

Electricity- Is it a Good or a Service?

North American Power Credit Organization

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with some digressions



General

- This is intended to be interactive- please ask questions whenever you have them
- It is ok to interrupt me
- This is not legal advice
Consult your counsel!



What is the UCC?

- Project started in 1950s to modernize commercial law and make it uniform across the states
- Replaced several prior uniform acts
- Varies by state
- Varies over time; continuously revised
- Uniform Law, but amplified with:
 - Official comment
 - State comment
 - Permanent Editorial Board Commentary
 - Recorder
 - Amendments

What is in the UCC?

- Rules and contract gap-fillers
- Articles on:
 - Sales (Article 2)
 - Negotiable Instruments (Commercial Paper) (Article 3)
 - Bank Deposits (Article 4)
 - Letters of Credit (Article 5)
 - Bulk Sales (Article 6)
 - Documents of Title (Warehouse Receipts) (Article 7)
 - Investment Securities (Article 8)
 - Secured Transactions (Article 9)
- Still growing
 - Leases (Article 2A)
 - Funds Transfers (Article 4A)
 - (Failed) Electronic Media Licensing (Article 2B)

Article 2: Sales

- Contract gap-filler provisions and rules
- Contains a statute of frauds- what contracts must be written
- Can imply every term into a contract other than quantity
- Contract does not fail for failure of minds to meet if the UCC can imply the terms and parties intended to contract (2-204(3))

Article 2: Sales

If the contract is for “goods,” Article 2 imports provisions the parties don’t cover in their contracts, which could be a lot:

- Price, cover damages, warranties, delivery point
- e.g., *Ewanchuk v. Mitchell*, 154 S.W.2d 476 (Mo. App. 2005)
 - Mo. breeder agreed to sell puppies to Canadian buyer
 - Disagreed on whether to ship them to Canada in one or two boxes
 - Court found agreement and implied UCC term of delivery at breeder’s place of business in Mo.

Article 2: Sales of Goods

What is a good?

- UCC 2 -105
- “all things ... movable” other than the money paid and lawsuit rights.
 - “thing” and “movable” undefined – law v. metaphysics
- Gas is a “good”

Article 2: Sales of Goods

What is a good?

- Can't contract "we agree this is a good"
 - Can't write a legal services retainer that claims to be a contract for sale of goods
- Instead, think about the Article 2 terms implied if it is a good

Article 2: Sales of Goods

What is a good?

- How about electricity?
 - *EPMI v. Nevada Power* – NY court says UT says a good
 - Until UT court says, which statute of frauds: UT code or UCC?
 - *Norcon v. NiMo* – NY court says service in NY, but implied terms from UCC “as a matter of public policy”
 - So pure uncertainty
 - Generated, transmitted and delivered across good v. service states



Article 2 Risks

Implied Warranties

- Merchantability and fitness for a particular purpose
- Rather than try to determine by contract it is a good or overrule the law- stops a contract gap from being filled by the UCC if the UCC would have done so, waive the implied warranties:

UCC/Disclaimer of Warranties. Whether or not the provisions of the applicable Uniform Commercial Code (UCC) are found to apply to Transactions hereunder, and a Product or energy is found to be a “good” for the purposes of the UCC or otherwise, PARTY A AND PARTY B EACH ACKNOWLEDGES THAT IT HAS ENTERED INTO THIS AGREEMENT AND IS CONTRACTING FOR THE PRODUCTS AND ENERGY TO BE SUPPLIED HEREUNDER BASED SOLELY UPON THE EXPRESS REPRESENTATIONS AND WARRANTIES SET FORTH HEREIN AND, SUBJECT THERETO, ACCEPTS SUCH PRODUCTS AND ENERGY “AS-IS” AND “WITH ALL FAULTS”. PARTY A AND PARTY B EACH EXPRESSLY DISCLAIMS ANY OTHER REPRESENTATION OR WARRANTY, WRITTEN OR ORAL, EXPRESS OR IMPLIED, RELATING TO SUCH PRODUCTS AND ENERGY, INCLUDING, WITHOUT LIMITATION, ANY REPRESENTATION OR WARRANTY WITH RESPECT TO CONFORMITY TO MODELS OR SAMPLES, MERCHANTABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE.

Article 2 Risks

Perfect Tender Rule

- Buyer can reject a nonconforming tender
- Rules about an accepted nonconforming delivery
- What if the delivery point is reconstituted?
- Think about and address it, e.g. for EEI:

Market Redesign. If the current definition of the Delivery Point set forth in a Transaction is modified, redefined, replaced or eliminated in the transmission provider, control area operator, regional transmission operator or other applicable tariff, deliveries of Product by Seller shall continue but will be instead delivered to or divided among the modified, redefined, replacement or substitute Delivery Points, zones or nodes in a manner that reasonably approximates the characteristics of the originally designated Delivery Point and puts the parties in the same economic position as they were prior thereto, as mutually agreed by the parties negotiating in good faith.

Article 2 Rewards

- If in a dispute over a contract for sale and the answer is not apparent in your contract, turn to Article 2 immediately
- If it is not addressed in your contract and it is in Article 2, it is by law in your contract
 - e.g., UCC 2609 Adequate Assurances
- AND.... it applies to other goods
 - RECs
 - Emissions allowances?
 - “not property” by enabling statute
 - BitCoins?
 - CFTC has asserted jurisdiction as a commodity
 - “money in which the price is to be paid”?

