

COMPARING THE UNITED STATES WAREHOUSE ACT AND U.C.C. ARTICLE 7

DREW L. KERSHENT†

I. GENERAL BACKGROUND INFORMATION

A. LEGISLATIVE ACTIONS

Congress adopted the United States Warehouse Act ("Act") in 1916.¹ Since that date, Congress has passed three significant amendments to the Act. In 1931, Congress conferred exclusive jurisdiction over all persons securing a license under the Act upon the United States Secretary of Agriculture.² In 1990 and 1992, Congress authorized the Secretary of Agriculture to create a central filing system for electronic cotton warehouse receipts.³ Aside from these amendments, there has been minimal legislative activity.

B. JUDICIAL ACTIONS

Despite the thousands of transactions and the billions of dollars of agricultural products under warehouse receipts each year, the number of reported cases is surprisingly small. Fewer than one case every two years involves a dispute concerning warehouse receipts issued by warehouses licensed under the Act. One would be hard pressed to find another federal statute of this magnitude that has produced such little case law.

† Earl Sneed Centennial Professor of Law, University of Oklahoma College of Law. B.A. University of Notre Dame (1966); J.D. University of Texas (1968); LL.M. Harvard University (1975). Chair of the Article 7 Task Force of the Uniform Commercial Code Committee of the Section on Business Law of the American Bar Association (ABA). The author is fully responsible for the content, organization, and opinion in this article. The ABA affiliation is for identification purposes only and does not indicate any knowledge or approval of this article by the ABA.

The author thanks the members of the Article 7 Task Force, especially Professor Linda J. Rusch of Hamline University School of Law, for their encouragement and comments on this article. The author also thanks the Licensing Authority Division, United States Department of Agriculture, especially Mr. Steve Mikkelsen, for answering questions during my research and providing comments on a draft of this article.

1. United States Warehouse Act, 7 U.S.C. §§ 241-73 (1988).
2. 7 U.S.C. §§ 241-73 (1988) (amended Mar. 2, 1931).
3. 7 U.S.C. §§ 241-73 (amended Nov. 28, 1990 and Oct. 28, 1992).

C. SCOPE OF THE ACT

The Act provides regulatory licensing for agricultural warehouses and also fosters confidence in warehouse receipts as commercial documents of title.⁴ In contrast, Article 7 of the Uniform Commercial Code ("Article 7") is concerned solely with commercial trade in documents of title. Sections 7-103 and 10-104 of the Uniform Commercial Code ("U.C.C.") make explicit that the U.C.C. neither repeals nor replaces the regulatory licensing acts of the various states for warehouses.

The Act is expressly limited to warehouses that store agricultural products.⁵ The Act has no application to nonagricultural products and nonwarehouse bailments. In contrast, Article 7 covers bailments for all products and both the storage and transportation of products.

D. COMPARABLE PROVISIONS

The regulatory sections of the Act have no comparable provisions in Article 7. Excluding the regulatory sections of the Act, there are only seven sections of the Act that have comparable sections in Article 7. Those sections are as follows:

United States Warehouse Act	U.C.C. Sections	Discussed in Text at
§ 242. Definitions	§ 1-201 & § 7-102. Definitions	Part III
§ 258. Mingling products stored	§ 7-207. Goods Must be Kept Separate; Fungible Goods	Part III(f)(1) and Part III(i)

4. *United States v. Kirby*, 587 F.2d 876, 880 (7th Cir. 1978). For an overview of the Act, see 1 JULIAN CONRAD JUERGENSMEYER & JAMES BRYCE WADLEY, *AGRICULTURAL LAW* §§ 20.1-20.6 (1982).

5. 7 U.C.C. § 242 (1988).

United States Warehouse Act	U.C.C. Sections	Discussed in Text at
§ 259(a). Receipts for products stored	§ 7-201. Who May Issue a Warehouse Receipt; Storage Under Government Bond — § 7-203. Liability for Non-receipt or Misdescription — § 7-401. Irregularities in Issue of Receipt or Bill or Conduct of Issuer — § 7-402. Duplicate Receipt or Bill; Overissue; § 7-501. Form of Negotiation and Requirements of "Due Negotiation" — § 7-502. Rights Acquired by Due Negotiation	Part III(b)
Cf. § 259(c) — Nothing directly comparable	§ 7-501. Form of Negotiation and Requirements of "Due Negotiation" — § 7-502. Rights Acquired by Due Negotiation — § 7-503. Document of Title to Goods Defeated in Certain Cases — § 7-504. Rights Acquired in the Absence of Due Negotiation; Effect of Diversion; Seller's Stoppage of Delivery	Part III(f)(3)
§ 260. Contents of receipts	§ 1-201(15). Document of Title — § 7-202. Form of Warehouse Receipt; Essential Terms; Optional Terms	Part III(a)

