²⁰ If a person to whom a negotiable document is negotiated has notice of any other defense or claim, the person becomes a holder but not a Holder by Due Negotiation. This requirement of receiving the negotiable document without notice is usually the major factual dispute between the competing claimants to ownership of the document of title and its embodied goods.¹²¹

e) For value. Holders by Due Negotiation must pay value for the negotiable document of title. By paying value the person receiving the negotiable document becomes a purchaser of the document.¹²² The element of value insures that the transaction is a commercial transaction as opposed to a non-commercial transaction. The person receiving the negotiable document can pay either cash money, make a loan, or give anything else of value sufficient to support a contract, except the person cannot accept the negotiable document in settlement or payment of a monetary obligation. See discussion in subparagraph (g) *infra*.

f) In the regular course of business or financing. The person negotiating the document of title must be a person who the holder could reasonably expect to

¹¹⁹ See, UCC § 1-201(b)(20).

¹²⁰ See, UCC § 1-202.

¹²¹ *Compare, Cleveland v. McNabb*, 312 F. Supp. 155 (W.D. Tenn. 1970) with *R.E. Huntley Cotton Company v. Fields*, 551 S.W.2d 472 (Tex. Civ. App. 1977).

¹²² See, UCC § 1-204 and 7-501 Official Comment 1 last paragraph.

have the power to negotiate the document of title being received by the holder. Moreover, the transaction itself must be a transaction which the holder could reasonably consider an ordinary, normal transaction in the buying, selling, and financing of goods and documents of title. If the holder could reasonably understand that the transaction was too good to be true, the transaction is outside the regular course of buying, selling, and financing of goods and documents of title.

g) Not in settlement or payment of a monetary obligation.

Monetary debts must be paid in money. If exiting monetary debts are paid or settled by using documents of title (commodity paper), the legal response has been to consider the substitution of commodity paper for money as outside the regular course of business or financing. Thus using documents of title in settlement or payment of an existing monetary obligation is an explicit example of what is not in the regular course of business or financing.

C. OWNERSHIP RIGHTS ACQUIRED BY HOLDERS BY DUE NEGOTIATION, HOLDERS, AND TRANSFEREES

46. Holders by due negotiation acquire almost all rights in the bailed goods. Recognizing two important exceptions discussed in §§ 47 and 48, *infra*, Holders by Due Negotiation acquire a superior claim over all third parties in the ownership to the document of title, the goods embodied in the document, all rights accruing under the laws of agency and estoppel, and the right to redelivery of the goods free of any defense or claim of the issuer of the document. These rights inure to the Holder by Due Negotiation even if the bailee has already redelivered the goods to someone else, even though the negotiation of the negotiable document was a breach of duty, even though the person who negotiated the document obtained possession of the negotiable document by fraud or theft or other improper means, or even though a third person has previously bought the goods or the document.¹²³ Several illustrations make clear the superior claim of a Holder by Due Negotiation.

a) Warehouses or carriers issue more than one negotiable document for a specific set of bailed goods. In domestic commerce, warehouses and carriers, as issuers of negotiable tangible documents, must carefully guard against more than one negotiable tangible document against bailed goods being outstanding at the same time. If the warehouse or carrier allows more than one negotiable tangible document to be outstanding at one time, the warehouse and carrier is fully liable to each Holder by Due Negotiation. The warehouse and carrier have no defense to say to a Holder by Due Negotiation that the bailed goods had already been redelivered to another Holder by Due Negotiation. In light of this legal obligation of warehouses and carriers, the American bailment law prohibits the issuance of bills of lading in a set or in parts for domestic transportation.¹²⁴

¹²³ See, UCC § 7-502; Pomerene Act, 49 U.S.C. §§ 80104(c)-(d) and 80105 (2000).

¹²⁴ See, UCC § 7-304(a); Pomerene Act, 49 U.S.C.A. § 80112(a) (2000). International commerce does recognize negotiable tangible bills in a set of parts. UCC § 7-304(b)-(e) set forth the rules for overseas transportation where negotiable tangible bills of lading in a set may be lawfully issued. Negotiable electronic bills of lading will not be issued in a set of parts, either in domestic or international commerce, because the concept of control for electronic bills of lading mandates that

Furthermore, warehouses and carriers should never issue duplicate documents of title for bailed goods unless the word "DUPLICATE" is conspicuously stamped upon the face of the document. Documents of title marked as duplicates do not confer any rights in the goods to the duplicate document holder. However, warehouses and carriers are fully responsible for documents of title that do not carry the "DUPLICATE" legend.¹²⁵

b) Holder by due negotiation from a buyer who did not pay for the negotiable document. Let us suppose a Bailor-Seller, holding a bearer document, sold and delivered the document to a First Buyer. First Buyer pays for the document by a check which Bailor fully expected was a good check. First Buyer sold and delivered the bearer document to a Second Buyer. Bailor-Seller then learned that the First Buyer's check was not good when the Bank refused to honor the First Buyer's check. If the Second Buyer qualifies as a Holder by Due Negotiation, the Second Buyer gets the goods from the warehouse. The Bailor-Seller has no claim to the goods and has only a claim for debt against the First Buyer.¹²⁶ Second Buyer, by having the status of a Holder by Due Negotiation, acquired greater rights in the goods than its seller (First Buyer) had, and superior rights to the goods than the Bailor-Seller who has been defrauded by First Buyer.

