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Annual Survey of Virginia Law: Commercial Law

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COMMERCIAL LAW

*Michael J. Herbert**

I. STATUTORY CHANGES

During its 1984 and 1985 sessions, the General Assembly enacted a number of minor technical amendments to Virginia's Uniform Commercial Code. These included both the much-needed and long-awaited change of the word "state" to "Commonwealth" throughout the Code and a series of inexplicable revisions in the Code's punctuation. The most significant of these technical changes was undoubtedly the increase in the filing fees for Article 9 financing statements filed with the State Corporation Commission.¹ (One substantial legislative change which indirectly affects the Code was the enactment of Virginia's new "Lemon Law." Some aspects of that statute are discussed below in conjunction with the Virginia Supreme Court's recent decision on the standards for revocation of acceptance of a lemon car.)

Of vastly greater importance than the technical changes to the U.C.C. was Virginia's adoption of the Code's 1977 Official Amendments (the "1977 Amendments"). The 1977 Amendments primarily affect Article 8 (Investment Securities). Although Article 8 is among the most obscure,² and least litigated,³ articles of the Code, the 1977 Amendments may eventually have a very substantial impact on the one aspect of investment securities law that can be significant to the typical commercial lawyer—the creation and perfection of security interests in investment securities.

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1. From \$5.00 to \$10.00. Act of April 18, 1984, ch. 771, 1984 Va. Acts 2093 (codified at VA. CODE ANN. § 8.9-403(5) (Cum. Supp. 1985)).

2. So obscure that the writers of the leading treatise in the field decided to ignore it. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE at xxi (2d ed. 1980).

3. There appears to be exactly one reported Virginia case that even refers to Article 8—*In re Mathews*, 25 U.C.C. REP. SERV. 305 (Bankr. E.D. Va. 1978), *rev'd sub nom. Mathews v. Starr*, 475 F. Supp. 37 (E.D. Va. 1979).

Traditionally, the law regarding the creation and transfer of interests in investment securities has closely paralleled the law regarding negotiable instruments. A traditional investment security, like a draft or a note, consists of rights embodied in a piece of paper. Generally speaking, the transfer of that piece of paper, if accompanied by any necessary endorsement, transfers the rights it embodies, free of the claims of third parties.⁴ The attributes of negotiability given to investment securities have facilitated the creation of a highly efficient market in those securities. Buyers do not have to research the title to the securities they obtain, since merely by taking possession of the crucial piece of paper they are, generally speaking, assured of obtaining clear title to the underlying rights.

However, the same technological changes which are affecting negotiable instruments are also affecting investment interests.⁵ Our society is moving from a reliance upon paper to a faith in electronic data storage as the embodiment of intangible rights. Indeed, it has long been true that many investment interests are not represented by paper securities held by the owner of the rights. A common and popular example is shares of stock held in a stock reinvestment plan. The issuer of the shares acts as custodian of the shares for the owner, and typically the only documentation received by the owner is a periodic statement. The owner may, but rarely does, get a certificate issued for the shares.

The increasing popularity of such devices created a problem for secured creditors who wished to use these "paperless" investment interests as collateral. Prior to the 1977 Amendments, a security interest in an investment security could only be perfected by taking possession of the security.⁶ This in turn meant that a certificate had to be issued. While this problem does not appear to have created an insuperable barrier to the use of paperless investment interests as collateral (the owner/debtor merely had to get the issuer

4. See generally U.C.C. §§ 8-301, -302, -304, -305, -308, -309, -311, -313 (1972). (In this article, all citations to the pre-1977 Amendments version of the U.C.C. are to the Official 1972 Text. All other cites are to the current Virginia version of the Code.) With regard to the negotiable nature of securities under the 1972 Code generally, see 3 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE 717-24, 726-32, 742-57, 760-70 (2d ed. 1971).

5. Either to avoid or to engender confusion, this article uses the term "investment interests" to describe collectively what new Article 8 calls certificated and uncertificated securities. This is because, except in those states that have adopted the 1977 Amendments, an uncertificated security is not a security.

