Status Report: The Conference Article 9 Subcommittee and the Uniform Law Revision Process

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By Alvin C. Harrell

I. Introduction

II. Article 9 Revision Process

6. The Drafting Committee in a joint project of the sponsors of the UCC (the American Law Institute and the National Conference of Commissioners on Uniform State Laws) and the Joint Uniform Personal Property Article Board (JUPPA), and the Joint Uniform Commercial Code Board (JUCC) in 1994, prepared the first Article 9 model in the form of the UCC Article 9 Uniform Code. The UCC Article 9 draft model served as the basis for the UCC Article 9 model that was approved by the Conference in 1994. The UCC Article 9 draft model was adopted by the Conference in 1994. The UCC Article 9 model was adopted by the Conference in 1994.

7. The Conference on Consumer Finance Law is a national association of Consumer Finance Law professionals, including attorneys, accountants, economists, and other professionals who work in the field of consumer finance law. The Conference on Consumer Finance Law is a national association of Consumer Finance Law professionals, including attorneys, accountants, economists, and other professionals who work in the field of consumer finance law. The Conference on Consumer Finance Law is a national association of Consumer Finance Law professionals, including attorneys, accountants, economists, and other professionals who work in the field of consumer finance law.

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D. Servicing Disclosure Statement Shrank

The New Proposal includes a proposed replacement for the model Servicing Disclosure Statement format included as Appendix MS-1 to Part 3500 of Regulation X (the “Servicing Form”). The new Servicing Form, which must be given to the customer at application or within three business days thereafter, consists of an introductory paragraph followed by the lender’s choice of one of the following two statements:

We may assign, sell or transfer the servicing of your loan while the loan is outstanding.

OR

We do not service loans. We intend to assign, sell or transfer the servicing of your mortgage loan before the first payment is due.

Alternatively, under the New Proposal, the information in the Servicing Form may be included in the Good Faith Estimate, so long as the title “Servicing Disclosure Statement” is used.21

E. When Does a Manager Not Routinely Perform Settlement Services?

The June 7 Rule allowed for referral payments (in the form of performance bonuses) to a managerial employee who does not “routinely perform” settlement services, which was defined in the June 7 Rule as a managerial employee who performs no more than three RESPA-covered transactions.22 The New Proposal clarifies that a manager whose total referral compensation does not exceed five percent of the annual income of the office or unit he or she manages will also be deemed not to be “routinely performing” settlement services.23

F. When Does an Employee Not Perform Settlement Services in Any Transaction?

The June 7 Rule provided that payment to such employees for referring business to an affiliate were exempt from RESPA section 8.24 The New Proposal clarifies that employees who have not performed settlement services for their current employer for at least six years, or who change positions with their employers or change employers and do not perform settlement services in their new position or with their new employer, qualify for the exemption.25

X. Conclusion

Although many believed that HUD’s June 7 Rule signified the end of the RESPA soap opera that has been running since November, 1992, it now appears that adoption of the June 7 Rule merely ended another episode. What seems most significant about the recent developments is that the EGRPrA reintroduced Congress as an important character in this drama. Now that HUD has responded to Congress’ EGRPrA directions, it will be interesting to see what action, if any, Congress will take in the next episode.

34. 61 Fed. Reg. 59255.

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nitigations of commercial practices through customs, usage and agreement of the parties.” Id. at 7, citing UCC § 1-201(40) (6).

The chair is William M. Burdick. As noted supra at note 5, the Report contains the names of Professor James and Professor Warrick. The Uniform Law Committee consists largely of representatives from the FED, ALI, NCCUSL, and American Bar Association. There are also a number of officials “advisers” and “observers” from other organizations, including the Conference on Consumer Finance Law.

Many of the most fundamental proposals (e.g., the proposed nationwide filing system) have survived the process and seem likely to be included in the final draft of revisions. While some of these revisions may be controversial, most are not. Aside from possible concerns over the increased complexity of the revised text,26 most of the revisions affecting commercial (as opposed to consumer) transactions represent clear improvements in the law and

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11. In any event, the phrase subject to reconsideration by the states. See, e.g., McFall, The Article 9 Revision’s—What Should be Done? supra note 1.
12. This proposal will be be included separately in future issues of the Quarterly Report.
13. To some extent the goals of simplicity and clarity are in conflict, and the former has given way to a focus on the latter. As Professor Penn Miller noted during a meeting of the Oklahoma Bar Association UCC Article 9 Legislative Review Subcommittee, the draft is complex in part because examples illustrate the text and cannot be ignored.
lease disclosure provisions which parallel the old Regulation M. Indeed, it may be prudent for states with disclosure provisions which parallel the old Regulation M (Colorado, Iowa, Maine, Oklahoma, Washington and West Virginia) to repeal their existing old Regulation M parallel disclosure statutes to avoid any potential confusion they may create. These states must recognize that all of the disclosures required by their laws are also required under federal law and, thus, their disclosure laws provide consumers with no additional protections beyond federal law.