c) Theft of a negotiable tangible document. Let us suppose that a Bailor of goods received a bearer tangible document at the time of storing the goods. Bailor kept the bearer tangible document in his office desk. An Agent of the Bailor steals the bearer tangible document from the Bailor's desk and sells and delivers the bearer tangible document to Buyer. If Buyer qualifies as a Holder by Due Negotiation, the Buyer gets the goods from the warehouse. The Bailor has no claim to the goods and can only sue the Agent for civil damages and ask state authorities to bring criminal charges against the Agent for theft. As for the Agent, the Agent who stole the bearer document becomes a holder but not a Holder by Due Negotiation because the Agent obtained the document without paying value and not in the regular course of business. Consequently, the Buyer who qualifies as a Holder by Due Negotiation from the Agent has acquired greater rights than the Agent and superior rights to the Bailor.¹²⁷

47. Paramount rights against holders by due negotiation – the § 7-503 exception. Holders by Due Negotiation do lose the goods to persons who prior to the issuance of the document of title had an ownership claim, including a security interest, against the goods. The persons with prior ownership interests prior to the issuance of the document are called paramount rights claimants. However, paramount rights claimants lose to Holders by Due Negotiation if the paramount rights holders are responsible for a negotiable document of title

only a single authoritative copy exist. See, UCC §§ 7-106 and 7-304 Official Comment 2.

¹²⁵See, UCC 7-402; Pomerene Act, 49 U.S.C.A. § 80112(b) (2000).

¹²⁶See, R.E. Huntley Cotton Company v. Fields, 551 S.W.2d 472 (Tex. Civ. App. 1977).

¹²⁷ Although the illustration involves a negotiable tangible document, the same legal result should be true if an agent stole the bailor's password, thereby allowing the agent entry into the system to deliver (by voluntary transfer of control) of a negotiable electronic document to a Holder by Due Negotiation. Bailors must safeguard their password to prevent unauthorized entry into electronic document of title systems or suffer the consequences for allowing dishonest agents (or thieves) to put the negotiable electronic document of title into the chain of commerce.

entering the stream of commerce. If paramount rights claimants are responsible for a negotiable document getting into the stream of commerce, bailment law protects the stream of commerce and places any loss on the paramount rights claimants.¹²⁸ Two illustrations provide fuller explanation of the relationship between paramount rights claimants and Holders by Due Negotiation.

a) Allowing a negotiable document of title to enter the stream of commerce. Let us suppose that a First Buyer of goods paid the Seller for the goods before the Seller shipped the goods. First Buyer authorized the Seller to ship the goods. Seller took the goods to a carrier and obtained a negotiable bill of lading in the Seller's name. Seller then negotiated and delivered the document to Second Buyer. If Second Buyer qualifies as a Holder by Due Negotiation, Second Buyer has the right to obtain the goods from the carrier. First Buyer, although having paramount rights in the goods before the document issued, allowed a negotiable document of title to enter the stream of commerce by allowing the Seller to ship. Seller cheated the First Buyer yet bailment law places this loss on First Buyer in order to protect the stream of commerce in negotiable documents.

b) Theft of goods placed in storage under a negotiable document. Let us suppose that a Thief stole 100 mattresses and stored them in a warehouse in return for a negotiable warehouse receipt. The Thief negotiated and delivered the document to a Buyer. Even if the Buyer qualifies as a Holder by Due Negotiation, the True Owner of the goods is entitled to get the mattresses back from the warehouse because the True Owner was a paramount rights claimant prior to the issuance of a negotiable document and was not responsible for the negotiable document being in the stream of commerce. Contrast this theft of goods illustration with § 46(c) *supra* Theft of a negotiable tangible document.

c) Bank with a security interest against a Holder by Due Negotiation. Let us suppose that a Bank made a loan to a Farmer at the time of planting a cotton crop. In return the farmer grants the Bank a security interest in the growing cotton and the harvested cotton as collateral for the loan. The Bank properly perfects a security interest in the cotton collateral under UCC Article 9. The Bank thereby acquires paramount rights to the cotton.

At the time of harvest, Farmer takes the cotton to a cotton gin. The cotton gin issues negotiable (bearer) electronic warehouse receipts (EWRs) to Farmer for each bale of cotton. Farmer sells the negotiable EWRs to Broker and delivers the EWRs to Broker. Farmer does not use the proceeds of the sale to repay the loan. Case decisions in the United States favor Broker over Bank on the theory that Bank acquiesced in the EWRs entering the stream of commerce. American courts protect Broker because American courts want to protect the commercial reliability of EWRs.¹²⁹

¹²⁸ See, UCC § 7-503. Cf., Pomerene Act, 49 U.S.C.A. § 80104(c) (2000).

¹²⁹ See, *Agricredit Acceptance, LLC v. Hendrix*, 41 U.C.C. Rep. Serv.2d 242, 82 F. Supp.2d 1379 (S.D.Ga. 2000). Although the illustration uses negotiable electronic warehouse receipts, the same result – assuming the same factual pattern -- would be true if the document of title were a negotiable tangible warehouse receipt.