Bankruptcy Code Section 503(b)(9)

2005 Amendments gave new administrative expense priority to goods *received* by debtor within 20 days before bankruptcy filing

- Applies only to “goods”; not services
- Goods must have been sold to debtor in ordinary course of debtor’s business
- Goods must have been physically received by the debtor

Bankruptcy Code Section 503(b)(9)

- Creditors generally recover 100% of administrative claims, if the case is administratively solvent
- Debtor may be able to setoff receivables against 503(b)(9) claim rather than same creditor's unsecured claim
 - *In re Circuit City Stores, Inc.*, Case No. 08-35653, 2009 WL 4755253 (Bankr. E.D. Va. Dec. 3, 2009); see also *In re ADI Liquidation, Inc.*, (f/k/a *AWI Delaware, Inc.*), No. 14-12092 (KJC) (Bankr. D. Del. May 5, 2015)

Section 503(b)(9) - Goods

- What are 503(b)(9) “goods”?
 - UCC definition of “goods”
 - Discussion in *Escalera Resources*
- Split of authority as to whether electricity is a good
- Utilities bringing claims for pre-petition bill
 - PacifiCorp Motion to Allow Admin Claim in *C&K Market* (D. Or. 2014)
 - PacifiCorp victory in *Escalera Resources* (D. Colo. 2017)

Escalera Resources

PacifiCorp

- Filed 503(b)(9) claim, limited it to commodity energy charges
- Put on an expert witness who is on a first-name basis with Stephen Hawking and testified that electricity moves through the meter
 - Debtor argued the electric tariff says “electric service”
 - In a bit of bad luck, Debtor’s attorney’s dad was a Nobel Prize winner and namesake for 4th law of thermodynamics; went after the expert



Escalera Resources

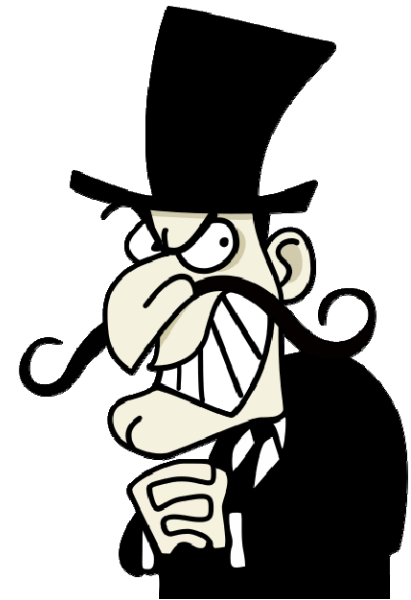
PacifiCorp

- Won a major, 40pp. decision at 563 B.R. 336 (2017)
 - Reviews UCC but also dictionary and laws, incl. antitrust, labor & FPA
 - Excoriates courts that found electricity is not a good
 - Opinion and hearing transcript available at:
<https://www.ieca.net/news/bankruptcy-court-ruling-electricity-good>
- Established that electricity is a good in the Tenth Circuit for 503(b)(9)
- When Debtor appealed PacifiCorp's victory, PacifiCorp settled by getting more money than it would have gotten
 - How did that happen?

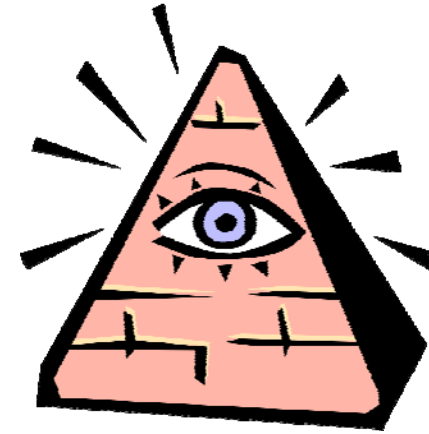


How Strong are the Major Banks, Really?

- Fed QFC Final Rule (82 Fed. Reg. 42882): “Voluntary” stay on exercising remedies against a defaulting bank until regulator steps in, with many other goodies, e.g.:
 - Non-bank has higher burden of proof in litigation
 - Stay includes pulling on guaranties
 - Non-bank must post collateral, but not bank
- DFA §210(a)(12)(F) subordinates setoff rights



How Strong are the Major Banks, Really?



- EU “bail-in” haircuts
- H.R. 10
 - Repeals the OLA
 - Repeals the tools the Fed used in 2008
 - “By committing government to bankruptcy as the method of resolving insolvent firms – **rather than bailing out creditors** or these firms – implicit government guarantees are ended, **counterparty discipline is strengthened**, and more vigilant due diligence is encouraged ...”*

* Comprehensive Summary p. 30, available at:
https://financialservices.house.gov/uploadedfiles/2017-04-24_financial_choice_act_of_2017_comprehensive_summary_final.pdf)

“Global Systemically Important Banks”

United States

Wells Fargo
Goldman Sachs
JP Morgan Chase
Morgan Stanley
Bank of America
Bank of New York Mellon
Citigroup
State Street

Foreign

Barclays	Credit Agricole
BNP Paribas	Bank of China
Credit Suisse	Agri. Bank of China
Deutsche Bank	China Constr. Bank
HSBC	Group BPCE
ING Bank	I&C Bank of China
Mitsubishi UFJ	Nordea
Mizuho	Standard Chartered
Société Générale	Sumitomo
UBS	Unicredit Group



Bankruptcy Claims

- Claims Priority
 - Secured to the extent of collateral
 - Administrative
 - Unsecured
- Secured creditor gets value of collateral and unsecured claim on deficiency
- Administrative claimants
 - e.g., the attorneys on the case, some special claims
 - Section 503(b)(9) claims
 - higher priority than unsecured

Administrative Insolvency

- A case is “administratively insolvent” if there is not enough money to pay the administrative claims
- What happens to an under-secured senior secured creditor in an administratively insolvent case?
- It might postpone the loss if it funds the case
- It takes the loss if the case is converted to a Chapter 7