3. Apply for an Exemption

Any state could apply for an exemption from the disclosure requirements of the CLA and Regulation M. The CLA provides the FRB with the authority to exempt from the requirements of the CLA any class of lease transactions within a state if it determines that under the law of that state that class of transactions is subject to requirements which either are "substantially similar" to those imposed under the CLA or give greater protection and benefit to the consumer. Such an exemption may only be granted if the state law contains adequate provisions for enforcement. The new Regulation M provides that a state may apply to the FRB for an exemption from the requirements of the CLA and Regulation M for any class of lease transactions within the state. Under the new Regulation M, the FRB will grant such exemption upon a formula identical to that set forth in the CLA.

It is unlikely that any state's lease disclosure laws could meet this federal "substantially similar" requirement. Even the states with comprehensive disclosure requirements do not require the breadth of disclosures required by the new Regulation M. For example, other than Wisconsin, no state with a comprehensive disclosure statute requires the disclosure of the rent charge or the depreciation amounts. Also, no state with a comprehensive disclosure statute requires the mathematical progression of disclosures as required in the Regulation M segregated disclosures. Thus, it is doubtful that any state would be able to procure an exemption from the disclosure requirements of the CLA and Regulation M.

VII. Conclusion

The impact of the new Regulation M upon state consumer lease disclosure laws depends upon whether the disclosures required by such leasing disclosure laws afford greater protection or are repetitive. When disclosures provide greater protection, no response is necessary. When disclosures are repetitive, a state must react in one of three ways, unless the current state leasing law adequately resolves potential conflicts between federal and state disclosures. First, states may enact statutory or regulatory directives regarding the treatment of such repetitive disclosures. Second, states may repeal repetitive disclosures. Third, states can apply to the FRB for an exemption from the disclosure requirements of the CLA and the new Regulation M. The District of Columbia and the 32 states which do not address consumer lease disclosures should review the new Regulation M to determine if its disclosures adequately meet their consumer protection goals. If they do, then these states should remain silent and allow the federal disclosures to provide lessees with appropriate levels of consumer protection. Given the comprehensive nature of the disclosures required under the new Regulation M, most states will probably reach this conclusion.

When choosing a response to the new Regulation M, all states, whether currently maintaining consumer lease disclosure laws or silent on the subject, must effectuate the ultimate goal of consumer lease disclosures—to promote the consumer's understanding of leasing and to ensure that lessees receive meaningful disclosures that enable them to compare lease terms. The courses of action proposed by this article will provide states with the means to achieve this goal by eliminating potentially confusing disclosures and by guaranteeing the optimal level of consumer protection.

183. 12 CFR § 213.3(b) (1986).
184. Id.

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likely will be embraced by knowledgeable parties. In short, many of the proposals earlier identified in the Study Group Report have now been incorporated in some extent in the proposed Article 9 revisions, are subject to a broad and favorable consensus, and seem likely to be included in the final package of proposed revisions.

III. The Wild Card: Consumer Transactions

The Article 9 Study Group has generally avoided consideration of separate consumer transaction issues, instead focusing on the core issues that are more common to both commercial and consumer transactions. With a very

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Appendix A

Additional Sources


This book provides numerous checklists, including lists relating to malpractice prevention and insurance.


This two-volume set includes a discussion of standards and checklists for self-evaluation.


Davis, Anthony E., Risk Management: Survival Tools for Law Firms (available from the ABA Service Center 312-988-5522). The checklists are designed to help a firm in conducting and evaluating a risk management self-audit.

Ewalt, Henry W., Through the Client's Eyes: New Approaches to Get Clients to Hire You Again and Again (1994) (available from the ABA Service Center 312-988-5522). This book provides guidance to firms interested in developing a client relations program and eliciting clients' opinions through client surveys.