6. U.C.C. §§ 8-102, 9-105(i), 9-304 (1972).

to give him/her a certificate), it did add significantly to the "paperwork crunch" that was burdening the securities market.⁷

It was suggested that this problem could have been adequately resolved by dealing with paperless investment interests as either "accounts" or "general intangibles" under Article 9.⁸ A security interest in an account or other intangible can be perfected rather easily by the mere filing of a financing statement.⁹ However, the majority of those involved in drafting the 1977 Amendments opposed this idea. They wished to retain the attributes of negotiability for paperless investment interests. Those attributes would be lost if the interests were treated as accounts or general intangibles because a transferee of the interest could not rely upon transfer and endorsement; he/she would have to check the U.C.C. records to determine whether he/she was getting clear title.¹⁰

In consequence, new Article 8 creates what can only be described as a negotiable intangible—dubbed the "uncertificated security."¹¹ The drafters realized that sufficient protection could be provided both to buyers and to secured parties by the simple device of protecting only those interests in the uncertificated security which were "registered" with the issuer. By registering a security interest with the issuer of the security, a secured party obtains protection against later buyers. Conversely, a buyer is generally assured of obtaining clear title against any interests that have not been registered.¹² The buyer is thus relieved of the potentially difficult task of tracking down a financing statement; the uncertificated security is as freely transferable as the traditional certificated security; and the highly efficient market associated with negotiability is preserved.

It should be noted, however, that, in establishing this new structure for using securities as collateral, the drafters of the new Article 8 seem to have made a serious political blunder which may be slowing the Article's adoption. The creation and perfection (though not the enforcement) of security interests in all investment securities will now be governed primarily by Article 8 rather than by

7. See generally Aronstein, Haydock & Scott, *Article 8 Is Ready*, 93 HARV. L. REV. 889, 890-92 (1980).

8. *Id.* at 891 n.8, 895-96.

9. VA. CODE ANN. § 8.9-302(1) (Cum. Supp. 1985).

10. Aronstein, Haydock & Scott, *supra* note 7, at 895-98.

11. VA. CODE ANN. § 8.8-102(b) (Cum. Supp. 1985).

12. *Id.* §§ 8.8-302, -313, -321; Aronstein, Haydock & Scott, *supra* note 7, at 897-99.

Article 9. This has already miffed at least one of Article 9's guiding spirits.¹³ (It is also worth mentioning that, for no very obvious reason, new Article 8 continues the archaic, and, in the context of uncertificated securities, misleading,¹⁴ term "pledge" to describe the security interest¹⁵ and "pledgee" to describe the secured party.)¹⁶

Under section 8.8-321(1), a security interest in a security is enforceable and can attach only if the security is "transferred" either to the secured party or to a person designated by the secured party.¹⁷ (Note that transfer is required both to create and perfect the security interest; thus, there is now no such thing as an unperfected security interest in securities, except in those cases where perfection has lapsed.) Section 8.8-313(1) sets out an exhaustive list of the means by which a transfer can be effectuated. Generally, however, a certificated security is transferred by the transfer of possession; an uncertificated security is transferred by "registration."¹⁸ Registration of a security interest in an uncertifi-

13. Namely, Professor Peter F. Coogan, who has expressed his strong disapproval. See Coogan, *Security Interests in Investment Securities Under Revised Article 8 of the Uniform Commercial Code*, 92 HARV. L. REV. 1013 (1979).

14. Since, after all, "pledge" has traditionally implied possession, the very requirement being abolished by new Article 8.

15. See, e.g., VA. CODE ANN. § 8.8-313(1)(b) (Cum. Supp. 1985).

16. See, e.g., *id.* § 8.8-308(7)(b).

17. Section 8.8-321(1) reads as follows: "A security interest in a security is enforceable and can attach only if it is transferred to the secured party or a person designated by him pursuant to a provision of subsection (1) of §8.8-313." *Id.* § 8.8-321(1).

