Oklahoma City University School of Law

From the SelectedWorks of Alvin C. Harrell

Spring 2009

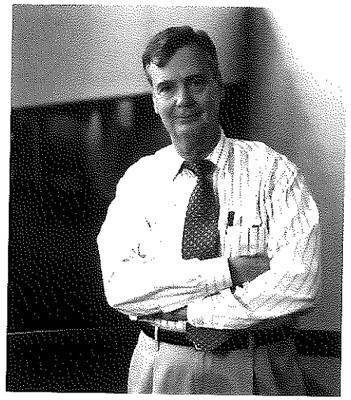
Can a Buyer and Secured Party Rely on a Certificate of Title? (Part Two: The Tenth Circuit Opines on CTs in the Wilserv Case)

Alvin C. Harrell, *Oklahoma City University School of Law*

Available at: https://works.bepress.com/alvin_harrell/104/

Can a Buyer and Secured Party Rely on a Certificate of Title? Part Two: The Tenth Circuit Opines on CTs in the *Wilserv* Case

By Alvin C. Harrell*



Alvin C. Harrell is a Professor of Law at Oklahoma City University School of Law, and President of Home Savings and Loan Association of Oklahoma City. He is coauthor of a dozen books, including THE LAW OF MODERN PAYMENT SYSTEMS AND NOTES (with Professor Fred H. Miller). Professor Harrell is Editor of the *Annual Survey of Consumer Financial Services Law* in *The Business Lawyer*. He chaired an American Bar Association UCC Committee Task Force on State Certificate of Title Laws, and was Reporter for the NCCUSL Uniform Certificate of Title Act (UCOTA) Drafting Committee. He is Executive Director of the Conference on Consumer Finance Law and a member of its Governing Committee, a member of the American Law Institute (ALI), a member of the American College of Commercial Finance Lawyers and the American College of Consumer Financial Services Lawyers, and served as Chair of the Financial Institutions and Commercial Law Section of the Oklahoma Bar Association. He chairs the UCC Legislative Review Subcommittee of the Oklahoma Bar Association. At the April 2008 meeting of the American College of Commercial Finance Lawyers, Professor Harrell was elected to the Board of Regents for the 2008–2009 term.

I. Introduction and Background

As suggested in a prior series of articles,[1] Oklahoma is a leading jurisdiction in the development of case law regarding certificates of title (CTs) created by Indian tribes. Since some of the prior articles were published, additional important Oklahoma bankruptcy cases have been decided (including a 2008 decision by the Tenth Circuit U.S. Court of Appeals[2]), and in response to some of the earlier cases the Oklahoma legislature enacted legislation (including nonuniform amendments to Oklahoma Uniform Commercial Code (Oklahoma UCC) Article 9) affecting CTs. As discussed in this article, these developments address but do not resolve certain practical and technical issues in CT law that are implicated in these cases.

The latest round of these developments began with a 2004 Oklahoma bankruptcy case[3] that addressed fundamental issues inherent in the relation between the state CT law,[4] UCC Article 9,[5] the U.S. Bankruptcy Code,[6] and tribal CT laws. This court concluded that, on the facts of that case, a CT "lien entry" pursuant to a tribal CT law was not sufficient for perfection of a security interest under Oklahoma law. The Oklahoma legislature responded later that year by amending the Oklahoma CT law[7] in an attempt to make clear its intention that "lien entry" perfection of a security interest pursuant to a tribal CT law was sufficient as a means of perfection under UCC Article 9.[8]

Unfortunately, that 2004 amendment was not effective, as it amended a law (the Oklahoma CT law, 47 Okla. Stat. section 1110) that does not apply to perfection of a security interest pursuant to the CT law of another jurisdiction, including an Indian tribe.[9] This left the matter subject to increased uncertainty as of the beginning of 2005, prior to the later developments described in this article.

Apparently in recognition of the above-noted limitations of its effort to address tribal CTs in the 2004 amendments to the Oklahoma CT law, on

* The author thanks Professor Fred H. Miller for his comments and assistance with this article and his contributions to development of the Uniform Certificate of Title Act (UCOTA), which if enacted by states and Indian tribes will resolve most of the problems noted in this article. Portions of this article are also indebted to Alvin C. Harrell, *Can a Buyer and Secured Party Rely on a Certificate of Title? Part III: Tribal CTs*, 77 Okla. Bar J. 547 (2006).

1. Alvin C. Harrell, Case Note: Volvo v. McClellan—*Can a Buyer and Secured Party Rely on a Certificate of Title?*, 74 Okla. Bar J. 2641 (2003); Alvin C. Harrell, *Can a Buyer and Secured Party Rely on a Certificate of Title? Part II*, 76 Okla. Bar J. 447 (2005); Alvin C. Harrell, *Can a Buyer and Secured Party Rely on a Certificate of Title? Part III: Tribal CTs*, 77 Okla. Bar J. 547 (2006); and Alvin C. Harrell & Fred H. Miller, *Can a Buyer and Secured Party Rely on a Certificate of Title? Part IV: The* Wilserv *Case*, 79 Okla. Bar J. 2205 (2008); *see also* Alvin C. Harrell, *Can a Buyer and Secured Party Rely on a Certificate of Title? – Part One*, 60 Consumer Fin. L.Q. Rep. 224 (2006). This article is a sequel to the 2006 *Quarterly Report* article.

2. Malloy v. Wilserv Credit Union (*In re* Harper), 516 F.3d 1180 (10th Cir. 2008). *See infra* Parts V.-VII.

3. Malloy v. The Wyandotte Bank (*In re* Lawson), No. 01-05385-R (Bankr. N.D. Okla. Jan. 5, 2004) (unpub.).

4. Title 47 Okla. Stat. §§ 1101-1151.

5. Title 12A Okla. Stat. §§ 1-9-101 - 1-9-709. Unless otherwise noted, citations hereafter are to the uniform text of Article 9, which is identical to Oklahoma Article 9 except as otherwise noted, and will be presumed to be identical to a tribal enactment of Article 9.

6. 11 U.S.C. §§ 101 *et seq.*

7. *See* 47 Okla. Stat. § 1110.

8. *See* Article 9 § 9-311(a), (b).

9. *See* Article 9 §§ 9-109, 9-303, and 9-311; Harrell, *Part II*, *supra* note 1; and discussion *infra*. *But see* Malloy v. The Cornerstone Bank (*In re* Snell), No. 04-14329-M (Bankr. N.D. Okla. Sept. 5, 2005) (discussed *infra* at Pt. III.) (finding the 2004 amendment to § 1110 to be "valid," though perhaps only in the sense of evidencing a general legislative intent to recognize perfection under an appropriate tribal law).

May 5, 2005 the Oklahoma legislature amended Oklahoma UCC Article 9 by adding nonuniform language at a new subsection 1-9-311(a)(4), recognizing perfection of a security interest by means of the "law or procedure of a federally recognized Indian tribe...."[10] In contrast to the wholly ineffective 2004 amendment to the Oklahoma CT law, this 2005 Oklahoma amendment recognized that (pursuant to Article 9 section 9-109) security interest issues generally are governed by Article 9 (*e.g.*, to the extent Article 9 does not defer to other law under sections 9-303 and 9-311). However, to the extent that the choice of law rules at sections 9-303 and 9-311(a) refer to tribal law, Article 9 does not apply to perfection issues involving tribal CTs, including some of the issues targeted by the 2005 Oklahoma amendment. This means that once again, as with the 2004 amendment to the Oklahoma CT law, the 2005 amendment to Oklahoma Article 9 failed to address the targeted problem. This illustrates the risks of piecemeal revisions to complex, related statutes like Article 9 and the CT laws. As illustrated by the subsequent cases discussed below, this also means that some of the troublesome issues highlighted in the Oklahoma case law remain unresolved.

The 2005 Oklahoma amendment attempted to resolve a narrow issue addressed by the prior line of Oklahoma bankruptcy court cases, at least as to transactions after the effective date of May 5, 2005, and perhaps as to transactions before that date to the extent the 2005 Oklahoma amendment could be viewed as partly a clarification of prior law.[11] That narrow issue is this: To the extent that Oklahoma Article 9 (and thus the 2005 Oklahoma amendment) applies, is a tribal CT lien entry recognized as a form of perfection under Article 9? Unfortunately, as discussed in this article, under current law the answer is frequently no, and a solution like the 2005 Oklahoma amendment is largely ineffective, as a vehicle covered by a valid tribal CT will be subject to the tribal secured transactions law (if any), not the state's Article 9 section 9-311, as a result of the choice of law rule in section 9-303. Moreover, as demonstrated in *Wilserv* (and discussed *infra* at Parts VII. and VIII.), if there is no tribal secured transactions law (to establish priority of the security interest over a lien creditor), the tribal CT will not qualify as a CT under Article 9 (section 9-102(a)(10)), and the 2005 Oklahoma amendment does not apply for this reason. Either way, a solution like the 2005 Oklahoma amendment is ineffective.

As noted, this demonstrates the dangers of narrowly-focused solutions in the context of complex statutory interrelationships--and illustrates why a carefully-considered, comprehensive solution like the Uniform Certificate of Title Act (UCOTA) may be needed to resolve these types of issues. As it now stands, the simple solution promised by the 2005 Oklahoma amendments was not to be, as amply demonstrated in the later cases discussed below, a consequence that dramatically illustrates the legal dangers of misunderstanding the relation between CT procedures, the UCC, and other law.[12] Each of these issues and developments is discussed in more detail below.

II. The *Dalton* Case

Malloy v. Bank of Commerce (*In re Dalton*)[13] was a follow-up to the issues in the 2004 *Lawson* case, as noted above and discussed in more detail in a prior article.[14] In *Lawson*, the bankruptcy court allowed the trustee in bankruptcy to avoid a security interest[15] because it was perfected by lien entry on a tribal CT and not under the Oklahoma CT law.[16] *Lawson* misconstrued the basic relation between Article 9 and state and tribal CT laws, erroneously concluding that the Oklahoma CT law governs security interests perfected by lien entry under the CT law of another (*e.g.*, a tribal) jurisdiction.

Dalton was a great improvement over the reasoning in *Lawson*, in terms of explaining the relation between Article 9 and state and tribal CT laws. The facts (and issues) in *Dalton* were similar to those in *Lawson*: The bank sought to perfect its security interest in the debtor's vehicle pursuant to the CT "lien entry" procedures of the Cherokee Nation (CN), and the trustee in bankruptcy argued that this did not constitute perfection under Oklahoma law.[17]

The *Dalton* opinion properly noted that, under UCC section 9-109, Article 9 governs a security interest in a vehicle, and under sections 9-303 and 9-311(a) the law of the jurisdiction that has created

10. Title 12A Okla. Stat. § 1-9-311(a)(4)(2005) (2005 Oklahoma amendment). Note that this nonuniform Article 9 amendment seeks to go beyond recognition of tribal CT lien entry perfection; if the vehicle is registered by a qualifying tribe the intent is to recognize any method of perfection allowed by tribal law or procedure, potentially including filing, or automatic perfection, and including tribal "common law." Since these methods might or might not provide appropriate public notice, this solution is not satisfactory as a policy matter; and this argues for enactment by the tribes of a full-fledged CT law like UCOTA. Moreover, as discussed *infra*, there is considerable doubt that the 2005 Oklahoma amendment is effective to accomplish its purpose.

11. The 2005 Oklahoma amendment sought to confirm that a tribal CT is a CT under Article 9 § 9-102(a)(10) and for the purposes of § 9-311(a) and (b), thus clarifying that the applicable tribal
(Continued in next column)

11. *(Continued from previous column)*
CT law governs perfection in all of the cases discussed in this article, despite the misdirected 2004 amendments to the Oklahoma CT law at § 1110. To this extent it can be viewed as merely a clarification of existing law. However, as noted in *Wilserv*, this still requires a tribal CT and secured transactions law that meets the requirements of § 9-102(a)(10). The 2005 Oklahoma amendment does not address this fundamental and essential issue. *See also* the discussion *infra* at Parts II. and VI.-VII. *But see* Snell, No. 04-14329-M, discussed *infra* at Part III. (2005 amendment was effective upon enactment and thus did not apply to the earlier *Snell* transaction, although the court treated the 2004 and 2005amendments as an expression of legislative intent to recognize tribal means of perfection).Presumably this latter analysis is now superceded by the inconsistent Tenth Circuit analysis in *Wilserv* (*see infra* Parts VI.-VII.).

