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Introduction to Symposium on Revised UCC Article 9

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Symposium: Revised UCC Article 9

Introduction to the Symposium

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I. Introduction

In early 1990 the Permanent Editorial Board (PEB) for the Uniform Commercial Code (UCC), in conjunction with its sponsors,[1] established the PEB UCC Article 9 Study Group, to study and consider the possible need for revision of UCC Article 9.[2] The Study Group spent several years engaged in a comprehensive study of UCC Article 9, the primary law governing security interests in personal property and generally recognized as the most innovative and important part of the UCC. On December 1, 1992 the Study Committee issued its Report,[3] recommending Article 9 revisions in three broad categories: (1) Revisions to broaden the scope of Article 9 to include personal property then excluded from Article 9 (*e.g.*, certain tort claims, deposit accounts, insurance claims, and real estate-related interests); (2) revisions to improve the public notice function of perfection by filing (*e.g.*, by improving the filing system); and (3) revisions to clarify and improve the provisions in old Article 9 Part 5 regarding enforcement of security interests.[4] The Report also recommended miscellaneous improvements affecting such things as the relationship between Article 9 and non-UCC liens, security interests in proceeds, and purchase money security interests.[5] But the Report concluded that old Article 9 was "fundamentally and conceptually sound," and accepted the traditional purposes of the UCC as a guide for the proposed revisions.[6]

In 1993 the sponsors of the UCC addressed the recommendations of the Study Group, by assembling a UCC Article 9 Drafting Committee to consider and draft proposed revisions for consideration by the NCCUSL and ALI.[7] The Drafting Committee and Reporters (along with various advisors, task forces, observors and others) drafted, circulated, considered, and revised numerous tentative drafts of proposed Article 9 revisions. The proposed revisions were considered and approved by the ALI and NCCUSL in the summer of 1998.[8] The revisions were offered to the states for enactment beginning with the 1999 legislative sessions, with a uniform effective date of July 1, 2001.

To a significant extent, the Drafting Committee followed the agenda of the Study Group Report, proposing for consideration revisions based on the Study Group recommendations. The disposition of these proposals by the Drafting Committee varied, however, with most proposals being favorably received (though often revised) and others not. On some issues the Drafting Committee reversed its position one or more times, and the debate on nearly all issues was thorough and lively.[9]

Many of the most fundamental proposals (*e.g.*, the proposed nationwide filing rule[10]) survived the process and are included in the revised uniform text. While some of the revisions may be controversial in some quarters, most are not. Aside from possible concerns over the increased complexity of the revised text,[11] most of the revisions affecting commercial (as opposed to consumer) transactions represent clear improvements in the law and likely will be embraced by knowledgeable parties.[12] In short, many of the proposals earlier identified in the Study Group Report have now been incorporated to some extent in the proposed Article 9 revisions, are subject to a broad and favorable consensus, and seem headed for nearly uniform nationwide enactment. This *Introduction* will note some of the most important of these, in an effort to anticipate some of the issues likely to be encountered by those who engage in secured lending transactions in the 21st century. The relevant issues will then be discussed in more detail elsewhere in this *Symposium*.

II. The Wild Card: Consumer Transactions

The 1992 Article 9 Study Group Report generally avoided consideration of consumer transaction issues, instead focusing on the core commercial law issues. The Article 9 Drafting Committee was not afforded the luxury of this option. Consumer groups discovered the importance of the UCC revision process after the UCC Article 3 and 4 revisions were approved by the ALI and NCCUSL,[13] and were very active participants in the Article 9 Drafting Committee meetings from the beginning.

As a result the Article 9 Drafting Committee was forced to confront a wide range of consumer protection issues throughout the Article 9 revision process, thus interjecting additional political and philosophical issues normally not addressed in the context of commercial law. At times the divergence of views on these issues seemed to threaten disruption of the process,[14] and until very late in the process the outcome on some of these issues remained uncertain. Your author and others have previously described some of the disputes relating to proposed consumer issues, and the historic compromise that finally resolved the impasse.[15]

The Article 9 Drafting Committee formed a Consumer Issues Subcommittee in an effort to reach a compromise between the consumer and creditor representatives, and the resulting report and recommendations were offered as a basis for compromise.[16] However, some of the recommendations were unacceptable to creditor representatives,[17] and the consumer representatives continued to press for additional consumer transaction rules. At one point the divisions were so deep that the creditor representatives withdrew from the Consumer Issues Subcommittee and announced an inclination to oppose enactment of the revisions if the proposed consumer transaction rules were included.[18]

The consumer issues represented the most contentious aspect of the Article 9 revision process. For awhile it seemed possible that these issues would not be susceptible to uniform resolution on a nationwide basis, meaning that the consumer transaction proposals could essentially block the entire revision process. Fortunately, this did not happen, and a historic consumer issues compromise was reached, allowing all parties to agree on a new uniform text. The specifics are described in Tom Buiteweg's article in this *Symposium*; suffice it to say here that all of those involved in developing this compromise deserve the thanks of those who appreciate the importance of revised Article 9.