48. Fungible goods sold and delivered by a warehouse to a buyer in the ordinary course of business – the § 7-205 exception. If a warehouse sells fungible goods to a buyer in the ordinary course of business, the buyer who takes delivery¹³⁰ of the goods does so free and clear of any claims to the fungible goods by a Holder by Due Negotiation. In this instance, which occurs most commonly in the grain trade but which can occur with respect to any fungible goods (fruits, vegetables, ores, mass-produced industrial products), the bailment law adopts a preference for the buyer in the ordinary course of business over the Holder by Due Negotiation.¹³¹ Holders by Due Negotiation are limited to gaining legal redress against the warehouse for having sold the goods covered by the negotiable document of title to a buyer in the ordinary course of business.¹³²

If the goods are not fungible, however, bailment law favors Holders by Due Negotiation over buyers in the ordinary course of business. In other words, if a warehouse sells non-fungible goods to a buyer in the ordinary course of business, the Holder by Due Negotiation can reclaim the non-fungible goods from the buyer, thereby through the loss upon the buyer. The buyer in the ordinary course of non-fungible goods is not allowed to defend under bailment law, by proving innocence in the transaction, against the Holder by Due Negotiation. The buyer's legal recourse would be against the bailee who sold the non-fungible goods.¹³³ UCC §§ 7-502 and 7-503 do not have language which protects buyers in the ordinary course of business as compared to Holders by Due Negotiation with respect to non-fungible goods.

49. Holders and transferees acquire only the rights which their transferor of the document had authority to convey. Unlike Holders by Due Negotiation who acquire almost all rights in the bailed goods, holders and transferees acquire only the rights in the bailed goods which their transferor had. Holders and Transferees almost never acquire rights in the bailed goods greater than what their transferor had.¹³⁴ In a few situations, transferees (but not holders) can notify the bailee of their rights as transferees in order to protect themselves from third party claims and in order to acquire rights greater than those their transferor had.¹³⁵

Holders and Transferees will rarely, if ever, have superior rights to the true owner of the bailed goods. Principles of estoppel, agency, and voidable title -- which protect a good faith purchaser of goods for value under the law of sales (Article 2 of the UCC, most specifically UCC § 2-403) -- do not exist in the law of bailments when the person claiming the goods through a

¹³⁰ The word "delivery" means voluntary transfer of possession of the fungible goods. UCC § 7-205 Official Comment 2.

¹³¹ See, UCC § 7-205; Commodity Credit Corporation Act, 15 U.S.C.A. § 714p (2000). *United States v. United Marketing Association*, 220 F. Supp. 299 (D. Iowa 1963).

¹³² See, UCC § 7-207(b). *Midland Bean Company v. Farmers State Bank*, 552 P.2d 317 (Colo. App. 1976).

¹³³ The buyer's legal recourse against the bailee would most often be found in UCC Article 2. See, UCC § 2-312 (warranty of title).

¹³⁴ See, UCC § 7-504(a) and Official Comments.

¹³⁵ See, UCC § 7-504(b) and Official Comment 2.

document of title has the status of a holder or a transferee of the document. Consequently, persons who deal with goods through a document of title that has not been duly negotiated, or that is a non-negotiable document, have less rights under bailment law than if they had dealt in the goods directly without using documents of title.¹³⁶ If persons want the fullest protection of bailment law, they must deal in negotiable documents and become Holders by Due Negotiation. If persons want the protection of the law of sales, they should deal in the goods directly.

If a holder or a transferee purchase fungible goods covered by the document of title and take physical possession of the fungible goods from the warehouse, § 7-205 protects the holder or transferee, so long as the holder or transferee qualify as a buyer in the ordinary course of business, from the true owner.¹³⁷ While the true owner would not be able to reclaim the fungible goods, the true owner would have legal recourse against the warehouse for having sold fungible goods that the warehouse did not own. The true owner has legal recourse against the warehouse through the tort of conversion.¹³⁸

50. Pro rata ownership of a mass of fungible goods. If farmers place their fungible crop into an elevator for storage, the elevator legally may commingle the fungible crop. Farmers own the mass of fungible goods in common. Each individual farmer owns the pro rata share evidenced by the individual farmer's negotiable or non-negotiable documents of title.¹³⁹

At times, elevators (warehouses) engage in illegal activities by issuing more documents of title for fungible goods than the amount of fungible goods that the elevator actually has in storage.¹⁴⁰ Documents of title for fungible goods that are not actually in storage are called "overissue documents". Despite being issued illegally, Holders by Due Negotiation of those overissue negotiable document obtain rights in the fungible goods.¹⁴¹ Holders by Due Negotiation share pro rata in the mass of fungible goods remaining in storage in the warehouse that has issued overissue documents.¹⁴² Holders by Due Negotiation also have a tort claim for conversion against the elevator for any shortage in the amount shown as stored on the negotiable document of title. By contrast, holders of negotiable documents not duly negotiated do not have a claim pro rata in the mass of fungible goods.¹⁴³

D. WHO HAS THE OBLIGATION TO PAY WAREHOUSE OR CARRIER LIENS?

51. Warehouses and carriers have a possessory lien for services. By law, warehouses and carriers acquire a lien against bailed goods to assure payment of the charges and

¹³⁶ See, UCC § 7-504 and Official Comments 1 and 2.

¹³⁷ See, UCC § 7-205 and Official Comment 2. See also, 1-201(b)(9) (definition of "Buyer in the ordinary course of business").