Green, Robert M., ed., The Quality Pursuit (1989) (available from the ABA Service Center 312-988-5522). This collection includes numerous articles dealing with law firm quality assurance programs.


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few exceptions, this was consistent with the tradition of Article 9. However, the Drafting Committee has not been afforded the luxury of this option. Consumer groups apparently discovered the importance of the UCC revision process after the UCC Article 3 and 4 revisions were approved by the ALI and NCCUSL and have been very active participants in the Article 9 Drafting Committee meetings since the beginning.

As a result the Drafting Committee has been forced to confront a wide range of consumer protection issues throughout the Article 9 revision process, thus injecting additional political and philosophical issues normally not addressed in this forum. At times the divergence of views on these issues has seemed to threaten disruption of the process, and at this writing the extent remains uncertain. Previous articles in this journal have described the perception of some observers that members of the Drafting Committee (who are not, for the most part, experienced in consumer lending transactions) may be inclined to accept proposals of the consumer advocates that would adversely affect consumer lenders, in order to obtain the acquiescence of the consumer advocates regarding improvements in the commercial law and to enhance the acceptability of revised Article 9.

The Drafting Committee formed a Consumer Issues Subcommittee in an effort to reach a compromise between the consumer and creditor positions, and the resulting report and recommendations offered some hope as a viable basis for compromise. However, some of the recommendations were unacceptable to creditor representatives, and for consumer representatives continued to press for additional consumer transaction rules. In November, 1996 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 are included. Subsequently the Drafting Committee and its Consumer Issues Subcommittee rejected outright a slate of creditor proposals and approved additional consumer advocacy proposals at the March, 1997 Drafting Committee meeting, widening somewhat the gap between the two sides.

At this writing the consumer issues represent perhaps the most significant set of contentious and potentially unresolved issues in the Article 9 revision process. It seems (Continued on page 157)


16. See Hartrell, The Article 9 Revision—What Should Be Done?, supra note 1, supra note 1. This divergence reflects what Professor William J. Woodard Jr. has described as "a polarity in thinking that may echo the polar ideologies about consumerism which have developed since the 1930's." William J. Woodard Jr., "Sale of Goods and Finance and the Wider Civic Effort Between 'Consumer' and 'Consumerism'" in the UCC, 75 Wash. L. Q. 243, 286-87 (1997).


20. At this writing the view of many consumer lenders is that the breadth of the proposed revisions is directed primarily at commercial transactions and offers little improvement for consumer lenders as compared to Article 9, yet consumer lenders are being asked to pay the "highest" price in terms of increased complexity and more onerous statutory requirements for consumer loans. Consumer advocates seem to concede this point by responding that consumer lenders should agree to the proposed revisions because the lenders' commercial lending operations and affiliates will benefit from the revisions. Obviously this does not sit well with the stand-alone consumer lender. As a result some consumer lenders apparently have concluded that they prefer current Article 9 to the revisions. For discussion of the conflicting considerations, see Harrell, The Article 9 Revision—What Should Be Done?, supra note 1.

<table>
<thead>
<tr>
<th>Case</th>
<th>Type of Secret Lien</th>
<th>Collateral</th>
<th>Priority Provision in Lien Statute?</th>
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<tbody>
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<td>Balzer Machinery Company v. Klineine Sand &amp; Gravel Company, 271 Or.196, 533 P2d 321 (1975)</td>
<td>artisan's</td>
<td>equipment</td>
<td>yes—priority to secret lienor</td>
<td>secured creditor</td>
<td>Section 9-310 implicitly amended nonpossessory lien statute to subordinate to Article 9 security interests</td>
</tr>
<tr>
<td>Freuhahn Corporation v. Huntington Moving &amp; Storage Co., 159 W.Va. 14, 217 S.E. 2d 907 (1975)</td>
<td>repairman</td>
<td>trailer</td>
<td>yes—priority to secured creditor</td>
<td>secured creditor</td>
<td>Court notes that a common-law (rather than statutory) lien would have had priority</td>
</tr>
<tr>
<td>Pennington v. Alexander, 103 Ill. App. 2d 145, 242 N.E. 2d 788 (1968)</td>
<td>mechanics'</td>
<td>tractor</td>
<td>yes—priority to secured creditor</td>
<td>secured creditor</td>
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The members of the Conference Article 9 Subcommittee include: the Chairman of the Conference (former associate justice judge L. X. Pasater); a representative of the auto finance industry (Conference President Jerry D. Braggard); national bankruptcy and consumer credit litigation counsel (Conference Vice President Lawrence A. Young); national regulatory and consumer credit compliance counsel (Conference Secretary David L. Decker); a member of the American Law Institute and former Assistant U.S. Attorney for the District of Columbia (Henry F. Field); a former Director of the Consumer Credit Division of the Federal Trade Commission (Ann P. Ford); the lead creditor representative to the Drafting Committee (Edward J. Henley); and two law professors (John Kupnow, Editor of The Texas Bank Lawyer and the American Bank Lawyer; and Alvin C. Harrel, Editor of The Quarterly Report and president of a small firm). This Subcommittee brings together diverse members with extensive expertise in consumer credit, secured transactions, debtor-creditor relations, and bankruptcy law, reflecting a broad variety of viewpoints and experiences that includes government, business, academia, the practicing bar, and leaders of different types and sizes. Some of these constituencies have not been extensively represented in the Article 9 revision process.

