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Selected Update - UCC Article 9

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The Conference on Consumer Finance Law presents
COMMERCIAL AND CONSUMER SECURED TRANSACTIONS
UNDER REVISED UCC ARTICLE 9 AND RELATED LAWS
February 10 – 11, 2000
Miramar Hotel • Santa Monica, CA

Thursday, Feb. 10

9:00 – 9:50
Update on Recent Article 9 and Related Case Law
Jeffrey S. Turner • Brobeck Phleger & Harrison LLP • Los Angeles, CA

Steven O. Weise • Heller Ehrman White & McAuliffe • Los Angeles, CA

10:00 – 10:50
Overview of Revised UCC Article 9
Jeffrey S. Turner • Brobeck Phleger & Harrison LLP • Los Angeles, CA

Steven O. Weise • Heller Ehrman White & McAuliffe • Los Angeles, CA

11:00 – 11:50
Receivables and Chattel Paper Financing Under Revised Article 9
Donald J. Rapson • Member, PEB and Article 9 Drafting Committee • Deal, NJ

12:00 – 1:30 Lunch

1:30 – 2:20
Default and Enforcement Under Revised Article 9
Donald J. Rapson • Member, PEB and Article 9 Drafting Committee • Deal, NJ

2:30 – 4:00
Consumer Provisions Under Revised Article 9
Thomas J. Buiteweg • General Motors Corporation • Detroit, MI

Brent Gunsalus • Hudson Cook • Washington, DC

Friday, Feb. 11

9:00 – 9:50
The Consumer Issues Compromise in Revised Article 9
Edward J. Heiser • Whyte Hirschboeck Dudek SC • Milwaukee, WI

10:00 – 10:50
Certificate of Title Issues Under Current and Revised Article 9
David B. McCrea • Shutts & Bowen • Miami, FL

11:00 – 11:50
Fixture Security Interests Under Revised Article 9
Jacqueline S. Akins • Bank One • Dallas, TX

12:00 – 1:30 Lunch

1:30 – 2:20
Security Interests in Vehicles and Boats
Elizabeth A. Huber • Hudson Cook • Los Angeles, CA

Thomas A. Russell • Cogswell Woolley Nakazawa & Russell • Long Beach, CA

2:30 – 3:20
The Interface Between New Article 9 and the Bankruptcy Code
George J. Wallace • Eckert Seamans Cherin & Mellott, LLC • Washington, DC

3:20 – 5:00
Impact of Bankruptcy Issues and Developments
Roger M. Whelan • Shaw Pittman Potts & Trowbridge • Washington, DC

Lawrence A. Young • Hughes, Watters & Askanase • Houston, TX

This program will be held at the beautiful Miramar Sheraton Hotel, former residence of Howard Hughes and a favorite of other celebrities. The Miramar is a short walk from the exciting Third Street Promenade, the Santa Monica Pier and Beach, and many other recreational amenities. Convenient access to Los Angeles International Airport. For more information or a registration form, call (405) 634-1445.
QUARTERLY REPORT

3. Australia (with links to other international reports)


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lender was held to be impermissible because four digits of the vehicle identification number (VIN) were wrong. The minor error rule from old UCC Article 9 section 9-402(8) is incorporated in revised Article 9 at revised section 9.506. Revised section 9.311 indicates that a certificate of title lien entry is equivalent to filing an Article 9 financing statement, and that in other respects the security interest remains subject to Article 9, suggesting applicability of the Article 9 harmless error rule.

B. Choice of Law

Choice of law in certificate of title transactions involves some inherent risks for lenders, despite the adoption of certificate of title laws for vehicles in all 50 U.S. jurisdictions. The risk that a borrower may take the vehicle to another jurisdiction, and obtain a "clean" certificate of title in that jurisdiction that leaves a prior secured party unperfected, is merely one of several dangers. A 1998 Oklahoma case illustrates one version of this risk. An Oklahoma manufacturer of motor homes contracted to supply motor homes to a Texas dealer. In a transaction that was typical for the parties in this respect, a Texas retail buyer contracted with the Texas dealer for a custom model, which the dealer then ordered from the Oklahoma manufacturer. The buyer's purchase money was provided by TexStar National Bank, a Texas lender, which executed a lien entry form. Upon completion of the motor home, the manufacturer's Certificate of Origin (MCO—the predecessor of the certificate of title) was issued to the Texas dealer. There was no lien recorded on the MCO.

The dealer then used the MCO to apply for a Texas certificate of title in the name of the buyer, with a lien entry in favor of TexStar. The receipt for this documentation was delivered to TexStar, which then funded the $750,000 purchase loan based on this documentation, making payment to the dealer.