¹³⁸ See, *In re Durand Milling Co., Inc.*, 9 B.R. 669 (Bankr. E.D. Mich. 1981).

¹³⁹ See, UCC § 7-207.

¹⁴⁰ See, USWA, 7 U.S.C. § 250(b) (2000).

¹⁴¹ See, UCC §§ 7-103(b) and 7-402; USWA, 7 U.S.C. § 80104(b) (2000). See, *State ex. rel Public Service Commission v. Gunkelman & Sons*, 219 N.W.2d 853 (N.D. 1974).

¹⁴² See, UCC § 7-207(b) and Official Comment.

¹⁴³ See, *Midland Bean Co. v. Farmers State Bank*, 552 P.2d 317 (Colo. Ct. App. 1976).

fees for providing bailment services. These statutory liens arise automatically by law against the goods.¹⁴⁴ Warehouses and carriers have these liens against the goods unless they voluntarily give up (waive) these liens. Part VI of this chapter discusses these statutory liens.

One lien topic –the issue of who has the obligation to pay the warehouse or carrier lien -- arises primarily in a conflict between the warehouse or carrier having the lien and other claimants to the bailed goods. These other claimants to the goods have now been identified in this Part V as Bailors, Holders by Due Negotiation, Holders, Transferees, and Persons Claiming Paramount Rights (e.g. a true owner or a bank with a security interest) in the bailed goods. It thus seems appropriate to discuss who has the obligation to pay the statutory liens at this point in the chapter.

52. Bailors and consignors: obligated to pay the bailment lien. Bailors and consignors have the obligation to pay the charges and fees for the bailment services. This obligation arises as a matter of statutory law.¹⁴⁵ Bailees enforce this statutory obligation against the bailed goods.

As importantly, bailors and consignors create the contract with bailees for the bailment services. Consequently, bailors and consignors almost always accept the obligation to pay the charges and fees described in the bailment contract. Bailees enforce this contractual obligation against the bailors or consignors personally. Unless the bailment contract specifically obligates someone other than the bailor or consignor to pay for the bailment services, bailors and consignors will be the parties responsible to pay bailment charges and fees under the bailment contract.¹⁴⁶ Even if the bailee has waived its statutory lien against the bailed goods, the bailee can still collect its charges and fees for bailment services from the party who contracted to pay them.¹⁴⁷ Documents of title often serve as the bailment contract. See §§ 18 and 19 *supra*.

53. Holders and transferees: obligated to pay the bailment lien. Holders and transferees have the rights in the goods that their transferor possessed. The transferor of a document of title is ultimately the original bailor or consignor. As § 52 *supra* just pointed out, bailors and consignors have the obligation both by law and, almost always, by contract to pay the bailment lien. Consequently, holders and transferees step into the shoes of the transferor with the obligation to pay the bailment lien as a matter of law.¹⁴⁸ Moreover, depending upon the terms of the contract between the transferor and the holder/transferee of the document of title, the holder and transferee may also have the obligation to pay the charges and fees as a matter of contract.

Particularly in transportation industry where the consignor is usually a different person from the consignee, consignors and consignees should, and usually do, enter into contractual agreements about who is to pay the freight charges. While consignees have an independent

¹⁴⁴ See, UCC § 7-209 (warehouse lien), § 7-307 (carrier lien); Pomerene Act, 49 U.S.C. § 80109 (2000).

¹⁴⁵ See, UCC § 7-209(a) (warehouse lien), § 7-307(b) (carrier lien); Pomerene Act, 49 U.S.C. § 80109 (2000).

¹⁴⁶ Bailors and consignors who are selling the bailed goods often pass on the charges and fees of the bailment to their purchasers. See, UCC § 2-320 [C.I.F. and C. & F. Terms] and Official Comments; Warsaw Convention Art. 8(k) printed in a note following 49 U.S.C. § 40105 (2000).

¹⁴⁷ For a case discussing, among others, the issue of contractual obligation to pay for bailment services, see *Bluebonnet Warehouse Cooperative v. Bankers Trust Co.*, 89 F.3d 292 (6th Cir. 1996).

¹⁴⁸ See, UCC §§ 7-403(b) and 7-504(a); Pomerene Act, 49 U.S.C. § 80110(a)(1) (2000). See also, UCC § 7-209 Official Comment 3.

liability to pay unpaid freight as a matter of law, carriers who deliver goods to consignees when the bill of lading exhibits the legend "Freight Prepaid" are usually estopped from collecting from consignees. Case decisions usually protect consignees who accept delivery of the goods in reliance upon the stamped legend that the freight has been prepaid.¹⁴⁹

54. Holders by Due Negotiation: limited obligation to pay the bailment lien. Holders by Due Negotiation are not bound by the contractual agreement entered into between bailors and warehouses or between consignors and carriers. Holders by Due Negotiation are obligated solely under the duly negotiated document of title. Holders by Due Negotiation must be able to read the negotiated document of title and know the extent of their liability for the statutory bailment liens. Consequently, Holders by Due Negotiation are accountable for the payment of bailment liens only under two circumstances. First, Holders by Due Negotiation are liable for charges and fees related to bailment services in an amount or rate specified in the negotiable document itself. Second, if no amount or rate is specified in the negotiable document, Holders by Due Negotiation are liable for charges and fees related to bailment services that are reasonable in amount and rendered subsequent to the date of the negotiable document.¹⁵⁰