12. For another example of this effect, *see* Bruce A. Campbell, *Ohio Car Buyers, Their Financers, and "Uniformers" Beware:*
(Continued in next column)

12. *(Continued from previous column)*
Certificates of Title Control in Ohio, 60 consumer Fin. L.Q. Rep. 216 (2006). In a recent dialog with your author, a CT office representative from another state, who was apparently beginning to comprehend the extent of the problems (and was apparently resistant to a comprehensive solution like UCOTA), suddenly exclaimed her preferred solution: "Can't we just take security interests out of the CT law?" Sorry, I think it's too late for that.

13. No. 04-10025-R (Bankr. N.D. Okla. May 18, 2005).

14. *See* Harrell, *Part II*, *supra* note 1; *Lawson*, No. 01-05385-R, *supra* note 3.

15. Under 11 U.S.C. § 544(a). *See also id.* § 323 (role and capacity of trustee).

16. *See Lawson*, No. 01-05385-R, *supra* note 3.

17. The vehicle was repossessed by the bank just prior to the debtor's bankruptcy filing. This constituted perfection by possession under Oklahoma law. *See* UCC §§ 9-313(a),(b), and 9-316(d), (e). But this was subject to avoidance as a preferential transfer under 11 U.S.C. § 547(b) if the security interest was previously unperfected. Moreover, as discussed below, it is possible that Oklahoma §§ 9-313 and 9-316 do not apply to a vehicle covered by a non-Oklahoma CT. *See* § 9-303. *But see* § 9-301 (choice of law if the vehicle is not covered by a CT).

the CT covering the vehicle determines whether a security interest in the vehicle is perfected. In *Dalton* (and *Lawson*) the CT was issued by an Indian tribe. Clearly the vehicle in *Dalton* (and *Lawson*) was not covered by an Oklahoma CT, and therefore the Oklahoma CT law did not apply. As *Dalton* recognized, the CN CT covering the vehicle in that case meant that the CN CT lien entry procedure or other applicable CN law should be applied to determine whether there was perfection, if the CN CT qualified as a CT within the meaning of Article 9.[18] Thus the *Dalton* case is important in recognizing that the forum state CT law does not apply to determine the validity of a CT lien entry created by another jurisdiction. But of course this is just the beginning of the required analysis.

The next question in *Dalton* was whether the CN CT was a "CT" as defined in Article 9.[19] This "test" requires that the CT be created pursuant to a law providing for indication of the security interest on the CT "as a condition or result of the security interest's obtaining priority over the rights of a lien creditor...."[20] According to *Dalton*, the CN CT law and procedures properly provided for an indication of the security interest on the face of the CT, as a means of perfection, after presentation to the tribal CT office of a completed lien entry form, but was faulty in that it did not specify that this constitutes priority over a competing lien creditor. The court concluded that this failure to specify the priority of a security interest in the CN CT law precluded the CN CT from qualifying as a CT under Article 9. This represents another fundamental misunderstanding of the relation between the CT law and UCC Article 9.[21]

The *Dalton* analysis on this issue is clearly incorrect under Article 9.[22] The Article 9 requirements for a CT at section 9-102(a)(10)[23] effectuate the deference in the uniform text of section 9-311(a) and (b) to state (and tribal) CT perfection law and procedures, if those laws and procedures are designed to yield an indication of the security interest on the face of the CT as a part of the process of perfection, and the result of perfection is priority over a subsequent lien creditor. As indicated at section 9-311(b), this is the equivalent of filing a financing statement. But the priority that results from that perfection comes from the otherwise applicable secured transactions law (*e.g.*, Article 9 section 9-317 or 9-322), not the CT law. Few CT laws provide for or even contemplate a comprehensive system of the priorities that result from CT perfection, nor should they. That is the job of Article 9, or the otherwise applicable secured transactions law, not the CT law.

Extraneous priority rules in the CT law would likely set up troublesome conflicts between that law and Article 9.[24] As a result, the vast majority of CT law provisions relating to security interests are appropriately focused on the procedures and mechanics of lien entry, and Article 9 section 9-311(a) and (b) defer to the CT law only to that extent. So the purpose of the language in section 9-102(a)(10) and the uniform text of section 9-311(a), referencing the required elements of a CT lien entry in order to qualify as CT perfection under Article 9, is to assure that Article 9 defers to a CT perfection system only if that system is designed to be a means of perfection by giving public notice via a CT lien entry. (As noted above, above, the 2005 Oklahoma amendment to Article 9 purports to change this to allow any tribal method of perfection, including a method other than notation on the CT, so as to bolster the position of the secured party in a case like *Dalton*. This raises other interesting questions, not material to our discussion here of the basic relation between CT law and the uniform text of Article 9.)

The required parameters for a CT in the uniform text of Article 9 (at section 9-102(a)(10)) do not state a requirement that the CT law provide a means of "perfection" as such, because "perfection" is a term created by Article 9 and not directly used (even today) in many CT laws. So the uniform text of Article 9 sections 9-102(a)(10) and 9-311(a) reference (and require) a CT lien entry procedure designed to provide a means of obtaining priority over subsequent competing liens by providing public notice on the CT, as a proxy for the perfection concept. Thus, the language of the uniform text at sections 9-102(a)(10) and 9-311(a), describing the parameters of a CT for purposes of Article 9, was intended to reference CT lien entry perfection systems without using the term perfection. The reference to the CT law as a means of obtaining priority over a lien creditor merely requires a mechanism in the CT law designed to provide public notice on the CT, as an alternative to filing an Article 9 financing statement.

It certainly was not intended that this Article 9 language require CT laws to include priority rules as a prerequisite to qualifying the CT as a CT under Article 9. In fact, quite the opposite. As noted, most CT laws do not contain secured transaction priority rules, and those that do are creating unnecessary conflicts with the UCC.[25] Under the *Dalton* interpretation of section 9-102(a)(10), the Oklahoma CT law itself might not qualify as the source of a CT lien entry for purposes of Article 9 perfection. The laws of many other states also could be in jeopardy.

Of course, the rebuttal to such an argument (regarding Oklahoma law) is that the Oklahoma CT law (at section 1110.A.1) provides for perfection of security interests by delivery to the state CT office (the Motor Vehicle Department of the Oklahoma Tax Commission, or an authorized tag agent) of a lien entry form, and the CT perfection provided under section 1110 and UCC section 9-311 then results in priority as against subsequent competing liens under Oklahoma Article 9 Part 3, thus meeting the test in the uniform text at sections 9-102(a)(10) and 9-311(a). This is the correct analysis under any state CT law and Article 9; it illustrates the basic point that a CT law need not (and should not) contain priority provisions. And, contrary to *Dalton*, this analysis is equally applicable to the CN CT law (assuming there is a CN secured transactions law--an issue that returned to haunt future case analyses). The arguable circularity in the analysis is inherent in the interdependence of Article 9 and the applicable CT law, and should not be viewed as a deficiency in either law.

Having erroneously decided that the CN CT was not a CT under Article 9 because the CN CT law did not address priority, the *Dalton* court analyzed the perfection issue entirely under Article 9, without regard to any CT law.[26] The court applied the purchase-money security interest provision at section 9-309, noting that by its terms section 9-309 applies only if the collateral is not "subject to" a CT perfection statute under section 9-311(a). The court noted that the exclusion of CT perfection from the Article 9 perfection rules (at section 9-311(a) of the uniform text) does not apply unless there is a qualifying CT covering the vehicle for purposes of Article 9. Thus, if (as the *Dalton* court held) the CN CT did not qualify as a CT under Article 9, the vehicle was not "subject to" a CT under section 9-311(a), and the exclusion from section 9-309 likewise did not apply. Thus section 9-309 was applicable, assuming the court was correct that no CT law was applicable.

Under section 9-309, the security interest was automatically perfected upon attachment under section 9-203, as a purchase-money security interest in consumer goods. Had the goods been used commercially, some other Article 9 perfection method would be required, such as filing a financing statement. Either way, perfection can be achieved under Article 9 but effective public notice may be lacking, at best an unsatisfactory result which again emphasizes the need for a proper interpretation of the relation between Article 9 and the CT law, an adequate tribal or state CT law such as UCOTA (*see infra* Part VIII.), and a comprehensive tribal secured transactions law such as Article 9, *e.g.*, to make clear that the tribal CT qualifies as a CT under the uniform text of sections 9-102(a)(10) and 9-311(a). In *Dalton* the attachment and automatic perfection occurred well before the beginning of the Bankruptcy Code preference period,[27] so the end result was that the security interest was perfected under Oklahoma Article 9 and could not be avoided in bankruptcy.

Dalton reached an appropriate result, was based on a mostly plausible interpretation of the uniform text of Article 9, and demonstrates a mostly sound analysis of the relation between Article 9, state and tribal CT laws, and the Bankruptcy Code. The court's explanation of Article 9 sections 9-109, 9-303, 9-309, and 9-311was correct in most respects. Importantly, the *Dalton* court recognized that the Oklahoma CT law did not apply, as there had been no lien entry form or CT application delivered to the Oklahoma CT office; this explains why the 2004 amendments to Title 47 Okla. Stat. section 1110 are ineffective. Yet, as noted, under the *Dalton* rationale there is no effective public notice in the section 9-309 automatic perfection that determined the outcome of the case (although note that the tribal CT lien entry, even if legally ineffective for perfection in the *Dalton* analysis, does provide public notice). Moreover, as illustrated in the subsequent *Wilserv* analysis (*see infra* Parts V.–VII.), the *Dalton* analysis is wholly is unsatisfactory in the absence of a purchase-money transaction.

These problems suggest a need to resolve the issue another way, *e.g.*, by state and tribal enactment of UCOTA.[28] Most fundamentally, and with regard to an issue that would return to haunt subsequent decisions, the *Dalton* court misconstrued the requirements for a CT as articulated in Article 9 at sections 9-102(a)(10) and 9-311(a). This resulted from, and reinforced, basic misconceptions about the relation between Article 9 and the applicable CT law, an error that (in later cases) would result not only in application of the wrong CT law but the wrong secured transactions law as well. Despite the improvement of *Dalton* over *Lawson*, the problems were just beginning.

Dalton was appealed and the United States Bankruptcy Appellate Panel of the Tenth Circuit (BAP) affirmed the bankruptcy court's decision, in an unpublished order dated December 8, 2005.[29] The sole issue considered by the BAP was whether the bankruptcy court erred in applying the automatic perfection rule of Article 9 section 9-309. The BAP properly rejected the bankruptcy trustee's argument that the court should have applied the Oklahoma CT law instead. By then it was obvious to nearly everyone that this aspect of the trustee's argument is wholly without merit, and the BAP correctly noted that the Oklahoma CT law does not apply to a CT created by another jurisdiction. The BAP further recognized that Article 9 (or, one might add, the otherwise applicable secured transactions law) governs the perfection and priority of security interests in vehicles, except to the extent that

18. The 2005 Oklahoma amendment states that perfection is allowed in any manner recognized under the law of the tribe that registers the vehicle, *e.g.*, even if that is by filing or automatic perfection. *See supra* note 10.

19. *See* UCC §§ 9-102(a)(10) and 9-311(a).

20. *Id.*

21. *See* discussion immediately below. In addition, the 2005 Oklahoma amendment inferentially rejects this view. *See supra* notes 10 and 18.

22. As noted *id.*, it is essentially rejected in the 2005 Oklahoma amendment, in addition to being fundamentally incorrect, as noted below.