The dealer then issued a check to the manufacturer, but before this was paid the dealer's bank made a setoff that depleted the dealer's account, leaving the check dishonored and the manufacturer unpaid. As a result, the manufacturer refused to allow the retail buyer to take delivery of the motor home (which remained in the manufacturer's possession). The resulting lawsuit was a battle between the Texas retail buyer and TexStar (as factor holder) against the Oklahoma manufacturer. The former paid the purchase price and received the Texas certificate of title with lien entry, but the latter retained possession of the motor home and never received payment of its sales price.

The Oklahoma manufacturer sought application of Oklahoma law, perhaps in the hope that this would favor a possessor Oklahoma lien interest over a Texas certificate of title. Since the form was an Oklahoma title, the court was directed to apply Oklahoma law under the Oklahoma UCC. However, this specifically directs application of UCC section 9-103, which in turn calls for application of the law of the state that has issued the certificate of title, as regards the perfection and priority of a certificate of title lien entry. Thus Oklahoma law referred to the Texas certificate of title law, and under that law TexStar lien was perfected and entitled to priority. This result would be the same under revised Article 9 sections 9-303, 9-311 and 9-316(a), as well as revised section 9-337.12

In Mitchell, the manufacturer argued under some nod cases that in Oklahoma a certificate of title is a "mortgage of title," and that it (the manufacturer) never transferred ownership because it retained possession of the motor home and hence delivery was incomplete. Apparently banning at least the subprimes of those old cases, the Mitchell court noted that they predate the Oklahoma certificate of title lien entry system, under which a certificate of title is deemed "proof of ownership." The Mitchell court correctly held that ownership and lien priority follow the certificate of title and in this case were governed by the Texas certificate of title law under UCC sections 9-103(2) and 9-302(3) (section 9.302(c) in Texas). In addition the retail buyer would take free and clear of any security interest claimed by the manufacturer, even if perfected by possession, under UCC section 9-307(1).

C. Importance of a Choice of Law Clause

On January 28, 1999, the Supreme Court of Arkansas decided Evans v. Harry Robinson Pontiac-Buick, Inc., holding that Texas law applied to a retail installment contract for the sale of a car by an Arkansas dealer. Joe Buck E. Evans, a resident of Arkansas, went to an Arkansas auto dealer, Harry Robinson Pontiac-Buick, to purchase a vehicle. He picked out a 1994 Buick Skylark and signed a retail installment contract to buy the car, with an interest rate of 18 percent. This contract would be usurious under Arkansas law. However, the contract stated that it was to be governed by Texas law, where the creditor to whom the contract was assigned was located.

The starting point for the required analysis is UCC section 1-105, the UCC choice of law provision. Consistent with well established principles of law, section 1-105(1) recognizes the primacy of party autonomy, generally deferring to a contractual choice of law provision, so long as the parties' (Continued on page 329)


6. Id.


8. The manufacturer had initiated the suit in Oklahoma, again perhaps to foreclose such action in Texas.

9. UCC § 9-305.


12. See Harrell, supra note 3. These provisions clearly reject external holdings like those in Westfall, 222 B.R. 734.


The penalty can only be exercised for the first five years;

- The prepayment does not arise from a refinancing by the creditor or an affiliate of the creditor; and

- At consumption the consumer’s total debts do not exceed 50% of the consumer’s verifiable monthly gross income.

D. Prohibited Practices

With respect to a Section 32 loan a creditor may not:

- Engage in a pattern or practice of extending such credit without considering the consumer’s ability to repay the obligation;

- Distribute the proceeds of a home improvement transaction to other than the consumer, the consumer jointly with the contractor or, at the election of the consumer, a third party escrow agent pursuant to a written agreement signed by the consumer, the creditor and the contractor; and

- Sell or otherwise assign a Section 32 loan without including a notice to the purchaser or assignee that the loan is subject to Section 32.

II. Agricultural Lending

A. Dangers of Course of Dealing

Your authors have previously noted the danger that a creditor may create a “course of dealing” by tolerating past due payments or sales of collateral, thereby approving such payments or sales in the future. This point was emphasized in First Bank of Okarche v. Lepar.

In Lepar, the bank properly perfected its security interest in cattle pursuant to the UCC and the federal Food Security Act. The borrower then sold the cattle to a third party at a livestock auction and defaulted or his loan to the bank.

The bank sued the debtor and the auctioneer for conversion, and sought to enforce its security interest against the auction buyer. The suit against the auctioneer claimed that the auctioneer knowingly sold cattle subject to the bank’s security interest.

The auctioneer responded that the bank had previously permitted the debtor to sell collateral, over an extended period, without objection, and that this constituted a waiver, estoppel and authorization of such sales. The bank argued that the federal Food Security Act and related amendments to Oklahoma law displaced the common law concepts of waiver and estoppel.

The Oklahoma Supreme Court rejected the bank’s placement argument and, for a determination on the factual issue, whether the bank authorized the cattle sales, by waiver, estoppel or otherwise.