III. Fundamental Considerations in the Revision Process

Early in the Article 9 revision process, various fundamental observations were made regarding the process and the intellectual environment facing the Article 9 Drafting Committee, including:

A. More Open Process

The uniform law drafting process today is far more open to diverse viewpoints than in the past. Consumer advocacy groups and organizations are very active, for example, in contrast to previous uniform law revision efforts. The process is now more political and less an isolated academic exercise than

1. The UCC and the PEB are sponsored by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI).

2. The Reporters for the Article 9 Study Group were Professors Steven L. Harris and Charles W. Mooney Jr., who went on to become the Reporters for the UCC Article 9 Drafting Committee.

3. PEB Study Group Uniform Commercial Code Article 9 Report 1 (PEB Dec. 1, 1992) (Report). Copies of this Report and associated appendices are available from:

   Permanent Editorial Board
   for the Uniform Commercial Code
   4025 Chestnut Street
   Philadelphia, Pennsylvania 19104-3099

4. *Id.*, at 10-11. The UCC Article 9 uniform text in effect prior to approval of the 1998 revisions will be herein referred to as "old Article 9."

5. Report, at 11-12.

6. *Id.*, at 6-7, citing the traditional goals of simplicity, clarity, and modernization of the law so as to permit the "continued expansion of commercial practices through custom, usage and agreement of the parties." *Id.*, at 7, citing UCC § 1-102(2)(a), (b).

7. *See supra* note 1. The chair of the Article 9 Drafting Committee is William M. Burke. As noted *supra* at note 2, the Reporters are Professors Harris and Mooney. The Drafting Committee consists largely of representatives from the PEB, ALI, NCCUSL, and American Bar Association. There are also a number of official "advisors" and "observers" from other organizations, including your author as an observor representing the Conference on Consumer Finance Law.

8. Various technical amendments were approved in 1999 and 2000. *See* http://www.nccusl.org/.

9. *See, e.g.*, Alvin C. Harrell, *The Article 9 Revisions—What Should be Done?*, 50 Consumer Fin. L. Q. Rep. 20 (1996).

10. *See* revised §§ 9-301 and 9-307.

11. To some extent the goals of simplicity and clarity are inherently in conflict, and in revised Article 9 the former has given way to a focus on the latter. As Professor Fred Miller noted during a meeting of the Oklahoma Bar Association UCC Article 9 Legislative Review Subcommittee, revised Article 9 is complex in part because complex issues exist and cannot be ignored.

12. A possible exception is the advocates of bankruptcy expansion, who may oppose improvements in the law of consensual secured transactions as representing a proportionate diminution in the rights of unsecured creditors and the trustee in bankruptcy.

13. *See, e.g.*, Gail K. Hillebrand, *UCC Articles 3 and 4 in the California Legislature: A New Focus on Consumer Protection in Uniform Law Proposals*, 47 Consumer Fin. L.Q. Rep. 123 (1993).

14. *See* Harrell, *supra* note 9.

15. *See, e.g.*, Alvin C. Harrell, *Article 9 Drafting Committee Considers Consumer Issues Subcommittee Report*, 50 Consumer Fin. L.Q. Rep 189, 195 (1996). *See also* Thomas J. Buiteweg, *New Consumer Provisions in Revised UCC Article 9*, in this *Symposium*.

16. *See Report of the Consumer Issues Subcommittee of the UCC Article 9 Drafting Committee*, 50 Consumer Fin. L.Q. Rep. 332 (1996).

17. *E.g.*, the attorney fee and statutory right of redemption proposals. *See, e.g.*, Harrell, *supra* note 9; Alvin C. Harrell, Commentary: *Should the Statutory Penalty at UCC Section 9-507(1) be Combined with Prevailing Party Attorney Fees?*, 50 Consumer Fin. L.Q. Rep. 343 (1996).

18. The consumer creditor position was that the benefits of the revisions (as then proposed) were directed at commercial transactions and offered little improvement for consumer lenders as compared to old Article 9, yet consumer creditors were being asked to pay the highest "price" in terms of increased complexity and more onerous statutory requirements for consumer transactions. Consumer advocates seemed to concede this point by responding that consumer creditors should agree to the proposed revisions because the creditors' commercial lending operations and affiliates would benefit from the revisions. As a result some consumer creditors concluded that they preferred old Article 9 to the revisions. For countervailing considerations, *see* Harrell, *supra* note 9.

in the past. For better or worse, this is affecting the end product, particularly with regard to consumer issues.