18. Section 8.8-313(1) reads as follows:

Transfer of a security or a limited interest (including a security interest) therein to a purchaser occurs only:

(a) at the time he or a person designated by him acquires possession of a certificated security; or

(b) at the time the transfer, pledge or release of an uncertificated security is registered to him or a person designated by him; or

(c) at the time his financial intermediary acquires possession of a certificated security specially indorsed to or issued in the name of the purchaser; or

(d) at the time a financial intermediary, not a clearing corporation, sends him confirmation of the purchase and also by book entry or otherwise identifies as belonging to the purchaser

(i) a specific certificated security in the financial intermediary's possession; or

(ii) a quantity of securities that constitute or are part of a fungible bulk of certificated securities in the financial intermediary's possession or of uncertificated securities registered in the name of the financial intermediary; or

(iii) a quantity of securities that constitute or are part of a fungible bulk of securities shown on the account of the financial intermediary on the books of another financial intermediary;

(e) with respect to an identified certificated security to be delivered while still in the possession of a third person, not a financial intermediary, at the time that person acknowledges that he holds for the purchaser;

cated security is accomplished by an "instruction," which is defined as "an order to the issuer of an uncertificated security requesting that the transfer, pledge, or release from pledge of the uncertificated security specified therein shall be registered."¹⁹ To be binding on the issuer, the instruction must be given by or on behalf of the registered owner to create the security interest, or by or on behalf of the "registered pledgee" (the secured party) to release the security interest.²⁰ Ordinarily, the instruction must be in writing and signed.²¹ Only one security interest in any uncertificated security can be registered at any given time.²² This, of course, means that there is no such thing as a junior security interest in an uncertificated security. Consequently, any creditor who wishes to obtain a subordinate interest in an uncertificated security can do so only by getting the registered pledgee to make a side agreement to give the junior creditor some part of the proceeds upon liquidation. The security interest, when registered, is auto-

(f) with respect to a specific uncertificated security the pledge or transfer of which has been registered to a third person, not a financial intermediary, when that person acknowledges that he holds for the purchaser;

(g) at the time appropriate entries to the account of the purchaser or a person designated by him on the books of a clearing corporation are made under § 8.8-320;

(h) with respect to the debtor of a security interest where the debtor has signed a security agreement containing a description of the security, at the time a written notification, which, in the case of the creation of a security interest, is signed by the debtor (which may be a copy of the security agreement) or which, in the case of the release or assignment of the security interest created pursuant to this subsection, is signed by the secured party is received by

(i) a financial intermediary on whose books the interest of the transferor in the security appears; or

(ii) a third person, not a financial intermediary, in possession of the security, if it is certificated; or

(iii) a third person, not a financial intermediary, who is the registered owner of the security, if it is uncertificated and not subject to a registered pledge; or

(iv) a third person, not a financial intermediary, who is the registered pledgee of the security, if it is uncertificated and subject to a registered pledge;

(i) with respect to the transfer of a security interest where the transferor has signed a security agreement which contains a description of the security, when new value is given by the secured party; or

(j) with respect to the transfer of a security interest where the secured party is a financial intermediary and the security has already been transferred to the financial intermediary under paragraphs (a), (b), (c), (d), or (g), at the time the transferor has signed a security agreement containing a description of the security and value is given by the secured party.

Id. § 8.8-313(1).

19. *Id.* § 8.8-308(4).

20. *Id.* § 8.8-308(7), (8).

21. *Id.* § 8.8-308(5).

22. *Id.* § 8.8-108.

matically perfected, and there is generally no time limit on the length of perfection.²³

It remains to be seen whether the new Article 8 will be as significant as its drafters hoped. To date, only a handful of states have adopted it.²⁴ Moreover, it may take many years before issuers, investors and lenders, who are accustomed to, and comfortable with, the present system will be equally comfortable with uncertificated securities. The Article's method of dealing with uncertificated securities is, however, a remarkably simple and ingenious response to the replacement of paper securities with paperless investment interests. Merely by informing the issuer of a security interest, the secured party can protect that interest at no cost to the security's negotiability.

II. CASE LAW DEVELOPMENTS

A. *Virginia Supreme Court*

The Virginia Supreme Court decided only a handful of Uniform Commercial Code cases during 1984-85. This, unfortunately, is not aberrational. The scantiness of commercial law precedents has made the commonwealth relatively insignificant in the development of modern American commercial law.

