

2001

Remarks on UCITA in Practice: Attorney Views

Carla Stone Witzel

Follow this and additional works at: <http://scholarship.richmond.edu/jolt>

 Part of the [Antitrust and Trade Regulation Commons](#), and the [Computer Law Commons](#)

Recommended Citation

Carla S. Witzel, *Remarks on UCITA in Practice: Attorney Views*, 8 Rich. J.L. & Tech 11 (2001).

Available at: <http://scholarship.richmond.edu/jolt/vol8/iss1/11>

This Speech is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in Richmond Journal of Law and Technology by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.



Volume VIII, Issue 1,

Fall 2001

Remarks on UCITA in Practice: Attorney Views

by: Carla Stone Witzel[*]

Cite As: Witzel, Carla Stone, *Remarks on UCITA in Practice: Attorney Views*, 8 RICH. J.L. & TECH. 11 (Fall 2001) at <http://www.jolt.richmond.edu/v8i1/article11.html>.

{1}Well, UCITA has been in effect since October 1, 2000, and I am here today telling you about it in Maryland. Maryland adopted it after Virginia, but [Virginia] has a delayed effective date. The law has been effective, and in fact we are busy fixing it or changing it at this moment in the Maryland legislature. We had the privilege to work for a coalition of software companies lobbying this legislation through the Maryland legislature. We were assisted just a little bit by the Governor and the Speaker of the House. So we've been working with the law probably longer than most practitioners in Maryland. I can report that it has not changed life as we know it. I can also report that I think many practitioners in Maryland who know the law has been in effect are in a state of denial about the fact that they need to go through this volume on a long weekend and really learn the Code.

{2}Some practitioners are moving slowly to the realization that UCITA applies to more transactions than [they] think, and once in a while, wide-eyed, [they] come into my office and say, "Oh, gee, do I have an access contract here?" And usually the answer is yes. What Richard [Grier] went through are the default provisions, which basically make your contract unless you contract around it. That's your contract, and unless practitioners deal with UCITA, it's like having a client who wants a will and saying rely on the probate code. You're not taking advantage of UCITA provisions. You may not be selecting the right law. And, sure, you have a contract, but you don't have the best contract you can get for your client, which is what we all want to do. Now some practitioners have moved into stage three. After realizing, yes, indeed, they have to read this thing, after denial, we're moving into, [the realization that] UCITA is pretty interesting. There are a lot of good provisions. And I think there are a lot of wonderful provisions in UCITA. And how can I take advantage of them? And to end your day today, I'd like to talk about three topics. [The first] is using UCITA in mixed transactions, opting in/opting out with a few comments on smart goods. [Second], a little bit about UCITA warranties and disclaimers, because of course one of the things you get with UCITA like Article 2 are many

warranties that maybe, maybe not, can be disclaimed. And then talk a little bit about the Maryland Code. I included in your outline as the last piece, a highlight of different changes Maryland made to the uniform law. And I'll also talk a little bit about what's going on in the legislature today.

{3}As Richard [Grier] pointed out, governing law is something that hopefully we're all sticking in all of our contracts all the time. And now we have to be even more careful, particularly in mixed use transactions, because we can either subject all the agreement, part of the agreement, or none of the agreement to UCITA. And we can select the UCITA we want to cover the transaction. So if the material part of the transaction is computer information, mixed computer information and other subject matter, or it is excluded subject matter, like some of the subject matter spoken about earlier, the parties can agree that UCITA governs in whole or in part or that other law governs. Most of my practice is financial institutions. Financial transactions are excluded from UCITA. Many financial transactions are excluded from UCITA because many other laws cover them. But I can opt into UCITA if a significant part of a transaction is in computer information.

{4}One of the things I have in fact been doing on a billable basis for clients is thinking about what advantages my client can get from potentially opting into UCITA. Now, I was deeply embroiled in the Y2K fun for financial institutions because the regulators told financial institutions "you've got to look at every contract you have and figure out if you're going to have liability or if you're going to have recourse," and the clients didn't want to do that. They sent me their contracts. So for the first time I got to look at all of the contracts my bank clients signed, which frankly was an eye opener. But I was frustrated when it came time to advise my client on many matters because there was no law: it wasn't Article 2, it wasn't Article 2A, and things weren't clear. And as lawyers you want clarity. So one of the things I'm thinking through is, why would someone want to opt into UCITA if it's significant part of the transaction? Home banking is a computer information transaction. Would it be a good thing to opt into UCITA? And I think that this is what all of us will be doing because so much of our work has a significant chunk of computer information.