B. Common Law Versus Regulatory Models

Law revision efforts always face a choice between the common law model (essentially uniform basic principles, liberally construed, to effectuate the intent of private parties), and the regulatory model (typically including detailed requirements, strictly construed, and possibly with punitive remedies such as statutory penalties, to effectuate social goals by mandating involuntary behavior). The latter typically embraces an *in terrorem* approach, using strict penalties for harmless errors, in order to inspire fear and intimidation as compliance tools.[19] The UCC traditionally has embraced the former approach, and the Article 9 Drafting Committee generally sought to do likewise, but there have been some concessions to the regulatory approach, again particularly in the consumer area.

C. Abusive Consumer Practices

Similarly, the Drafting Committee has had to confront a basic conflict between the goal of facilitating commerce and a perceived need to concede a role for social and political judgements that certain classes of citizens need special protection against abusive practices. The cost-benefit analyses needed to resolve such conflicts proved elusive and often inconclusive, but the consumer issues compromise largely mooted the issue.

D. Uniformity and Enactability

The Drafting Committee had to confront periodic conflicts between the goals of uniformity and enactability; for a time it was perceived, for example, that consumer provisions essential to enactability in states such as New York, Massachusetts and California had to be included even at the risk of generating nonuniform amendments or even opposition in some other states. However, the consumer issues compromise largely resolved these issues.

E. Segregated or Integrated Provisions?

Early in the process the choice was faced between integrated and segregated consumer protection provisions. Segregated provisions would have favored enactability in some states, by facilitating deletion or amendment of provisions deemed undesirable in such states without structural alteration of the primary rules in the main text. However, this approach was rejected at the insistence of consumer groups, and the integrated approach was adopted. Again, the consumer issues compromise largely mooted this issue.

F. Fundamental Policy Issues

The Reporters repeatedly tried to emphasize the physician's mandate to "first, do no harm." Fundamental policy choices that form the basis for Article 9 were, for the most part, not revisited. Aside from the consumer issues and a few other matters, the focus was on improving the old law rather than making new law. For those who view law revision efforts primarily as an opportunity to overturn the current system of law, this may have rendered the effort a disappointment.

G. Filing System Issues

One of the most significant revisions for commercial lenders is the new national filing system. These revisions will resolve many thorny conflict of laws problems, and have been embraced uniformly with little or no dissent.

H. Recognizing Commercial Practice

The Drafting Committee generally sought to let the market lead, *i.e.*, to recognize and adopt standards based on existing commercial practices rather than seeking to mandate new practices. Again, some of the consumer proposals come to mind as an exception, but the consumer issues compromise largely reconciled this dichotomy.

I. Changing Technology

As noted above, with a few notable exceptions, the Drafting Committee favored an evolutionary approach, and has therefore sometimes been less daring than some would like. There is a common perception, however, that in ten or 15 years many of today's burning issues will have been resolved by advances in technology and commercial practice; there is a desire that today's revisions not impede this progress. Concerted efforts were therefore made to be sure revised Article 9 is media-neutral.

J. Other Problem Areas

Aside from the consumer issues, difficult issues arose in the context of bailments, buyers in the ordinary course of business, commingled goods, "all assets" claims, deposit accounts, tort claims, structured-settlements, and insurance. Difficult, measured, and sometimes hotly-debated decisions were made regarding these (and many other) issues. As with the consumer issues, the resulting compromises have been highly acclaimed and widely embraced by interested parties,and resolve many problem areas under old Article 9.

K. Scope

One way in which revised Article 9 is significantly expanded is in its scope. While this will be addressed in other articles elsewhere in this *Symposium*, some introductory explanation on this issue is provided below.

IV. Sales of Accounts and General Intangibles

Most of the UCC Articles are limited in scope to specified classes of personal property. For example, UCC Article 2 is limited to sales of goods,[20] Article 3 is limited to negotiable instruments,[21] Article 5 is limited to letters of credit,[22] Article 7 to documents of title,[23] and Article 8 to investment property including securities entitlements and financial assets.[24] Conspicuously absent from the otherwise comprehensive list of personal property sales covered by the UCC Articles outside Article 9, are the categories of accounts,[25] chattel paper,[26] non-negotiable prmissory notes, and general intangibles.[27]

Possibly because of a desire that the UCC comprehensively cover personal property sales transactions, and because sales of accounts and chattel paper are traditional financing devices (and thus may be difficult to distinguish from a secured loan), such sales have long been brought within Article 9 by the scope provision at old section 9-102(1)(b). This leaves sales of general intangibles and non-negotiable promissory notes as substantially the only sales of personal property not covered by the old UCC.[28]

