The PEB Study Group Report and Revised Article 9 With Respect to Certificate of Title Issues

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I. Introduction

On December 1, 1992 the Article 9 Study Group established by the Permanent Editorial Board (PEB) of the Uniform Commercial Code (UCC) issued a Study Group Report recommending consideration of possible revisions to UCC Article 9. Accompanying this Report was a separate book of Appendices (hereinafter Appendices), including Appendix F (Working Document No. M6-39), entitled “Certificate of Title Issues,” authored by Francis C. Suarino.1

Subsequently, an Article 9 Drafting Committee was formed to consider specific proposals for revision of Article 9.2 While no final decisions have yet been made, and therefore all deliberations remain tentative, the Article 9 Drafting Committee has considered the recommendations in the Study Group Report relating to certificate of title issues.3 The Drafting Committee proposals relating to certificate of title issues are now well developed; interested parties should make their views on these issues known without further delay.4

II. The Relation Between Article 9 and State Certificate of Title Lien Entry Systems

All states now provide for certificate of title lien entry (lien entry) perfection for security interests in vehicles (subject to certain exceptions, e.g., vehicles held for resale as dealer inventory). Many states also provide for lien entry perfection for mobile homes and boats.5 To the extent collateral is subject to lien entry perfection, Article 9 provides an exception to the UCC filing system and defers to the state lien entry system. Current UCC section 9-302(3) provides as follows:

(3) The filing of a financing statement otherwise required by this Article is not necessary or effective to perfect a security interest in property subject to a statute or treaty of the United States which provides for a national or international registration or a national or international certificate of title or which specifies a place of filing different from that specified in

1. Copies of the Study Group Report and Appendices may be obtained from the PEB, 4023 Chestnut Street, Philadelphia, PA 19104-3059. It should be noted that the Study Group Report and Appendices represent discussion drafts only and are not to be cited as authority. No final decisions have yet been made with respect to these issues. The PEB and UCC are joint proprietors of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute. Appendix F to the Study Group Report (hereinafter “Appendix F”) is limited in scope to commercial paper transactions to certificate of title goods and makes no effort to deal with consumer issues. Still, the basic issues also affect consumer tractors.

2. William M. Burke is the Chair; Professors Steven L. Harris and Charles W. Mooney, Jr. are the Reporters.


4. See, e.g., Alvin C. Harrell, UCC Article 9 Drafting Committee Considerations October 1995 Draft, 51 Conn. L. Rev. 54 (1997). Since this article was written, the Reporters have produced a revised draft which was considered at the 1997 Annual Meeting of NCCUSL, in July/August 1997 (October 1997 NCCUSL Annual Meeting Draft) and revised October and November, 1997 drafts.

5. (Continued from previous column)

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this Article for filing of the security interest; or
(b) the following statutes of this state: [list any other certificate of title statute governing automobiles, trucks, motorcycles, boats, farm tractors, or the like, and any central filing statute:], but during any period in which collateral is inventory held for sale by a person who is in the business of selling goods of that kind, the filing provisions of this Article (part 4) apply to a security interest in that collateral created by him as debtor; or
(c) a certificate of title statute of another jurisdiction under the law of which the creation of such security interest on the certificate is required is a condition of perfection (subsection (2) of section 9-103).

While this limited defeasance to certain other law (including state certificate of title laws) secures simple, it is the beginning point for a series of potential conflicts and unresolved issues arising from the relationship between Article 9 and state certificate of title laws.

III. Choice of Law—UCC Section 9-103

Appendix F recommended adoption of the rule in In re Page, allowing a certificate of title to be issued in any state, regardless of whether that state has any other connection to the transaction. The latest drafts of proposed revisions to Article 9 include this position.

Appendix F recommends language clarifying that Article 9 follows the state certificate of title law in determining whether perfection occurs upon submission of the lien entry form to the proper state official or requires actual notation on the certificate of title. The latest drafts of proposed Article 9 include this rule, providing for perfection pursuant to the local law of the state that issued the certificate covering the goods.

Appendix F recommends deletion of the language at current section 9-103(1)(A), which under certain circumstances currently preserves perfection until the goods are "registered" in another jurisdiction. This language has been applied improperly and inconsistently by some courts. The latest drafts of proposed Article 9 eliminate the concept of "registration" from section 9-103, instead providing that a new choice of law change is triggered when the goods become "covered" by a certificate from another jurisdiction (subject to a four-month grace period).

