Commentary: Revised Article 9 Should Be Enacted

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By Alvin C. Harrel

For many of those (including your author) who believe that Uniform Commercial Code Uniform Article 9 is the best statute ever written, the revision process that began in 1990 and is set to con-
clude this year has periodically been viewed as a mixed blessing. While there is general agreement that Article 9 must be updated if it is to survive, (Continued on page 139)

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The Quarterly Report is published four times each year. Please address all correspondence concerning editorial content to Professor Alvin C. Harrell, Editor, Consumer Finance Law Quarterly Report, The Oklahoma City University School of Law, 2501 N. Blackwelder, Oklahoma City, Oklahoma 73106.
there is also a widespread recognition that an Article 9 for the 21st Century cannot be the simple and compact Article 9 of the 1940s. The transactions and issues are now more complex, changes in technology are driving new types of business transactions unheard of 50 years ago, and a half-century of experience with Article 9 has revealed new problems with the old statute. Much as some of us might like, it is too late to go back; Article 9 must either be updated or die a slow and (for its fans) agonizing death.

Two obvious themes to the continued viability of Article 9 are: (1) the threat of federal preemption, and (2) the threat represented by attacks on the very validity of consumer (and, ultimately, other types of contracts). Revised Article 9 cannot resolve these problems, any more than it can resolve every ambiguity or reject every wrongly decided case under current law. But revised Article 9 can make a positive contribution in each of these areas, along with accomplishing both major and minor reforms across a broad spectrum of issues. Measured against this standard, revised Article 9 is a success and deserves active support in the state legislatures.

There are numerous small improvements in the revised Article 9, too numerous to mention here, and these incremental improvements may represent the real strength of revised Article 9, despite the understandable focus on a shorter list of "big" issues. But one cannot deny the impact of the big issues, and these alone provide sufficient improvements in the law to commend revised Article 9 for enactment.

Revised Article 9 includes major, obvious and largely uncontroversial improvements in the law regarding, among other things: (1) certificate of title goods; (2) agricultural goods; (3) the filing system; (4) tort claims; (5) deposit accounts; (6) future advances; (7) proceeds; (8) real estate mortgages; (9) intangible collateral; (10) trade accounts, name changes, mergers, etc.; and (11) collateral descriptions. Consumer protections are advanced in a meaningful way that addresses egregious abuses without significant disruption of the vast volume of mainstream transactions.

All of this was accomplished within the confines of the basic framework of existing Article 9. The basic concepts that make Article 9 the finest statute ever written are preserved intact: attachment, perfection, priority, and remedies remain the foundations of Article 9 and are enhanced, not diminished. Those familiar with current Article 9 will soon find revised Article 9 quite familiar and perhaps even more comfortable, as the statutory resolution of niggling problems and uncertainties is discovered.

While revised Article 9 is necessarily more complex than Old Article 9, in some ways it is even more user-friendly than current law. Related concepts are now grouped together more conveniently and logically than in the past. As a specific example, certificate of title lien entry perfection is made paramount for virtually all purposes, eliminating the more complex and uncertain current rules governing the relationship between certificate of title lien entry and other claims. In essence, the Revisions have largely accomplished the seemingly contradictory goals of simplifying and clarifying the law while expanding its coverage and providing more rules to resolve problems, ambiguities and newly emerging issues. In this sense revised Article 9 must be regarded a clear success, perhaps even a masterpiece.

Of course, when issues and ambiguities are resolved, there will be those who do not like the outcome of that resolution. Almost every interested party will find something to dislike in revised Article 9, though most of us will find ourselves periodically on both sides of any given issue. In this regard, though we may like the flexibility to argue either side of the issue that is provided by the ambiguities and uncertainties in current law, to be intellectually honest we must also admit that by addressing and resolving these issues revised Article 9 represents an improvement in the law, and that in all such cases the resolution is at least fair and appropriate as a matter of public policy.

Legitimate criticisms can be made, e.g., that revised Article 9 covers too much and is too complex (though the same critics typically find things left out and argue for inclusion of more rules to cover issues that they want resolved);2 Revised Article 9 is not (and can never be) perfect, to everyone's (or even, perhaps, anyone's) total satisfaction. But that is not the question. The question is whether this is the best overall product that can be developed in the circumstances, keeping in mind that the likely alternative, over time, is a federal regulatory approach that would micro-manage every aspect of the transaction and perhaps override the basic elements of common law contracts and property principles.

1. Many of these will be familiar to readers of the articles on revised Article 9 that have appeared in this journal over the past few years; these issues will also be described in future articles.