23. UCC § 9-102(a)(10). *See also* further discussion *infra* at Part V.B.

24. Indeed, that has been the case in the troublesome cases where a CT law includes priority provisions. For that reason, UCOTA is carefully designed to defer to the Article 9 (and UCC Article 2) priority rules. The alternative is to invite analytical and priority chaos. *See, e.g.*, Campbell, *supra* note 12.

25. *Id.*

26. This is the correct approach in the absence of an applicable CT law. Article 9 § 9-311(a) defers to CT perfection only if the CT law qualifies under the Article 9 test discussed above, so in the absence of a qualifying CT law the perfection issues are governed entirely by Article 9 or the otherwise applicable secured transactions law. *See also infra* Parts V.-VII.

27. *See* 11 U.S.C. § 547(b)(4).

28. Note that enactment of UCOTA by the state resolves this problem, as to inadequate tribal CT laws, because UCOTA §§ 25-26 allow perfection by filing with the state CT office in cases where no CT has yet been created, assuming the CT office wants to accept such filings (which presumable it would). This allows perfection by filing with the state CT office (a convenient and appropriate public record) as a back-up to an uncertain tribal CT perfection. *See infra* Parts VII. and VIII.

29. Malloy v. Bank of Commerce (*In re* Dalton), BAP No. 05-052 (Dec. 8, 2005) (unpub.).

Article 9 expressly defers to an applicable CT law. As there was no Article 9 reference to the Oklahoma CT law in this case, and accepting the bankruptcy court's conclusion that no other CT law applied, the bankruptcy court's application of Article 9 was correctly affirmed.

The BAP's decision in *Dalton* avoided some of the errors that have plagued other courts, but did not address the major problem triggered by the bankruptcy court's decision in *Dalton,* namely the interpretation of section 9-102(a)(10) to exclude the CN CT. This is admittedly a challenging issue, but, while not leading to an incorrect result in *Dalton,* it opened the door to future problems with implications for subsequent cases. It also serves as a compelling argument for the enactment of UCOTA, by both states and the tribes, as a tribal UCOTA would make clear that the tribe has a proper CT law for purposes of Article 9, and state enactment of UCOTA would provide an alternative means of perfection (without a state CT) in cases where the only CT is one created by a tribe without the requisite underlying CT and secured transactions law.[30]

III. The *Snell* Case

In *Mallory v. The Cornerstone Bank (In re Snell),*[31] the question was again whether a security interest in a vehicle was perfected under Article 9 pursuant to sections 9-303 and 9-311(a), by compliance with the CT lien entry procedures of the Cherokee Nation (CN).[32] The parties stipulated that: the security interest was perfected pursuant to CN CT procedures; the security agreement stated that it was governed by Missouri law and the law of the state where the vehicle was located;[33] the vehicle was located in Oklahoma; the CN has adopted the UCC; and the bank defendant had a security interest under Article 9 section 9-203.

As a foundational matter it should be noted that, for issues other than perfection and priority, Article 9 is subject to the general choice of law rules in UCC Article 1.[34] These defer to party autonomy, subject to some qualifications, and absent an effective choice by the parties apply a version of the significant relationship test generally thought to be consistent with the *Second Restatement.*[35] Consistent with general choice of law analysis, there is also a built-in bias in favor of the law of the forum.[36] Among other things, this means that for issues such as attachment of the security interest (but not perfection and priority), the parties can choose any law they want, within reason; there is also an inherent tendency to apply the law of the forum (in this case, Oklahoma) to these issues. In *Snell* the court applied the Oklahoma UCC to resolve initial issues relating to the scope of the applicable law, attachment of the security interest, and enforcement. Passing quickly over these issues, one can assume that the court was justified in choosing to apply Oklahoma law, not Missouri law, to these issues.

But not in choosing to apply the Oklahoma CT law for perfection issues. Even if Oklahoma law applies, *e.g.,* for issues relating to the attachment, perfection, priority, and enforcement of the security interest, the applicable law is Oklahoma UCC Article 9, not the Oklahoma CT law.[37] The Oklahoma CT law is not a wide-ranging secured transactions law that applies to every debtor or vehicle located in Oklahoma. To the extent that Oklahoma law applies, *e.g.,* pursuant to UCC sections 1-301 and 9-109, that honor belongs to Oklahoma Article 9. A CT law applies to govern perfection of a security interest only to the extent that Article 9 sections 9-303 and 9-311(a) refer to that law. There is no such reference to the Oklahoma CT law on the facts in *Snell*; instead, the reference in sections 9-303 and 9-311(a) is to the CN CT law, assuming that law qualifies under section 9-102(a)(10). The only questions in *Snell* were whether the CN CT qualified as a CT under Article 9 section 9-102(a)(10) and, if so, whether the security interest was perfected under the CN CT law. These issues do not involve any aspect of the Oklahoma CT law.

In *Snell* the trustee apparently argued that the only method for perfection of a security interest in a vehicle "in the state of Oklahoma" is by lien entry under the Oklahoma CT law. Taken literally, this is incorrect on its face. By this argument, a security interest would become unperfected every time a vehicle titled in one state crossed the border into another state. This is an extraordinary argument indeed. There is no rational basis for this view, or for arguing that the Oklahoma CT law imposes perfection requirements as to vehicles covered by CTs created by other jurisdictions, whether a state or an Indian tribe, just because such a vehicle is located in the State of Oklahoma. And even as to Oklahoma CTs, the Oklahoma CT law impacts security interests only to the extent that Article 9 so provides at section 9-311(a). Thus, contrary to the trustee's argument in *Snell,* a lien entry perfection under the CN CT procedure need not pass muster under the Oklahoma CT law.

Moreover, and also contrary to the court's opinion in *Snell,* the Oklahoma CT law is equally inapplicable as a means to bolster the effectiveness of the CN CT procedure. It was a nice gesture for the Oklahoma legislature to amend Title 47 Okla. Stat. section 1110 (the Oklahoma CT law) in 2004, to endorse the validity of tribal CT lien entry perfection. And there is no doubt, as the *Snell* court noted, that the 2004 amendments to section 1110 were "...strong evidence of legislative intent..." to support tribal CT laws. But the fact remains that section 1110 is not applicable to the facts of the *Snell* case, any more than it would be applicable to perfection by lien entry on a Kansas or Texas CT.[38] Thus, the 2004 amendments to Title 47 Okla. Stat. section 1110 were wholly ineffective to accomplish the intended purpose.

No doubt the *Snell* court felt that it would be hard to go wrong following the clear intent of the state legislature as to an issue it viewed as a matter of state law, and in the 2004 amendments to section 1110 that intent is unmistakable, although as noted not directly effective. It does raise an interesting, although largely academic, issue when the legislature says the right thing but in a completely inapplicable statute, as to an issue governed by the law of another jurisdiction. Perhaps one can view the 2004 amendments to Oklahoma section 1110 as an example of post-enactment Article 9 legislative history, or as a kind of legislative commentary on the law of another jurisdiction, or to confirm a legislative intent that the uniform text of section 9-311(a) apply to tribal CTs.

Arguably the latter is a proper interpretation of the uniform text of Article 9, without any help from the Oklahoma CT law, and that was the law even before the 2004 Oklahoma amendments to section 1110 and the 2005 Oklahoma amendments.[39] To some extent it is, after all, an issue of state legislative intent and expression, though one governed by Article 9 and more complex than the 2004 amendments to section 1110 suggest. However, any such expression relating to a security interest should be in the applicable secured transactions law, rather than an inapplicable CT law (as with the 2004 amendments to Oklahoma section 1110).[40]

In any event, the plain fact is that none of this changes the Article 9 requirement for a tribal CT that qualifies as such under the definition at section 9-102(a)(10). Despite being forced into a tortured and incorrect path of statutory interpretation, perhaps in an attempt to salvage some role for amended section 1110, the *Snell* court arguably reached the correct result, upholding the lien entry perfection under the CN CT procedure. But the court's analysis (basing its decision on the Oklahoma CT law rather than Article 9 and the applicable tribal law) fell short in terms of providing proper guidance to interested parties.

In applying the Oklahoma CT law to a CN CT, the *Snell* court said: "...it is difficult for this court to find fault...in the laws of the state of Oklahoma which voluntarily recognize the validity of the laws of the Indian nations...."[41] It is very true that Oklahoma law does this, though in Article 9 sections 9-303 and 9-311(a) rather than in the Oklahoma CT law as the *Snell* court indicated. The entire matter reflects the sometimes complex relation between federal, state, and tribal laws and governments, which is handled quite well in the rules of Article 9, so long as those rules are correctly applied in the context of a conforming CT law. The results in *Snell* (recognizing the CN CT law) and *Dalton* (recognizing perfection of the security interest) were correct, though in both cases there were fundamental flaws in the courts' reasoning. As always, the next question was how much harm this flawed reasoning would cause in future cases. It would not take long to find out, but in the meantime the Oklahoma legislature decided to try again to fix the problem.

IV. The 2005 Oklahoma Amendment

The 2005 Oklahoma amendment at section 1-9-311(a)(4), already briefly noted *supra* at Part I., was an attempt to implement the intent of the 2004 amendment at Title 47 Okla. Stat. section 1110, and also to fix some problems with section 1110.G (as noted below), by means of a nonuniform Article 9 amendment specifying that perfection under a tribal CT law or procedure does not require notation on a tribal CT.

As a general matter in Oklahoma, under the Oklahoma CT law and the uniform text of Article 9 (*see* section 9-102(a)(10)), it is sufficient if the secured party complies with a procedure designed to result in a CT notation; actual notation on the CT is not required. Thus, all that is required for perfection under Article 9 sections 9-102(a)(10) and 9-311 is compliance with a CT procedure designed to result in such a notation on the CT. Language to the contrary in Title 47 Okla. Stat. section 1110.G (added in the 2004 amendment discussed above) was misleading and this was corrected in the 2005 Oklahoma amendment that also resulted in a new, nonuniform Oklahoma section 1-9-311(a)(4).

Thus, the 2005 Oklahoma amendment adding a nonuniform section 1-9-311(a)(4) to Oklahoma Article 9 sought to clarify that a tribal CT lien entry procedure (or other perfection procedure) is sufficient as a means of perfection under Oklahoma Article 9 sections 1-9-303 and 1-9-311(a).[42] This change is unnecessary under a proper reading of the uniform text, given a tribal CT, and should not have been necessitated by the misguided 2004 amendment to section 1110.G because,

30. *See supra* note 28 and *infra* Part VIII; and UCOTA §§ 25, 26, allowing perfection by a filing with the state CT office if no jurisdiction has created an applicable CT. This would provide a means of appropriate public notice, as compared to automatic perfection under § 9-309, as the CT office files are commonly accessed by interested parties, in the manner of the UCC filing records for other transactions.

31. No. 04-14329-M (Bankr. N.D. Okla. Sept. 5, 2005).

32. The *Snell* court indicated, *id.* at n. 7 that, although the parties extensively briefed the UCC issues, the court would focus instead on the Oklahoma CT law. However, as noted above and again here, the Oklahoma CT law did not apply to this case. As in *Lawson* and *Dalton*, the issues were governed largely by Article 9 and tribal law. The *Snell* court's return to the problematic analysis in *Lawson*, despite the clear debunking of that analysis in *Dalton*, represented a step backwards and illustrates the difficulty of putting to rest even such a fundamental error, absent statutory reform.

33. Missouri was a seemingly odd choice of law, given the extensive contacts with Oklahoma, but this is allowed, at least as to some issues, under UCC Article 1. *See infra* this text.

34. UCC § 1-301 (2005 uniform text). Oklahoma enacted revised UCC Article 1, effective January 1, 2006, but retained the substance of old § 1-105 at revised § 1-301 (as have most enacting states). *See* Keith A. Rowley, *Revised Article 1 Legislative Update,* 60 Consumer Fin. L.Q. Rep. 669 (2006); J. Scott Sheehan, *Texas Adopts UCC Article 1 Revisions with State-Specific Changes to Retain the Prior Choice-of-Law Rules,* 58 Consumer Fin. L.Q. Rep. 174 (2004). Since the CN has a uniform version of Article 9, it was not necessary in this case to choose between the Oklahoma and CN Article 9. *See also infra* note 51.