United States Warehouse Act	U.C.C. Sections	Discussed in Text at
§ 260. Contents of receipts	§ 7-104. Negotiable and Non-negotiable Warehouse Receipts, Bills of Lading or Other Documents of Title — § 7-203. Liability for Non-receipt or Misdescription — § 7-501. Form of Negotiation and Requirements of "Due Negotiation"	Part III(c)
Cf. § 260(j). Contents of receipts — § 262(a). Delivery of products stored on demand; Conditions of delivery — Nothing directly comparable	§ 7-209. Lien of Warehouseman	Part III(d) and Part III(f)(2)
§ 261. Issuance of further receipt with original outstanding	§ 7-402. Duplicate Receipt or Bill; Overissue — § 7-601. Lost and Missing Documents	Part III(g)
§ 262. Delivery of products stored on demand; conditions of delivery	§ 7-104. Negotiable and Non-Negotiable Warehouse Receipt, Bill of Lading or Other Document of Title — § 7-403. Obligation of Warehouseman or Carrier to Deliver; Excuse — § 7-506. Delivery Without Instrument; Right to Compel Indorsement	Part III(h)
§ 263. Cancellation of receipt on delivery of product stored	§ 7-403(3). Obligation of Warehouseman or Carrier to Deliver; Excuse	Part III(h)

United States Warehouse Act	U.C.C. Sections	Discussed in Text at
Nothing directly comparable	§ 7-204. Duty of Care; Contractual Limitation of Warehouseman's Liability — § 7-403(1)&(2). Obligation of Warehouseman or Carrier to Deliver; Excuse	Part III(e)

In addition to the statutory provisions of the Act, Congress expressly granted the Secretary of Agriculture the authority to issue rules and regulations to carry out the provisions of the Act.⁶ Pursuant to this delegated authority, the Secretary has promulgated a series of regulations for agricultural warehouses.⁷ These regulations relate to the licensing of warehouses, the bonding of warehouses, warehouse receipts, duties of warehouse operators, fees, licensing of classifiers/graders and weighers, commodity classification/grading, and appeals. Only the regulations concerning warehouse receipts have sections comparable to provisions in Article 7, which concern documents of title. The other topics addressed by the regulations are not within the purview of Article 7. Only in a few instances are any regulations on these nonwarehouse receipts topics addressing issues that might arise under Article 7.

6. *Id.* § 268.

7. 7 C.F.R. §§ 735-42 (1993). United States Department of Agriculture ("USDA") regulations on warehouses are found in 7 C.F.R. as follows: Part 735 (Cotton Warehouses); Part 736 (Grain Warehouses); Part 737 (Tobacco Warehouses); Part 738 (Wool Warehouses); Part 739 (Dry Bean Warehouses); Part 740 (Nut Warehouses); Part 741 (Syrup Warehouses); Part 742 (Cottonseed Warehouses). The USDA divided the regulations by agricultural product to respond to the special trade practices that exist with respect to the warehousing of the individual agricultural products. However, a moderate examination of the regulations for the different commodity warehouses reveals substantial similarity among all the warehouse regulations regardless of the specific agricultural product covered.

In light of this substantial similarity, the author will most often cite regulations from Part 736, relating to grain warehouses. Citations to grain warehouse regulations are meant to typify USDA regulations, but attorneys should be careful to look at the specific regulations for the precise commodity warehouse involved when confronted with a client's factual situation.

II. PREEMPTION RELATIONSHIP BETWEEN THE ACT AND U.C.C. ARTICLE 7

Lawyers who practice agricultural commercial law usually think of *United States v. Kimbell Foods, Inc.*⁸ as setting forth the preemption paradigm between federal law and the Uniform Commercial Code ("U.C.C."). Under the *Kimbell* analysis, even though federal law controls, courts are expected to adopt nondiscriminatory state law as the content of federal commercial law. For example, a Farmers Home Administration ("FmHA") borrower can use a state's redemption right even though no explicit federal redemption right exists and even though federal law controls the relationship between the FmHA and the borrower.⁹ Consequently, even when federal law controls, federal commercial law in practice does not differ from state commercial law.

The preemption paradigm governing the United States Warehouse Act ("Act") and Article 7 of the Uniform Commercial Code ("Article 7") differs. In cases like *Kimbell*, courts face situations where no federal act and accompanying regulations are applicable to the legal and factual issues in the case. In contrast, the Act and its accompanying regulations provide the applicable federal law for warehouse receipts issued by warehouses licensed under the Act. Thus, courts must respect federal law. Section 7-103 of the U.C.C. acknowledges the supremacy of federal law by expressly making the provisions of Article 7 subject to federal statutes and treaties.¹⁰

Even though the Act provides applicable federal law, the Act itself does not explicitly provide when it preempts conflicting state law, including Article 7. In *Rice v. Santa Fe Elevator Corp.*,¹¹ the United States Supreme Court set forth the precise preemption standard between the Act and state law. According to the Court, "The test, therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State."¹² If the Act addresses a particular matter, the federal law fully preempts state law.¹³ However, the Court stated

8. 440 U.S. 715 (1979).

9. *United States v. Ellis*, 714 F.2d 953, 957 (9th Cir. 1983); *see also*, *United States v. Einum*, 992 F.2d 761 (7th Cir. 1993).

10. U.C.C. § 7-103. One purpose of U.C.C. section 7-103 is "[t]o make clear what would of course be true without the Section, that applicable Federal law is paramount." *Id.* cmt. 1.

