Commentary: Should the Statutory Penalty at UCC Section 9-507(1) be Combined With Prevailing Party Attorney Fees?

Alvin C. Harrell, Oklahoma City University School of Law

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1. Introduction

The last sentence of Uniform Commercial Code (UCC) section 9-507(1) currently provides that if a secured party violates any provision of Article 9 Part 5 (Remedies):

If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten percent of the principal amount of the debt or the time price differential plus 10 percent of the cash price.1

As discussed infra, this constitutes a statutory penalty for even harmless and minor errors, a type of provision that, in combination with a rule allowing the prevailing party to recover attorney fees, has created havoc in the context of certain other laws such as the Truth in Lending Act2 and the Fair Debt Collection Practices Act.3

In contrast, UCC section 9-507(1) has not created significant problems in the past, possibly because there is currently no provision in UCC Article 9 permitting a party who successfully alleges a trivial error to recover attorney fees.4 It is the combination of a statutory penalty for trivial errors and the right to recover attorney fees on the basis of such a penalty that has proved so troublesome in the context of other laws.5 Previously, the drafters of the UCC (and most other state laws) have avoided this troublesome combination. Now, however, the UCC

1. UCC § 9-507(1). References are to the 1991 uniform text unless otherwise noted.
2. 15 U.S.C. § 1601 et seq. See infra Part IV.
3. 15 U.S.C. § 1692-1696 et seq. See infra Part V.

There are a number of other statutes, mostly federal consumer credit laws such as the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 et seq., that allow recovery of prevailing party attorney fees by a consumer. However, some of these do not provide for recovery of a set amount of statutory penalty for minor, harmless errors, as is the case for this type of attorney fees, either.

Other of these statutes involve evidentiary burdens for the consumer that are greater than under § 9-507(1). For example, consumers are expected to have knowledge of the ECOA, the relative ease of asserting a technical violation of Article 9 Part 5. However, if it were found that there were technical violations of the UCC, then requirements and litigation fees may not have occurred.

It must also be admitted that even with the increased complexity of the proposed revisions, Article 9 does not impose the kind of technical and onerous requirements provided in (Continued in next column)

3. (Continued from previous column)

the Fair Debt Collection Practices Act (FDCPA), which have proved so troublesome in conjunction with a statutory penalty and prevailing party attorney fee provision. For an argument that proposed revisions Article 9, which may provide for reciprocal attorney’s fees for consumers if the secured party conducts improper fees for itself, and have an error defense, will not replace the ECOA experience, see Fred H. Miller, Consumer Issues and the Revision of UCC Article 2, 75 Wis. 3d. 1559, 223 N.W.2d 440 ("the nature and context of the asserted violation may be more important than the remedy") (issues omitted).

A listing of "Selected Federal Statutes Providing Attorneys Fees to Prevailing Individuals..." provided to the UCC Article 9 Drafting Committee by consumer representatives appears in Appendix A at the end of this article (supra this issue at 267).

4. However, the same experience is seen in Oklahoma even though a separate statute long allowed recovery of such fees.

5. As noted supra at note 3, the context and nature of the violation giving rise to a claim of violation may be significant. It is not the right to prevailing party attorney fees per se that is troublesome, but the combination of this right in the context of a statutory penalty triggered by even the slightest technical error. In these circumstances, the probability that some minor error can be found as a basis for the statutory penalty, thereby creating a prevailing party claim for attorneys fees, creates almost innumerable judicial litigations.