B. Ag Lien Versus Security Interest

In In re Bernstein, the debtors borrowed money secured by livestock, then delivered the livestock to a commonly-owned limited liability company (LLC) for care and feeding. When the livestock was ultimately sold, the LLC claimed a statutory lien for the food supplied and asserted priority over the lender’s Article 9 security interest.

The North Dakota bankruptcy court ruled that the deficiency in the LLC’s lien statements violated the security interest. However, the court concluded that the lien statute would give priority to a properly executed lien statement, providing legal cause for creditor concern.

This is a problem that has so far largely been avoided in Oklahoma, though the language of some statutory liens and case law elsewhere provides some reason for lender discretion. Revised Article 9 should resolve this problem by bringing the perfection and enforcement of agricultural liens within the Article 9 filing and remedies provisions.

C. Federal Crop Insurance Regulations

The question in In re Cook was whether federal crop insurance payments preempt Article 9 as regards a secured party’s claim to such insurance as proceeds of an Article 9 security interest. Federal regulations require an assignment of crop insurance proceeds to be filed with the Federal Crop Insurance Corporation (FCIC).

In Cook, the secured party was perfected under Article 9 as to the crop and the insurance proceeds, but did not file with the FCIC. The debtors received a crop insurance payment, and argued that it was beyond the reach of the security interest because the FCIC regulations preempted Article 9.

The court disagreed. Following a line of reasoning that has become familiar in other cases involving federally regulated collateral, interpreting the statute on which the FCIC regulations

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16. See Harrell, Miller & Carroll, supra note 2, at 141.
17. 962 P.2d 194 (Okla. 1998).
18. See Harrell, Miller & Carroll, supra note 2, Ch. 16.
21. Use the term of all the due dates, rather than the due date was first supplied as required in the lien statute. The court cited the description of the supplies provided to be indeterminate. Cf. discussion supra Pt. I(A).
22. See generally Harrell, Miller & Carroll, supra note 2, at 303.
23. See supra note 19, supra note 9, 9-310, 9-316, 9-272, 9-324, 9-339, 9-606.
24. 169 F.3d 271 (9th Cir. 1999).
25. 197 F.2d 461 (E.D. Cal. 1952).
27. As a general proposition, federal law will preempt inconsistent state law. See, e.g., UCC § 9-106(1).
sentations made by the defendant's agent during the test drive. Sadly, one can see at several points in the *Murray* opinion the appellate court struggling with but not quite grasping how these issues are legally significant for deciding the UCC Article 2 issues in the case.

V. Conclusion

In the final analysis we must give a "mixed review" to that portion of the opinion of the Oklahoma Court of Civil Appeals in *Murray v. D & J Motor Company, Inc.* dealing with UCC Article 2. Its final conclusion that the trial court committed reversible error in denying the plaintiff the remedy of revocation of acceptance under section 2-608 as a matter of law appears justifiable in light of the facts at bar. Particularly compelling are the facts relating to the plaintiff's reasonable expectations arising from the defendant's oral representations of quality as well as the defendant's duplicitous conduct in refusing to honor those representations. On the other hand, the appellate court's reasoning on which it premised the conclusion seems misguided in a curiously "so near yet so far away" sense. That reasoning flirts with but never fully appreciates the telling proposition that the "as is" disclaimer and the plaintiff's knowledge of the written disclaimer did not necessarily prevent her from actually and reasonably expecting that the seller's oral quality representations were an enforceable portion of the parties' sales contract. This proposition is well and specifically embraced by the interpretive guidelines addressing the disclaimer of express warranties in section 2-316(1) and in no way violates the implied warranty disclaimer provision in section 2-316(3)(a). Because the *Murray* court did not realize the true decisional importance of this proposition, it adopted a rationale which depended on the dubious idea that "the absence or existence of any warranty is immaterial when considering revocation under Section 2-608".

While this statement would be correct in a case involving a nonconformity other than a breach of warranty of quality, it surely is not so on the *Murray* facts where the only possibility of nonconformity was the breach of such a warranty. Overall, the appellate court either failed to identify or identified but underestimated various UCC provisions which not only were conveniently at hand and clearly pertinent but also would have permitted it to reach the same final result in a statutorily approved warranty analysis. The provisions in question, section 1-203, subsection 2-316(1) and section 2-302, are the focus of the analyses which we have discussed in the course of this article as alternative methods for protecting the plaintiff's expectations in a case like *Murray*.

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are based, the court concluded that federal law prohibits only a state-law assignment of a pro-payment claim against the FCIC, and does not bar enforcement of an Article 9 security interest in the insurance proceeds once paid to the debtor.

III. Inventory and Accounts Receivable Lending

Collateral description problems continue to plague courts and lenders; there is no substitute for careful training of loan department staff on this issue.