11. 331 U.S. 218 (1947).

12. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947).

13. *See Demeter, Inc. v. Werries*, 676 F. Supp. 882, 887 (C.D. Ill. 1988) (holding that the Act fully preempts federally licensed warehouses from complying with an Illinois statute creating the Illinois Grain Insurance Fund, which gets its money through a per bushel assessment, as security for depositors). *See also Duluth Bd. of Trade v.*

that if the Act did not address a particular matter, then the "conflicts between federal and state law" preemption paradigm would control the issue.¹⁴

In light of the preemption paradigm of the *Rice* case, the Act preempts Article 7 much more often than federal law preempts state commercial law under the *Kimbell* standard. As previously stated, seven sections of the Act are comparable to sections in Article 7. Under the *Rice* preemption test, these seven sections of the Act fully preempt federally licensed warehouses from the comparable provisions of Article 7.¹⁵ Due to full preemption where comparable provisions exist, federal law under the Act for warehouse receipts may be substantively different from state law for documents of title (warehouse receipts) under Article 7.

III. SUBSTANTIVE COMPARISON OF THE ACT AND ARTICLE 7

A. THE FORM AND CONTENTS OF WAREHOUSE RECEIPTS

Uniform Commercial Code ("U.C.C.") section 7-202(1) is clear: "A warehouse receipt need not be in any particular form."¹⁶ Moreover, U.C.C. section 1-201(15) defines document of title to include "any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers."¹⁷ With these two provisions as background, courts have recognized scale tickets or weight slips¹⁸ and canceled checks¹⁹ as docu-

Head, 298 F. Supp. 678, 682 (D. Minn. 1969) (holding that Minnesota law regarding the form of weight receipts was preempted by United States Warehouse Act for federally licensed warehouses).

14. *Rice*, 331 U.S. at 237. The "conflicts between federal and state law" preemption paradigm dictates that the federal law preempts state law only when the state law contradicts the federal law. In the *Rice* case, Justice Frankfurter, in dissent, argued for the adoption of the "conflicts between federal and state law" preemption paradigm as the correct standard to apply to cases involving all matters addressed both by the Act and state warehouse laws. *Id.* at 238-47.

15. Warehouses may apply for a federal license but are not required to be federally licensed. 7 U.S.C. § 244 (1988). The Act is permissive, not mandatory. Thus, a warehouse owner who desires to avoid the Act can do so simply by not applying for a federal warehouse license. However, some states have statutes that require warehouses to have either a federal license or a state license. *See, e.g., OKLA. STAT. tit. 2, § 9-22(A)* (1991).

16. U.C.C. § 7-202(1).

17. *Id.* § 1-201(15).

18. *In re Durand Milling Co., Inc.*, 9 B.R. 669, 671-72 (Bankr. E.D. Mich. 1981) (recognizing weight slips as documents of title). *But see, In re Biniecki Brothers*, 38 B.R. 519, 522 (Bankr. E.D. Mich. 1984) (refusing to treat scale tickets as documents of title).

19. *Midland Bean Co. v. Farmers State Bank*, 552 P.2d 317, 321 (Colo. Ct. App. 1976).

ments of title under Article 7 of the U.C.C. ("Article 7").²⁰ As documents of title, holders of scale tickets, weight slips, or canceled checks were given the opportunity, but not the guarantee, of entitlement to protections afforded holders under Article 7.

Section 260 of the United States Warehouse Act ("Act") prescribes the contents of warehouse receipts. Section 260 sets forth content requirements that are substantially similar to the content requirements of U.C.C. section 7-202(2). However, section 260 contains no statutory language comparable to U.C.C. section 7-202(1), which expressly provides that no particular form is necessary. As a result of this difference in statutory language, how do courts treat scale tickets or weight slips issued by federally licensed warehouses?

In *Farmers Elevator Mutual Insurance Co. v. Jewett*,²¹ the United States Court of Appeals for the Tenth Circuit ruled that scale tickets held by farmers qualified for protection under the surety's bond even though the scale tickets did not comply with the Act or its regulations concerning the proper form for warehouse receipts. The court ruled that scale tickets were storage documents under the Act which thereby imposed upon the federally licensed warehouse the obligation to redeliver the stored wheat upon demand of the scale ticket holders.²² When the warehouse failed to redeliver upon demand, the bond provided security for the depositors in accordance with section 247 of the Act.²³ By so holding, the Tenth Circuit reached a conclusion that is compatible with U.C.C. section 7-202(1) cases, which make particular form unnecessary.²⁴

B. ILLEGALLY ISSUED WAREHOUSE RECEIPTS

Section 7-401 of the U.C.C. imposes obligations on the issuer of a document of title, even though the document was issued in violation of laws regulating warehouses. The Official Comments to section 7-401 indicate that the drafters had three purposes for adopting this section. First, issuers should not be able to avoid their obligations under a doc-

20. Drew L. Kershen, *Article 7: Documents of Title*, 48 *BUS. LAW.* 1645 (1993). Compare *In re Celotex*, 134 B.R. 993, 998 (Bankr. M.D. Fla. 1991) (holding that monthly service statements, invoices, and injection volume documents did not qualify as documents of title because they did not satisfy the terminological or informational requirements of U.C.C. § 7-202(2)) with *In re Julien Co.*, 136 B.R. 755, 759 (Bankr. W.D. Tenn. 1991) (concluding that warehouse receipts need not meet terminological requirements of U.C.C. § 7-202(2)).