IV. Section 9-205—Perfection by Possession

Appendix F raises the question whether certificate of title goods should be subject to perfection by possession, as an alternative to lien entry perfection, and expresses ambivalence though ultimately concluding that perfection by possession should be allowed. The 1997 NCCUSL Annual Meeting draft provides that perfection by means prescribed in a statute referenced at section 9-306(2) (this would include certificate of title lien entry systems) is equivalent to perfection by filing under Article 9.

1. If a debtor sells or trades certificate of title goods, does a prior lien entry perfection extend to such proceeds or other steps provided under current section 9-306(2)? Proposed section 9-305A of the 1997 NCCUSL Annual Meeting draft provides that perfection by means prescribed in a statute referenced at section 9-306(2) (this would include certificate of title lien entry systems) is equivalent to perfection by filing under Article 9.

2. Must a lessor under a lease intended as a security agreement be shown as lienholder on the certificate of title, or is it sufficient to be shown as owner? 14

3. Should minor errors in compliance with certificate of title laws be fatal to perfection? Should the UCC Article 9 "harmless error" rules apply? Again, the courts have not been consistent on this issue.

4. Does a secured party already perfected by a certificate of title lien entry need to do anything more to reperfect, upon extending a new loan, refinancing the old loan, or extending future advances? The answer should be "no," but not all courts agree. Variations in state lien entry statutes may contribute to this problem.

5. If a lender, with lien entry perfected, assigns its interest to another lender, must the assignee be substituted in the lien entry? Is this controlled by UCC section 9-302(2), or by other state laws?

6. Do the Article 9 provisions on sufficiency of a collateral description (at sections 9-110 and 9-402) apply to collateral descriptions in lien entry forms?

7. To what extent does Article 9 apply to supplement state lien entry systems?

VI. Accessions

A. Introduction

UCC section 9-314 governs security interests in accessions. In operation, it can be one of the more challenging Article 9 provisions. Section 9-314 provides as follows:

(1) A security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed (called in this section "accessions") over the claims of all persons to the whole except as stated in subsection (3) and subject to Section 9-315.

(2) A security interest which attaches to goods after they become part of a whole is valid against all persons subsequent to the making of the security interest only if the person with the interest in the whole attaches to the goods which has not in writing consented to the security interest or obtained the consent of the goods as part of the whole.

(3) The security interests described in subsections (1) and (2) do not take priority over

(a) a subsequent purchaser for value of any interest in the whole; or
(b) a creditor with a lien on the whole subsequently obtained by judicial proceedings; or
(c) a creditor with a prior perfected security interest in the whole to the extent that he makes subsequent advances if the subsequent purchase is made, the lien by judicial proceedings obtained or the subsequent interest is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the whole at a foreclosure sale other than the holder of a perfected security interest is released at his own foreclosure sale to a subsequent purchaser within this section.

(4) When under subsections (1) or (2) a secured party has an interest in accessions which has priority over the claims of all persons who have interests in the whole, he may not, without the consent of the holder of its security interest, remove any part of its security interest or the whole thereof, unless the consensual nature of his security interest is destroyed. See generally Willard L. Crandall and Gary R. Teach, Turek, The UCC, 3rd ed. (St. Paul: West, 1994).
the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

Appendix F of the Study Group Report includes a thorough discussion of accession issues and the relevant case law.27 This article will merely highlight the discussion issues and recommendations described in Appendix F, and their disposition by the Article 9 Drafting Committee.

B. Discussion Issues—Current Law

1. What is the scope of current section 9-314, as compared to lien entry perfection? When accessing claims are added to or removed from a vehicle subject to lien entry perfection, compelling claims may be asserted under section 9-314 and the lien entry system. Such claims are subject to resolution under current section 9-314, but the courts sometimes misconstrue the scope of section 9-314, for example applying section 9-314 when the secured party is asserting a security interest in the whole vehicle (including accessions) pursuant to lien entry perfection and there is no separate claim to accessions.28

2. How is perfection as to accessions achieved (by a party claiming a security interest in the whole vehicle)? One issue is the scope of the collateral description.