The most important Virginia Supreme Court case was undoubtedly *Gasque v. Mooers Motor Car Co., Inc.*,²⁵ in which the court made its first excursion into the troubled issue of "lemon cars." Buyers of lemon cars have long sought, and frequently obtained, relief under Article 2, using one or more of several theories. Some buyers of lemon cars have been able to "reject" the defective car, sometimes after driving it for a considerable period of time, and get their money back.²⁶ Others have been able to "revoke acceptance," usually on the ground of substantial, latent defects.²⁷ Of course, most contracts for the sale of a car include a limitation of the remedies available for breach, generally to repair or replace-

23. *Id.* § 8.8-321(2), (3), (4).

24. However, it is significant that Delaware is among them. See DEL. CODE ANN. tit. 6, § 8-101 (Cum. Supp. 1985).

25. 227 Va. 154, 313 S.E.2d 384 (1984).

26. See, e.g., *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195 (Law Div. 1968).

27. See, e.g., *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d. 348, 292 N.E.2d 168 (1972).

ment of the car at the seller's option. Such limitations would ordinarily preclude rejection or revocation, but, with regard to lemon cars, they have been widely ignored by the courts. A common rationale used by the courts is that if the seller cannot repair the defects, the limited remedy has "failed of its essential purpose," and the buyer is thereby entitled to use the full range of remedies given by the Code.²⁸ The *Gasque* case explores only one aspect of lemon car law—the ability of the buyer of a lemon to revoke acceptance.

The facts of the case indicate that the Gasques' car was only a moderately sour lemon. The automobile was not wholly or even virtually inoperable, as has been true in some lemon car cases;²⁹ however, it was plagued with significant and bothersome defects. These included, among others, a water leak, a loose gear shift lever, poor shifting, a malfunctioning heater, an inoperative clock, choke difficulties, excessive oil consumption, vibration, noise and rattles.³⁰ The car was a new one, purchased by the Gasques on February 21, 1979; it was returned to the seller for repairs on March 13, March 23, an undetermined day in May, June 22, June 27, July 20, and August 6.³¹ Finally, on September 19, 1979, the Gasques' attorney wrote both to Mooers and to the manufacturer (Fiat) demanding either a full refund or the replacement of the automobile. However, the Gasques did not return the car to Mooers; they continued to drive it. When their refund/replacement demand was not met, the Gasques sued in equity for "rescission" of the contract or replacement of the car, plus punitive damages.³² This relief was denied by the circuit court, and its decision was affirmed by the supreme court.

Since it appears that both the buyers and the seller assumed that the car had been "accepted," the only question before the court was whether, under these circumstances, the buyers could revoke their acceptance. The Code provision upon which the buyers relied was section 8.2-608, which states, in pertinent part, that "the buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it . . . without discovery of such nonconformity if his ac-

28. See, e.g., *Riley v. Ford Motor Co.*, 442 F.2d 670 (5th Cir. 1971).

29. See, e.g., *Zabriskie Chevrolet*, 99 N.J. Super. 441, 240 A.2d 195.

30. *Gasque*, 227 Va. at 158, 313 S.E.2d at 387.

31. *Id.*

32. *Id.* at 157, 313 S.E.2d at 387.

ceptance was reasonably induced . . . by the difficulty of discovery before acceptance" and further that "[r]evocation of acceptance must occur within a reasonable time."³³

The court examined two aspects of revocation under section 8.2-608. First, it considered the meaning of the "to him" in the phrase "substantially impairs its value to him." The question was whether or not this phrase created a wholly subjective standard of substantial impairment, i.e., was the buyer's personal dissatisfaction sufficient to constitute substantial impairment? The supreme court ruled that, although the language of the Code may suggest a subjective standard, it creates what the court called an objective standard.³⁴ In fact, a close reading of the case indicates that the standard is partly subjective and partly objective. It is subjective to the extent that the goods must be suitable for the buyer's particular use. In other words, if the Gasques had some "unusual and special purpose" for the car, the goods would have to be fit for that purpose.³⁵ On the other hand, the goods must be "objectively" unsuited for the purpose the buyer does have. Since, in the court's view, the Gasques' purpose in buying the car was merely to have "simple transportation," and since the car did indeed provide simple transportation, the defects did not substantially impair the value of the car.³⁶ The court rejected two out-of-state cases that it saw as creating a wholly subjective standard of substantial impairment (although it should be noted that a close reading of those cases indicates that they are quite reconcilable with *Gasque*).³⁷

33. VA. CODE ANN. § 8.2-608 (Repl. Vol. 1965).

34. *Gasque*, 227 Va. at 160, 313 S.E.2d at 388-89.