The effect of old section 9-102(1)(b) is to include sales of accounts and chattel paper in Article 9 for some purposes (*e.g.*, the buyer may have to file a financing statement to be protected against claims of the seller's creditors, unless the transaction is excluded under old section 9-104(f) or excepted under old section 9-302(1)(e)), but not others (*e.g.*, the duty to account for a surplus upon the sale of collateral under old section 9-502(2)).[29] Regardless of these issues, however, it should be clear that old section 9-102(1)(b) does not convert absolute sales of accounts or chattel paper into secured transactions.[30]

Unfortunately, in *Octagon Gas Systems, Inc. v. Rimmer*,[31] the Tenth Circuit confused these issues and held that old section 9-102(1)(b) requires every sale of accounts (and presumably chattel paper) to be treated as a secured transaction for all purposes. This created significant potential problems for transactions involving absolute sales (*e.g.*, asset securitizations), and was justly criticized by commentators.[32]

The PEB responded by issuing Commentary No. 14,[33] and this was later incorporated more directly into UCC law as an amendment to Official Comment 2 to old section 9-102 (rejecting the rationale of *Octagon*).[34] Oklahoma further responded by codifying this comment and rejecting the *Octagon* rationale via a nonuniform amendment to old section 9-102.[35]

The lack of such an amendment in other states, the *Octagon* decision, the definition of "security interest" at UCC section 9-102(37), and the "squeamish" reaction of Professors White and Summers to the amendment of section 9-102 Comment 2, suggested lingering doubts on this issue in some quarters. Revised Article 9 deals with this issue at revised section 9-203(b)(2), requiring that a debtor can only create a security interest if he or she has rights in the collateral or the power to transfer such rights to a secured party,[36] and revised section 9-318(a), making clear that a seller of an account, chattel paper, payment intangible or promissory note does not retain such a right.[37] This resolves the problem on the facts of the *Octagon* case, though it leaves open the other aspect of the *Octagon* problem, where a buyer does not know it has an Article 9 transaction and therefore never perfects under Article 9. The expanded scope of revised Article 9 may make this even more likely.

For example, revised section 9-109(a)(3) brings sales of "payment intangibles" (essentially a general intangible for the payment of money[38]) and promissory notes within the scope of Article 9 for the first time, and revised section 9-102(a)(2) expands the concept of an Article 9 "account." The resulted is an expanded list of sales transactions subject to revised Article 9, thereby covering new ranges of buyers who may not know they need to file under Article 9.

V. Deposit Accounts

Old Article 9 does not cover a security interest in a deposit account, unless the security interest in the deposit account is claimed as proceeds of other Article 9 collateral.[39] However, old Article 9 spe-

19. *See* BALLENTINES LAW DICTIONARY 655 (3d ed. 1969).

20. UCC § 2-102 (limiting Article 2 to "transactions in goods").

21. UCC §§ 3-102, 3-104.

22. UCC § 5-103.

23. UCC §§ 7-101 - 7-104

24. UCC §§ 8-101 and 8-102.

25. Defined at old § 9-106 to include accounts receivable for a past performance and contract rights relating to a future performance.

26. Defined at old § 9-105(1)(b) as any writing that evidences a monetary obligation secured by an interest in goods, thereby including leases of goods and both negotiable and non-negotiable notes secured by an Article 9 security interest. If the chattel paper includes a negotiable instrument, the UCC Article 3 rules governing a holder in due course will prevail over Article 9 in the event of a conflict. *See* UCC §§ 3-302, 3-305; old §§ 9-308, 9-309; revised §§ 9-102(a)(3) and 9-331.

27. Defined at old § 9-106 as any personal property other than goods, accounts, chattel paper, documents, instruments, investment property, proceeds from letters of credit, and money (thereby including such things as intellectual property).

28. A security interest in a general intangible is, however, covered by old Article 9 (old § 9-102(1)(a)); sales of "payment intangibles" (defined at revised § 9-102(a)(61) as a general intangible for the payment of money) are included in Article 9 under revised § 9-109(a)(3).

29. The classic case on this is Major's Furniture Mart v. Castle Credit Corp., 602 F.2d 538 (3d Cir. 1979).

30. For example, an absolute sale vests in the buyer all of the seller's right, title and interest in and to the subject of the sale, while in a secured transaction the assignor retains a right to redeem the collateral upon payment of the debt. *See, e..g, Majors*, 602 F.2d 538.

31. 995 F.2d 948 (10th Cir. 1993) *cert. denied*, 114 S.Ct. 554 (1993).

32. *See, e.g.*, Thomas E. Plank, *When a Sale of Accounts is Not a Sale: A Critique of* Octagon Gas, 48 Consumer Fin. L.Q. Rep. 45 (1994); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 21-8 (4th Ed. 1995).

