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Oklahoma Supreme Court Addresses the Role and Importance of Good Faith in Commercial Transactions

By Alvin C. Harrell

On Oct. 30, 2012, the Oklahoma Supreme Court decided a significant case¹ addressing Uniform Commercial Code (UCC)² Articles 2 and 9 (and contract-related good faith issues), in the context of an unpaid sale of goods to an insolvent buyer whose rights were subject to a prior security interest. The focal point of the decision is UCC section 2-403, which gives priority to the security interest (as against the unpaid seller) on these facts, if the secured party acted in good faith. This article analyzes the UCC issues presented in this case.

Section 2-403 is an important UCC provision, illustrating an intersection of issues from UCC Articles 2 and 9 and resolving questions that periodically arise in litigation in Oklahoma and elsewhere.³ Section 2-403 is an Article 2 version of a fundamental principle that runs throughout the UCC: the protection of innocent purchasers.⁴

Basically, section 2-403 recognizes three types of sales of goods transactions in which an innocent purchaser (including a secured party) or buyer who meets the stated qualifications⁵ can obtain clear title to the goods being purchased (*i.e.*, ownership free of adverse claims) even though the seller did not have clear title.⁶ The three scenarios are: 1) a transaction of purchase;⁷ 2) a seller with voidable title;⁸ and 3) an entrustment by the previous owner to a merchant seller who deals in goods of that kind.⁹ In its Oct. 30, 2012, decision in *Bank of Beaver City*,¹⁰ the Oklahoma Supreme Court issued a split decision dealing with the transaction of purchase and voidable title issues governed by section 2-403(1).¹¹

FACTS AND ARGUMENTS IN THE BANK OF BEAVER CITY CASE

Bank of Beaver City involved a fairly common scenario in which the Bank of Beaver City (the bank) financed a cattle operation, Lucky Moon Land and Livestock, Inc. (Lucky, or the debtor), secured by a UCC Article 9 security interest in all of the debtor's existing and after-acquired cattle.¹² Barretts' Livestock, Inc. (Barretts', or the seller) sold cattle to Lucky on a deferred payment basis (the cattle were delivered to Lucky, with payment due a few weeks later).¹³ When the cattle were sold and delivered to Lucky, the debtor (Lucky) acquired rights in the cattle as collateral subject to the after-acquired property security interest of the bank.¹⁴ Under the general first-in-time priority rule governing Article 9 security interests, the bank's prior perfected security interest gave it priority over the unsecured claim of Barretts' to payment.¹⁵ In addition, the specific rules governing transactions of purchase and voidable title at section 2-403(1) and limitations on the seller's right to reclaim at section 2-702 make clear that

a GFP takes priority over the seller's right to reclaim.¹⁶

In *Bank of Beaver City*, Barretts' argued that this result did not apply because: 1) the bank did not take its security interest in good faith (as required for GFP status under sections 1-201(b)(20) and 2-403(1)); and 2) the bank did not have priority under Article 9 because this lack of good faith prevented the bank from acquiring rights in the collateral under section 2-403(1) sufficient for the bank's security interest to attach.¹⁷ The latter argument is doomed to failure, given that Article 9 "rights in the collateral" (as required for attachment of the security interest under section 9-203) do not require that the secured party (here the bank) act in good faith or prevail as a GFP under section 2-403(1). Attachment of a security interest is governed by Article 9 section 9-203 and has nothing to do with good faith or section 2-403. It requires only that the bank's debtor have rights in the collateral, which clearly was the case here.

Moreover, the priority rules of Article 9 mean that a perfected security interest will be enforceable against the debtor and third-party claims such as unperfected liens and security interests, even though the debtor may be subject to those claims and those claims may prevent the debtor from having clear title.¹⁸ All that is required in order for a security interest to "attach" is for the debtor to have rights in the collateral;¹⁹ perfection then provides the security interest with priority over most subsequent and unperfected claims.²⁰ Section 2-403 and the parties' good faith generally are irrelevant to this analysis.²¹