As a practical matter, the description of the whole in the security agreement should automatically include accessions (and, if desired, attachments and replacements), to the extent permitted under section 9-204 (which limits a claim against subsequent property in a consumer transaction).29 While a distinct description of accessions in the security agreement is not required under Article 9, in cases where the accession is very important and is easily detachable, such a description may help minimize the risk of a court incorrectly concluding that the accessions are not covered by the lien entry perfection.

3. Where should the secured party search and file regarding accessions? If a lender on the whole vehicle is claiming a security interest in a "leisure" accession not yet affixed to the whole vehicle, or in a vehicle with an easily removable accession that may be subject to a separate perfection, the lender may wish to search and perfect separately as to the accession. The proper place and method of perfection will depend on the classification of the goods under Article 9.30 This may involve some subtle analysis, for example distinguishing between "ordinary goods," "mobile goods," under current section 9-103(3), and "special mobilized machinery," under a state motor vehicle act.31

C. Recommendations and Proposed Article 9

Appendix F recommends that the term "accessions" not be used in Article 9, due to confusion with common law concepts using the same language. Appendix F also recommends that current section 9-314 be revised to make clear that all normal attachments to a vehicle may be encumbered by a certificate of title lien entry against the vehicle, without a separate Article 9 filing.32 It also recommends clarifications to the relationships between ordinary goods and "mobile goods," and clarification of the relationship between senior and junior secured parties after repossessing and sale of collateral by the latter.33

VII. Section 9-504 and Repo Titles

A current question is whether UCC section 9-504 (governing repossession sales of vehicles) applies to a repossessed sale of collateral subject to certificate of title lien entry perfection. While the answer seems clearly yes, contrary implications or requirements in state certificate of title statutes may cloud the issue.34 Nonetheless, Article 9 seems clear that its default to state certificate of title lien entry systems at current section 9-302(3)(b) is limited to filing and perfection issues. Another problem is the requirement in many states that a "repo title" be obtained in the secured party's name before the repossesion sale is conducted. In these circumstances it may be construed as an accord and satisfaction for the secured party to transfer title to itself in preparation for the repossessing sale, under current section 9-505: Proposed section 9-41(1) should resolve this problem.

VIII. Task Force Question Format

In addition to authoring Appendix F, Frank Saurino drafted for the ABA Task Force on State Certificate of Title Laws a list of 20 questions to be answered for each state, regarding that state's certificate of title law. The answers are being compiled by the ABA Task Force on Certificate of Title Laws into a Task Force Report. The questions are as follows:

1. What is the scope of the Law?
2. Definition of vehicles/house trailers/boats?
3. Definition of term "Owner/"?
4. What state agency issues titles?
5. What documents must be submitted in order to have the Certificate of Title issued?
6. How and when is the security interest in titled goods perfected?
7. How is the security interest assigned?
8. What are the procedures for obtaining a Certificate of Title for titled goods which were last titled or registered in another jurisdiction?
9. Must a secured party do when its security interest is satisfied?
10. What procedures must a secured party follow in order to foreclose its security interest?
11. Does the Certificate of Title statute specify which provisions of Article 9 are superseded by and provisions of title law. The answers are being compiled by the ABA Task Force on Certificate of Title Laws into a Task Force Report. The questions are as follows:

12. Does the Certificate of Title statute provide a method for determining the existence of security interests against titled goods by the agency or must the Certificate of Title be examined in order to determine whether there are any security interests against such goods?
13. How does the law deal with repossessed/salvaged vehicles?
14. How (if at all) does state law protect an assignee/ lienor, if the certificate is lost?
15. Does state law have a provision (like UCC section 9-404) requiring a creditor who has been paid to release the lien in a specified time?
16. Does the state require an MISO as a prerequisite to issuing a new title?
17. Does the state certificate of title law affect leases and security interests, including tort liability?
18. How does state law deal with the relationship between personal property law and real property law with regard to interests in and claims against mobile homes?
19. What are the grace periods for titling?
20. Does the certificate of title cover boat trailers?

As noted, the responses are being compiled into a comprehensive Task Force Report. Copies of the Final Report will be available soon, at a nominal cost. If you are interested in obtaining a copy, please send a written inquiry to your author.

IX. Conclusion

Certificate of title issues are an important part of the Article 9 revisions. The proposed revisions are designed to address many of the nagging problems that have arisen under current law. The preceding two articles in this issue describe in more detail the intended and likely impact of these revisions, and interested parties are also invited to request a copy of the Report of the ABA Task Force on State Certificate of Title Laws.