33. June 10, 1994.

34. *See* White & Summers, *supra* note 32, at 748-49 (calling this an *ex post facto* revision of old § 9-102(1)(b) and expressing a "slightly squeamish" reaction to this approach).

35. The amendment reads as follows:

> (4) This article does not prevent the transfer of ownership of accounts or chattel paper. The determination of whether a particular transfer of accounts or chattel paper constitutes a sale or a transfer for security purposes is not governed by this article.

12A O.S. § 9-102(4).

36. *See also* revised § 9-203, comment 6.

37. *See also* revised § 9-318(b), and official comments (seller can nonetheless make an effective transfer to a third party prior to perfection by the buyer).

38. *See supra* note 28.

39. Old §§ 9-104(*l*), 9-306, 9-312. "Deposit account" is defined at old § 9-105(l)(e) as any "demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization, other than a…certificate of deposit." Oklahoma had a nonuniform version of old

(Continued on next page)

cifically recognizes a right of set-off arising under other law,[40] and most states recognize a common law pledge as creating a lien against a deposit account.[41] The result is that under old Article 9 most creditor claims against deposit accounts are governed by non-UCC law, often involving an amorphous relationship between vague common law principles and a diverse array of other laws.[42]

The Article 9 Study Group Report concluded that the applicable law could be clarified by bringing security interests in deposit accounts within the scope of Article 9, and recommended that Article 9 be revised accordingly.[43] Several potential difficulties were noted and left unresolved, mostly involving the priority of competing claims and the methods of perfection.[44] In a departure from prior law, the Report recommended that the depository institution's right of set-off be paramount over a perfected security interest in the deposit account in many cases (apparently, even if the depository institution has notice of the security interest).[45]

Consistent with these recommendations, revised Article 9 brings within the scope of Article 9 security interests in deposit accounts, *except*: "an assignment of a deposit account in a consumer transaction."[46]

Under revised Article 9 a security interest in a deposit account will be created like any other,[47] and would be perfected by the secured party obtaining "control" over the deposit account.[48] Control is automatic if the secured party is the depository institution where the account is maintained.[49] Otherwise, control can be obtained by putting the secured party's name on the account[50] or obtaining an agreement from the depository institution that it will comply with the instructions of the secured party.[51]

Priority as between competing security interests will go to the party with control.[52] A secured party without control can still trace proceeds of other collateral into a deposit account and thereby claim a perfected security interest in the deposit account.[53] However, this security interest will always be subordinate to a competing secured party with "control," regardless of which was first in time.[54] Since the depository institution where the account is maintained will automatically have "control" to the extent it has a claim against the debtor[55] (and frequently will have such a claim), under the revision the Article 9 proceeds claim will usually lose to the depository institution.

While the purpose of these rules is to expand the scope of Article 9 and to clarify the rules governing security interests in deposit accounts, it should be noted that the revisions overall diminish the value of an Article 9 security interest in proceeds traced to a bank account. Under old Article 9 such a security interest would usually defeat the depository institution's right of set-off,[56] and against other liens would have priority based on the first-in-time rule and perhaps purchase money priority.[57] Under revised section 9-340, the bank will retain its traditional set-off rights, but under revised sections 9-104, 9-312, and 9-314 the depository bank may also obtain a new automatically perfected security interest in its customers' deposit accounts,[58] which will be entitled to priority by reason of the institution having "control" over such accounts.[59] This claim of the depository bank will be entitled to priority over competing claims that do not have control, including a prior perfected security interest in proceeds traced into the deposit account, unless the proceeds claimant achieves "control" as against the bank under revised section 9-104(a)(3) (a difficult task, as noted below).

The proceeds claimant can take steps to protect itself, by itself obtaining "control" under revised section 9-104(a); but this will require that (1) the bank agree in writing that, "without furter consent by the debtor,"...the "will comply with instructions" of the secured party[60] or (2) that "the secured party becomes the bank's customer...with respect to the account."[61]

Thus in order to achieve a real measure of protection against the bank's "control," the proceeds claimant must exercise considerably more effort and diligence than under prior law, in order to itself be recognized as a "control" party under revised section 9-104(a). But if the proceeds claimant was first in time to perfect and obtain control (at a time when the depository institution had no such claim or interest), if the depository institution later obtains "control" the proceeds claimant will have priority over the bank,[62] except that a security interest held by the depository institution where the account is maintained will have priority over a competing security interest *unless* the competing security interest has perfected by achieving "control" under revised section 9-104(a)(3).[63]