SELLER'S RIGHT TO RECLAIM

However, the *Bank of Beaver City* scenario contains the seeds of another argument, also raised in the case: Since Barretts' was asserting a seller's right to reclaim under section 2-702,²² the debtor's ownership of the goods was potentially subject to this right; and since the bank's security interest extended only to the debtor's rights in the collateral, absent application of section 2-403(1) the security interest would attach only to the debtor's limited ownership rights. Thus, absent section 2-403(1) the bank could "foreclose" against the debtor's interest but would remain subject to the seller's statutory right to reclaim the goods.²³ However, if the bank is a GFP for purposes of section 2-403(1) it will take the debtor's rights free of

any claims against those rights by Barretts' as the seller who conveyed voidable title in a transaction of purchase.²⁴ Thus, section 2-403(1) was crucial in determining the bank's priority as against the seller's right to reclaim.²⁵

GOOD FAITH REQUIREMENT

This raised the ultimate issue in the *Bank of Beaver City* case: Whether the bank acted in good faith so as to be a GFP under section 2-403(1) when it acquired its security interest.²⁶ Barretts' argued that the bank failed to meet the test of good faith because it was "intimately involved" in the debtor's operations, *e.g.*, being aware of dishonored checks drawn by the debtor (including those drawn to Barretts')²⁷ and knowing of the debtor's "deteriorating financial condition."²⁸ However, the majority opinion rejected this argument and appropriately distinguished these relatively routine matters from cases like *Monsanto Co. v. Heller*,²⁹ where the bank "had a deep relationship with its debtor . . . and exercised considerable control over its business practices."³⁰ Thus, in *Bank of Beaver City* the majority held that the bank was a GFP entitled to priority over the seller's right to reclaim, pursuant to section 2-403(1).

In one of the most important aspects of the *Bank of Beaver City* majority opinion, the court observed that the bank owed a duty of good faith only to the party with whom it dealt (the debtor), and not to a third party (such as Barretts').³¹ This is inherent in the UCC definition of good faith in UCC Article 1 section 1-201(b)(20), which requires "reasonable commercial standards of fair dealing," and is also reflected in the substantive rule at UCC section 1-304: "Every contract or duty within [the UCC] imposes an obligation of good faith in its performance and enforcement."³² By its terms, this duty of "fair dealing" logically can extend only to one with whom a person contractually deals.³³ It should be clear, therefore, that a person cannot owe a duty of good faith to the entire world,³⁴ but only to those with whom the person deals (owing them a duty to act honestly and observe reasonable commercial standards of fair dealing).³⁵

Thus, in *Bank of Beaver City*, the bank owed no duty to Barretts', and knowledge by the bank that its debtor was experiencing financial difficulties or wrote checks to Barretts' on insufficient funds was not unfair to its debtor (Lucky), and did not breach any duty of good faith.³⁶ The bank thus qualified as a GFP under

section 2-403(1) and took free of the claims of Barretts' as an unpaid seller.³⁷

CONCURRING OPINION

Bank of Beaver City was a split decision of the Oklahoma Supreme Court, with the majority opinion written by Justice Kauger and a concurring opinion by Justice Combs (also joined by Chief Justice Taylor and Justice Kauger) expressing concern as to how Barretts' could protect itself in these circumstances.³⁸ The concurring opinion notes (perhaps with more credence than is deserved) the argument of Barretts' that it could not pass title to the debtor (Lucky) without receiving payment in full (despite consummation of the sale of goods and the delivery of possession — see UCC section 2-401), and therefore the bank's security interest did not attach.³⁹ However much one might sympathize with the plight of Barretts', this argument is without merit (otherwise a buyer would not obtain ownership in a credit sale) and does not deserve even a hint of approval in a Supreme Court opinion.⁴⁰ As to how Barretts' could protect itself, the oddball and potentially troublesome non-uniform amendment to section 2-403 that was enacted in Colorado, cited with approval in the concurring opinion,⁴¹ simply creates a secret lien in favor of certain sellers. It is unnecessary in view of the seller's ability to perfect a purchase-money security interest (PMSI) under Article 9, which (in contrast to a secret lien) provides full notice to the world.⁴² It is not clear why a statutory secret lien would be preferable as a matter of public policy.