21. 394 F.2d 896 (10th Cir. 1968).

22. *Farmers Elevator Mut. Ins. Co. v. Jewett*, 394 F.2d 896, 899-900 (10th Cir. 1968).

23. *Id.* at 900.

24. For similar treatment of scale tickets as documents of title under the Act, see *Lee v. Bartlett & Co.*, 121 B.R. 872 (D. Kan. 1990).

ument of title by claiming that the document is invalid. Second, those acquiring invalid documents of title should be protected from arguments as to the invalidity of the document in order to protect the commercial trade in documents of title. Protecting the commercial viability of documents of title is the primary purpose of Article 7. Third, the appropriate sanctions for issuing invalid documents of title are regulatory sanctions against warehouses under warehouse licensing laws. By using regulatory sanctions against warehouses, adequate enforcement exists without declaring the documents themselves invalid.²⁵

The fact pattern that most clearly illustrates U.C.C. section 7-401 occurs when a warehouse issues warehouse receipts for goods that are not stored in its warehouse. Most state warehouse regulatory laws and section 259 of the Act expressly forbid the issuing of warehouse receipts unless the products covered by the receipts are in storage at the time of issuance. Thus, warehouse receipts issued for phantom goods are invalid. What are the consequences of this invalidity upon the obligations of the issuer and the rights of holders of these invalid documents?

In *State ex rel. Public Service Commission v. R.F. Gunkelman & Sons, Inc.*,²⁶ the Supreme Court of North Dakota correctly construed U.C.C. section 7-401 to mean that the issuer could not deny its obligations for warehouse receipts issued without actual delivery of grain into storage.²⁷ The court correctly understood section 7-401 as declaring the invalidity argument as legally ineffective against the warehouse receipts issued in violation of North Dakota warehouse regulatory laws. Thus, the issuer of the warehouse receipts could not find cover from its obligations through the invalidity argument.

Even though issuers cannot use the invalidity argument to avoid obligations for their issued documents of title, holders may not be successful in using the documents to assert their rights. Section 7-203 of the U.C.C. protects a good faith purchaser for value of a warehouse receipt for unstored goods unless the "purchaser otherwise has notice" that the warehouse is not storing the goods.²⁸ Moreover, a holder of a negotiable document of title under U.C.C. section 7-502 acquires title to the document and the goods it represents if the negotiable docu-

25. Section 7-401 impliedly rejects the holdings of cases such as *Central Nat'l Bank v. Fidelity & Deposit Co.*, 324 F.2d 830, 832 (7th Cir. 1963) (noting that holders of illegal warehouse receipts could not collect on the warehouse person's bond); *Fidelity State Bank v. Central Surety & Ins. Corp.* 228 F.2d 654, 647 (10th Cir. 1955) (same); *Central States Corp. v. Luther*, 215 F.2d 38, 42-43 (10th Cir. 1954) (same).

26. 219 N.W.2d 853 (N.D. 1974).

27. *State ex rel. Pub. Serv. Comm'n v. R.F. Gunkelman & Sons, Inc.*, 219 N.W.2d 853, 857 (N.D. 1974).

28. U.C.C. § 7-203.

ment was duly negotiated to the holder. Under U.C.C. section 7-501(4), due negotiation occurs when a holder purchases in good faith for value without notice of defenses or claims and with proper indorsement. Consequently, holders of warehouse receipts for unstored goods acquire rights under either section 7-203 or section 7-502 only if they are purchasers in good faith for value without notice.

In *Branch Banking & Trust Company v. Gill*,²⁹ the North Carolina Supreme Court held that the holder of warehouse receipts for unstored grain was not a good faith purchaser for value without notice.³⁰ The bank, as holder, lost because under the facts and circumstances known at the time it took the warehouse receipts, the bank had notice that the warehouse had stored no grain to support the issuance of the warehouse receipts.

The Act has no section comparable to U.C.C. section 7-401, but section 259 specifically prohibits a federally licensed warehouse from issuing warehouse receipts when no goods are received into storage. In light of these differences between the Act and Article 7, what is status of warehouse receipts for phantom goods under federal law?

The only relevant cases construing the Act were decided by the Georgia Supreme Court. In *Maryland Casualty Company v. Washington Loan & Banking Company*,³¹ and *National Bank v. Maryland Casualty Co.*,³² the Supreme Court of Georgia construed the Act in a manner similar to the North Dakota Supreme Court in *Gunkelman* and the North Carolina Supreme Court in *Gill*. In *Washington Loan & Banking Company*, the Georgia Supreme Court held the issuer to its obligations, even though the evidence strongly suggested that the warehouse receipts did not represent cotton stored or owned by the issuer. The court emphasized that the issuer of the warehouse receipts should be estopped from denying the validity of the receipts when no evidence existed showing that the bank knew of any irregularity in their issuance. In contrast, one year later in *National Bank*, the Georgia Supreme Court affirmed a verdict denying the holder of warehouse receipts rights under the receipts because the jury found that the bank had knowledge that the receipts were issued for phantom goods. Some language in the court's holding in *National Bank* seems to adopt an invalid document analysis, but the main thrust of the court's reasoning focuses on the bank's knowledge and good faith at the time the bank accepted the warehouse receipts as collateral for the loan.