For the proceeds claimant, then, even achieving "control" under section 9-104(a)(2) (by written consent of the bank) will not be sufficient; only control under section 9-104(a)(3) (by becoming the account holder) will protect against a later "control" by the bank. This represents a considerably greater burden for the proceeds claimant than under prior law; in addition, titling the account in the lender's name may be deemed intrusive by the debtor, and could involve the proceeds claimant in lender liability concerns. Even then, a transferee of funds from the account will take free of any security interest in the account unless the transferee acted in collusion with the debtor.[64]

VI. Agricultural Liens and Other Statutory Liens; PrMSIs

Every state has a unique blend of statutory liens created in response to local political considerations. In most states these liens contribute to a confusing and difficult interplay between: (1) consensual security interests under UCC Article 9 (and real estate mortgage law); (2) judicial liens and priorities; and (3) the state's system of statutory and common law liens.[65]

Old Article 9 addresses these issues to a limited extent. Old section 9-301 governs the priority of a security interest as against judicial lien creditors and the trustee in bankruptcy.[66] Section 9-310 deals with the priority of a security interest as against a possessory common law or statutory lien for work or materials supplied with respect to the collateral. But this leaves unresolved a wide range of issues involving nonpossessory statutory and common law liens (sometimes dubbed "secret liens" because there is no mechanism for giving public notice[67]), resulting in a great deal of nonuniformity and uncertainty.

The problems seem most severe in the context of agricultural liens, perhaps because legislatures seem prone to create special protections for agricultural interests. Oklahoma, for example, has several statutory agister's liens to protect those who feed, graze or herd animals.[68] While Oklahoma case law generally has been kind to consensual, perfected secured creditors who encounter such "secret liens,"[69] secured parties in other states have not always been so fortunate and "secret" statutory liens are widely regarded as a problem area.

The American Bar Association Business Law Section Committee on Commercial Financial Services, Subcommittee on Agricultural and Agribusiness Financing, established an Article 9 Task Force and a Task Force on Statutory Liens to help the PEB Article 9 Study Group (and later the Article 9 Drafting Committee) deal with these issues. The Final Report on Agricultural Financing Under Article 9 of the Uniform Commercial Code[70] appears as Appendix H to the Study Group Report and the recommendations in this report were adopted by the Study Group and subsequently by the Article 9 Drafting Committee.[71]

These recommendations included expansion of Article 9 to cover the perfection, priority and enforcement (but not the creation) of agricultural statutory liens, and a new priority rule for a "production money security interest" (PrMSI) arising in favor of certain agricultural crop lenders who make a loan to enable the debtor to plant the crop.[72] These recommendations have been incorporated into revised Article 9, though the PrMSI is an optimal provision.

Under revised section 9-308(b), an "agricultural lien"[73] is perfected when it becomes effective and the steps for perfection at revised section 9-310 are met.[74] Under revised section 9-310(a), a financing statement must be filed to perfect an

39. *(Continued from previous page)*

§ 9-105(l)(e), which went on to define "certificate of deposit" (CD) to include Article 9 "instruments" as defined at old § 9-105(l)(i), plus nontransferable certificates, and uncertificated (or "book entry") CDs. Old Oklahoma § 9-302(l)(j) provided a nonuniform rule for perfecting a security interest in a CD. 12A O.S. §§ 9-105(l)(e), 9-302(l)(j). *See generally* Alvin C. Harrell, *Security Interests in CDs: Some Recent Developments and Proposals*, 48 Consumer Fin. L.Q. Rep. 338 (1994).

40. Old §§ 9-104(i), 9-306(4)(d)(l).

41. *See, e.g.*, Alvin C. Harrell, *Security Interests in Deposit Accounts: A Unique Relationship Between the UCC and Other Law*, 23 U.C.C. L.J 153, 173-76 (1990). A right of set-off is not a lien and creates no right in the account until exercised. *Id*, at 155-65. Garnishment may also create a lien against a deposit account, as may an I.R.S. levy. *See, e.g.*, ALVIN C. HARRELL, THE BASIC LAW OF BANK ACCOUNTS § 2.04 [2], [3], § 2.11 [2] [n](2d Ed. 1996).

42. *Id.*

43. Study Group Report, *supra* note 3, at 68-71.

44. *Id.*, at 70-71.

45. *Id. Cf.* Harrell, *supra* note 41. Revised §§ 9-327(4) and 9-340(c) provide that a depository institution is subordinate to a competing claim perfected by "control" under revised § 9-104(a)(3). But this essentially requires that the secured party put the debtor's account in the secured party's name, a drastic step that many debtors and secured parties may wish to avoid. *See infra* this text at notes 59-64.

46. Revised § 9-109(d)(13). "Consumer transaction" is defined at revised § 9-102(a)(8) as a transaction primarily for personal, family or household purposes. *Cf.* the Truth in Lending definitions of "consumer" at 15 U.S.C. § 1602(h) and "consumer credit" at 12 CFR § 226.2(a)(12) (Regulation Z) (essentially the same as revised § 9-109(d)(13)).