35. Restatement Second Conflicts of Law § 187.

36. A court always applies its own choice of law rules, *e.g.* (in the case of the UCC), § 1-301 (2005 uniform text) and § 9-303. *See supra* note 34.

37. *See* UCC § 9-109, and *supra* this text Parts. I. and II.

38. *See* UCC § 9-303.

39. *See supra* Part II.

40. On the other hand, when a state legislature starts adding nonuniform amendments to Article 9, the potential adverse consequences (*e.g.*, in terms of nonuniformity and unintended secondary effects) can easily multiply. *See* discussion below at Part IV. Since the 2004 Oklahoma amendments are both unnecessary and ineffectual, perhaps it is better that they are isolated in an inapplicable statute.

41. *Snell*, No. 04-14329-M, slip op. at 9.

42. As noted, under the 2005 Oklahoma amendment any method of perfection under tribal law is recognized. However, as noted below, this may require a tribal CT in order to trigger a choice of tribal law under § 9-303.

as noted above, section 1110 does not apply to a tribal CT in any event. Moreover, the 2005 amendment creating a nonuniform Article 9 section 1-9-311(a) proved insufficient to save the secured creditor in *Wilserv*, in part because it still requires a proper tribal CT and secured transactions law to trigger the application of sections 1-9-303 and 1-9-311(a).

The 2005 Oklahoma amendment at section 1-9-311(a)(4) is not only ineffective, it also resurrects some old choice of law problems, much like those noted years ago in an article by Kent Meyers,[43] generally not seen in this area of law since all of the states adopted CT lien entry perfection for security interests in motor vehicles some thirty years ago. The residue of these old choice of law problems was mostly resolved by the 1998 uniform revisions to Article 9.[44] But these kinds of choice of law problems are potentially resurrected by the 2005 Oklahoma amendment to Article 9, because of the possibility that vehicle secured transactions law is now different in Oklahoma than in other states.

For example, suppose the *Snell* court had applied Missouri law, as the contract permitted, or the debtor had taken the vehicle to Texas and filed bankruptcy there, or applied for a Texas CT, triggering an application of Texas law.[45] In any of these cases, the Missouri or Texas uniform text of Article 9 would not include the 2005 Oklahoma amendment at section 1-9-311(a)(4), and the difference might be interpreted as a reason not to recognize the tribal CT as a means of perfection.[46]

This is not a constitutional issue, as in the Kansas case noted in *Snell*.[47] It is not merely a matter of whether to recognize perfection under a tribal CT, but rather whether a tribal CT is a CT under the applicable Article 9 standard, for purposes of perfection. One can only marvel at the prospect of what a Missouri or Texas court (or any court) would do with the mess that has been made of these issues in Oklahoma, for example if called upon to determine the validity of an Oklahoma tribe's CT lien entry, in view of the 2004 and 2005 Oklahoma amendments and related case law, in a case otherwise governed by the law of another state.

As noted, enactment of UCOTA by Oklahoma and the tribes would resolve this, *e.g.*, by making clear that a tribal CT is a CT under Article 9 (if the tribe has enacted UCOTA) or providing a practical alternative if the state has enacted UCOTA (*see infra* Part VIII.). Thus, even if a given tribe has not enacted UCOTA, enactment of UCOTA by the state provides an alternative means of perfection under the state CT law, to perfect a security interest even if the tribe has no qualifying CT law or perfection procedure.[48]

In the meantime, cases like *Lawson, Dalton,* and *Snell* left this entire range of issues dangling rather precariously, from the perspective of nearly every interested party. As a result, one could only have sympathy for the next court that was called upon to resolve these issues in the context of a CT lien entry created by an Oklahoma Indian tribe that has not adopted UCOTA and Article 9. The 2005 Oklahoma amendment to Article 9 not only failed to resolve these issues, it made them worse by suggesting a nonexistent defect in the uniform text of Article 9, and purporting to apply Oklahoma Article 9 in a scenario where Oklahoma Article 9 does not apply (again, *see* UCC section 9-303, likely directing the issue to tribal secured transactions law, not Oklahoma Article 9). The Oklahoma legislature corrected a nonexistent problem by amending an inapplicable statute in a way that creates new problems without addressing important unresolved issues. It was all but a prelude to the next case and, in retrospect, made the *Wilserv* case all but inevitable.

V. The *Wilserv* Case[49]

A. Applicable Law

This case once again involved an auto loan by an Oklahoma lender (Wilserv) to an Oklahoma resident who was also a member of an Oklahoma Indian tribe, in this case the Muskogee (Creek) Nation (Creek Nation or the tribe). The security interest was perfected by lien entry on a Creek Nation CT, and when the debtor filed bankruptcy the trustee sought to avoid the security interest, claiming that the lien entry on the tribal CT was insufficient for perfection under UCC Article 9. The bankruptcy court agreed with the trustee, as did the Tenth Circuit Bankruptcy Appellate Panel (BAP), and, ultimately, the Tenth Circuit U.S. Court of Appeals.[50] A basic issue in the case was whether the CT created by the Creek Nation was a "certificate of title" for purposes of Article 9, pursuant to the definition at UCC section 9-102(a)(10) and the reference at section 9-311(a)(3).

Assuming the Oklahoma UCC applies,[51] Oklahoma UCC Article 9 is again the starting place for issues relating to a security interest in the vehicle,

43. *See* D. Kent Meyers, *Multi-State Motor Vehicle Transactions Under the Uniform Commercial Code: An Update*, 30 Okla. L. Rev. 834 (1977).

44. *See, e.g.*, Alvin C. Harrell, *A Roadmap to Certificate of Title Issues in Revised UCC Article 9*, 53 Consumer Fin. L.Q. Rep. 202 (1999).

45. *See, e.g.*, Title 12 Okla. Stat. § 1-105 (2004); (the section applicable in this case, now revised); *see supra* this text and notes 33-36.

46. In all of these scenarios, the court would not be directed (under the choice of law rules at UCC §§ 1-301 and 9-303) to apply the Oklahoma perfection and priority rules, because the vehicle was not covered by an Oklahoma CT. Thus, Oklahoma § 9-311(a) and its nonuniform amendment would not apply. *See* discussion *supra* this text at Part II, and *infra* Parts V.-VII. Arguably, in a case like *Snell* the tribal Article 9 and not the Missouri or Texas state law might apply; however, the extent and effect of tribal jurisdiction in some of these cases is less than clear.

47. Prairie Band Potawatomi Nation v. Wagnon, 402 F.3d 1015 (10th Cir. 2005). This case is also discussed in Harrell, *Part II*, *supra* note 1.

48. *See supra* note 28 and accompanying text, and *infra* Part VIII. At this writing several Oklahoma tribes have adopted versions of UCOTA and Article 9, but the remainder have not.

49. Malloy v. Wilserv Credit Union (*In re* Harper), 516 F.3d 1180 (10th Cir. 2008).

50. *Id. See also infra* Parts VII. and VIII. Your author participated in the preparation of an Amici Curiae brief submitted in the appeal to the Tenth Circuit, on behalf of the Oklahoma Credit Union League and the Oklahoma Bankers Association.

51. As noted above, there is a basic choice of law issue, as to which state's law or tribal law should apply as a foundational matter. The parties to this case proceeded on the basis that Oklahoma law initially applied. This is a matter left largely to the choice of the parties and the law of the forum. *See* Okla. Stat. tit. 12A § 1-301 (2007) (revised UCC Article 1); *supra* notes 33-36. This is also consistent with the basic law-of-the-forum rule in choice of law analysis, which is incorporated into UCC Article 1. *See id.* In effect, the forum always applies its own choice of law rules, and in this case those rules are in the Oklahoma UCC. *See also supra* this text at notes 33-36.

pursuant to the scope provision at section 9-109(a), including, *e.g.*: issues relating to the scope of the applicable law (section 9-109(a)); attachment of the security interest (section 9-203); choice of law (section 9-303); possibly (depending on the application of section 9-303) the priority of the security interest as against the lien of the bankruptcy Trustee (section 9-317(a)(2));[52] and enforcement of the security interest (sections 9-601 – 9-628). Again, assuming that Oklahoma Article 9 applies, Oklahoma sections 9-303 and 9-311(a) will determine which law applies to perfection of a security interest in a vehicle covered by a CT. Thus, at least initially, Oklahoma UCC Article 9 governs issues relating to the security interest, either directly or through incorporation by reference of other applicable law (*e.g.*, pursuant to sections 1-301, 9-109(a), 9-303(c), and 9-311(a)(2)-(3)).

Two fundamental points relating to the *Wilserv* case are clear at this point of the analysis, despite some disingenuous arguments to the contrary by one party or the other in the case: (1) UCC Article 9 does not require that there be priority provisions in the applicable CT law;[53] and (2) the state CT law[54] has no applicability to this type of case, as there was no Oklahoma lien entry form or application for an Oklahoma CT covering the vehicle.[55] Except as otherwise provided in the UCC, a CT law does not apply to a security interest in a vehicle, and in this case nothing in the UCC indicates that the Oklahoma CT law is applicable to a vehicle covered by a tribal CT, or that a priority rule is necessary in the applicable CT law.

The incorporation by reference of the applicable CT law at Article 9 section 9-311(a)(3) (the applicable CT law is determined under Article 9 section 9-303) is limited to recognition of the CT law's perfection mechanism under section 9-311(a)(2) or (3); Article 9 section 9-311(a) does not reference, require, or recognize any priority rules in the applicable CT law. Section 9-303 refers to the priority rules of the jurisdiction that created the CT, but this does not require those rules to be in the CT law. To the extent that the bankruptcy trustee argued in *Wilserv* that the Creek Nation CT law was deficient under Article 9 because that CT law lacks priority rules, the argument was incorrect. Not only would this conclusion misinterpret Article 9, many (if not most) state CT laws would fail the same test.

Thus, the crucial question in *Wilserv* was not whether the tribal CT law had priority provisions, but whether the CT perfection procedure of the Creek Nation permitted recognition of the Creek Nation CT as a CT in Article 9 by reason of the definition in section 9-102(a)(10) and the reference at sections 9-303 and 9-311(a)(3). If so, the security interest was perfected under Article 9 pursuant to sections 9-308(a), 9-310, and 9-311(b) and had priority over the lien of the bankruptcy trustee pursuant to the applicable secured transactions rule, *e.g.*, the universally recognized "first-in-time, first-in-right" priority rule, *e.g.*, at section 9-317(a)(2).[56] This merely required that the Creek Nation CT qualify as a CT under Article 9 sections 9-102(a)(10) and 9-311(a)(3), under the Article 9 standard for a "certificate of title statute" or law, at sections 9-102(a)(10) and 9-311(a)(3).

B. The Definition of "Certificate of Title"

The pertinent language in Article 9 sections 9-102(a)(10) and 9-311(a)(3), defining "certificate of title" for purposes of sections 9-303 and 9-311(a)(3), is cumbersome and may even seem odd, and efforts to understand it may benefit from an overall perspective on the history and context of the statutory language. Attention sometimes focuses on the language in sections 9-102(a)(10) and 9-311(a)(3) requiring a CT law that "provides" for the security interest to be indicated on the CT as a "condition or result" of obtaining priority. It is, perhaps, understandable that this language could be misinterpreted to indicate a requirement that the CT law include priority provisions. But this interpretation would be incorrect, reflecting a fundamental misunderstanding of the role of Article 9 and its relation to the applicable CT law. Nonetheless, sometimes (as in *Wilserv* and the other cases described here) allegations are made that an applicable CT law (such as the Creek Nation CT law in *Wilserv*) is deficient under Article 9 because it includes only procedures that provide for indication of the security interest on the CT, rather than providing for priority of the security interest.