2. Though inevitably there must first be a learning process.

3. From your author's perspective this is very regrettable, but largely inevitable. But revised Article 9 is very likely superior in this respect to almost any alternative solution.

4. See, e.g., revised § 9-335(b) (priority in succession governed by the certificate of title); 9-237 (remittance to good covered by a certificate of title). The exception is for goods held for sale or lease; or in lease. See revised § 9-314(b).

5. It should be noted that revised Article 9 appears at first glance to be longer and more complex, in part because amended subsections or provisions previously combined are now separated into more logical groupings. For example, old § 9-405/7 has now become three separate sections.
B. The Commission's Process Favored Vested Interests

Finally, in the interest of saving time, I will briefly summarize my misgivings about this process.

First, in the consumer area, it was a serious mistake to require the Commission to vote all-or-nothing on the consumer proposals. We did not have an opportunity to discuss or vote separately on the items that make up the majority five-four recommendations. I am convinced that had we been able to do so, there would have been far less disagreement among the Commissioners on specific recommendations for reform. Because the all-or-nothing approach was thrust upon the Commission, however, the result is that five members supported a package of proposals that, as has been widely recognized in the press, strongly favor the interest of debtors and skew the bankruptcy process toward more Chapter 7 liquidation cases and fewer Chapter 13 repayment plans.

Further, in the last three or four months of the Commission's work, we voted, often by mail ballot and by five-four votes, on several consumer proposals that are simply not well thought out. These include the proposals on credit card dischargeability, serial filings, reaffirmations, uniform federal exemptions, valuation of collateral, and the issue-preclusive effect of true defaults in discharge proceedings. As we had no open or specific discussion on many of these issues, the final conclusions are questionable.

Finally, the all-or-nothing approach eliminated issues of vital and just concern to creditors, such as clarifying section 707(b), expediting relief from the automatic stay, and preventing tenants' abuse of bankruptcy to forestall eviction.

The final package of consumer proposals adopted by the five-member majority is debtor-friendly, but it is not consumer-friendly to society at large. These proposals make bankruptcy more attractive and enhance the role of bankruptcy lawyers and judges, but they do not put society on a sounder financial path.

With regard to the "big business" Chapter 11 recommendations, the most important of those were "adopted", in September 1996 at a meeting in Santa Fe, despite vigorous protests that at least three Commissioners would not be present. I was absent because of court hearings, and I had already expressed opposition. The most significant recommendations, on absolute priority and classification of claims, both passed by five-four votes in the end. They were never subjected to full and open debate among the Commissioners, in the manner that the small business, single asset real estate, and taxation proposals all were. Although the Chairman personally promised me on several occasions that these matters would be rescheduled for full discussion, that simply did not occur.

Further, the minutes of the Chapter 11 working group reflect that the principal participants in those sessions were attorneys and some non-attorney professionals who, while skilled in business reorganizations, all have a vested interest in the lucrative reorganization process. Representatives of creditor groups, such as the National Housewares Manufacturers Association, whose members are often trade creditors in bankruptcy, were not invited to participate in these sessions. One academic "skeptic" of Chapter 11 who participated in a working group discussion was later asked if he liked being the lone dissenter among ten.

4 My dissent to the Commission's Chapter 11 recommendations indicates my conclusion that these proposals are in many ways a wish-list for bankruptcy professionals and will complicate rather than streamline the reorganization process. Worse, several of them will directly undermine the Commission's salutary small-business Chapter 11 recommendations. The Commission never seriously considered any recommendation that would reduce costs and delays in "large" Chapter 11 cases. That outcome may favor bankruptcy professionals, but it deserves society.

4 These are at least a dozen well-known academic critics of Chapter 11, but few of them were seriously consulted by the Commission.

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The consumer provisions in revised Article 9 provide a representative example. Many of us would like to discard or rework aspects of the current Article 9 remedies structure, and some truly elegant alternative approaches were floated over the past few years. But none of these came close to achieving a consensus. In the end, a consumer issues compromise was reached that essentially builds a few modest new consumer protections on the foundation of old Article 9 Part 5 (revised Article 9 Part 6). It is not a sophisticated solution, but it works, both politically and in the real world. Among the alternatives, it is the best that can be done. And it reaches a very appropriate outcome that should be satisfactory to just about everyone (except possibly the fringe elements on both sides). Tested by any reasonable standard, it is a fine compromise.

Realistically, the law can do no better. Responsible parties should give the fullest support to revised Article 9. When fairly considered, your author believes that most will agree that revised Article 9 deserves active support and the earliest possible enactment by state legislatures.

[The views expressed herein are solely those of the author and do not represent a position of the Conference on Consumer Finance Law or its Governing Committee. Opposing views are welcome and will be considered for publication.]