In *In re Cottage Grove Hosp.*, the secured lender sought to account receivables (defined as an "account" at UCC section 9-106) by describing the collateral in the financing statement as "All the Debtors' Income." The court concluded that this description was too broad and the security interest was unperfected.

The *Grove* court relied on the well-known case of *Boogie Enterprises, Inc.* holding that the collateral description "all personal property" was too broad and vague. Revised Article 9 will liberalize the law somewhat, allowing broad descriptions of commercial collateral in the financing statement (but not necessarily the security agreement); however, until such time as the law is clearly changed a secured party would be well advised to remember cases like *Grove* and *Boogie*.

Lenders who use the correct Article 9 terminology have been treated much better. Even in the security agreement, which generally requires a more detailed description than the financing statement, use of broad Article 9 terms has been held sufficient. The terms "inventory" and "accounts" (defined at UCC sections 9-106 and 9-109) have been consistently upheld as adequate under section 9-106, and have generally been held to inherently include after-acquired property even without additional or specific language. The decisions are not uniform, however, and though cases like *Filtercorp* represent the better view, lenders may wish to avoid the issue by including specific after-acquired property language.

IV. Rights of Innocent Transferees

One of the themes that runs throughout the UCC is the protection of innocent purchasers. The protected parties go by different names and are subject to varying requirements, but overall this theme represents a consistent pattern within the UCC. Sometimes this can impact the rights of Article 9 secured parties.

For example, in *In re Steinberg's,* a creditor sold inventory merchandise to a dealer. When the debtor filed bankruptcy, the creditor sought to reclaim the merchandise under UCC section 2-702. However, the merchandise had become apart of the dealer's inventory and was also claimed by the dealer's inventory lender.

The court noted that the section 2-702 right to reclaim is subject to the rights of a good faith purchaser.

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30. See generally, Harrell, Miller & Carroll, supra note 2, Chaps. 11-12.
31. See id. Ch. 5.
33. 860 F.2d 1172 (9th Cir. 1988).
34. See id.
36. See, e.g., *In re Filtercorp, Inc.*, 163 B.R. 570 (9th Cir. 1993).
37. See, e.g., *HCC v. Mustang*, 805 F.2d 921 (9th Cir. 1986), 500 F.2d 20 (9th Cir. 1974).
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Quarantine Report

V. Debra's Name Problems

One of the challenges facing Article 9 is the risk of a party entering a financing agreement with the wrong Debtor. Article 9 requires that a party must verify that it is dealing with the correct Debtor. This is important because a financing agreement entered into with the wrong Debtor can result in serious problems for both parties. For example, a financing agreement entered into with a Debtor who is not authorized to enter into such agreements could result in the financing agreement being unenforceable, which could cause significant financial losses for the party that entered into the agreement.

VI. Debit, Default, and Bankruptcy

Article 9 provides safeguards to protect parties entering into financing agreements. These safeguards include provisions for the immediate perfection of security interests, which can help prevent the Debtor from defaulting on its obligations. In the event of a default, Article 9 provides for a priority order among secured parties, which can help ensure that the rights of each party are respected.

VII. Disposition of the Collateral

In the event of a default, Article 9 provides for the disposition of the collateral, which can be a valuable asset for the party that holds the security interest. However, the disposition of collateral can be complex and requires careful consideration to ensure that the rights of all parties are respected.

Another case involving disposition in bankruptcy is in Dodd, where the bankruptcy court allowed the Debtor to retain two mobile homes for only $1,250. The mobile homes were deemed to be personal property, not real property, and therefore were not subject to the bankruptcy laws. This decision was upheld by the Circuit Court, which ruled that the $1,250 was adequate to cover the lien on the mobile homes. This case highlights the importance of understanding the bankruptcy laws and how they apply to different types of property.

Disputing the U.S. Supreme Court's decision in American Guarantee & Co. v. Broderick as applicable to Chapter 7 bankruptcy, the Dodd court ruled that the mobile homes were personal property and therefore not subject to the bankruptcy laws. Since the court ruled that personal property was not subject to the bankruptcy laws, it concluded that the $1,250 was adequate to cover the lien on the mobile homes. This decision was upheld by the Circuit Court, which ruled that the $1,250 was adequate to cover the lien on the mobile homes. This case highlights the importance of understanding the bankruptcy laws and how they apply to different types of property.

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The mission of the Conference on Consumer Finance Law is to promote education and research in the field of consumer finance law, to stimulate discussion and publications on the importance of legal protection of consumers, and to provide a forum for review and discussion of recent developments in consumer finance law. The Conference is committed to promoting the interests of consumers and to ensuring that the rights of consumers are protected.

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The Quarterly Report is a research tool designed to help readers understand and evaluate applicable laws and regulations. It also provides a forum for discussion and analysis of important legal developments affecting consumer finance law. The Conference welcomes comments and suggestions for future issues.

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