29. 237 S.E.2d 21 (N.C. 1977).

30. *Branch Banking & Trust Co. v. Gill*, 237 S.E.2d 21, 37 (N.C. 1977).

31. 145 S.E. 761 (Ga. 1928).

32. 146 S.E. 739 (Ga. 1929).

After examining the cases concerning illegally issued warehouse receipts, there appears to be no substantive incompatibility between the Act and Article 7. While the statutory language of the two laws differ, courts have reached similar results in similar fact patterns under either law.

C. NEGOTIABILITY

A person who receives a negotiable warehouse receipt after proper indorsement and due negotiation "may acquire more rights than his transferor had."³³ The transferee acquires title to the negotiable document, the goods the negotiable document represents, and other rights of the bailee and obligations of the issuer which protect the transferee from almost all claims of paramount rights by other persons.³⁴ Consequently, negotiable warehouse receipts are equivalent to lawful currency. Like lawful currency, negotiable warehouse receipts must be carefully guarded, and the holder of a negotiable document of title, properly endorsed and duly negotiated, is presumed to be entitled to spend the negotiable document.³⁵ In contrast, if a person receives non-negotiable warehouse receipts or if a person takes negotiable warehouse receipts without proper indorsement or without due negotiation, then the transferee acquires the title and rights that the transferor had or had authority to convey.³⁶ Thus, negotiability is the most important attribute for documents of title and a key concept in Article 7.

Section 7-104 of the U.C.C. distinguishes negotiable from non-negotiable documents of title through terms in the document itself. A negotiable document is one that "by its terms the goods are to be delivered to bearer or to the order of a named person."³⁷ Documents must have these magic words to be negotiable. All other documents of title are nonnegotiable.³⁸ Section 7-202(2)(d) of the U.C.C. reinforces sec-

33. U.C.C. § 7-104 cmt.

34. *Id.* § 7-502(1).

35. *Id.* § 7-503 cmt. 1.

36. *Id.* § 7-504(1).

37. *Id.* § 7-104(1)(a).

38. For a case that rejects the magic words approach to negotiability, see *In re George B. Kerr, Inc.*, 25 B.R. 2 (Bankr. D.S.C. 1981), *aff'd without opinion* 696 F.2d 990 (4th Cir. 1982). In the *Kerr* case, the bankruptcy trustee disputed a bank's status as a perfected secured party. The bank held warehouse receipts. The bankruptcy court ruled that the receipts were negotiable and had been perfected through possession. Alternatively, the court ruled that if the receipts were non-negotiable, then the bank was a perfected secured party against the goods covered by the receipts. *Id.* at 7.

The author believes that the court was mistaken in its characterization of the receipts as negotiable but was correct in its decision that the bank had a properly perfected security interest against the goods covered by non-negotiable receipts. The receipts in *Kerr* did not contain the magic words of negotiability as required by U.C.C.

tion 7-104 by requiring that the document state "whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order."³⁹ Finally, U.C.C. section 7-501 specifies how negotiable documents are indorsed: bearer documents are indorsed by delivery alone; to-the-order-of-a-named-person documents are indorsed by signature and delivery.⁴⁰

Even if the documents are negotiable and properly indorsed, the person to whom the documents are transferred cannot acquire the protections of negotiable warehouse receipts unless the transferee acquired the documents through due negotiation. Section 7-501(4) of the U.C.C. provides the eight elements of due negotiation: (1) proper indorsement; (2) to a holder; (3) who purchases; (4) in good faith; (5) without notice of competing claims or defenses; (6) for value; (7) in the regular course of business or financing; and (8) not in settlement of a prior money obligation. "Good faith" and "without notice" are separate elements, despite being quite similar and often present in the same factual pattern. Moreover, the good faith and without notice elements are often contentious issues in due negotiation disputes. Due negotiation disputes are common in cases involving competing claimants to goods stored under negotiable warehouse receipts.⁴¹

Section 260 of the Act requires each warehouse receipt to state "whether the agricultural products received will be delivered to the bearer, to a specified person, or to a specified person or his order."⁴² The language of section 260 is almost identical to U.C.C. section 7-202(1)(d). Building on the Section 260 language, United States Department of Agriculture ("USDA") regulations mandate that every warehouse receipt have "[t]he words "Not Negotiable," or "Negotiable," according to the nature of the receipt, clearly and conspicuously printed or stamped thereon."⁴³ However, the Act contains no statu-

§ 7-104(1). Moreover, the bankruptcy court did not take into account U.C.C. § 7-501(5), which explicitly states that signing non-negotiable receipts will not render them negotiable. Signatures on non-negotiable receipts are not indorsements. *See*, U.C.C. § 7-104 cmt. Moreover, the *Kerr* case focuses on the question of the perfected status of the secured party. Thus, the *Kerr* case can be distinguished from the discussion in the main text where the precise issue is negotiability itself, not the status of a party as perfected or unperfected under U.C.C. Article 9.