55. Persons claiming paramount rights in the goods: obligation to pay the bailment lien. Persons claiming paramount rights in the goods can be better described primarily through two examples. True owners of the goods prior to their being bailed are the first example of persons claiming paramount rights in the goods. Banks having a security interest in the goods prior to their being bailed are the second example of persons claiming paramount rights in the goods. In both examples, the key to being a person claiming paramount rights in the goods is that the legal claim (either ownership or a security interest) arose prior to the goods being bailed. In order to understand the responsibility of persons claiming paramount rights for payment of the statutory liens, it is best to discuss the warehouse lien and the carrier lien separately.

a) Warehouse liens and persons claiming paramount rights. With respect to the responsibility of persons claiming paramount rights for payment of warehouse liens, § 7-209 distinguishes between ordinary goods (all goods other than household goods) and household goods.

i) Ordinary goods. If true owners or banks deliver or entrust ordinary goods to the bailor, thereby allowing the bailor to place the ordinary goods into the bailment, true owners and banks are accountable to pay the warehouse lien that arises as a matter of law.¹⁵¹ If true owners or banks acquiesce in the bailor placing the ordinary goods into the

¹⁴⁹See, *Wheaton Van Lines v. Gahagan*, 669 A.2d 745 (Me. 1995); *E. W. Wylie Corporation v. Menard, Inc.*, 523 N.W.2d 395 (N.D. 1994); *The Atchison, Topeka and Santa Fe Railway Company v. Texas International Gas & Oil Company*, 811 S.W.2d 685 (Tex. Civ. App. 1991). See also, UCC § 2-320 and Official Comments; Warsaw Convention Art. 8(k) printed in a note following 49 U.S.C. § 40105 (2000).

¹⁵⁰See, UCC § 7-209(a) & § 7-307(a).

¹⁵¹ See, UCC § 7-209(c)(1).

bailment so that the bailor obtains a document of title, true owners and banks are accountable to pay the warehouse lien that arises as a matter of law.¹⁵² While the legal conclusions just stated are correct, the factual disputes as to whether a particular true owner or a particular bank delivered, entrusted, or acquiesced can be quite difficult. What can be safely said is that persons claiming paramount rights do not have to pay a warehouse lien to reclaim their ordinary goods if a thief was the bailor.¹⁵³

ii) Household goods. Persons claiming paramount rights in household goods must pay the warehouse lien under the same circumstances in which persons claiming paramount rights must pay the warehouse lien for ordinary goods. In addition, persons claiming paramount rights in household goods must pay the warehouse lien to reclaim their household goods if the depositor was the legal possessor of the goods at the time of deposit.¹⁵⁴ For example, even if the true owner of the household goods had had no interaction with the depositor of the household goods about the deposit, the true owner must pay the warehouse lien to reclaim them if the depositor (e.g. a sheriff, ex-spouse, landlord) was a legal possessor of the household goods at the time of the deposit. Obviously, a thief can never be a legal possessor of the household goods at the time the thief deposits them into the bailment.¹⁵⁵

b) Carrier liens and persons claiming paramount rights. With respect to the responsibility of persons claiming paramount rights for payment of carrier liens, § 7-307 distinguishes between the situation in which the carrier is required by law to accept the goods for transportation and the situation in which the carrier has the discretion to accept the goods for transportation.¹⁵⁶

i) Required transportation. If a carrier is required by law – a reference to general transportation law – to accept the goods for transport, the carrier will be protected in its carrier lien against everybody unless the carrier had notice that the consignor lacked authority to subject the goods to bailment.¹⁵⁷ Consequently, if a carrier is required to accept goods for transport and does not have notice that a thief is the consignor, the carrier will be entitled to be paid its carrier lien before the true owner can reclaim the goods from the carrier.¹⁵⁸

ii) Discretionary transportation. In situations where the carrier has discretion to accept the goods for transport, the carrier can enforce its statutory lien against the consignor and any person that permitted the consignor to have control of possession

¹⁵² See, UCC § 7-209(c)(2).

¹⁵³ See, UCC § 7-209 Official Comments. The Official Comments set forth both explanations and specific examples about when persons claiming paramount rights are accountable to pay the warehouse lien.

¹⁵⁴ See, UCC § 7-209(d).

¹⁵⁵ See, UCC § 7-209 Official Comment 3, Example 11.

¹⁵⁶ See, UCC § 7-307(b).

¹⁵⁷ See, UCC § 7-307(b) first sentence.

¹⁵⁸ See, UCC § 7-307(b) and Official Comment 1.

of the goods unless the carrier had notice that the bailor lacked authority.¹⁵⁹ For example, true owners who allow their neighbors to borrow sculpture must pay the carrier lien to reclaim the sculpture from the carrier if the neighbor ships it to the neighbor's vacation home. True owners can avoid paying the carrier lien created by the neighbor borrowing art only if the carrier had notice that the neighbor lacked authority to ship – likely a difficult burden of proof for the true owner. On the other hand, true owners do not have to pay a carrier lien to reclaim goods shipped by a thief because the true owner did not allow the consignor (the thief) to have control of possession of the goods.