35. *Id.* at 160, 313 S.E.2d at 389. Unfortunately, the phrasing used by the court may lead to some confusion of the standard for substantial impairment under § 8.2-608 with the standard for creating an implied warranty of fitness for particular purpose under § 8.2-315. The mere fact that goods do not do what the buyer wants them to do does not mean that the seller is in breach of contract. A buyer who has some unusual need must make that known to the seller to have the benefit of the particular purpose warranty. *Id.* Thus, *Gasque* should have said that if the seller is in breach of contract and the breach is such that it (objectively) substantially impairs the (subjective) value of the goods to the buyer, the buyer may, in proper circumstances, revoke acceptance.

36. *Id.* at 160-61, 313 S.E.2d at 389.

37. Indeed, it is not really clear that any court actually uses a subjective test to measure "substantial impairment." See J. WHITE & R. SUMMERS, *supra* note 2, at 308-09. The *Gasque* court cited two cases as examples of a subjective standard of substantial impairment—*Stamm v. Wilder Travel Trailers*, 44 Ill. App. 3d 530, 358 N.E.2d 382 (1976) and *Zabriskie Chevrolet*, 99 N.J. Super. 441, 240 A.2d 195. Unfortunately, neither case is especially relevant. In *Stamm*, the court held that a number of annoying, but not fatal, defects in a motor home did *not* give the buyer the right to revoke acceptance; it is thus virtually identical to *Gasque*. *Zabriskie Chevrolet* is not even a revocation case; it deals with the

This aspect of the *Gasque* case may be affected by Virginia's adoption of a so-called "lemon law." Under sections 59.1-207.9 to -207.14 of the Code of Virginia,³⁸ the rights of a consumer purchaser of a motor vehicle to enforce *express* warranties have been greatly expanded. For example, if the motor vehicle does not conform to the express warranties and the nonconformity is reported during the year following its purchase, "the manufacturer, its agent, or its authorized dealer" must make appropriate repairs, even if the repairs have to be made after the expiration of the one year period³⁹ (which presumably means after the expiration of the usual one year warranty). More significant to those in the *Gasques'* position, the buyer has a right to obtain a refund of the purchase price or replacement of the vehicle if there is a defect which "significantly impairs" the vehicle's "use, market value, or safety" and cannot be repaired after "a reasonable number of attempts."⁴⁰ Whether the lemon law would have changed the outcome in *Gasque* is unclear. The right to repair or replacement under the lemon law is contingent on a defect that "significantly impairs" the vehicle. The Virginia Supreme Court certainly could read this language to be less demanding than the "substantially impairs" language of the Uniform Commercial Code; unfortunately, there is nothing in the lemon law which directly addresses this issue or which even defines the phrase "significantly impairs."⁴¹

The second revocation question examined by the court was whether the Code's procedures for revocation had been followed.

seller's right to cure a defective tender. The car at issue in *Zabriskie Chevrolet* just barely got out of the showroom and declined to move at more than five to ten miles per hour. 99 N.J. Super. at ___, 240 A.2d at 197. The seller attempted to cure this by replacing the car's transmission with a used, reconditioned transmission of "unknown lineage." *Id.* at ___, 240 A.2d at 205. The New Jersey court held that this was an inadequate cure. *Id.* The magnitude of the underlying defect would surely have permitted revocation even under the *Gasque* rule.

38. VA. CODE ANN. §§ 59.1-207.10 to -207.14 (Cum. Supp. 1985). A much more comprehensive review of the Lemon Law can be found in Comment, *Virginia's Lemon Law: The Best Treatment For Car Owner's Canker?*, 19 U. RICH. L. REV. 405 (1985).

39. *Id.* § 59.1-207.12.