39. U.C.C. § 7-202(2)(d).

40. For a good discussion of indorsement for negotiable documents, see *R. E. Huntley Cotton Co. v. Fields*, 551 S.W.2d 472 (Tex. Civ. App. 1977).

41. *See, e.g.*, *Cleveland v. McNabb*, 312 F. Supp. 155, 160 (W.D. Tenn. 1970) (holding that warehouse receipts were not duly negotiated and thus did not impair plaintiff's crop lien); *Branch Bank & Trust Co. v. Gill*, 237 S.E.2d 21, 29 (N.C. 1977) (holding that the plaintiff bank did not acquire warehouse receipts through due negotiation); *R. E. Huntley Cotton Co.*, 551 S.W.2d at 475-76 (rejecting plaintiff's argument that warehouse receipts were not duly negotiated).

42. 7 U.S.C. § 260(d).

43. 7 C.F.R. § 736.18(a)(7) (1993).

tory provisions comparable to U.C.C. sections 7-104 and 7-501, which specifically define what makes a document negotiable, how negotiable documents are indorsed, or what constitutes due negotiation.

In *Peoples Warehouse Company v. Commercial Bank & Trust Company*,⁴⁴ the Georgia Court of Appeals discussed negotiability of federal warehouse receipts under section 260 of the Act and its accompanying regulations. Peoples Warehouse had issued warehouse receipts, which by their terms were negotiable and, in compliance with USDA regulations, had stamped the receipts with the conspicuous notation "Negotiable." USDA regulations also specified however that warehouse receipts must state a period, not greater than one year, for which the agricultural product (in this case, cotton) was accepted into storage.⁴⁵ Commercial Bank acquired the warehouse receipts after proper indorsement but one year and three months after the date of issuance. Peoples Warehouse refused to deliver the cotton to Commercial Bank on the ground that Commercial Bank could claim no rights under the receipts because they were stale by three months. The Georgia Court of Appeals held for Commercial Bank through two holdings that illustrate the court's understanding of negotiability for federal warehouse receipts.

First, the court ruled that the terms of the document are what counts for negotiability. In this instance, the terms of the document were terms of negotiability. Thus, the court concluded that the warehouse receipts would have been negotiable even if the stamped notation "Negotiable" required by USDA regulations were not present. Furthermore, the court noted its reassurance as to its interpretation of negotiability under the Act because Georgia law and the Uniform Warehouse Receipts Act also examined the terms of the document itself, not any conspicuous stamped notation, to determine negotiability.⁴⁶ In this regard, because the receipts by their terms were negotiable, the conspicuous stamped notation "Negotiable" only re-emphasized the negotiability of the receipts.

With its first holding, the Georgia Court of Appeals interpreted the Act in a way which is compatible with the concept of negotiability adopted under Article 7. The terms of the document — magic words — control negotiability. Although the Georgia court was a state court interpreting a federal act, the court was delighted to be able to interpret the Act in such a way as to make it compatible with existing state

44. 38 S.E.2d 855 (Ga. Ct. App. 1946).

45. 7 C.F.R. § 736.18(a)(8), (b) (1993) (grain warehouses). The regulations for cotton warehouses no longer contain a one-year duration for cotton warehouse receipts. *Id.* § 735.16(b).

46. *Peoples Warehouse Co. v. Commercial Bank & Trust Co.*, 38 S.E.2d 855, 858-59 (Ga. Ct. App. 1946).

law. Courts today should follow the holding and the attitude of the Georgia Court of Appeals in its *Peoples Warehouse* decision.⁴⁷

Second, the Georgia Court of Appeals held that acquiring the federal warehouse receipt three months after the one-year storage period stated on the receipts did not per se make the receipts non-negotiable or invalid. The court ruled that Peoples Warehouse could not have delivered the cotton to anyone unless it had obtained surrender of the receipts and canceled them on their face. If the warehouse had failed to cancel the receipts, then the court blamed Peoples Warehouse for violating its Section 263 duty under the Act and implicitly held that Peoples Warehouse should suffer any losses caused thereby.⁴⁸ Moreover, the court ruled that in its demurrer Peoples Warehouse presented no factual allegations that Commercial Bank had failed to exercise due care.⁴⁹

With its second holding, the Georgia Court of Appeals provided an interpretation of the concept of negotiability under the Act that is compatible with the concept of due negotiation in U.C.C. section 7-501(4). Section 7-501(4) includes as an element of due negotiation

47. In what should be classified as dictum, the Georgia Court of Appeals did discuss what would happen if a warehouse stamped a receipt "Negotiable" when by its terms the document was non-negotiable. The court stated that due to the stamped notation, the document would be negotiable as against the warehouse "even though as respecting any party to the transaction other than the warehouseman, it might not be negotiable." *Peoples Warehouse Co.*, 38 S.E.2d at 858. The court did not address a further possibility: a stamped notation of "Not Negotiable" upon a document that by its terms is negotiable.