PART VI. WAREHOUSE AND CARRIER LIENS

A. TYPES OF LIENS AND THEIR EXISTENCE

56. Specific liens. Warehouses and carriers have a lien against the specific goods in the bailment relationship to protect payment of their charges for storage or transportation of those specific goods. This specific lien also extends to the proceeds of the specific goods. These charges include the fees for providing the storage or transportation service (including demurrage and terminal charges), the costs of insurance and labor incurred in relation to the goods, and the expenses of preserving the goods or reasonably incurred in the lawful sale of the goods by the warehouse or carrier. Warehouses and carriers are entitled to specific liens regardless of whether the lien is expressly mentioned in the document of title. Specific liens arise as a matter of law.¹⁶⁰

57. General warehouse lien. Warehouses are permitted to claim a general lien against goods presently in storage for charges incurred with respect goods that were previously in storage but which are no longer in storage. In other words, a warehouse that asserts a general lien is using the goods presently in storage as protection for payment of the warehouse's charges both with respect to the specific goods remaining in storage and for the goods previously stored but now redelivered. Warehouses may assert a general lien only if the general lien is expressly claimed in the warehouse receipt. General liens are authorized by law, but only if claimed; general liens do not automatically arise as a matter of law.¹⁶¹

58. Specific lien for carriers. By contrast to warehouses, carriers may only claim specific liens against the goods for which they are presently providing transportation. General liens are not allowed nor authorized in the transportation industry.¹⁶²

¹⁵⁹ See, UCC § 7-307(b) second sentence.

¹⁶⁰ See, UCC §§ 7-209 & 7-307; Pomerene Act, 49 U.S.C. § 80109 (2000). Cf., USWA, 7 U.S.C. § 251(b) (2000). UCC Article 7 does not have a definition of “proceeds” but the definition in UCC Article 9 is also likely the correct definition for the word “proceeds” in Article 7. UCC § 9-102(a)(64).

¹⁶¹ See, UCC § 7-209(a) and Official Comment 1 with accompanying examples. See generally, Drew L. Kershen, Article 7: Documents of Title, 48 THE BUSINESS LAWYER 1645, 1654-1657 (1993).

¹⁶² See, UCC § 7-307 and Official Comment 1; Pomerene Act, 49 U.S.C.A. § 80109 (2000).

59. Document of title or storage agreement necessary to assert a warehouse or carrier lien. To be entitled to a warehouse or carrier lien, the warehouse or carrier must issue a document of title for the goods against which the lien will attach. The statutory lien exists against the goods “covered by” the warehouse receipt or bill of lading.¹⁶³ While the document of title need not be in any particular form, a warehouse or carrier can be assured of having a lien against the bailed goods only if they issue a document of title.¹⁶⁴ In addition, in light of modern business practices, warehouses that have storage agreements with bailors also gain the statutory warehouse lien for goods covered by the storage agreement.¹⁶⁵

60. Bailment liens are possessory liens. Warehouses and carriers have a lien against bailed goods only so long as those goods are in the possession of the warehouse or the carrier. When warehouses or carriers voluntarily redeliver the goods, they lose their bailment lien against the goods which are now outside the bailment relationship.¹⁶⁶ Without a lien against specific goods, warehouses and carriers become ordinary creditors of whoever is responsible for the bailment charges and must collect this ordinary debt through regular court procedures. Most often, warehouse or carriers will be able to pursue a contract claim against the bailors or consignors to recover the bailment charges.¹⁶⁷ However, warehouses and carriers should ordinarily consider pursuing a contract claim to be more difficult and more expensive than enforcing the statutory bailment lien. Moreover, warehouses and carriers also lose their bailment liens if they unjustifiably refuse to redeliver.¹⁶⁸ In light of the fact that warehouses and carriers lose their bailment liens upon redelivery or unjustifiable refusal to redeliver, one can clearly understand why warehouses and carriers have the legal right to refuse to redeliver until after they have been paid the bailment charges.

B. ENFORCEMENT OF BAILMENT LIENS

61. Commercial bailments compared to consumer bailments. Warehouses and carriers have statutory liens against bailed goods regardless of whether the bailment is a commercial bailment or a consumer bailment. However, with respect to enforcement of the lien, warehouses and carriers must be much more careful when enforcing a lien against goods in a consumer bailment. Commercial bailments are bailments of goods by merchants in the course of their businesses. Consumer bailments are bailments by non-merchants and primarily involve the storage and transportation of household goods. The enforcement procedures for liens against consumer goods include additional requirements meant to provide an extra margin of consumer protection.¹⁶⁹

¹⁶³ See, UCC § 7-209(a) and 7-307(a). Cf. USWA, 7 U.S.C. § 250(a)&(c) (2000).

¹⁶⁴ See, UCC § 7-202. Compare *Marlow v. Universal Warehouse Company*, 136 B.A. 755 (Bank. W.D. Tenn. 1991) and *Plains Cotton Cooperative Association v. Julien Company*, 141 B.R. 359 (Bankr. W.D. Tenn. 1992) with *In re Celotex Corporation*, 134 B.R. 993 (Bankr. M.D. Fla. 1991).

¹⁶⁵ See, UCC § 7-209(a).

¹⁶⁶ See, UCC §§ 7-209(e), 7-307(c).

¹⁶⁷ Cf. § 52 of this chapter supra.

¹⁶⁸ See, UCC §§ 7-209(e), 7-307(c).