The concurring opinion indicates that, *i.e.*, some kind of secret lien is necessary to protect the seller's "free market enterprise" because otherwise the unsecured credit seller may not get paid. But this is a risk assumed by all unsecured credit sellers, and other creditors, in any type of transaction.⁴³ There is no apparent reason to create another special exception, essentially in the form a secret lien, for this class of transactions, especially when public notice in the form of a PMSI is so readily available.⁴⁴ This would be a step backwards, toward a balkanized legal system of the type that the UCC and Article 9 so importantly replaced.⁴⁵

JUSTICE WATTS' DISSENT

A separate dissenting opinion (written by Justice Watts and joined by Justices Colbert and Reif) characterized the issue in *Bank of Beaver City* as one of "contested facts" that should

be remanded to the trier of fact.⁴⁶ This dissent cites both the uniform text and Oklahoma Comments to UCC Article 9 (stating that the Oklahoma comments "are even more instructive").⁴⁷ However, if anything, these comments (and basic contract law) support the majority position that the contractual duty of good faith (including "fair dealing") runs only to the person with whom one is dealing contractually, and not to third parties or the world at large.⁴⁸ Moreover, the legal standard of good faith is an issue of law, not fact; if, on the alleged facts, the bank owed no duty to Barretts', then facts relating to the bank's treatment of Barretts' interests are irrelevant and there is nothing for the trier of fact to reconsider.

This dissent states that there are remaining issues of fact to be resolved, namely whether the bank "is in bed with the debtor, . . . through knowledge of [the debtor's] poor financial condition and that [the debtor was] selling cattle out of trust [and had] numerous overdraft checks . . ." ⁴⁹ The dissent emphasizes that the bank honored numerous checks drawn on insufficient funds (overdraft checks) in the past, even with knowledge of the above facts, and then suddenly began to "dishonor checks to the livestock company in an attempt to increase its own collateral and financial positions."⁵⁰ The dissent then concludes: "If the bank did act in the way described, they owe a duty to the 3rd party."⁵¹

The problem is that there is no basis for that conclusion in section 2-403(1) (as alleged in the case), and no basis elsewhere in the law absent a more comprehensive control of the debtor than that stated in the alleged facts, *e.g.*, control that effectively converts the bank into the debtor's partner.⁵² Moreover, the stated facts have little or nothing to do with the duty of good faith owed by the bank (the relevant issue under section 2-403), which as noted runs only to the debtor in this scenario,⁵³ provides no basis for imposing a duty to third persons or the world at large, and requires only that the bank treat its customer honestly and fairly.⁵⁴ In this context, the bank was perfectly within its rights to protect itself (indeed had an obligation to do so), as any prudent person would.⁵⁵ Even if the worst that Barretts' asserted is true, the bank would not have breached any duty of good faith and the outcome of the case under section 2-403(1) would not change. It was Barretts', not the bank, which had a duty to protect the interests of Barretts'.⁵⁶

JUSTICE GURICH'S DISSENT

An additional dissent was written by Justice Gurich, also joined by Vice Chief Justice Colbert and Justice Reif.⁵⁷ This dissent directly rejects the holding of the majority that the good faith requirement of section 2-403 does not extend to third parties, stating that "[s]uch a holding is not supported by the [UCC or] case law interpreting the [UCC]."⁵⁸ All of the cases cited in support of this proposition were decided under the "old" definition of good faith (requiring only honesty fact, prior to enactment of the 2001 revisions to the uniform text of UCC Article 1 adding the "fair dealing" requirement).⁵⁹ Whatever the shortcomings of the new definition,⁶⁰ it does make more clear that the duty of good faith runs only to those with whom one deals.⁶¹

Logically, it must be so; otherwise every person in the world could sue every other person for acting unfairly.⁶² Just as the debtor in *Bank of Beaver City* could not assert the bank's rights as a defense to its liability to Barretts',⁶³ so also Barretts' cannot assert claims arising from its transaction with the debtor as the basis for liability of the bank.⁶⁴

Who then can assert rights based on a lack of good faith under section 2-403(1)? The answer is that a reclaiming seller can assert priority over a competing purchaser under section 2-403(1) (based on a lack of the competing purchaser's good faith or other requisites for GFP status), but only to the extent the requisites for GFP status as required in section 2-403(1) are not met by the competing purchaser; and those requisites arise only in the relation between the purchaser (here the bank) and its debtor (here, Lucky). On the facts of *Bank of Beaver City*, Barretts' can argue against the bank's good faith and thus its status as a GFP, but only on the basis that the bank breached its duty of good faith to the debtor, not that the bank owed such a duty to Barretts'.