A purpose of the Conference Article 9 Subcommittee is to take a fresh look at the consumer issues confronted in the Article 9 revision process, along with other proposals that may be offered, outside the constraints that have characterized the Drafting Committee meetings. Article 9 advocacy positions have been vigorously asserted in the context of a perceived Drafting Committee mandate to achieve political consensus. This mandate is understandable, and desirable, if revised Article 9 is to be widely accepted and constitute a prominent commercial law in the United States. But as a result the issues have been considered in a somewhat politically charged atmosphere, by a Drafting Committee that generally lacks consumer credit experience, in the context of a perceived mandate to reach a compromise acceptable to the consumer advocacy representatives. In these circumstances it is difficult for an observer to determine the extent to which the result may be a product of political considerations rather than the traditional uniform law process. In these circumstances a fresh look by other knowledgeable persons is warranted.

The Consumer Issues Subcommittee of the Drafting Committee was created in part to address these concerns, and the efforts and accomplishments of that Subcommittee should not be underestimated. The Consumer Issues Subcommittee labored long and hard, significantly eliminating numerous unrealistic proposals, and probably came closer than many thought possible to achieving a full consensus on the consumer issues. The work of the Drafting Committee's Consumer Issues Subcommittee in reducing the area of contention should be viewed as an essential ingredient in whatever success may ultimately be achieved. This achievement probably could not have been accomplished in any other forum, and Professor Maris Benfield (Chair of the Drafting Committee's Consumer Issues Sub-
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The view of the Consumer Issues Subcommittee’s work represents the results of long and careful deliberations and compromises, and should not be lightly overturned. The Conference Article 9 Subcommittee generally agrees with this assessment, and does not propose to casually reject all or any part of the Consumer Issues Subcommittee’s carefully crafted compromises. These compromises will be carefully considered by the Conference Article 9 Subcommittee, may well become the foundation for some or all Conference recommendations, and may be embodied in part or as a whole by the Conference Article 9 Subcommittee.

On the other hand, it is appropriate that the work of the Drafting Committee’s Consumer Issues Subcommittee be considered and supplemented by a panel of specialists with the breadth and depth of expertise of the Conference Article 9 Subcommittee. As noted above, the Drafting Committee’s Consumer Issues Subcommittee is concerned with an imperative to achieve political consensus, in the context of an agenda presented to a significant degree by consumer advocacy representatives. This may have precipitated consideration of other potential policy initiatives. It is therefore appropriate that the Article 9 proposals be further and independently reviewed by the Conference Article 9 Subcommittee, as well as by state bar groups and legislative review committees, among others. Indeed, this is part of the normal uniform law revision process, and it is appropriate that such groups be open to consideration of alternative approaches to improving, clarifying and simplifying the law for creditors and consumers.

V. Guiding Principles

Although the Conference Article 9 Subcommittee has not yet reached a consensus on particular Article 9 revisions and proposals, the Subcommittee believes that initial concerns on basic guiding principles is important as a consistent point of reference when considering individual issues. Such principles may help the Subcommittee avoid an ad hoc approach based on a series of political compromises or individual expedients that produce inconsistent results.