These arguments fail to recognize the purpose of UCC sections 9-102(a)(10) and 9-311(a)(3). These Article 9 sections require the applicable CT law to provide for an indication of the security interest on the CT as a "condition or result" of a procedure that creates priority for the security interest under the applicable secured transactions rule (which normally will be in Article 9, *e.g.*, at section 9-317(a)(2)). Thus, the priority rule is found in the applicable secured transactions law, which is normally Article 9, not in the CT law.[57]

52. *See also* the Bankruptcy Code, 11 U.S.C. § 544(a). As noted *supra* at note 5, throughout this article, for the convenience of the reader, UCC citations reference the uniform text rather than the Oklahoma Statutes, unless otherwise noted.

53. *See supra* Part II.

54. In *Wilserv*, this would be Okla. Stat. tit. 47 § 1110 A.1. and G. (2007).

55. As required for application of the Oklahoma CT law under UCC § 9-303(b).

56. Note that further analysis is required to determine and apply the applicable priority rule, in order to resolve this issue. *See* UCC § 9-303(c), providing for application of the law of the jurisdiction whose CT covers the vehicle, and discussion *infra*. If the collateral is covered by a valid CT, this requires application of the priority rules of the jurisdiction that created the CT. As noted in the discussion below, resolution of the priority issues in *Wilserv* thus required a further reference to Creek Nation secured transactions law.

57. *See also supra* this text Part II, and discussion of *Wilserv infra*. Note again that most commonly the choice of applicable law under § 9-303(c) is a jurisdiction that has enacted UCC Article 9. This will be the case if the CT has been created by a state, as all states have enacted the UCC; however, it may not be the case if the CT was created by an Indian tribe that has not enacted the UCC. Thus, for example, if the security interest was created under Oklahoma UCC Article 9 pursuant to §§ 1-301, 9-109(a) and 9-203, and the collateral is a vehicle covered by an Indian tribal CT as defined in § 9-102(a)(10), then under § 9-303(c) the priority of the security interest will be determined under the secured transactions law of the tribe that created the CT. If that tribe has not adopted UCC Article 9 or an equivalent priority statute, the applicable priority rules should include the common law of that tribe. Thus, recognition of a tribal CT under § 9-102(a)(10) means not only recognition of tribal perfection pursuant to § 9-311(a)(3) but also application of tribal priority rules pursuant to § 9-303(c). However, note also that in *Wilserv* the Tenth Circuit was somewhat dismissive of this use of the tribal common law, at least on the record in

(Continued on next page)

The purpose of the CT law is to provide a perfection mechanism that will result in public notice, and result in priority under the applicable secured transactions law.

Article 9 defers to the CT law procedure for indicating the security interest on the CT as a mechanism for providing public notice and achieving perfection under Article 9, in effect as the equivalent of filing an Article 9 financing statement (*see, e.g.,* section 9-311(b)), as a means to achieve priority under the applicable priority rules, which normally are in Article 9 but could be in other applicable law.[58] Clearly it is not necessary or appropriate for these priority rules to appear in the CT law.

As noted above,[59] few if any state CT laws adequately provide priority rules governing security interests. It would be superfluous to do so, given the exclusive and comprehensive state law priority system in Article 9. But all state CT laws (and the Creek Nation law at issue in *Wilserv*) provide a means to achieve perfection by CT lien entry, which then may result in priority under Article 9 or other law.[60] Thus, Article 9 sections 9-102(a)(10) and 9-311(a)(3) require a CT law with a perfection mechanism that includes a procedure intended to result in public notice by an indication on the CT (the equivalent of an Article 9 financing statement--again *see* section 9-311(b)); compliance with this procedure then constitutes perfection under Article 9 and establishes priority under Article 9 or other applicable secured transactions law (the applicable priority law is determined in part pursuant to section 9-303(c)).

Article 9 requires only that the CT law result in such priority and include a procedure intended to provide public notice, by means of a requirement that the CT law provide a procedure designed to indicate the security interest on the CT. The CT law should not, and normally will not, go beyond this to provide priority rules. To do so would only create conflicts with the priority rules in Article 9 and other secured transaction laws.[61]

Thus the Creek Nation CT law, though perhaps not a model of clarity on these issues, should be sufficient under the standards of sections 9-102(a)(10) and 9-311(a)(3) despite its lack of priority rules. Of course, it would be better if the tribes (and states) could avoid these kinds of problems by enacting CT laws (such as UCOTA) that are better integrated with the UCC, and if the tribes would also enact Article 9 (to provide the underlying secured transaction priority rules), but in the meantime it is not helpful for the courts to misinterpret the Article 9 standards for a CT law, as provided in sections 9-102(a)(10) and 9-311(a)(3).

There is one more point to be made about the Article 9 definition at section 9-102(a)(10): The seemingly cumbersome references in sections 9-102(a)(10) and 9-311(a)(3), to an indication of the security interest on the CT as "a condition or result" of the process leading to perfection and priority, recognize that some CT laws require an indication on the CT as a prerequisite to perfection, while others do not, providing instead that an indication of the security interest on the CT is a result (not a condition) of the process leading to perfection and priority. So the "condition or result" language in sections 9-102(a)(10) and 9-311(a)(3) is there to pick up both types of statutes. Clearly Article 9 does not require an indication on the CT as a precondition to perfection; it is sufficient if the CT law provides for the security interest to be indicated on the CT as a result of the process creating perfection and leading to priority under Article 9 or other secured transactions law.

Similarly, as noted above, sections 9-102(a)(10) and 9-311(a)(3) cannot logically be read to require the CT law to include or specifically reference the Article 9 perfection and priority rules; no state CT law is likely to meet that requirement. Thus, it is enough that the CT law provides: (1) a means to achieve perfection and priority under Article 9 or other applicable law; and (2) a process providing for indication of the security interest on the CT as a result. Sections 9-102(a)(10) and 9-311(a)(3) do not require any other linkage between Article 9, the applicable priority rule, and the CT law, other than a CT law that meets these two requirements as stated at sections 9-102(a)(10) and 9-311(a)(3). Simply stated, this requires a CT law with a mechanism that results in perfection and priority under Article 9 or other law, and is designed to provide an indication of the security interest on the CT in order to serve a public notice function.

In view of the apparent confusion, this basic point is worthy of emphasis. The language defining an appropriate "certificate of title statute" at sections 9-102(a)(10) and 9-311(a)(3) may seem awkward,[62] but is there for a reason, and remains necessary due to the great variety of CT laws it must relate to. Clearly it does not require a CT law expressly stating that an indication of the security interest on the CT is a condition or result of having priority under Article 9. It is enough that the CT law provides for an indication of the security interest on the CT, and that such indication results from procedures achieving perfection and priority in conjunction with other law. In essence, it is required that the CT law provide a procedure that may result in priority under other law, not that the CT law articulate an explanation of how that result is achieved.

57. *(Continued from previous page)*

that case, holding that because there was no apparent tribal secured transaction law, there could be no tribal CT under the definition at Oklahoma § 9-102(a)(10). *See* further discussion *infra* at parts VII.-VIII.

58. *Id.* Generally, other law will not apply except to the extent Article 9 provides or is preempted, *e.g.*, by federal law. *See* UCC §§ 9-109 and 9-303.

59. *See* supra notes 57-58 and accompanying text. *supra* Part II.

60. *Id.*

61. For an example, *see* Campbell, *supra* note 12. This is a primary reason for enacting a comprehensive CT law such as UCOTA, which fits into the UCC without creating such conflicts.

62. As chair of the American Bar Association, Section of Business Law, UCC Committee Task Force on State Certificate of Title Laws, your author (along with many others) advised the Drafting Committee revising Article 9 in the 1990s, with respect to CT issues. The definition of CT at §§ 9-102(a)(10) and 9-311(a)(3) is drawn from prior language that dates to the origins of the UCC, and reflects the need for Article 9 to interact with great variations in state CT laws. This Article 9 language worked well for some 50 years after promulgation of the original UCC, and neither your author nor (to my knowledge) anyone else suggested to the Article 9 Drafting Committee that it be changed. *See also* discussion of the Article 9 context, *infra* at Part V.C.

At this writing, the current Drafting Committee on Amendments to UCC Article 9 is proposing to add language to the definition of CT at § 9-102(a)(10), to include certain electronic records within the definition of CT. *See* 2009 NCCUSL Annual Meeting Draft, Amendments to UCC Article 9, § 9-102(a)(10) (July 9–16, 2009). An expanded Comment to § 9-102 is also proposed, dealing with CT perfection. *Id.* Based on a preliminary analysis, it does not appear that this directly affects the issues discussed in this article. However, *see infra* note 91.

It would be asking far too much to require that any CT law and procedure provide a comprehensive system of priority rules for security interests. No state CT law does this. That is the job of Article 9 or other law (*see* sections 9-109 and 9-303(b)); the deference to the applicable CT law at section 9-311(a)(3) is expressly limited to the mechanics of perfection, and does not include priority. The choice of law for priority rules as to collateral covered by a CT is at section 9-303(c), and that reference is not limited to the applicable CT law. So it should be clear: An argument that sections 9-102(a)(10) and 9-311(a)(3) require a CT law with priority provisions is flat wrong. This is a fundamental issue, as a misunderstanding on this point could cast doubt on virtually every CT law in the United States. Instead, in order to understand how the CT law relates to the applicable priority rules, and the implications for cases like *Wilserv*, a further consideration of the CT law in the overall context of Article 9 and secured transactions law is required.

C. The Article 9 Context

As noted above, the language in Article 9 sections 9-102(a)(10) and 9-311(a)(3), requiring a CT law procedure that provides for the security interest to be indicated on the CT as a condition or result of obtaining priority, does not require a CT law that references, duplicates, or incorporates the Article 9 perfection and priority rules. Sections 9-102(a)(10) and 9-311(a)(3) merely require that the CT law provide a mechanism to create perfection under Article 9.[63] The word "perfection" could not be used in the Article 9 references to the CT law at sections 9-102(a)(10) and 9-311(a)(3), because CT laws predate Article 9 and therefore (as when the original Article 9 was written) often do not use or recognize the term "perfection." Instead they used (and often still use) obsolete terminology such as "lien entry" to describe the mechanism for perfection of a security interest in a vehicle.

Because the terminology used in state CT laws was (and is) so nonuniform and obsolete, and does not fit with the Article 9 terminology, it was necessary for the drafters of Article 9 to use generic language describing the intended result of perfection (*e.g.,* priority over a lien creditor), rather than expressly requiring the CT law to be a means of Article 9 "perfection." As noted, this language in the definition of a "certificate of title statute" in old Article 9 caused no problems and was carried forward from old Article 9 into the 1998 revisions of Article 9 at sections 9-102(a)(10) and 9-311(a)(3).[64]

Thus, UCC sections 9-102(a)(10) and 9-311(a)(3) require a CT law that provides: (1) a mechanism for creating Article 9 perfection which, in conjunction with Article 9 or the other applicable priority rules, results in priority over a subsequent lien creditor; and (2) a process designed to provide an indication of the security interest on the CT as a means of public notice, as a condition or result of such perfection. An appropriate statutory analysis in a case like *Wilserv* thus proceeds as follows: The applicable Article 9 covers the initial security interest issues, including the scope of the law and creation (attachment) of the security interest, pursuant to sections 9-109(a) and 9-203. Article 9 then defers to the applicable CT law perfection mechanism via sections 9-303 and 9-311(a)(3), requiring a CT law that qualifies under section 9-311(a)(3) and section 9-102(a)(10). This requires a CT law that: (1) provides a mechanism for achieving perfection and priority under Article 9 or other law; and (2) is designed to result in an indication of the security interest on the CT. It does not require a CT law that states or expressly provides priority rules.

Having determined that the security interest is perfected pursuant to the applicable CT law, priority is then determined under Article 9 or the other priority rules of the jurisdiction that created the CT (pursuant to the choice of law rule at section 9-303). Two different versions of Article 9 (or other secured transactions law) may apply: The forum will apply its own Article 9 to determine such issues as scope, attachment, and choice of law (pursuant to sections 1-301, 9-109, and 9-303); then will apply the CT law and Article 9 (or other secured transactions law) of the state that created the CT, to determine perfection and priority (pursuant to sections 9-303) and 9-311.