In effect, section 2-403(1) protects the purchaser (here, the bank) in a transaction such as that in *Bank of Beaver City*, but only if the purchaser acted in good faith (and gave value) to the other party (here the debtor) in the "purchase" transaction.⁶⁵ Third parties (such as a reclaiming seller) may attack the purchaser's GFP status when that is relevant to their priority, e.g., on grounds that the purchaser acted dishonestly toward the debtor, or treated the debtor unfairly in the context of commercial

standards, or failed to give value to the debtor,⁶⁶ but cannot claim that these duties are owed to the third party (absent privity or some equivalent, not alleged here).⁶⁷ In other words, Barretts' cannot logically assert that the bank owed or breached a duty of good faith to Barretts', or that the bank's duty of good faith to the debtor required that the bank treat Barretts' fairly. But if the bank breached its duty of good faith to the debtor, Barretts' can assert this in contesting the bank's claim to priority as a GFP under section 2-403(1).

Thus, it is not correct to conclude, as in the Gurich dissent, that the majority decision in *Bank of Beaver City* "bars all future third parties from defeating a secured lender's interest under [section] 2-403 regardless of how egregiously the lender has acted."⁶⁸

CONCLUSION

In the final analysis, the majority stated the matter succinctly in observing that "a lender's duty of good faith [does] not require that it be ignorant of third party claims . . . or [that it] continue financing a doomed business enterprise,"⁶⁹ and holding that "[t]he good faith requirement does not extend to unpaid sellers such as Barretts."⁷⁰ It is always difficult to allocate losses between innocent parties (a common occurrence when a debtor becomes insolvent), but in this instance the law seems clear and it is important for future transactions that this continue to be the case.

1. *Bank of Beaver City v. Barretts' Livestock, Inc., and Tri-State Feeders, Inc. v. Morris*, 2012 OK 89, 295 P.3d, 1088, 2012 WL 5334761 (Okla. S.Ct.). As noted in this article, the court issued four opinions in the case: A majority opinion, a concurring opinion, and two dissenting opinions.

2. The Oklahoma UCC is codified at Okla. Stat. Ann. tit. 12A §§1-101 - 11-107 (2004, 1998, 2001 & 2013 Supp.). For ease of reference, this article generally references the uniform text of the UCC, prior to the 2010 uniform text amendments. At this writing, Oklahoma has not yet enacted the 2010 uniform text amendments. Regarding the 2010 amendments, see generally Alvin C. Harrell, "The 2010 Amendments to the Uniform Text of Article 9," 65 *Consumer Fin. L. Q. Rep.* 138 (2011).

3. For a sampling of previous cases, see, e.g., *State v. Skaggs*, 140 P.3d 576 (Okla. Civ. App. 2006), and the listing of pertinent cases in Justice Gurich's dissenting opinion in *Bank of Beaver City*, 295 P.3d at 1095, n.2, 2012 WL 5334761, at *6, n.2; see also *infra* note 57 and accompanying text.

4. Sometimes this protection runs to a good faith purchaser for value (GFP) and sometimes to a buyer in ordinary course of business (BIOCOB). Cf., e.g., UCC §2-403(1), (2). Other examples of similar UCC protections include Article 3 §§3-305 and 3-306 (protecting a holder in due course) and Article 9 §9-320 (protecting a BIOCOB). The distinctions between a GFP and BIOCOB can be significant because, e.g., a UCC Article 9 secured party can be a GFP but not a BIOCOB. See, e.g., definitions at UCC §1-201(b) (9), (29), (30); *infra* note 8.

5. E.g., as either a GFP or a BIOCOB in the stated circumstances. See *supra* note 4.

6. E.g., due to claims against the seller by a prior, unpaid seller as in *Bank of Beaver City*. See UCC §2-403(1). This is an exception to the general rule, in contracts and property law, that a transferee takes only the rights of the transferor. See, e.g., *id.* (stating the general rule before providing the three exceptions).