¹⁶⁹ See, UCC §§ 7-210(a) & 7-308(a) [commercial bailments] compared to §§ 7-210(b) and 7-307(g) [consumer

62. Enforcement procedures for commercial bailments. The key point to understand about enforcing liens against goods in a commercial bailment under the UCC Article 7 is that warehouses and carriers have a non-judicial enforcement mechanism.¹⁷⁰ Warehouses and carriers can act on their own, without court approval, to enforce bailment liens so long as they follow the statutory procedures set forth in UCC Article 7.¹⁷¹ Warehouses and carriers have identical statutory procedures for enforcement of the statutory lien against goods in a commercial bailment.¹⁷²

a) Notice to those known to claim an interest in the goods.

Warehouses and carriers must give notice to those known to claim an interest in the bailed goods so that these persons can decide prior to the sale to satisfy the lien. In the notice, bailees must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale.¹⁷³ If any person claiming a right in the goods pays the bailment charges, the warehouse or carrier may not sell the goods. Once the charges are satisfied, the warehouse or carrier must retain the goods subject to the document of title and the obligations of reasonable care and prompt redelivery.¹⁷⁴

b) Commercial reasonableness required of sale procedures.

When warehouses and carriers use non-judicial enforcement under UCC Article 7, their actions will be measured against the standard of commercial reasonableness. Commercial reasonableness depends upon the facts of each particular sale. As a general rule, however, commercial reasonableness means that warehouses and carriers must act fairly toward the known claimants during the enforcement process. Proper and adequate notice to the known claimants, as just discussed in § 62a, is the first requirement of commercial reasonableness. But commercial reasonableness also must exist with respect to the sale itself.

Warehouses and carriers enforce a lien in a commercially reasonable manner if they sell the goods in recognized markets using recognized sales methods or in recognized markets obtaining current prices. A properly arranged and notified sale does not fail the test of commercial reasonableness just because a better price could have been obtained at a different time or a

bailments]. The federal bailment statutes (e.g. the Pomerene Act and the United States Warehouse Act) do not have statutory provisions distinguishing between commercial bailments and consumer bailments for purposes of the enforcement of the statutory lien. However, federal courts, if faced with a consumer bailment situation, are likely to adopt the distinction between commercial and consumer bailments as set forth in UCC Article 7.

¹⁷⁰ This chapter discusses the enforcement procedures for statutory liens under UCC Article 7. This chapter does not address the enforcement procedures for federal statutory liens under the Pomerene Act or the United States Warehouse Act.

¹⁷¹ However, UCC §§ 7-210(g) and 7-308(f) explicitly state that the non-judicial enforcement allowed by UCC Article 7 is an additional enforcement mechanism. Bailees also retain all rights allowed by law to a creditor against a debtor.

¹⁷² See, UCC §§ 7-210(a) & 7-308(a) and Official Comment.

¹⁷³ See, UCC §§ 7-210(a) and 7-308(a).

¹⁷⁴ See, UCC §§ 7-210(c) & 7-308(b).

different method of sale.¹⁷⁵ Warehouses and carriers may purchase the goods at a public sale that satisfies the standards of commercial reasonableness.¹⁷⁶

If the sale produces proceeds greater in amount than that needed to satisfy the lien, the warehouse or carrier must hold the balance of the proceeds for the person to whom the warehouse or the carrier would have redelivered the goods.¹⁷⁷ Moreover, warehouses and carriers, in many instances, must be careful to sell only the amount of bailed goods necessary to recover the bailment charges. If warehouses and carriers sell more than is apparently necessary to satisfy the lien, warehouses and carriers have acted in a commercially unreasonable manner because they have unnecessarily interfered with the ownership claims of the known claimants.¹⁷⁸

63. Enforcement procedures for consumer bailments. For warehouses, UCC § 7-210(b) sets forth a non-judicial enforcement procedure that is mandatory when warehouses are enforcing the statutory lien against goods stored by a non-merchant. Goods stored by a non-merchant are most often household goods stored by consumers. For carriers, UCC § 7-308 does not have a mandatory non-judicial enforcement procedure for consumer bailments but carriers have the option to use the § 7-210(b) procedure.¹⁷⁹ In light of the heightened protection that courts give to consumers with bailed goods, carriers should carefully consider using the § 7-210(b) enforcement procedures in situations involving consumer bailments.

a) Heightened protection from courts for consumers. Although the Supreme Court of the United States has ruled that the non-judicial procedures of UCC Article 7 satisfy constitutional standards of due process,¹⁸⁰ some courts relying upon state constitutional provisions have ruled that consumers are entitled to a judicial hearing prior to having their bailed goods sold by the bailee.¹⁸¹ Moreover, even if courts validate the non-judicial enforcement of statutory bailment liens, courts have ruled that commercial reasonableness applies to consumer bailments as an additional standard above-and-beyond the stricter procedural requirements of UCC § 7-210(b). In other words, in consumer bailments, courts provide heightened protection for consumers both in terms of the procedures of the sale and the fairness of the sale. Courts see themselves as protectors of consumers against warehouses and carriers.¹⁸²

b) Stricter procedural requirements in the enforcement of liens in consumer bailments. The UCC § 7-210(b) procedure for enforcement of statutory liens in consumer bailments sets forth more detailed and more chronologically choreographed

¹⁷⁵ See, UCC §§ 7-210(a) & 7-308(a).