The Conference Article 9 Subcommittee endorses the traditional governing principles and goals of the UCC: Conformity, simplicity, uniformity and party autonomy. This means the Conference Article 9 Subcommittee endorses the goals and principles as set forth by the PEB Article 9 Study Group in its Report of December 1, 1992. The Conference Article 9 Subcommittee also recognizes the following basic principles and parameters for modern law revisions (based in part on the conclusions in the Article 9 Study Group Report):

1. The process today necessarily is far more open to diverse viewpoints than is the past. For example, as noted above, consumer advocacy groups and organizations have been very active participants, in contrast to previous law revision efforts. As a result, the process is now more political and less an insulated academic exercise than in the past. For better or worse, this is affecting the end product, particularly with regard to consumer issues. While the Conference Article 9 Subcommittee will endeavor to assess the impact of politics and consider the issues on the basis of traditional legal considerations, there is a recognition that law revision and enactment processes are inherently political.

2. Law revision efforts always face a choice between the common law model (predominantly basic principles, liberally constructed, to effectuate the intent of the parties) and the regulatory model (typically including detailed and complex requirements, strictly construed, and potentially with punitive remedies such as statutory penalties, to effectuate social goals by mandating certain behavior). The UCC traditionally has embraced the former approach.

3. Similarly, the Drafting Committee has had to confront a basic conflict between the goal of facilitating commerce and voluntary transactions versus a need to codify a role for social and political judgments that consumers need special protection against abusive practices. Typically this is based on perceived need for knowledge and bargaining power as between consumer creditors and debtors. The cost-benefit analysis needed to resolve these issues has proved elusive and often inconclusive. These issues will be revisited by the Conference Article 9 Subcommittee, recognizing a need to provide adequate consumer protection without unnecessarily impairing private contracts.

4. The Drafting Committee also has had to confront periodic conflicts between the goals of uniformity and tractability. It has been perceived, for example, that consumer protection provisions essential to tractability in states such as New York, Massachusetts and California must be included even at the risk of generating non-uniform amendments or even opposition in some other states.

5. Early in the Article 9 revision process the choice was faced between integrated and segregated consumer protection provisions. Segregated consumer protection provisions would have favored tractability in some states, by facilitating deletion or amendment of provisions deemed undesirable in such states without structural alteration of the substantive rules in the remaining text. However, this approach was rejected at the insistence of consumer groups, and an integrated approach was adopted. This issue may be reconsidered by the Conference Article 9 Subcommittee.

6. The Reporters for the Drafting Committee have tried to emphasize the physician’s mandate to “first, do no harm.” Fundamental policy choices that form the basis for Article 9 have, for the most part, not been revisited. Aside from consumer issues and a few other matters, the focus has been on improving the current law rather than making new law.

But with regard to consumer issues, there appears to have been an effort to create new law. This will be reconsidered by the Conference Article 9 Subcommittee.

7. The Drafting Committee generally has sought to list the market lead, i.e., to recognize and adopt standards based on commercial practices rather than seeking to mandate those practices. Again, the consumer issues are a possible exception.

6. Input Solicited

Counting the PEB Article 9 Study Group that preceded the Drafting Committee, the current process of reviewing Article 9 has been underway for over seven years. Obviously, it is time for interested parties to make their views known. The Conference is providing a vehicle for such input.

The time to provide your comments is now. Please feel free to comment on any aspect of secured transactions or Article 9. All issues and approaches are open for consideration, including the appropriate role of consumer protection in Article 9 and the extent to which proposed consumer provisions should be re-structured, re-directed, or expanded to cover other transactions. For those wishing to respond to specific proposals in the current (June 1997) draft of proposed Article 9, your attention is called to the following proposals that have come to the attention of the Conference Article 9 Subcommittee:

1. Reciprocal attorneys fee provision in conjunction with the statutory penalty for any violation of proposed Article 9 Part 6.

2. Absolute bar, rebuttable presumption or other methods relating to liens on government property.

3. Statutory right of reimbursement if 60% paid.


5. FMSI transformation upon refinancing of FMSI by a different creditor.

6. Definition of consumer secured transaction.

7. Price as an aspect of whether a repossession sale has been conducted in a commercially reasonable manner.

8. Extension of expanded concept of “good faith” to Article 9.

Other suggestions are welcome. In addition, the Conference Article 9 Subcommittee will be addressing the foundational issues noted again at Part V. Your input and comments on all of these and any other relevant issues are solicited. Please send your comments to:

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