The Consumer Issues Subcommittee of the Article 9 Drafting Committee recommended bringing security interests in consumer deposit accounts into Article 9, on grounds that consumers would benefit from increased access to low cost credit as a result. Report of the Consumer Issues Subcommittee, *supra* note 16, at 340. This was opposed by consumer advocacy groups, who argued that consumers do not need increased access to credit and should not be encouraged to encumber their deposit accounts by reason of a clarification of the applicable law (it was recognized that such an encumbrance is already possible under common law principles). The Drafting Committee thus rejected the recommendation of its Consumer Issues Subcommittee on this issue. It was the only Subcommittee recommendation rejected by the Drafting Committee. *See* Harrell, *supra* note 15, at 194.

47. *See* revised § 9-203(a) (attachment of a security interest). *See also* § 9-104 (control), § 9-304 (choice of law), §§ 9-312 and 9-314 (perfection), and §§ 9-327 and 9-340 (priority).

48. *See* revised §§ 9-104, 9-312, 9-314.

49. Revised § 9-104(a)(l).

50. *Id.* § 9-104(a)(3) (apparently even if the debtor also remains on the account—revised § 9-104(b)).

51. Revised § 9-104(a)(2). *See also* revised §§ 9-312 and 9-314 ("Perfection by Control").

52. Revised § 9-104(a), §§ 9-327 and 9-340.

53. Revised §§ 9-315 and 9-322 (proceeds). Mercifully, old § 9-306(4)(d), providing special tracing rules upon debtor insolvency, has been deleted. For some possible reasons why, *see* Peter Dillon and Alvin C. Harrell, *Anatomy of a Failed Statutory Provision: U.C.C. Section 9-306(4)(d)(ii)*, 43 Consumer Fin. L.Q. Rep. 198 (1989).

54. Revised §§ 9-327, 9-340.

55. Revised § 9-104(a)(1).

56. *See, e.g.*, Universal C.I.T. Credit Corp. v. Farmers Bank, 358 F.Supp. 317 (E.D.Mo. 1973); Harrell, *Security Interests in Deposit Accounts*, *supra* note 41; Harrell, *Security Interests in CDs*, *supra* note 39.

57. Old § 9-306 (3),(4),(5), old § 9-301(l)(b), (2).

58. To the extent attachment has been achieved via a contractual provision.

59. Revised §§ 9-104(a)(1), 9-312, 9-314, 9-327 and 9-340. *See also* revised § 9-341.

60. Revised § 9-104(a)(2). One may anticipate that depository institutions may not be inclined to enter such agreements.

61. Revised § 9-104(a)(3). This may qualify as "control" even if the debtor retains the right to draw on the account. *Id.* § 9-104(b). This form of control will permit the proceeds claimant to have priority over a competing set-off or security interest of the depository institution. *See* revised §§ 9-327(4) and 9-340(c).

62. Revised § 9-327(2).

63. *Id.* § 9-327(3), (4). Essentially requiring that the account be held in the secured party's name. *See supra* note 61 (describing § 9-104(a)(3)).

64. Revised § 9-332. *See also* revised § 9-331 (rights of holders in due course and other innocent purchasers of paper collateral). *Cf.* old § 9-306, official comment.

65. *See, e.g.*, Alvin C. Harrell and Joseph R. Dancy, *Creditor Lien Rights in Oklahoma and the Impact of Bankruptcy*, 10 Okla. City Univ. L. Rev 455 (1985).

66. *See* the definition of "lien creditor" at old § 9-301(3).

67. *See, e.g.*, Leger Mill Company, Ins. v. Kleen-Leen, Inc., 563 P.2d 132 (Okla. 1977) (Article 9 security interest given priority over agister's lien because knowledge of secured party that the animals were being supplied with feed was not sufficient to meet the "knowledge and consent" test of agister lien priority). *See also In re* N-Ren Corporation, 773 P.2d 1269 (Okla. 1989) (expressing disfavor for "secret liens") (in context of 42 Okla.Stat. §§ 97 and 98).

68. *See* 4 Okla. Stat. §§ 192 and 193.

69. *Id.*

70. Study Group Working Document No. M6-48 (1992).

71. *See* Meredith S. Jackson and Jennifer L. Kercher, *Report of the ABA Business Law Section Uniform Commercial Code Committee, Subcommittee on Relation to Other Law, Re: Inclusion of Nonpossessory Liens in Article 9*, 51 Consumer Fin. L.Q. Rep. 108 (1997).

72. *Id.* This would be a consensual security interest, not a lien.

73. As defined at revised § 9-102(a)(5). *See generally* Drew L. Kershen and Alvin C. Harrell, *Agricultural Finance—Comparing the Current and Revised Article 9*, 33 U.C.C. L.J. 169 (2000).