Article 9 section 9-303 determines which CT law is applicable for purposes of achieving perfection pursuant to section 9-311(a)(3), and then applies the secured transactions law of that state to determine priority. The applicable CT law provides the mechanism for achieving perfection, in conjunction with the secured transactions law of that jurisdiction, *e.g.,* sections 9-308(a), 9-310(b), and 9-317 if the jurisdiction has enacted Article 9. The security interest is thus perfected for purposes of the applicable secured transactions law by means of compliance with the requirements of the applicable CT law, pursuant to the choice of law rules at Article 9 sections 9-303(c) and 9-311(a)(3), and priority is then determined pursuant to the secured transactions priority rules of the jurisdiction whose CT covers the vehicle, pursuant to section 9-303(c). The resulting priority is recognized under Article 9, pursuant to sections 9-109 and 9-303(c).

Again, this does not require the CT law to include priority provisions, only that it be a means of achieving perfection and priority under the otherwise applicable secured transactions law. In the case of a CT created by one of the fifty states for example, section 9-303(c) will reference the priority rules of the applicable Article 9 (*e.g.,* at Article 9 section 9-317), providing priority for the perfected security interest over a subsequent lien creditor. In the case of a tribal CT, the equivalent tribal priority rules must be considered.

63. *See* UCC §§ 9-303(c), 9-308(a), 9-310, and 9-311(a), (b).

64. *See supra* note 62.

D. The Impact of Tribal Law

The analysis in a case like *Wilserv* is complicated by the fact that the reference in Article 9 section 9-303(c), to the priority rules of the jurisdiction that created the CT, is a reference to the priority law of a tribal nation. As the bankruptcy court, the Tenth Circuit BAP, and ultimately the Tenth Circuit itself pointed out, no evidence of such law was provided in the *Wilserv* case.[65]

There is no requirement, in Article 9 or elsewhere, for a comprehensive secured transactions priority law, *e.g.*, a Creek Nation commercial code (although of course such would be very helpful, and would help avoid cases like *Wilserv*). Section 9-303(c) defers to the law of the jurisdiction that created the CT, which in *Wilserv* was Creek Nation law, as to the mechanics of CT perfection, the effect of that perfection or nonperfection, and the resulting priority. This requires reference to the tribal law to resolve these issues, whatever that law is. The *Amici* argued in *Wilserv* that perfection was achieved pursuant to Article 9 sections 9-303(c) and 9-311(a)(3), incorporating by reference the Creek Nation CT lien entry procedure as a mechanism for perfection. Article 9 of the forum continued to govern any remaining issues relating to scope, attachment, and enforcement, pursuant to sections 1-301 and 9-109(a), and the agreement of the parties. The Article 9 reference to Creek Nation law at section 9-303(c) is a deference to the tribal perfection and priority rules (and the other effects of perfection). In a case like *Wilserv*, this requires an inquiry into tribal law to determine how that law would resolve a priority conflict between an Article 9 security interest perfected on a tribal CT and a state law lien creditor.

In *Wilserv*, all three courts concluded that the Creek Nation had no law or procedure governing such priority disputes, or at least that such evidence was not provided (and of course a lack of evidence may relate to the burden of proof). But the Article 9 choice of law rule at section 9-303(c) directs a court to apply the local law of the referenced jurisdiction (here, the Creek Nation) to resolve this priority conflict, no matter what that law says or does not say. In the absence of evidence as to that law, the *Amici* argued for a remand to determine it. A tribal commercial code would be nice, but is not required. In the absence of a tribal commercial code, *Amici* argued that section 9-303(c) requires an inquiry into the "common law" of the Creek Nation, to determine how it would handle a similar priority dispute.

In the view of the *Amici*, Article 9 perfection was achieved in *Wilserv* via Oklahoma UCC Article 9 and the Creek Nation CT procedure, pursuant to UCC sections 1-301, 9-109, and 9-303(c), and a proper analysis would then shift back to Article 9 and other law to determine priority and enforcement issues. In *Wilserv*, section 9-303(c) seemingly required an analysis of Creek Nation law to resolve the priority conflict. There is no requirement in all of this that the Creek Nation CT procedure (or any other tribal law) include a parallel set of Article 9 perfection and priority rules in order to qualify under Article 9, or that the tribal CT law expressly state what law governs priority, or incorporate the Article 9 rules on perfection and priority; Article 9 clearly applies, by its own terms, to resolve certain issues and as to other issues it directs the analysis to other applicable law, whatever it may be.

The Article 9 deference to the CT law at section 9-311(a)(3) is specifically limited to the mechanics of perfection, and providing those mechanics is all that the state or tribal CT law need do. Section 9-303 then directs the analysis to the applicable priority law. As discussed below at Parts VII. and VIII., the Tenth Circuit opinion in *Wilserv* basically follows this analysis, except as to one crucial point: The Tenth Circuit held that, absent evidence of a sufficient tribal secured transactions law, the tribal CT is not a CT under Article 9 and therefore sections 9-303 and 9-311(a)(3) (otherwise deferring to the tribal CT law) do not apply.

E. Summary

There is nothing in UCC Article 9 that requires a tribal CT procedure (or any state CT law) to expressly include or reference the applicable priority rules (whether they are in Article 9 or elsewhere), or the consequences that result from providing an indication of a security interest on the CT. If this were the test, many state CT laws currently in force would fail to qualify, and the perfection of vehicle security interests all over the United States could be called into question.

When Article 9 says at sections 9-102(a)(10) and 9-311(a)(3) that the applicable CT law must provide for an indication of the security interest on the CT as a means or result of obtaining priority, it simply means the CT law must provide an avenue to that result. It does not mean the CT law must restate the law of security interests, or replicate the Article 9 perfection and priority rules, or reaffirm the limited reference to the CT law in Article 9, as all of that is already specified in Article 9 at sections 9-109, 9-303(c) and 9-311(a)(3). The Article 9 language at sections 9-102(a)(10) and 9-311(a)(3) (defining "certificate of title") simply requires a procedure designed to result in indication of a security interest on the CT as a means to provide public notice, *i.e.*, the equivalent of filing an Article 9 financing statement, in order to create perfection and priority pursuant to Article 9 and other applicable law.[66] Whether that results in priority in a given case then depends on Article 9 or the other applicable law, determined pursuant to the choice of law rule at section 9-303(c).

Any other interpretation of sections 9-102(a)(10) and 9-311(a)(3) and (b) would mean that every state CT law could potentially meet the same fate as the Creek Nation law did in *Wilserv*, because few if any state CT laws include sufficient priority rules or expressly provide for perfection under the applicable rules of Article 9 or other law. CT laws don't need to do this, and should not, because that is the role of Article 9, not the CT law. Any other view would mean that every state would apply an unrealistic and inappropriate test to every other state's CT law, under Article 9 sections 9-102(a)(10) and 9-311(a)(3). This could lead the courts of every state to question the CT laws of other states, perhaps then refusing to recognize security interests perfected in other states, creating absurd and unnecessary problems in the vehicle financing industry nationwide. This is obviously not a correct or intended interpretation of Article 9.

The facts of *Wilserv* required application of the tribal CT procedure to determine whether the mechanics of perfection have been achieved, and application of tribal priority law to resolve the priority conflict in the case, pursuant to the choice of law rules at section 9-303. This means an analysis of the tribal law governing secured transaction priorities, to determine how a tribal court would rule in the case. This is a relatively straightforward exercise if the tribe has enacted Article 9; otherwise, it seemingly would require consideration of tribal common law, including, if appropriate, application by analogy of the tribe's version (or variation) of the nearly universal "first in time, first in right" basic priority rule. It is on this issue that the Tenth Circuit decision in *Wilserv* may have its most immediate impact: In *Wilserv*, the Tenth Circuit indicated that a reliance on tribal common law (at least as such law was documented in the *Wilserv* case) is not enough, and that the result is that tribal CTs (and lien entries) are not recognized under Article 9 or in bankruptcy. As noted below at Parts VI.–VII., the consequences may be significant.

Clearly the smooth functioning of this area of law will be facilitated if the tribes and states enact UCOTA, and the tribes enact Article 9. But in the meantime it is important for all parties to understand the existing relation between state and tribal laws, as discussed by the Tenth Circuit in *Wilserv*.

VI. The Tenth Circuit Decision in *Wilserv*

On January 24, 2008 the Tenth Circuit U.S. Court of Appeals issued its decision in *Malloy v. Wilserv Credit Union (In re Harper)*,[67] affirming the decision of the Tenth Circuit BAP,[68] and holding that the Creek Nation CT was not a CT as that term is defined in UCC Article 9.[69] Thus, the Tenth Circuit concluded, the Article 9 deference to perfection under the CT law[70] did not apply, and because the security interest was not otherwise perfected under Article 9, it was "avoidable" by bankruptcy trustee under 11 U.S.C. section 544(a).[71]

The court's foundational conclusion was that the Creek Nation CT did not qualify as a CT under Article 9 because neither the tribal CT law nor any other Creek Nation law provided for the perfection and priority of a security interest indicated on a Creek Nation CT.[72] Therefore, the CT did not meet the Article 9 requirement that the CT be created pursuant to a law that provides for indication of the security interest on the CT as a condition or result of priority over a lien creditor.[73] The Tenth Circuit disagreed on this point with the *Amici* brief,[74] which argued that the UCC Article 9 rules at sections 9-102(a)(10), 9-303(c) and 9-311(a)(3) require the court to consider what the result would be under the priority law of the jurisdiction that created the CT, whether that priority law is expressed in a statute or common law.[75]

Instead, the court concluded that, in the absence of evidence of a proper tribal statute, "there is too little to go on."[76]

The good news is that, in reaching this conclusion (and whether or not one agrees with it), the court conducted a basically sound analysis of Article 9 and its relation to the applicable CT law (as did the bankruptcy court and BAP in their turns), and thus *Wilserv* has much to commend it in terms of reaffirming essential legal principles. Along the way the Tenth Circuit opinion also addressed some related issues, though not always resolving them because of its ultimate disposition on the grounds noted above. Each of these aspects of the *Wilserv* decision is noted below.

The court noted various alternatives to CT lien entry perfection, as relevant in a case like *Wilserv* where the attempted CT perfection was held to be ineffective. The potential alternatives noted by the court include: (1) perfection by filing (section 9-310(a)); (2) perfection pursuant to a tribal law or procedure under the nonuniform 2005 Oklahoma amendment at section 1-9-311(a)(4) (not applicable here because the Creek Nation was deemed not to have a sufficient law or procedure to qualify the CT as such under Article 9 (*see supra* Part IV.), and because the secured party did not meet the thirty day deadline in the 2005 Oklahoma amendment); (3) Title 47 Okla. Stat. section 1110(A)(1) and (G) (the Oklahoma CT law), which purports to recognize tribal CTs but was deemed inapplicable, again due to the lack of a sufficient tribal law;[77] and (4) automatic perfection of a purchase-money security interest (PMSI) in consumer goods under UCC section 9-309(1) (inapplicable in *Wilserv* because the secured party was

65. *See* Patrick J. Malloy, III, Trustee v. Wilserv Credit Union, BAP No. NO-06-76, 2007 WL 45918 (Order and Judgment, filed Jan. 9, 2007), slip op. at 5: "The Credit Union has not provided the Court with any applicable Muscogee Nation law providing for the perfection or priority of a lien on a motor vehicle"; Patrick J. Malloy, III, Trustee v. Wilserv Credit Union, No. 05-13352-R (Bankr. N.D. Okla. June 7, 2006), slip. op. at 11: "The parties did not supply any Creek Nation law resembling a commercial code or procedure that governs [the] creation, perfection, priority, or foreclosure of liens on personal property." *See also* discussion of the Tenth Circuit opinion, *infra* at Part VII.

66. *See* §§ 9-308(a), 9-310, and 9-311(a)(3) and (b).