Article 7 of the U.C.C. does not require that any conspicuous stamped notation of "Negotiable" or "Not Negotiable" be placed on documents of title in contrast to the USDA regulations mandating such a conspicuous stamped notation. Thus, between Article 7 and the Act, the possibility exists that negotiability may have a different meaning under the Act due to stamped notations placed on the receipt in compliance with USDA regulations. For federal warehouse receipts, courts must take into account both the terms of the document and the conspicuous stamped notation when defining negotiability.

This potential difference concerning negotiability between federal warehouse receipts and Article 7 warehouse receipts can be nullified in two ways. First, the USDA regulation says that the receipts will be stamped with "[t]he words 'Not Negotiable,' or 'Negotiable,' according to the nature of the receipt." 7 C.F.R. § 736.18(7) (1993) (emphasis added). The emphasized words can be interpreted to mean that the stamped notation is irrelevant when in conflict with the nature (terms) of the receipt itself. Thus, the USDA regulation can be interpreted as adopting the terms-of-the-document definition of negotiability just like U.C.C. § 7-104(1). Second, the stamped notation requirement originates in USDA regulations. The USDA could rewrite the regulations to eliminate this stamped notation requirement. If the USDA eliminated the stamped notation requirement, then negotiability for federal warehouse receipts would be controlled solely by the terms of the document just as is true of Article 7 documents of title.

48. 7 U.S.C. § 263 (1988). Section 263 provides that "[a] warehouseman conducting a warehouse licensed under this chapter shall plainly cancel upon the face thereof each receipt returned to him upon the delivery by him of the agricultural products for which the receipt was issued." *Id.*

49. *Peoples Warehouse Co.*, 38 S.E.2d. at 859.

that the document be taken in the regular course of business or financing. In the Official Comment to section 7-501, the drafters state that irregularities on the face of a document or unexplained staleness "may appropriately be recognized as negating a negotiation in 'regular' course."⁵⁰ In *Peoples Warehouse*, the Georgia Court of Appeals recognized staleness as an element of due negotiation but did not allow the warehouse to avoid its obligations to redeliver under negotiable warehouse receipts simply because the receipts were negotiated three months after the storage period stated on their face.⁵¹

Although some tension exists between the concept of negotiability under the Act and the concept of negotiability under Article 7, the tension does not appear to be significant or severe. Courts can easily interpret the concept of negotiability in compatible ways for both federal warehouse receipts under the Act and documents of title under Article 7.

50. U.C.C. § 7-501 cmt. 1.

51. The Act does not create any time limits on the effectiveness of a warehouse receipt. The requirement that the receipt contain a statement as to the period of storage, not exceeding one year, comes from USDA regulations. 7 C.F.R. § 736.18(a)(8), (b). Uniform Commercial Code Article 7, like the Act, does not contain any time limits on the effectiveness of documents of title.

In light of the USDA regulation requiring the storage period to be stated on the face of warehouse receipts, the possibility exists that negotiable federal warehouse receipts will be declared stale and not negotiated in the regular course of business more often than Article 7 documents of title. There are, however, two ways to make the Act and Article 7 more similar on the regular course of business issue.

First, while section 736.18(a)(8) provides that a holder of a receipt must demand delivery within one year of the date of the receipt, section 736.18(b), in its second sentence, also provides as follows:

Upon demand for issuance of a new receipt, surrender of the old receipt by the lawful holder thereof at or before the expiration of the period specified therein and an offer to satisfy the warehouseman's lien, the warehouseman . . . shall, in the absence of some lawful excuse, issue a new receipt for a further specified period, not exceeding one year.

7 C.F.R. § 736.18(b) (1993).

This second sentence can be interpreted to mean that the one-year time limitation on federal receipts is meant to protect the solvency of federal warehouses by insuring that they receive storage charges at least once a year and is not meant to undermine the negotiability of the receipts themselves. This interpretation is supported by the fact that new receipts must be issued ordinarily as a matter of regular course. This interpretation of the USDA regulation does not raise possible conflicts between the legal treatment of federal warehouse receipts when compared to Article 7 documents of title with respect to the regular course element of due negotiation.

Second, the USDA can rewrite its regulations to eliminate the requirement that warehouse receipts state the storage period for which the receipt is issued. By eliminating the storage period, the USDA would remove any time limits on the effectiveness of federal warehouse receipts because the Act itself imposes no time limits. In fact, the USDA did rewrite the cotton regulations in 1944 to remove any odor of staleness from cotton receipts. Cotton receipts under the rewritten regulation are effective indefinitely until all the cotton evidenced by the receipts has been properly redelivered. 7 C.F.R. § 735.16(b) (1993).