7. *Id.* This runs in favor of a GFP. *Id.*
8. *Id.* This also runs in favor of a GFP. *Id.* It is clear that a secured party can be a purchaser (see UCC §1-201 (b) (29), (30)) and therefore a GFP if the security interest is taken in good faith and for value. Regarding value see UCC §1-204.
9. UCC §2-403(2). This protects only a BIOCOP. *Id.* The *Bank of Beaver City* case did not involve this scenario.
10. 295 P.3d 1088, 2012 WL 5334761.
11. As noted below, these issues in the case are confused somewhat by an additional allegation that the bank's security interest did not attach under UCC §9-203. See *infra* this text and notes 17-23 & 39.
12. *Bank of Beaver City*, 295 P.3d at 1089-90, ¶¶4 & 5, 2012 WL 5334761, at *1, ¶¶4 & 5. A security interest in after-acquired property is expressly permitted by UCC §9-204.
13. *Bank of Beaver City*, 295 P.3d at 1089-90, ¶¶4 & 5, 2012 WL 5334761, at *1, ¶¶4 & 5.
14. See UCC Article 9 §§9-203 & 9-204; (attachment of the security interest); UCC §2-401 (passage of title to the buyer). See also *infra* notes 17 & 25.
15. See *id.* §§9-201, 9-202, 9-317 & 9-322 (UCC Article 9 priorities); UCC §2-703 (seller's remedies).
16. See: UCC §2-403(1); *id.* §2-702(3). A secured party (here, the bank) can qualify as a GFP. See *supra* note 4.
17. See *Bank of Beaver City*, 295 P.3d at 1090, ¶7, 2012 WL 5334761, at *2, ¶7 (citing UCC §§1-201(20), 2-403, 9-203 & 9-308). Note that the requirement for attachment of the security interest is that the *debtor*, not the secured party, have "rights in the collateral." Moreover, attachment is governed by UCC Article 9, not §2-403. See UCC §9-203(b)(2). Clearly in this case the debtor acquired rights in the collateral in buying the cattle from Barretts'. See UCC §2-401; *infra* note 25. However, see further discussion of this issue below, at notes 22 - 25 and accompanying text.
18. See, e.g., UCC §§9-317 & 9-322. This is a basic point that is not always made clear in some case law. See, e.g., Alvin C. Harrell, "Security Interest v. Non-Code Interest: An Analysis of the Ramifications of *Utica National Bank & Trust v. Associated Producers*," 6 *Okl. City Univ. L. Rev.* 519 (1981).
19. Along with meeting the other requirements for attachment at UCC §9-203. These other requirements are not implicated here.
20. See UCC §§9-203, & 9-317 - 9-332.
21. This is an intentional policy choice in the UCC, designed to avoid subjective considerations that could require a trial to resolve every priority dispute if good faith was an issue (a danger illustrated in the *Bank of Beaver City* case). There are, of course, exceptions, where a resolution of priorities based on good faith is appropriate, as in §2-403(1). In addition to §2-403, these exceptions include instances governed by UCC §§9-330 - 9-332, e.g., where holder in due course status or a lack of collusion is relevant to priority. These other issues are not implicated here.
22. This is sometimes a difficult assertion to sustain, due to the limits of §2-702. The remainder of this discussion will assume those requirements were met, as appropriate for a summary judgment motion. If not, however, Barretts' would have standing only as a general, unsecured creditor.
23. See UCC §2-702. Note that, in this instance, the right to reclaim offers rights superior to a lien or security interest, essentially on the theory that the debtor's rights in the collateral (and therefore also the security interest) are subject to the seller's right to reclaim, which otherwise would be subordinate to the bank's prior, perfected security interest under Article 9 §§9-201, 9-202 & 9-317;
24. See UCC §2-403(1); *Bank of Beaver City*, 295 P.3d at 1091 ¶8, 2012 WL 5334761, at *2, ¶8.
25. Note again that this is a question as to the priority of the bank as a GFP under §2-403(1), not a question as to attachment of the bank's security interest under §9-203. Thus, arguments that the bank's security interest did not attach are misplaced. See also *supra* note 17.
26. *Bank of Beaver City*, 295 P.3d at 1091 ¶9, 2012 WL 5334761, at *2, ¶9.
27. It can be noted here that this is not an unusual experience in the banking business. See, e.g., Alvin C. Harrell, "Some Surprising New (and Old) Perspectives on Check-Kiting," 57 *Consumer Fin. L.Q. Rep.* 214 (2003) (noting the commonality of checking account overdrafts due to customers running short of funds, and some confusion about these issues within the legal community).
28. Once again it can be noted that this is not unusual. *Id.*
29. 449 N.E. 2d 993 (Ill. App. 1903), noted in *Bank of Beaver City*, 295 P.3d at 1091, ¶10, 2012 WL 5334761, at *3, ¶10.
30. *Bank of Beaver City*, 295 P.3d at 1091-92, ¶10, 2012 WL 5334761, at *3, ¶10 (citing *Monsanto*, 449 N.E. 2d at 994-95).
31. *Id.* at ¶¶11-15, 2012 WL 5334761, at *3, ¶¶11-15. See also *infra* this text and notes 32 - 34 & 48 - 49.
32. UCC §§1-201(b)(20) & 1-304. See also *id.* §1-304 cmt. 1.