40. *Id.* § 59.1-207.13. The section creates a presumption that a "reasonable number of attempts" have been made to fix the vehicle if, during the year after it was purchased, either the same nonconformity has been subject to repair four or more times or (with some exceptions) if the vehicle is out of service to repair it for a cumulative total of thirty calendar days. *Id.* § 59.1-207.13(B).

41. See generally Gayle, *Virginia's Lemon Law: More Bark than Bite?*, 33 VA. B. NEWS, Oct. 1984, 11, 13-14. Unfortunately, the author of that article completely ignores the possibly significant difference in wording between the operative portions of the Uniform Commercial Code and the Virginia Lemon Law.

The Gasques' problem was that they had continued to use the car after giving notice of revocation and, indeed, to the time of trial. The Gasques gave notice of revocation to Mooers on September 19, 1979, but continued to drive the car until at least May 21, 1980, during which time they put an additional two thousand six hundred miles on the car.⁴² The supreme court held that this continued use meant that the Gasques' attempted revocation was ineffective.⁴³ While the court indicated, in dicta, that a widely followed exception to this "no use" rule for buyers of mobile homes would be applied in Virginia, it also held that such an exception had no applicability to the continued use of an automobile. The court distinguished the mobile home cases on two grounds—first, the compelling need of the revoking buyer for shelter; and second, the fact that continued occupancy of a mobile home "might be the best means of safeguarding the property," while continued use of an automobile causes further depreciation in value.⁴⁴

It is unclear whether the lemon law will affect this part of the *Gasque* decision. The lemon law does not have any express requirement that the buyer cease to use the car once the right to refund/replacement accrues,⁴⁵ which certainly suggests that there is no such requirement. Moreover, the consumer who obtains a refund under the lemon law is only entitled to refund of the purchase price "less a reasonable allowance for the consumer's use of the vehicle."⁴⁶ This "implied rent" provision provides a very

42. *Gasque*, 227 Va. at 161, 313 S.E.2d at 389.

43. *Id.* at 162, 313 S.E.2d at 390. The court was careful to note, however, that the initial revocation was made within a reasonable time; only that the buyers' continued use, being "inconsistent with their position as bailee," had the effect of nullifying the revocation. *Id.*

44. *Id.* at 162, 313 S.E.2d at 389-90.

45. VA. CODE ANN. § 59.1-207.13 (Cum. Supp. 1985).

46. The relevant provision reads as follows:

If the manufacturer, its agents or authorized dealers do not conform the motor vehicle to any applicable express warranty by repairing or correcting any defect or condition which significantly impairs the use, market value, or safety of the motor vehicle to the consumer after a reasonable number of attempts, the manufacturer shall: . . . [a]ccept return of the motor vehicle and refund to the consumer and any lienholder . . . the full purchase price, including all collateral charges, less a reasonable allowance for the consumer's use of the vehicle. The subtraction of a reasonable allowance for use shall apply when either a replacement or a refund of the motor vehicle occurs. A reasonable allowance for use shall not exceed one-half of the amount allowed per mile by the Internal Revenue Service, as provided by regulation, revenue procedure, or revenue ruling promulgated pursuant to § 162 of the Internal Revenue Code, for use of a personal vehicle for business purposes, plus an amount to account for any loss to the fair market value of the vehicle resulting from damages beyond normal wear and tear, unless the damage resulted from nonconformity to an express war-

strong reason for not imposing a "no use" requirement. Much of the purpose of that requirement is to protect the seller, who ordinarily must return the full purchase price, from the penalty of refunding the buyer's full cost for what are now used goods. Indeed, the cases which have created an exception to the "no use" rule for buyers of defective mobile homes have also required that the revoking buyer pay the seller a fair rental for the continued use of the goods.⁴⁷ Thus, since the interests of the seller are adequately protected by the lemon law's "rent" requirement, a buyer seeking refund rather than revocation under the provisions of Article 2 should not be precluded from getting the refund by his/her use of the motor vehicle.⁴⁸

In addition to providing Virginia attorneys with some guidance on revocation in general and lemon cars in particular, *Gasque* also made it clear that a buyer need not choose between revocation and damages. Indeed, the court strongly indicated that the *Gasques* could have recovered damages, perhaps even punitive damages, but for the curious fact that the plaintiffs did not request compensatory damages.⁴⁹ Unlike prior law, the Uniform Commercial Code does not require that an election be made between the equitable relief of revocation/rescission and the recovery of money damages.⁵⁰ The plaintiff could thus have sued for both and at least obtained what the Code refers to as "damages for breach in regard to accepted goods."⁵¹ Those attorneys representing buyers of lemon cars should thus be careful to join a demand for damages with a request for revocation.