67. 516 F.3d 1180 (10th Cir. 2008).

68. *In re* Harper, 2007 WL 45918 (10th Cir. BAP Jan. 9, 2007).

69. UCC § 9-102(a)(10). *See supra* Part VI.

70. UCC § 9-311(a)(3).

71. *Wilserv, supra* note 67, No. 07-5016, slip op. at 2.

72. *Id.* at 5.

73. *Id.* (paraphrasing the requirements of UCC §§ 9-102(a)(10) and 9-311(a)(3)).

74. Coauthored by your author. *See supra* note 50.

75. *Wilserv, supra* note 67, No. 07-0516 slip op., at 15.

76. *Id.* This appears to give too little weight to the role of common law, although clearly a tribal secured transactions statute would help. On the latter, *see, e.g.*, Bruce A. King, *The Model Tribal Secured Transactions Act and Tribal Economic Development*, 61 Consumer Fin. L.Q. Rep. 804 (2007).

77. *See* discussion in this text below. The court should have also noted that Title 47 Okla. Stat. § 1110 does not apply on these facts because that is not the correct choice of law under Article 9 § 9-303(c). Regrettably, the court declined to recognize this basic point, which has previously caused confusion for other courts and under *Wilserv* may do so again. *See* discussion *supra* at Part III., and immediately below.

deemed not to have a PMSI).[78] The Tenth Circuit also rejected a constitutional argument based on the *Prairie Band* case, on grounds that the issues in *Wilserv* were fundamentally different and did not implicate constitutional issues.[79]

A slight disappointment in the Tenth Circuit opinion (from your author's perspective, and aside from the outcome) was the court's decision not to address a fundamental point, raised in the *Amici* brief: that the Oklahoma CT law (Title 47 Okla. Stat. section 1110) does not apply to a CT created by another jurisdiction, and would only apply if an application for an Oklahoma CT or an Oklahoma lien entry form had been filed. This is clearly the law on these facts under UCC sections 1-301, 9-109, 9-301, and 9-303(c).[80] Since the court rejected the application of Title 47 for other reasons, the court was free to disregard this point. However, it would seem that Article 9 is clear on this point,[81] and the court could easily have cited this as an additional (and even more fundamental) reason why Title 47 did not apply, thereby clarifying some potentially misleading language in other Oklahoma bankruptcy cases that form part of the case law on this issue.[82] Instead the *Wilserv* court was content to describe these basic points as "interesting arguments" that did not need to be addressed,[83] because as noted the court decided the case on other grounds. Of course, this hardly qualifies as a valid criticism of the *Wilserv* decision; one cannot expect a court to reach out and unnecessarily address every issue. But it does leave an important issue potentially subject to continuing judicial confusion, in an area of law where there is already more than enough of that to go around.

As noted, the basic decision in *Wilserv* was that the Creek Nation CT was not a CT for purposes of perfecting security interests, under UCC Article 9 section 9-102(a)(10), due to a lack of sufficient tribal CT and secured transaction laws. But the decision also has various interesting and potential secondary implications, as discussed below.

VII. Implications of *Wilserv*

An obvious implication of *Wilserv* is that secured parties everywhere, who have relied on tribal CT lien entry as a means of perfection, may have concerns about the effectiveness of that perfection. One can imagine that bankruptcy trustees may examine tribal CT perfections very closely, especially in cases where a tribe does not have a full-blown CT and secured transactions law,[84] looking for a basis to avoid the security interest. Thus we may see more such cases.

For secured parties, the good news is that there are still some lines of defense. The numerous alternatives to CT perfection, rejected in *Wilserv* on the facts of that case,[85] may apply in many other cases, *e.g.*: (1) it may be possible for the secured party to perfect by filing a financing statement pursuant to UCC section 9-310(a), in cases where there is no CT (in some instances, secured parties with credit contracts secured by certain tribal CT lien entries may wish to file financing statements as a "back-up" means of perfection, although this is obviously impractical in other cases); (2) in many cases the secured party will have a PMSI subject to automatic perfection under UCC section 9-309(1), again if there is no CT (creditors may wish to avoid non-PMSI [*i.e.*, refinancing] transactions involving questionable tribal CTs, in order to stay within the possible protection of section 9-309); (3) in some cases the tribe in question may have clearly defined rules (*e.g.*, by enactment of UCC Article 9 and/or UCOTA) to support a valid CT perfection mechanism (obviously tribal enactment of Article 9 and UCOTA would avoid much uncertainty on these issues); and (4) finally, the reliance of the *Wilserv* decision on its analysis of the Creek Nation law means that a similar *de novo* analysis may be required in other cases, perhaps with results different than in *Wilserv*.

Finally, although not noted in the *Wilserv* case, and perhaps not entirely clear under many current CT laws (but quite clear under UCOTA; *see infra* Part VIII.), it is possible that filing a "lien entry" form under the state's CT law could constitute perfection in that state in cases where no valid CT has been issued in any jurisdiction. This requires an analysis of the state's conflicts of law rules and CT law, as well as UCC sections 1-301 and 9-301 (and may raise difficult issues in the context of tribal law[86]), but offers the prospect of another alternative in cases where the vehicle is covered by an inadequate CT law. As noted *infra* at Part VIII., enactment of UCOTA by the state clarifies this. In the absence of UCOTA, this multiplicity of alternatives alone poses unnecessary challenges and risks in these transactions.

Absent a solution like UCOTA (as noted *infra* at Part VIII.), the focus in *Wilserv* on the need for evidence of tribal law means that each applicable tribal law may need to be examined, and reexamined whenever there is a change in that law, on essentially a case-by-case basis. Moreover, the standards for that review are not entirely clear. Obviously, a tribe that has enacted UCOTA and Article 9 will have a sufficient statutory basis for

78. *Wilserv, supra* note 67, No. 07-0516, slip op. at 7-10. At this point the court also noted its rejection of various subrogation and equitable subordination arguments. *Id.* These were rejected by the Tenth Circuit and the lower courts, for various reasons stated by the courts (relating to application of these theories of law). More properly, the equitable subordination theory is displaced by UCC Article 1. *See Wilserv, supra* note 67, No. 07-0516, slip op., at 18-19, and UCC Article 1 § 1-103(b). The court's rejection of the PMSI and subrogation arguments is more questionable. *See, e.g.*, Harrell & Miller, *supra* note 1, at 2205-06 and nn.6 and 18-19.

79. *Wilserv, supra* note 67, No. 07-0516, at 18-19, citing *Prairie Band*, 546 U.S. 1072 (2005). This point is correct, as the issue in *Wilserv* related to the definition of "certificate of title" in UCC section 9-102(a)(10), which does not have a direct constitutional dimension.

80. UCOTA is even more clear on this point. *See infra* this text at Part VIII.

81. *See id.*; and again *see* UCC §§ 1-301, 9-109, 9-301, and 9-303(c).

82. *See In re* Snell, No. 04-14329-M (Bankr.N.D. Okla. Sept. 5, 2005), discussed *supra* at Part III.

83. *Wilserv, supra* note 67, No. 07-5016, slip op. at 12.

84. At this writing several Oklahoma tribes, including the Cherokee Nation, have adopted UCOTA and/or Article 9.

85. *See supra* this text at notes 77-78.

86. *See, e.g.*, Harrell & Miller, *supra* note 1, at 2208-09, noting some of these issues.

CT perfection. But what about the others? What kind of statute, other than UCOTA and Article 9, is sufficient? Is evidence of tribal common law ever enough?

Wilserv leaves these issues in a state of counterproductive uncertainty, and considerable litigation may be needed to resolve these matters on an individualized basis, perhaps with some nasty surprises along the way. This cannot help having an adverse impact on the cost and availability of credit (just as these problems are already growing).[87] The good news for secured parties, one supposes, is that such litigation will provide an opportunity for secured parties to relitigate the sufficiency of a tribal CT in virtually every case, with the hope that each time a tribal law is attacked there will be something in that law to distinguish it from the *Wilserv* case and meet the test for a CT in Article 9 section 9-102(a)(10). For the tribes that have enacted UCOTA and Article 9, defense of the CT law is easy and this alone should discourage additional litigation. And, of course, it is all part of a problem that the other tribes can easily fix, anytime they want, by enacting UCOTA and Article 9.

There are risks and opportunities in all of this for the states as well. Obviously, the states have enacted Article 9, and all have CT statutes intended to provide a means of CT perfection for vehicles (and many for watercraft and manufactured homes as well). However, as the case law discussed here reveals, and as illustrated by a comparison of the issues addressed in UCOTA versus the state of current CT laws, many CT laws are outmoded, unclear, contradictory to other law, and do not relate properly to Article 9 and other parts of the UCC. As a result, significant problems are evident with regard to these laws, and the case law reflects this (with other problems potentially below the surface, evident to some but apparently not to others--yet). These deficiencies in state CT laws make the problems resulting from a case like *Wilserv* worse, *e.g.*, by multiplying the issues rather than providing a simple alternative solution as does UCOTA (*see infra* Part VIII.), thereby creating new analytical complications in their uneven relation to Article 9 (*see supra* Parts II.–IV.).

The creativity of some of the arguments asserted in the line of Oklahoma bankruptcy cases that culminated in *Wilserv,* and the intricacy (and, in some cases, shortcomings) of the resulting judicial analyses, suggest the potential for as-yet unprecedented attacks on the efficacy of some state CT laws. The tendency of some states to enact piecemeal CT law amendments, in an apparent legal vacuum, *e.g.*, authorizing electronic records as the substitute for a CT without addressing the related issues that this raises, exacerbates this risk.

In some states the office that creates CTs may be so preoccupied with other issues, *e.g.*, the federal Real ID Act[88] and even the issue of drivers' licenses for undocumented aliens, that there may be a tendency to push aside the issues noted here. As a result, there is at least some risk that state CT laws will become increasingly disconnected from the other laws and issues relevant to routine CT transactions, and therefore could be at risk of being deemed inadequate under the test required for CT perfection under Article 9 or for other purposes.[89] The dramatic failure of the tribal CT perfection laws in *Wilserv* could be merely a precursor to even bigger troubles at the state level, perhaps ultimately putting at risk our entire system of state CT laws. While that may seem far-fetched today, no doubt the same was thought to be true of tribal CTs not many years ago.

Finally, it should be noted again that the states can themselves largely address the problems with tribal CT and secured transaction laws, as illustrated in *Wilserv,* and avoid the ensuing litigation over tribal CT laws, by enacting UCOTA.[90] As noted below, UCOTA sections 25 and 26 permit perfection by filing a security-interest statement with the state CT office, in cases where no valid CT has been created in any jurisdiction (assuming the CT office wishes to accept such filings). The CT office can set a fee which makes this economically attractive for all parties, thus providing a logical and convenient "back-up" system of perfection in the event the tribal CT fails to pass muster. Together with a lien entry on the tribal CT, this also provides the most effective means of public notice available. Given the probability that, even in the most rosy scenario, there will be tribes somewhere that issue CTs without a proper statutory foundation, this alone provides a clean, simple, and important solution--and another reason fo the states to enact UCOTA.

VIII. How UCOTA Addresses These Problems

A. Why the Other Solutions Don't Work

The basic problem in a case like *Wilserv* is that the tribal secured transactions and CT laws are deemed not to meet the requirements of Article 9 section 9-102(a)(10). While this can be addressed by a tribe, *e.g.*, by tribal enactment of Article 9 and UCOTA, this requires a tribe-by-tribe solution, and some risks will remain as long as there is uncertainty about tribal law. In contrast, enactment of UCOTA by the state provides a simple state-wide solution that is also respectful of tribal laws and CTs.

Solutions involving an amendment to Article 9, like the 2005 Oklahoma amendment at section 1-9-311(a), don't work because section 9-311(a) only

87. *See, e.g.*, Associated Press, *Massive new programs aimed at loosening credit*, Oklahoman, Nov. 26, 2008, at 3B (reporting that the financial bailouts programs to that date totaled a "staggering $7 trillion"). UCOTA would be cheaper.