D. WAREHOUSE LIENS

Section 7-209 of the U.C.C. sets forth the statutory language governing warehouse liens. The U.C.C. authorizes two types of warehouse liens. Specific (special) liens exist against presently stored goods as set forth in the first sentence of section 7-209. General (spreading) liens exist for charges incurred with respect to previously stored goods as set forth in the second sentence of section 7-209.⁵² Both specific and general liens are possessory liens. A warehouse can claim these liens only while the warehouse retains possession of debtors' goods, and these liens can be satisfied only against debtors' goods presently in possession.⁵³

With respect to non-negotiable warehouse receipts, specific liens arise as a matter of law without the necessity for any notation about the lien being made on the face of the non-negotiable receipt.⁵⁴ For general liens on goods stored under non-negotiable receipts of title, the second sentence of section 7-209(1) mandates that a notation claiming a general lien must be made on the face of the non-negotiable receipt. Without this notation claiming the general lien, the goods stored under the non-negotiable warehouse receipt cannot be charged with a general lien.⁵⁵

With respect to negotiable warehouse receipts, specific liens arise as a matter of law unless the negotiable receipt has been duly negotiated. If the negotiable receipt has been duly negotiated, then the third sentence of section 7-209(1) limits the specific lien to the rate and charges specified on the face of the negotiable warehouse receipt or, if no notation exists, to a reasonable rate and reasonable charges. In other words, unless the warehouse places information about its fees and charges for the specific lien on the face of negotiable receipts, the warehouse can recover only reasonable fees and charges. Original depositors who received negotiable receipts remain bound by the con-

52. Warehouses can claim general liens only as against goods actually deposited at one time with the warehouse. Warehouses cannot claim a general lien with respect to goods previously handled by the warehouse but never stored by the warehouse. *Marlow v. Rollins Cotton Co.*, 127 B.R. 604 (Bankr. W.D. Tenn. 1991).

53. U.C.C. § 7-209(4); *id.* § 7-209 cmt. 1 (1993). See *Sunflower Compress v. Julien Co.*, 136 B.R. 784, 788-90 (Bankr. W.D. Tenn. 1992).

54. U.C.C. § 7-209(1) comment 1.

55. *Id.* See, e.g., *Plains Cotton Coop. Ass'n v. Julien Co.*, 141 B.R. 359, 368-69 (Bankr. W.D. Tenn. 1992) (holding that the warehouse receipts in failing to comply with U.C.C. § 7-209 did not assert a general lien); *Bluebonnet Warehouse Corp. v. Julien Co.*, 136 B.R. 765, 775-76 (Bankr. W.D. Tenn. 1992) (same); *Sunflower Compress*, 136 B.R. at 788-89 (concluding that the language on the warehouse receipt was inadequate to assert a general lien under § 260(j) of the United States Warehouse Act).

tractual charges between them and the warehouse because the specific lien arises as a matter of law.⁵⁶

With respect to a general lien for goods stored under negotiable warehouse receipts, the faces of the negotiable receipts must give notice that a general lien is claimed.⁵⁷ If negotiable receipts lack the notation claiming a general lien, then no general lien exists against either the depositor or any holder by due negotiation.⁵⁸ If the negotiable receipt contains a notation claiming a general lien, then the warehouse can claim the rate and charges specified in the notation against the depositor or holder by due negotiation. If no specified rate or charges are set forth in the general lien notation, then the warehouse can claim the contractual amounts as against the depositor but can only claim a reasonable amount against the holder to whom the warehouse receipt was duly negotiated.⁵⁹

The types of charges that warehouses can claim through either a specific or a general lien must relate to the storage of the goods. The first sentence of section 7-209(1) enumerates these as charges for storage, transportation, insurance, labor, preservation of the goods, sale of the goods, or other charges in relation to the stored goods. Consequently, if warehouses sell fertilizer, seed, or fuel to farmers, then warehouses cannot try to collect money owed for these purchases by asserting a warehouse lien against the debtor's stored goods.⁶⁰ In order to collect for nonbailment related debts, warehouses will have to use section 7-209(2), which allows warehouses to take security interests against bailors' stored goods.

The legal principles concerning warehouse liens described in the preceding paragraphs control even though section 7-202(2)(i) lists a statement about warehouse liens as an essential term of a warehouse receipt. However, courts should reject any assertion that a warehouse has no warehouse lien because its receipt does not contain this essential term or any other term listed as essential by section 7-202(2). Section 7-202(1) provides that a warehouse receipt need not have any particular form. Section 7-202(2) reinforces subsection (1) by providing that if a warehouse receipt does not have a particular essential term, the warehouse is liable for damages caused by the omission.

56. U.C.C. § 7-209(1) cmt. 1.

57. *Id.* § 7-209(1).

58. *Plains Cotton Coop. Ass'n*, 141 B.R. at 368-69; *Bluebonnet Warehouse Corp.*, 136 B.R. at 775-76; *Sunflower Compress*, 136 B.R. at 788-89.

59. U.C.C. § 7-209(1); *id.* cmt. 1.

60. *See* *Western Cotton Serv. Corp. v. Marlow*, 136 B.R. 743, 752 (Bankr. W.D. Tenn. 1991) (stating that a warehouse lien must relate to the stored goods). *See also*, *Jefferson County Coop Ass'n v. Northeast Kansas Prod. Credit Ass'n*, 73 B.R. 3, 5-6 (D. Kan. 1982) (construing the Kansas warehouse lien, a non-U.C.C. lien, as similarly limited to storage charges and as unavailable for nonbailment related debts).