The remaining supreme court cases are relatively unremarkable. In *Allsbrook v. Azalea Radiator Service, Inc.*,⁵² the court merely noted that the sale of a service company is not subject to the bulk transfer provisions of Article 6, which apply only to the sale of companies that are primarily in the business of selling goods from

ranty. Mileage, expenses, and reasonable loss of use necessitated by attempts to conform such motor vehicle to the express warranty may be recovered by the consumer. *Id.* § 59.1-207.13(A)(2).

47. *See, e.g.,* *Lawrence v. Modern Mobile Homes, Inc.*, 562 S.W.2d 729 (Mo. Ct. App. 1978).

48. But, of course, the buyer would have to pay the "rent" for such continued use under § 59.1-207.13(A)(2); *see supra* note 46.

49. *Gasque*, 227 Va. at 159, 313 S.E.2d at 388.

50. *Id.*

51. VA. CODE ANN. § 8.2-714 (Add. Vol. 1965).

52. 227 Va. 600, 316 S.E.2d 743 (1984).

inventory. In *United Virginia Bank v. E.L.B. Tank Construction, Inc.*,⁵³ the court ruled that, when one person deposits money in a bank to the credit of another with the consent of that other person, the person to whose credit the deposit was made is deemed to be the "depositor" for determining his/her rights, and the bank's responsibilities, under Article 4 of the Code. Of somewhat more interest is *Flowers Baking Co. v. R-P Packaging, Inc.*⁵⁴ In that case, Kearns Bakery of Virginia, Inc. (Kearns) had been engaged with R-P in the development of a new plastic wrap for Kearns's products. Prior to the completion of this development, Kearns sold all its assets to Flowers. The court held that, even though Kearns and R-P had exchanged both an order and an acknowledgment form, no contract existed between them because the clear intent of the parties was that no contract come into existence until the dimensions and design of the cellophane wrap had been approved by Kearns.⁵⁵ Since Flowers, not Kearns, ultimately approved the design, R-P's contract was with Flowers.⁵⁶ Flowers also asserted that the contract with R-P was unenforceable under the Article 2 Statute of Frauds, apparently because the only writings evidencing the contract were the Kearns and R-P forms.⁵⁷ The court rejected this argument on the basis of the Code's exception for specially manufactured goods, reasoning that plastic wrap which had been designed for, and bore the name of, a specific buyer was specially manufactured.⁵⁸ Finally, the court rejected Flowers' contention that it had properly rejected the goods, ruling that a buyer claiming rightful rejection on the ground of nonconformity to the contract has the burden of proving the nonconformity.⁵⁹

B. *Fourth Circuit*

The most significant Fourth Circuit case interpreting Virginia's Uniform Commercial Code is unfortunately an unpublished

53. 226 Va. 551, 311 S.E.2d 773 (1984).

54. 229 Va. 370, 329 S.E.2d 462 (1985).

55. *Id.* at 375-76, 329 S.E.2d at 465-66. It should also be noted that the acknowledgment by R-P was issued after the sale of Kearns's assets to Flowers. *Id.* at 373, 329 S.E.2d at 464.

56. *Id.* at 373-76, 329 S.E.2d at 464-66. The dimensions of the wrap were never tested by Flowers, nor does there appear to have been any express approval of them. However, Flowers' plant manager did tell R-P that the wrap was satisfactory and told R-P to "[p]roceed with the order." *Id.* at 373-74, 329 S.E.2d at 464. The manager did expressly approve the design. *Id.*

57. *Id.* at 376-77, 329 S.E.2d at 466.