33. Obviously a person cannot deal, fairly or unfairly, with a person as to whom one has no dealings. This basic point is sometimes, but not always, recognized in the case law. See, e.g., *Any Kind Checks Cashied, Inc. v. Talcott*, 830 So.2d 160 (D. Ct. App. Fla. 2002) (after correctly citing UCC Article 3 §3-103 cmt. 4 as distinguishing between good faith (including fair dealing) and ordinary care, and noting that fair dealing raises the question: "fairness to whom[?]," the court presented an analysis that seems to dart back-and-forth among the concepts of good faith, notice, and ordinary care without recognizing any distinctions, ultimately "taking a global view" that apparently contemplates a contractual duty of fairness running in favor of the entire world); *Maine Family Fed. Credit Union v. Sun Life Assurance Co. of Canada*, 727 A.2d 335 (Me. 1999) (cited with approval in *Talcott*), is another well-known case that makes essentially the same error. See also *infra* notes 34 & 48 - 49.
34. An idea that is absurd and unworkable on its face, and can lead to confused reasoning such as that in the cases cited *supra* at note 33. Such reasoning defies logic (and the law). After all, the basis for a duty of good faith is a contract, and the law requires privity as a prerequisite to a claim for breach of a duty arising from contract. See, e.g., *supra* notes 32-33 & *infra* notes 48-49.
- It should be emphasized, however, that the priority rights determined under §2-403 are not limited to those with privity. Section 2-403 resolves the priorities of competing claims between parties not in privity with each other, just like the other UCC priority rules (e.g., at §§9-317 & 9-322). However, the §2-403 priorities depend in part on GFP status, and that status must be established as between parties in privity with each other. See, e.g., *supra* notes 32 - 33; and discussion of Justice Gurich's dissent, *infra*.
- There is a separate issue, as to whether a breach of the duty of good faith can constitute an independent claim. There is a split of authority on this issue, but the majority and better view is no. See, e.g., Jennifer S. Martin, "Sales," 66 *Bus. Law.* 1083, 1094 n. 97 (2010) (citing a minority view case and contrasting UCC §1-304 cmt. 1 and PEB Commentary No. 10 (Feb. 10, 1994)). As noted in the Oklahoma Code Comment to §1-304 (Okla. Stat. tit. 12A §1-304), revised section 1-304 is intended to reject the minority view and cases like *Beshara v. Southern National Bank*, 928 P.2d 280 (Okla. S.Ct. 1996). In any event, this issue is not implicated in the *Bank of Beaver City* case. In the context of a holder in due course (HDC) issue under UCC Article 3, of course, HDC status can be defeated by reason of the holder having notice of a claim or defense under UCC §3-302; but that is yet another issue (not requiring privity) and not involved in a determination of good faith under §2-403. See generally Fred H. Miller & Alvin C. Harrell, *The Law of Modern Payment Systems and Notes* ¶3.03 (2002 & 2008 Supp.).
35. See *supra* notes 32 - 34.
36. *Bank of Beaver City*, 295 P.3d at 1092-93, ¶¶12-15, 2012 WL 5334761, at *3-4, ¶¶12 - 15 (citing, e.g., *Shell Oil Co. v. Mills Oil Co., Inc.*, 717 F.2d 208 (5th Cir. 1983)). See, e.g., UCC Article 1 §1-201, cmt. 20. See also *supra* notes 32 - 34 & *infra* notes 47 - 48. This is a very different scenario from one where a secured party exercises control over its debtor to the detriment of other creditors. But there was no apparent evidence or allegations of that here. See, e.g., *infra* note 49.
37. *Bank of Beaver City*, 295 P.3d at 1093, ¶17, 2012 WL 5334761, at *4, ¶17.
38. *Bank of Beaver City*, 295 P.3d at 1094, ¶¶1 - 3, 2012 WL 5334761, at *4, ¶¶1 - 3 (Combs, J., joined by Taylor, C.J. & Kauger, J., concurring). The simple answer, it would seem, is: Do not sell goods on unsecured credit to an insolvent buyer; taking a purchase-money security interest under UCC Article 9 seems a better idea. See *infra* notes 43 - 44. There were also two dissents, as noted below.
39. *Bank of Beaver City*, 295 P.3d at 1094 ¶¶1-3, 2012 WL 5334761, at *4, ¶¶1 - 3.
40. It should be emphasized that the concurring opinion does not suggest approval of this argument; it merely cites it in expressing concern for the plight of Barretts'. *Id.*
41. *Id.*
42. See *infra* note 43.
43. The majority opinion cites *Matter of Samuels & Co., Inc.*, 526 F.2d 1238 (5th Cir. 1976), a well-known case noting that the original UCC definition of good faith for purposes of a GFP (old UCC §1-201(19), (33) & (44)) "did not expressly or impliedly include lack of knowledge of third-party claims as an element." *Bank of Beaver City*, 295 P.3d at 1092, ¶13 at nn.15 & 18-19, 2012 WL 5334761, at *4, ¶13 at nn.15 & 18-19 (quoting *Samuels*, 526 F.2d at 1243-44). Cf. current UCC §1-201(b)(20) (additionally requiring "observance of reasonable commercial standards of fair dealing" — but not a lack of notice; see *supra* notes 32-34). *Samuels* led Congress to enact the federal Packers and Stockyards Act, Pub. L. No. 94-410, §8, 90 Stat. 1251 (1976), codified as amended at 7 U.S.C. §§196 (livestock) & 197 (poultry), effectively overruling *Samuels* by creating a statutory trust for certain sellers of livestock and poultry.