74. *See also* revised §§ 9-322, 9-334, 9-338.

agricultural lien.[75] Section 9-315 then provides rules governing the perfection as to proceeds of a security interest, but comment 9 to revised section 9-315 notes that revised Article 9 does not similarly provide for continuation of an agricultural lien in proceeds. That depends on other law, including the law creating the lien.

In essence this will permit a person who provides goods or services to a farmer, in the ordinary course of the provider's business, and thereby obtains a statutory lien under other law, to "perfect" that lien under Article 9 and thereby gain access to the Article 9 rules on priority and enforcement. It is believed that this will provide a significant incentive for agricultural lienors to comply with Article 9, thereby giving public notice of their claims and avoiding the "secret lien" problem, in order to utilize the clear and certain priority and enforcement rules of Article 9 (as a superior alternative to the generally unclear and uncertain rules otherwise governing the priority and enforcement of statutory liens). This does not convert statutory liens, created by other law outside Article 9, into Article 9 security interests; it merely provides an Article 9 mechanism for perfection, priority, and enforcement of such liens.[76]

In terms of priority, an agricultural lien not perfected under Article 9 would be treated like an unperfected security interest, and generally subordinated to perfected security interests and other lien creditors.[77] Perfected agricultural liens will have priority based on the normal first-in-time rule;[78] under optional provisions, a "Production Money Security Interest" (PrMSI)[79] would be given the equivalent of purchase money priority as to crops and their proceeds, if certain requirements are met (*e.g.*, perfection by filing when new value is given, and direct notice to competing perfected secured parties).[80]

The revised Article 9 system for agricultural liens has been widely lauded, and a number of parties have urged expansion of this system to cover other (non-agricultural) statutory liens. The American Bar Association, Business Law Section, UCC Committee Subcommittee on Relation to Other Law prepared a Report on "Inclusion of Nonpossessory Statutory Liens in Article 9," analyzing these issues. The Report, dated September 1996, was presented to the Article 9 Drafting Committee on November 2, 1996 by Meredith S. Jackson, Chair of the Subcommittee on Relation to Other Law. The Report generally recommends extending the revised Article 9 provisions on agricultural liens to cover other nonpossessory statutory liens. The Article 9 Drafting Comment did not adopt this, but it remains on the table for possible future consideration.

75. Revised § 9-310(a).

76. *See also* revised § 9-302 (choice of law for perfection of agricultural liens—generally providing a rule based on the location of the debtor). *Cf.* revised § 9-301, for security interests.

77. Revised §§ 9-302, 9-310, 9-317, 9-322, and Pt. 6.

78. *Id.*

79. *See* revised Article 9, Appendix II, providing optional provisions for an Article 9 security interest (this must be consensual, not merely an agricultural lien) in crops for new value to enable the debtor to produce the crops.

80. *Id.*

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and in litigation. Part II in the next issue will focus on related developments at the state level. While the future direction of these developments necessarily will depend largely on political trends, the current debate on these issues makes consideration appropriate at this point.

II. Implications for the Credit Markets

Despite periodic lip-service to the contrary, the state and federal agencies that are most active with regard to Predatory Lending do not always seem well-attuned to the potential for damage to the credit markets that could result from some of their proposals. From the standpoint of a mortgage lender, some of these proposals seem so severe, on top of an already very difficult legal environment, that an exodus of legitimate lenders from the affected markets seems likely to result if such proposals are implemented.

One must admit that we have heard this before, and yet consumer credit has expanded dramatically even as the legal environment has become more complex and difficult. And this is not to suggest that all subprime lending will stop if any of these proposals is implemented. But it also should be admitted by proponents that such proposals have costs. While consumer credit is widely available today, the average cost of such credit has apparently moved upward in conjunction with new consumer protection laws and regulations, so that overall consumers today are paying considerably more than they were 25 years ago.

There can be little doubt that much of this increase is due to the more complex, sometimes punitive, always litigious and often economically damaging legal environment faced by consumer creditors today. Surely no one seriously believes that society can impose these kinds of costs and risks on creditors without experiencing a corresponding increase in the cost of such credit. Therefore an appropriate question for policy makers is whether even higher credit costs (perhaps, at some point, in the form of reduced credit availability) should be imposed on consumers in order to provide additional protections against Predatory Lending.

All of this may sound familiar to those familiar with the modern history of consumer credit. In the early part of this century, unrealistic usury laws stifled legitimate creditors in many states, and the result was a serious problem with illegal loansharking in some communities. The lesson was learned, the laws were (mostly) reformed, and our highly competitive credit markets are the result. Let's hope we don't have to learn that lesson again, the hard way.

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