{5}One of the things we won't be able to do, though, and this is the two minutes on smart goods, is opt into UCITA when the transaction is excluded from UCITA because it's smart goods. That's the car with the chip for the anti-locking brakes, and I am sure you have talked about it at some point in the day. UCITA can cover a mixed transaction. It covers the computer information, and other law may cover the goods, except when the computer chip is embedded and you are really buying the goods. Now Article 2 is under revision to hopefully make the scope of Article 2 and UCITA work well together.

{6}So for transactions where you can opt into UCITA, why would you? What looks attractive? UCITA has a provision on authentication. Again, the authentication of the document can be proven in any manner including compliance with a commercially reasonable attribution procedure. UCITA has a provision on attribution. If any of you are working with UETA and E-Sign, attribution of an electronic document is challenging. Well, UCITA has some law on that, and I for one think it would be helpful to have that provision govern a transaction.

{7}Under UCITA, parties clearly can choose applicable law even if the transaction doesn't have a nexus with a particular state. That's nice. Parties can choose an exclusive judicial forum. In Maryland we added a provision, and I'm not sure if it's in Virginia, blessing specifically agreements to an arbitration clause. Whether an arbitration clause can be stuck into a financial services agreement is a hot litigation issue. I like having a law that specifically says yes.

{8}Manifesting assent can be shown by the infamous "double click." There are rules, as Richard [Grier] pointed out, on receipt of an electronic message. I like that too. I like having the electronic mailbox rules. An agreement to modify contracts subject to UCITA needs no consideration. Many financial service contracts are ongoing [over] multiple years. I like having layered contracting. So, to summarize, I think that you will join your brothers and sisters from the North in thinking about how you can take advantage of many of the

provisions of UCITA and think about opt out, opt in, the appropriate language, and you will all become confident conflict of law lawyers.

{9}Now moving on just briefly to UCITA warranties. UCITA has five, at least five, warranties. Many of them are similar to the Article 2 warranties with which we are familiar. Maryland, for one, basically adopted the rule that none of these warranties could be disclaimed away or reduced in consumer transactions. And that is certainly one of the issues that you will want to be looking at as a practitioner when you are thinking about which state's UCITA to adopt. Has the state wiped out waivers and disclaimers of warranties or not? And in my written material I go through in lengthy detail the Maryland warranty changes.

{10}Finally, focusing specifically on Maryland, the outline goes through the changes. A major change we made was to clarify that the Unfair Deceptive Trade Practices Act applies as well to computer information transactions. We broadened the mass market definition so that a mass market transaction is not just a transaction at retail. It could also be [that] an accountant buying 50 copies of the retail program would be in the mass market in Maryland because there is no quantity exclusion. We changed the jurisdiction and choice of forum rules slightly. The way it reads is that a Maryland court is always, no matter what, going to decide choice of forum. I'm not sure how that works. And prohibiting disclaimers and limitations of warranties. We established a joint task force of our House and Senate to report periodically on the implementation of UCITA and other technology issues. And the result of this is we have several legislators who have gotten very smart on technology and are doing a wonderful, wonderful job. We are tweaking UCITA now to actually contend with some of the tweaks we made away from the uniform version, and I will not go through that in detail. It is covered in my outline. And finally this task force has broadened its scope, and it's moved into UETA and changing some of UETA to make it consistent with E-Sign. That finishes my prepared remarks. Thank you for your hospitality in Virginia.

ENDNOTES

[*] Carla Stone Witzel is a member of the Financial Services and Government Relations Department of Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC. She earned her B.A. from the University of California at Berkeley, graduating Phi Beta Kappa, and her Juris Doctor from the University of Maryland School of Law, graduating Order of the Coif. The focus of Ms. Witzel's practice is on financial institutions law, including consumer credit, regulatory compliance, and implementation of expanded powers, such as insurance and securities brokerage. Significant representations in her practice have included mergers and acquisitions of financial institutions, compliance audits, financial institution corporate transactions, and the preparation of credit and deposit instruments. Her practice increasingly includes reviews of computer on-line hardware and software contracts. Ms. Witzel is a member of the American Bar Association Banking Law, Consumer Financial Services, and Credit Union Committees, and is on the Business Law Section Council of the Maryland state Bar Association. She is past-Chair of the community Bank Matters Subcommittee of the ABA's Business Law Section and past-Chair of the Uniform Commercial Code Committee of the Maryland State Bar Association. She is past-President of Financial Institution Lawyers of Maryland, Inc., and is a frequent lecturer on financial topics. Ms. Witzel has authored *Maryland Secured Transactions Under Revised Article 9 of the Uniform Commercial Code: Forms and Procedures Manual*, Data trace Publishers, 2000.

Related Browsing