For example, as suggested supra at note 3, the ECOA is "wrong" in the sense of fishing for a plaintiff. In contrast the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692d, is not. FDCPA violations are relatively easy to allege. See infra Part V. Therefore, defense litigation is very risky in FDCPA cases, providing the plaintiff with extreme negotiating leverage. Hopefully, revised Article 9 will be more like the ECOA in this regard, though only time will tell; e.g., based on the evolving litigation up to what is "commercially reasonable." See generally Miller, supra note 5.
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The Consumer Issues Subcommittee of the Article 9 Drafting Committee is proposing to adopt this combination as a part of the proposed revisions to Article 9.11.1. The Report of the Article 9 Drafting Committee's Subcommittee on Consumer Issues

The Report of the Consumer Issues Subcommittee of the Article 9 Drafting Committee was presented at the June 1986 Drafting Committee meeting and has been previously discussed in this journal. The Subcommittee was formed in an effort to seek a consensus among the different credit card issuers that have been presented to the Article 9 Drafting Committee. At times the division of these issues has seemed to threaten the entire Article 9 revision project and thereby jeopardize the modernization and continuing viability of state commercial laws. The stakes are very high, and the likelihood of success has sometimes seemed in doubt.

Out of this difficult environment the Committee achieved a consensus that is a series of compromises that sharply reduced the decibel level of the arguments on both sides of the debate. For the first time it seemed that a satisfactory compromise might be reached (though no one expected either side to be entirely satisfied).

The Consumer Issues Subcommittee Report endorsed this proposal, favoring inclusion of a reciprocal attorney fee provision in the statute. The reason, as stated in the Report, is that it seems fair that a creditor who is clamoring a right to prevailing party attorney fees would have a reciprocal claim if the consumer establishes that the creditor failed to comply with Article 9.1.5. This view is in such a way can never be truly reciprocal as long as only one party (the secured creditor) but not the other subject to a statutory right. Moreover, it recognizes the difficulty of technical, or minor error. It is the combination of this statutory penalty with a prevailing party attorney fee provision that creates serious public policy concerns.

IV. Policy Implications of the Proposal—the TIL Experience

There has been extensive experience with the combination of a statutory penalty and a reciprocal attorney fee provision in the state of Illinois and a provision allowing collection of attorneys'/bears by the prevailing party. Indeed, those familiar with the evolution of the federal Truth in Lending Act and with applicable Illinois Law in such cases as Loaning Simplification Act in 1986 held a sense of deja vu about the whole thing. As stated by Professors Letwin and Miller in The Law of Truth in Lending:

"Article 9 from legislative changes, the dominant characteristic of TIL during the 1970s was that a creditor, with the right to prevent disputes over attorney's fees. As a result, the Bankruptcy Board 2, TIL was a technical instrument set of requirements. Any noncompliance subjects pledges to civil action by these customers and to administrative agency disbarment. The automatic recovery of minimum statutory damages in situations where a violation is slight, if not nonexistent, especially common in default or nonpayment, might call for realistic treatment of TIL, violations, must be fairly treated. The result of legislative production is meagerly sound, and minimally based, which the Bankruptcy Court tenures to encourage: litigation or the interpretation of TIL rules to require: one approach to the imprecise aim of the TIL's objective, the federal statute, and through the implementation of TIL's measures, the number of notices of violation factor and simplicity, clarity, (b) structure, and the implementation of commercial practice through recognition of distinct, and agreement of parties.

It has been noted that while the TIL does provide complex and ambiguous, Article 9 traditionally is not a party to the fair. Furthermore, the evidence indicates a model of the UCC's flexibility to simplicity, clarity, (b) structure, and the implementation of commercial practice through recognition of distinct, and agreement of parties.

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With the benefit this experience, it is surprising that the Article 9 Drafting Committee would vote to insert a similar regime into Article 9.11.1.

III. The Reciprocal Attorneys' Fee Proposal

The first proposal considered in the Report of the Consumer Issues Subcommittee is the reciprocal attorneys' fee provision in section 9.507 of the May 1986 draft of the Article 9 proposal (the section numbers have since been changed). Under this proposal, if the security agreement provides that a prevailing creditor would be entitled to recover prevailing party attorney fees, a prevailing consumer party would also be entitled to recover attorney fees.

The credit industry's representatives feel that they are being given two chances to lose, but that attorney fees in these cases are not always a fait accompli, even if the creditor won the case under the UCC. They feel that a reciprocal attorneys' fee provision is likely to have the effect of obligating the creditor to make settlement offers, and that this would not be a realistic approach to the problem.

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