88. *See, e.g.*, Ja'Rena Lunsford, *Getting Real? 17 States Opposing New ID Law*, Oklahoman, Jan. 26, 2008, at B1; *see generally* Elizabeth A. Huber, *The Real Deal with the Real ID Act of 2005*, 61 Consumer Fin. L.Q. Rep. 362 (2007).

89. It is not the purpose of this article to create alarm or point out specific deficiencies in current state CT laws, so it is sufficient to note again that, among other things, the interface of current CT laws with the UCC is often poor, creating unnecessary conflicts and uncertainties that can be a breeding ground for unnecessary litigation. The long path of the litigation that led to *Wilserv*, and the many disingenuous arguments that had to be dealt with along the way, serve to illustrate this point. *See also* Campbell, *supra* note 12.

90. *See infra* Part VIII.

applies if there is a qualifying CT law under section 9-102(a)(10) (otherwise there is not a "certificate of title" for purposes of the choice of law rules at sections 9-303 and 9-311(a)). Of course, if the definition of "certificate of title" at section 9-102(a)(10) is revised,[91] this change could mean that tribal CTs are recognized under Article 9 even if the tribal law does not meet the current requirements for secured transactions and CT laws. But this would represent a more drastic solution, and still would require an analysis of tribal laws in each case (an uncertain and potentially expensive prospect), since the result would be a reference to tribal perfection and priority rules pursuant to section 9-303, even if those rules were inadequate or unclear. Again, UCOTA offers a far more simple and practical solution.

B. How UCOTA Solves the Problem

There are two basic aspects to the problem: (1) providing a choice of law analysis that will properly address the issues; and (2) providing a result, *i.e.*, a chosen law, that works. UCOTA does both.

First, the choice of law analysis: Current law, at Article 9 sections 9-102(a)(10), 9-303, and 9-311(a), requires an arcane analysis of whether tribal (or state) CT and secured transactions laws are sufficient to meet the Article 9 tests. If not, another arcane analysis is required, *e.g.*, as to tribal law under the choice of law rules at section 9-301. All of this leads to an analysis of sometimes unclear tribal law.

In contrast, the applicability of UCOTA is governed by UCOTA section 4, which provides an independent basis for the application of UCOTA in these circumstances, a feature missing from virtually all CT laws today. UCOTA section 4 "fits" with Article 9 section 9-303, so that a choice of law reference in section 9-303 to a state that has enacted UCOTA will create a seamless transition to UCOTA for perfection purposes, leaving no "gap" (or conflict) in the applicable laws. However, if section 9-303 is inapplicable, *e.g.*, because there is not a qualifying CT under section 9-102(a)(10) (as in *Wilserv*), Article 9 section 9-301(1) will refer to the law of the state of the debtor's location (*see also* section 9-307), for the rules governing perfection, and (as noted below) if that state has enacted UCOTA the result will be application of UCOTA. This is also consistent with UCOTA section 4(e)(2) (recognizing the enacting state's choice of law rules in the absence of a CT or an agreement to the contrary).

Thus, in the absence of a CT that qualifies as such under Article 9 section 9-102(a)(10) (*e.g.*, where the only CT is a tribal CT that does not meet the requirements of section 9-102(a)(10)), both UCOTA section 4(e)(2) and Article 9 section 9-301(1) will refer to the law of the debtor's location. If that jurisdiction has enacted UCOTA, that will trigger application of UCOTA section 26. Section 26 will apply directly, by its own terms, pursuant to section 26(a): "...a security interest in a vehicle may be perfected only by a security-interest statement that is effective under [UCOTA] Section 25." Section 26(a) also states that perfection occurs upon receipt of the security-interest statement by the appropriate office under section 25, or attachment under Article 9 section 9-203, whichever is later. UCOTA section 26(d) defers to Article 9 for vehicles held as inventory, consistent with Article 9 section 9-311(d), and provides for perfection by possession only as provided in Article 9 sections 9-311(b) and 9-316(d).

While this result is provided directly under Article 9 section 9-301 and UCOTA section 26(a), it is also provided for under Article 9 sections 9-102(a)(10) and 9-311(a). Section 9-311(a)(2) defers to the enacting state's CT law (in our hypothetical UCOTA) for purposes of perfection, if that CT law "provides for a security interest to be indicated on the [CT] as a condition or result of perfection, [or is a] non-[UCC] central filing statute." UCOTA clearly qualifies for that reference to a CT law; thus (assuming enactment of UCOTA and its incorporation by reference at Article 9 section 9-311(a)(2)), UCOTA section 26(a) would be applicable in a *Wilserv* scenario (where there is no qualifying CT that covers the vehicle), both pursuant to Article 9 section 9-311(a)(2) and UCOTA section 26(a). As in other respects, UCOTA solves the *Wilserv* problem in a manner consistent with the UCC and other law, without disrupting current norms and practices.

C. Practice Under UCOTA

Assuming enactment of UCOTA, in a case like *Wilserv* where the vehicle is covered by a tribal CT that may or may not qualify as such under Article 9 section 9-102(a)(10), the secured party could simply file a security-interest statement with the state CT office under UCOTA sections 25-26, as an adjunct to a lien entry on the tribal CT. If the tribal CT lien entry turns out to be a sufficient means of perfection under Article 9 sections 9-102(a)(10), 9-303, and 9-311(a), the state filing will be unnecessary (though perhaps still a useful form of public notice). But if there is a question as to the validity of the tribal CT under section 9-102(a)(10), or the tribal CT lien entry is attacked under tribal law, the state filing under UCOTA is a useful and cost-effective alternative means of perfection. Either way, the UCOTA filing is cheap insurance, if there is any doubt about tribal CT lien entry perfection.

The filings under UCOTA also would represent additional fee income for the CT office, and some CT offices already allow similar filings (*e.g.*, a lien entry form without an accompanying CT or CT application). This is currently also important in entirely different scenarios, *e.g.*, where the secured party finances a new vehicle purchase and the buyer fails to apply for a new CT or delays the application beyond the thirty day period provided in section 547 of the Bankruptcy Code.[92] UCOTA will not require any change in this filing office procedure in those states (note that the statutory basis for that procedure, provided by UCOTA, is often missing in current CT laws). Most current CT laws do not provide an independent basis for filing a lien entry form, in the absence of a CT or CT application. As illustrated by the Oklahoma cases noted in this article, this means there is no basis for recognizing a lien entry form filed with the state CT office as a means of perfection for a vehicle covered by a tribal CT (or not yet covered by any CT) even if the state CT office accepts such filings. Once again, UCOTA resolves this problem, by providing a clear "fit" with Article 9 and providing a proper basis for perfection in cases not covered by other appropriate laws.

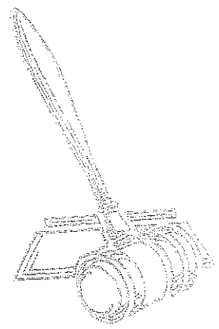
IX. Conclusion

The 2005 Oklahoma amendment at section 9-311(a)(4) illustrates the pitfalls for a state enacting piecemeal solutions to CT problems; it was an effort to resolve the basic issues highlighted in *Lawson*, *Dalton*, and *Snell*, as regards the validity of lien entry perfection under tribal CT procedures. Unfortunately, the related laws and issues are so complex and intertwined that such solutions are likely to do more harm than good. The 2005 Oklahoma amendment, for example, does not (and cannot) address the basic viability and interpretation of tribal CT and secured transactions laws, and further comes at a significant cost in terms of nonuniformity and choice of law uncertainty. As a result, much of the confusion and uncertainty caused by previous analytical lapses in these case decisions remains unresolved, even exacerbated, leaving the potential for residual misunderstandings about the proper roles of the various laws involved. As a result, a case like *Wilserv* probably was inevitable, and it may not be the last.

As has been demonstrated before, CT issues can quickly become more complicated than anticipated, and analytical errors in one case can be multiplied in future years in others.[93] Fortunately, in this context there is a simple and easy solution, presently available for both the states and tribes. The enactment of UCOTA can resolve or prevent all of these problems. In the meantime, the potential for considerable mischief remains.

Among the residual questions left unanswered or needlessly lingering after *Wilserv* are: (1) Will courts persist in seriously considering unmerited arguments that a state's CT law applies to CTs created by other jurisdictions, including Indian tribes?; (2) will the courts continue to seriously consider arguments that a state CT law is the proper place for secured transaction priority rules that effectively contradict the state's Article 9 as to secured transactions priority issues?; (3) is a CT valid under section 9-102(a)(10) and 9-311(a)(3) only if the tribal law includes specific priority rules?; (4) if the prior question is answered yes, does this mean that CT perfection is invalid in every tribal jurisdiction that has not enacted Article 9 or something like it?; (5) if a tribe has not enacted UCOTA and Article 9, what are the standards for determining whether tribal law is sufficient?; (6) what is the proper evidence and role of tribal common law?; (7) will the CT laws in the states be interpreted to have priority rules, so as to comply with a misinterpretation of section 9-102(a)(10), thereby creating a new series of conflicts with Article 9?; (8) are tribal CTs, that are invalid for perfection purposes under the laws of other states which (unlike Oklahoma) have the uniform text of Article 9 section 9-311(a), valid in cases filed in Oklahoma because of Oklahoma's nonuniform section 9-311(a)(4)?; (9) what is the effect in Oklahoma of a contractual choice of law clause that makes a valid choice of another state's law that does not include Oklahoma's nonuniform section 9-311(a)(4)?; (10) are CTs that are invalid under the uniform text of Article 9 sections 9-102(a)(10) and 9-311(a) in other states somehow validated by the "wild card" language in the Oklahoma CT law, purporting to validate tribal CTs?; (11)what law will be applied by courts in other states that are confronted with lien entry perfection on a CT created by an Oklahoma-based tribe?; and (12) how will the courts determine tribal CT and secured transactions rules, in the absence of a code or established tribal case law? And, of course, (13) how will creditors, car dealers, consumers, banking regulators, and others deal with these issues in everyday transactions. The answer to these questions may be vital to the purchase and finance of thousands of motor vehicles. A proper interpretation of Article 9 will resolve many (though not all) of these questions, though this may not be apparent to a casual reader of Article 9 and the case law. Beyond this, a comprehensive solution requires the enactment of a solution like UCOTA.

Hopefully, UCOTA will be enacted by the states and tribes, to clarify, simplify, and resolve these issues. It can come none too soon.



91. This is reportedly under consideration, but it is not clear how broadly the definition will be revised or if the change will have a direct impact in this context. *See supra* note 62.

As noted *supra* at note 62, the current Drafting Committee on Amendments to UCC Article 9 presented a discussion draft at the 2009 NCCUSL Annual Meeting, including a proposed addition to § 9-102(a)(10) to include certain CT office electronic files within the definition of a CT. This is apparently intended essentially as what UCOTA defines as an "electronic CT," though without answering the wide range of related questions that are addressed in UCOTA. For example, the Article 9 revision would preserve Article 9 perfection via § 9-311(a), by deeming the CT office file to be a CT for perfection purposes, but does not (and cannot) cure deficiencies in state CT laws relating to the specifics of the CT perfection process (*compare* UCOTA §§ 25-26). As a result it may not be clear which CT files constitute a CT and which do not, and whether filing a notice of security interest is sufficient (absent a full application for a CT). Choice of law issues also are implicated, as an electronic file that constitutes a CT could trigger a change in the choice of law under § 9-303.

In the context of tribal CTs, this raises the possibility that a tribal CT (indicating a security interest perfected under tribal law) could be displaced by creation of an electronic file in the state CT office (however that file is created). This could result in the simultaneous creation or maintenance of multiple CTs, and some interesting conflicts scenarios. Piecemeal enactment of the proposed addition to § 9-102(a)(10) would create nonuniformities among the states that could add yet another dimension to the issue. It is not difficult to envision a new range of interstate conflicts and litigation as a result.

92. 11 U.S.C. § 547(c)(3)(B).

93. *See, e.g.*, Campbell, *supra* note 12.