Commentary: The Article 9 Revisions - What Should be Done?

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By Alvin C. Harrell

As readers of this journal may know, some supporters of the Uniform Commercial Code (UCC) Article 9 revision process are confronting a basic conflict, between (1) a belief that Article 9 must be preserved and modernized if the role of state law is to be maintained in secured transactions, and (2) concern over a perceived tendency of the commercial lender representatives on the Article 9 Committee to provide a new Article 9 that, while retaining some elements of the current Article 9, would be different enough from the current Article 9 to make the new Article 9 a significant departure from the current one.

To some, the suggestion that Article 9 must be changed is alarming. They see it as a threat to the well-being of the financial community, and as a step toward the creation of a more complex and expensive system of secured transactions. To others, the suggestion is less alarming. They see it as a necessary step toward the modernization of the current Article 9, and as a step toward the creation of a more efficient and effective system of secured transactions.

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QUARTERLY REPORT

sured party took possession of the storage device itself.

However, under the current version of Article 9 of the UCC (governing secured transactions) it is more probable that the obligation will be treated as a "general intangible," which includes by definition all personal property which does not fall into another category under Article 9.12 Treating electronic cash as a general intangible creates its own set of problems. A general intangible which is transferred usually remains subject to the security interest of the transferor's secured creditor.13 There are no holder in due course rules or bonafide purchaser rules to protect the transferee. Given the nature of electronic obligations and the purpose for which they are used, it would seem that a holder in due course or bonafide purchaser rule would be necessary to protect transferees of these interests. Of course, to the extent the interests are not traceable, the issue may be moot.

It may require a change to secured transactions law to clarify when and how such a security interest is perfected. Unhappily, the current draft of proposals to revise Article 9 of the Uniform Commercial Code does not really solve the problem. As currently written, electronic obligations stored on a device would probably continue to constitute a type of general intangible.

Commentary: The Article 9 Revisions—What Should Be Done?

(Continued from page 228)

The details of this conflict, and the consumer proposals being considered or already approved by the Drafting Committee, have been covered elsewhere in this and previous issues.14 But the basic nature and importance of the issues are emphasized by the decision of consumer creditor representatives, announced at the November 1-3, 1996 meeting of the Article 9 Drafting Committee, to withdraw in apparent frustration from the Article 9 Drafting Committee's Subcommittee on Consumer Transactions.15 While this leaves in doubt the future of the Consumer Issues Subcommittee, the Drafting Committee is continuing to formulate proposed Article 9 revisions, and ultimately the result will be approved by the sponsoring organizations16 and presented to the states for enactment. Concerned parties may then be faced with the unhappy choice of opposing the modernization of state law or accepting a revised Article 9 with objectionable provisions.17

With regard to such choices, even reasonable persons can disagree. This evolving scenario will only add to the need for different decisions that probably will have to be resolved on a state-by-state and issue-by-issue basis. One can only hope that the resulting need for uniformity will not itself threaten the system of state and international law.18

In retrospect, perhaps it would have been better if the Article 9 Drafting Committee had taken a less narrow approach, announcing that it would consider only revisions to modernize and increase the efficiency of commercial law. This was the primary purpose of the revision process, and there is broad nationwide agreement on these issues. This was especially the decision made with regard to original Article 9, and may have been crucial to its success.

(Continued on page 258)


3. Perhaps the law should recognize a "realistic" customer under Rule 1222(a)(2)(B) who is not similarly treated. For example, under Rule 1222(b)(2), a real customer is one who does not take title to the collateral subject to the secured interest or whose interest is not subject to the secured interest. In the latter instance, the secured creditor may take title to the collateral subject to the secured interest and, if the customer defaults, the secured creditor may foreclose on the collateral and obtain a judgment against the customer. See 12 U.S.C. § 1331(b)(2), and the text. This issue is also discussed in the article. See supra note 2.

4. In Oklahoma, for example, the Department of Consumer Credit Supervision over 2,500 consumer credit licenses, many of whom are consumer office operators. In contrast, there are less than 100 banks and less than a dozen thrifts.

5. The National Credit Union Administration is the consumer of credit unions with respect to small credit unions. The Economic Growth and Regulatory Paperwork Reduction Act of 1996 recently certified that a NCUA exemption from the TILA requirements for small, non-insured credit unions, on grounds they do not have the resources to comply. See supra note 4. Perhaps this is illustrative of the reasons why so many small credit unions have refused to be covered in the few small savings and loan associations.

6. Not only will the lenders and consumer suffer, but the ante repair shop as well. The only beneficiaries will be the tone deaf, unlitigious creditors who are not subject to the requirements of the Article 9.


8. Most of the creditor representatives withdrew from the Subcommittee and indicated that they would be unwilling to support enactment of the revisions at the state level. The report of the Consumer Issues Subcommittee appears in this issue.


10. For a complete, see Alvin C. Harrell, Commentary: Should the Statutory Penalty on UCC Section 9-307(c) be Overruled with Providing Party Statutory Fees?, in 1996 U.C.C.

11. See supra note 21.
Commentary: The Article 9 Revisions—What Should Be Done?

(Continued from page 227)

The decision to include consumer issues in the current revision effort, while widely endorsed,12 instant the introduction of political and social policy issues that are subject to strong disagreements across regions. This made the resulting controversies inevitable. While a more narrow approach, focused on commercial law issues, might have been preferable, there were political imperatives that mitigated against it. The political influence of consumer groups at both state and federal levels made it difficult to ignore their insistence on a role in Article 9 for consumer protection provisions. There were indications that a narrower approach, excluding consumer issues, would be unacceptable in several important commercial law states with very active consumer advocacy constituencies (e.g., California and New York). Obviously, a perfect solution was necessary to be achieved but very little value was placed on the exclusion of consumer provisions.13 Moreover, your author believes that there is a strong propriety toward consumer interests on the part of the Article 9 Drafting Committee. The members clearly recognize that Article 9 is a major historical work, and the nature of Article 9 has not been responded to or even addressed in the revision process. The revision and enactment processes must be expanded to include diverse viewpoints.14 This perspective is quite understandable and is commendable in the abstract, but in practice the importance and nature of Article 9 justifies a revision process of the highest standard and quality. But the result, from the perspective of consumer issues, has been less than optimal.