58. *Id.*

59. *Id.* at 378-79, 329 S.E.2d at 467.

one—*E.W.G. Corp. v. TWI, Inc.*⁶⁰ *E.W.G. Corp.* is one of the very few Virginia cases exploring the much-litigated question of the adequacy of collateral descriptions under Article 9. Some years ago, the Fourth Circuit ruled that the phrase “accounts receivable” was a sufficiently detailed description of that type of collateral.⁶¹ In *E.W.G. Corp.*, the court held that the phrases “assets” or “corporate assets” used in a financing statement were not sufficient to perfect a security interest in a tax refund.⁶² The common thread of these two holdings is that “account” is a category of collateral specifically defined by Article 9, while “assets” and “corporate assets” are not defined. The Code requires that, in a financing statement, collateral descriptions be by “type or item.”⁶³ “Type,” in the Fourth Circuit’s view at least, seems to mean a description that is at least as specific as the Code-defined categories of collateral. The Code-created category into which tax refunds fit is “general intangibles”;⁶⁴ that is thus the broadest description which would be sufficient to describe a tax refund.

E.W.G. Corp. is in line with most decisions on this question throughout the country. Presumably, therefore, the Virginia Supreme Court would follow similar reasoning. It is thus probably safe to use “blanket” collateral descriptions that track the categories in the Code, but not to use completely open-ended descriptions such as “all assets” or “all property.”

Three other Fourth Circuit cases are of some interest. In *United States v. Kellerman*,⁶⁵ the court held, en route to acquitting a defendant accused of misappropriating assets, that a bank holding a check as escrow agent for the drawer is not a holder of the check, even if the check is payable to the bank. Since the bank was not a holder of the check, it could not, of course, be a holder in due course of the check; since the bank was not a holder in due course, the check (which was subject to a defense of the drawer) was worthless to it; and since the check was worthless, the fortunate Kellerman had not misappropriated an asset.⁶⁶ In *Otto Gerdau Co.*

60. 39 U.C.C. REP. SERV. 1031 (4th Cir. 1984).

61. *In re Varney Wood Prods., Inc.*, 458 F.2d 435 (4th Cir. 1972).

62. *E.W.G. Corp.*, 39 U.C.C. REP. SERV. at 1032-33.

63. VA. CODE ANN. § 8.9-402(1) (Cum. Supp. 1985); see also *id.* § 8.9-203 (Add. Vol. 1965 & Supp. 1984).

64. *E.W.G. Corp.*, 39 U.C.C. REP. SERV. at 1033.

65. 729 F.2d 281 (4th Cir. 1984).

66. *Id.* at 284-85.

v. Lamberts Point Docks, Inc.,⁶⁷ the court, relying upon both Article 7 and pre-Code Virginia law, held that a bailor establishes a prima facie case of negligence against a warehouseman by showing that goods were delivered to the warehouseman in good condition and returned to the bailor in damaged condition. The warehouseman then carries the burden of persuasion, by a preponderance of the evidence, that it exercised due care in dealing with the goods.⁶⁸ Finally, in a products liability case of some residual interest but continuously diminishing importance, *Farish v. Courion Industries Inc.*,⁶⁹ the court, en banc, decided that Virginia's version of section 2-318⁷⁰ (which limits the availability of the defense of privity) does not apply with regard to goods sold before its effective date (June 29, 1962).⁷¹

C. Other Courts

One United States district court case is worth mentioning. In *Wise v. General Motors Corp.*,⁷² the Western District court ruled that there could ordinarily be no recovery under Article 2 for mental suffering and emotional distress.⁷³ The court, however, indicated that there would be an exception to this rule in cases where serious emotional disturbance was a particularly likely result of the breach.⁷⁴ Interestingly, the court relied heavily on the Restatement of Contracts in reaching its decision.⁷⁵

67. 733 F.2d 343 (4th Cir. 1984).

68. *Id.* at 345-46.

69. 754 F.2d 1111 (4th Cir. 1985).

70. VA. CODE ANN. § 8.2-318 (Repl. Vol. 1965) states:

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods; however, this section shall not be construed to affect any litigation pending on June twenty-nine, nineteen hundred sixty-two.

71. *Farish*, 754 F.2d at 1114-18.

72. 588 F. Supp. 1207 (W.D. Va. 1984).

73. *Id.* at 1208-10.

74. *Id.* at 1210-11.

75. *Id.* at 1211-12.