¹⁷⁶ See, UCC §§ 7-210(d) & 7-308(c).

¹⁷⁷ See, UCC §§ 7-210(f) and 7-308(e).

¹⁷⁸ See, UCC §§ 7-210(a) and 7-308(a).

¹⁷⁹ UCC § 7-308(g).

¹⁸⁰ *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149 (1978).

¹⁸¹ *Svendsen v. Smith's Moving & Trucking Co.*, 76 App. Div.2d 504, 431 N.Y.S.2d 94 (1980). As a result of the *Svendsen* decision, the New York legislature enacted a non-uniform UCC provision [N.Y. UCC § 7-211] creating a judicial hearing to establish the validity of the bailment lien.

¹⁸² See e.g., *Bradford v. Muinzer*, 498 F. Supp. 1384 (E.D. Ill. 1980); *Connery v. Jones Storage & Moving, Inc.*, 997 P.2d 745 (Kan. Ct. App. 2000).

requirements than those set forth in § 7-210(a) for commercial bailments. Moreover, the courts have tended towards demanding strict compliance with these requirements. Any misstep by the warehouse can have adverse legal consequences for the warehouse.¹⁸³ There are three differences in procedures between consumer bailments and commercial bailments that are worth highlighting.

i) Notice requirements. Warehouses must give notice to all persons known to claim an interest in the consumer goods. In contrast to the notice for commercial bailments, the substantive content of the consumer bailment notice are more detailed. The consumer notice must have an itemized statement, a description of the goods, a demand for payment within not less than ten days after receiving the notice, and a conspicuous statement stating that the goods will be advertised and sold at auction unless the consumer responds to the notice.¹⁸⁴ The consumer notice is meant to make the consumer clearly aware of what is about to occur, why it is occurring, and the consequences for ignoring the notice.

ii) Advertising requirements. After the notice has been given and its time passed, warehouses must advertise the sale at least twice in a two week period either in a general circulation newspaper or (if no newspaper exists for the place of sale) by posting the advertisement in six conspicuous places in the neighborhood of the sale. The sale cannot take place until 15 days minimum after the first advertisement publication. The advertisement must inform the reader of the description of the goods, the person on whose account the goods are held, and the time and place of sale by auction.¹⁸⁵ These advertising requirements are meant to promote the most number of bidders and the highest price for the consumer goods being sold.

iii) Public sale. When warehouses have satisfied the notice and advertising requirements for consumer bailments, the warehouse must conduct a public sale by auction. In contrast to the enforcement of a lien against commercial goods, warehouses can not use a private sale for goods in a consumer bailment.¹⁸⁶ In addition, the public sale must be conducted in accordance with the terms set forth in the notice to known claimants and at the suitable place and time stated in the advertisement. In other words, warehouses must do as they have said they will do in the notice and the advertisement.¹⁸⁷

64. Consequences flowing from the sale under statutory procedures.

Purchasers in good faith of the goods sold through the statutory procedures take the goods free of any rights by persons against whom the lien was valid. Purchasers in good faith acquire the

¹⁸³ See e.g., *Owen v. Treadwell*, 715 P.2d 1040 (Kan. Ct. App. 1986); *Hughes v. Accredited Movers, Inc.*, 190 N.J. Super. 71, 461 A.2d 1203 (1983).

¹⁸⁴ See, UCC § 7-210(b)(1)-(2).

¹⁸⁵ See, UCC § 7-210(b)(5). Section 7-210(a) has no specific advertising requirements for commercial bailments. Of course, warehouses must act in a commercially reasonable manner which, in certain circumstances, may mean that advertisements should be used to assure a commercially reasonable sale.

¹⁸⁶ See, UCC § 7-210(a).

¹⁸⁷ See, UCC § 7-210(b)(2)-(3).

goods free of claims against the goods even though the warehouse has failed to comply with the UCC statutory procedures.¹⁸⁸

However, when warehouses and carriers have failed to comply with the statutory procedures for enforcement of their liens, persons with claims to the goods may sue the warehouses and carriers to recover damages caused by such failure. If the failure was willful, these persons suing may recover not only on a damage claim but also for the tort of conversion against the warehouses and carriers. Using the tort of conversion, persons suing may be able to recover punitive damages for the willful failure to comply.¹⁸⁹

PART VII. CONCLUSION

This chapter has provided an introduction to the law of bailment with an emphasis on commercial bailments. While this chapter has tried to provide the reader with a solid understanding of bailment law, this chapter has not attempted to provide a detailed exposition of every legal issue that has arisen. More significantly, this chapter has not attempted to provide a discussion of the many cases that have addressed specific bailment law issues. At times the footnotes in this chapter cite case decisions, but the chapter focuses on the statutory provisions of state and federal laws relating to bailment. If readers desire a thorough treatment on bailment issues and bailment cases, readers should consult one or both of the following treatises: Hawkland, Holland & Azivino, UCC SERIES [volume 7] ARTICLE 7: Documents of Title (Callaghan & Company) or Lawrence's Anderson on the UNIFORM COMMERCIAL CODE [volume 7A] ARTICLE 7: Warehouse Receipts, Bills of Lading and Other Documents of Title (West Group).

¹⁸⁸ See, UCC §§ 7-210(e) and 7-308(d).

¹⁸⁹ See, UCC §§ 7-210(i) & 7-308(h).