From the standpoint of lenders, it would have been better if the Drafting Committee had reached a consensus to aggregate the new consumer provisions in a separate part of Article 9, so that the rest of Article 9 would not be tainted by the resulting controversy. While aggregated provisions would have been a part of Article 9, the aggregation would have reflected a judgment that such provisions are somehow different from the rest of Article 9.

15. See, e.g., McNally, supra note 7, at 184-85.

16. This may be an ironic statement. The consumer advocates were not alone in the process that approach was not acceptable to them, and the Drafting Committee may therefore have felt that it had little choice but to reject that option.

17. See supra notes 12, 14 and 15 and accompanying text.

18. Gail E. Pauley, a social work professor at the University of Chicago, has been a strong supporter of the consumer protection provisions in Article 9 and a leader in the movement to enact such provisions. She is currently employed by the National Consumer League.

19. See, e.g., UCC § 1-102(2).


21. On the other hand, nonuniformity has existed for years and is consistent with our federal system. Moreover, state laws are not as uniformly applied as uniform laws. It is likely that the differences are minor.

(Continued on page 271)
legislative intent of this legislation,

- Coordinate and report the development and progress of long-term plans, proposed systems and joint projects to the Legislature.
- Review agency budget requests for new and expanded programs for data processing and telecommunications and make recommendations to appropriations committees of the Legislature as necessary.

No recommendations from any of these entities become final unless approved by the Contingency Review Board which consists of the Governor, the Senate Pro Tempore and the Speaker of the House.

The Oklahoma Government Telecommunications Network (OGTN) will, as discussed earlier, be developed, operated and maintained by OSF: OSF will be responsible for coordinating all aspects of this wide area telecommunications network that consists of the telecommunications systems and networks of educational entities and agencies of state government with the following exceptions:

- The Oklahoma State Regents for Higher Education may continue to operate, maintain and enhance the State Regents Educational Telecommunications network. However, the Regents must submit all plans for enhancement to OSF for review and approval and participate in joint efforts to provide services for the OGTN.
- The Department of Public Safety may continue to operate, maintain and enhance the statewide law enforcement data communications network with the same conditions as above.

All these policy making and oversight committees were in place when the 1994 Oklahoma Statutes Supplemental was printed. During the 1995 legislative session, Senate Bill 351 was introduced to slightly change the structure of the policy making and oversight entities. The bill failed to pass.

Senate Bill 351 tried to address the need for a more autonomous entity to plan and coordinate the direction of Oklahoma's technology resources. The bill proposed the creation of the "Oklahoma Telecommunications and Computerization Authority" (OTCA), which would have consisted of seven members to be appointed by the Governor with the advice and consent of the Senate and whose term would have been seven years.

The Information Services Division of OSF would have been moved from OSF to the OTCA. The responsibilities of the OTCA would have essentially been the same as those now performed by the ISD.

Senate Bill 351 also proposed the creation of two additional oversight commissions: The Executive Telecommunications and Computerization Oversight Commission (ETOCOC), which would have consisted of six members, appointed by the Governor, who would designate one of the appointees as Chair and the Legislative Telecommunications and Computerization Oversight Commission (LTOCOC), which would have consisted of six members: three members of the Senate, appointed by the President Pro Tempore and three members of the House appointed by the Speaker. They would have had the authority to revoke or rescind any policy of the OTCA with a majority vote of the members of each Commission.

VII. Conclusion

Increasing demands for services, rapid advances in technology and federal mandates leave the states with no choice but to become better managers and users of technology. Obviously, to do so will require a significant investment of money. However, if properly implemented, a state should recoup tremendous dividends.

Commentary: The Article 9 Revisions—What Should Be Done?

A possible solution, addressing both the problem of controversial consumer provisions and the danger of increasing nonuniformity, is for credit card issuers and other concerned parties to formulate and support a uniform set of alternative consumer provisions for revised Article 9. If a "model" set of alternative revisions can be formulated, subject to widespread agreement among concerned parties, and presented consistently to states during the enactment process, this would offer an alternative text for states that want to separate commission consumer issues from the effort to modernize and upgrade Article 9. The potential difficulty of extracting or modifying proposed Article 9 consumer provisions that have been integrated into the uniform text, may make it important that state legislatures receive this assistance. It may also be important that states be offered the opportunity to adopt alternative revisions on a consistent basis in order to minimize nonuniformity among the states. Again, a model alternative would address this need.

The Conference on Consumer Finance Law has established an Article 9 Review Committee to consider the Article 9 revisions and, as needed, propose alternatives addressing the issues noted above. At the work of this Committee progresses, the results will be reported in these pages. In addition, state legislative review committees have been formed in some states,22 also for the purpose of reviewing the proposed recommendations and making legislative recommendations. We will be reporting on these developments as well.23 In addition, the Conference will continue to monitor and report on the deliberations of the Article 9 Drafting Committee, and invites interested parties to reflect on the viewpoints submitted to the Committee and the results of this work. Please contact the Committee for questions or further information.

21. (Continued from page 258)

22. E.g., Oklahoma and Texas.

23. State legislative review committees and other interested parties are invited to submit reports on their recommendations for publication in the Quarterly Report.