Subsequently, the Perishable Agricultural Commodities Act, 7 U.S.C. §499e, did the same for certain agricultural commodities; and Oklahoma followed suit with a state statutory trust for sellers of dairy products, in Okla. Stat. tit. 2 §§751-756. See also Harrell & Miller, *infra* note 45, at 597-98. Parties interested in these issues also should consider the impact of the Federal Food Security Act of 1985, Pub. L. No. 99-198, Tit. XIII, §1324 (codified as amended at 7 U.S.C. §1631). See also Harrell & Miller, *infra* note 45, at 602-05; see generally: Drew L. Kershen & Alvin C. Harrell, "Agricultural Finance — Comparing the Current and Revised Article 9", 33 U.C.C. L.J. 169 (2000); Harrell & Miller, *infra* note 45, ch. 16 (Agricultural Finance). Ultimately these agricultural trust fund statutes inspired a series of somewhat similar state statutes designed to provide equivalent protections for sales of oil and gas minerals by royalty owners. See, e.g., Fred H. Miller & Alvin C. Harrell, "Aftermath of the Sem-Group Case — Oklahoma Enacts the Oil and Gas Owners' Lien Act of 2010," 81 Okla. Bar Ass'n J. 2818 (2010). None of these agricultural trust fund statutes was an issue in the Supreme Court opinions in the *Bank of Beaver City* case.

44. UCC §9-324(d) & (e) provide a specific framework for a seller like Barretts' to claim priority via a PMSI in livestock. See also: *Id.*, cmt. 10; Kershen & Harrell, *supra* note 43. Even the dissenting opinion of Justices Watts, Colbert and Reif in *Bank of Beaver City*, despite essentially arguing in favor of Barretts' position, concedes that "the livestock company was sloppy in not filing a financing statement." See *infra* note 56. Regarding a PMSI in livestock, see also Harrell & Miller, *infra* note 45, at 595-96.

45. See, e.g., Alvin C. Harrell & Fred H. Miller, *The Law of Personal Property Secured Transactions Under the Uniform Commercial Code and Related Laws* 4 - 5 (2001).

46. *Bank of Beaver City*, 295 P.3d at 1095, ¶3, 2012 WL 5334761, at *5, ¶3 (Watts, J. joined by Colbert, V.C.J. & Reif, J., dissenting) (quoting the majority opinion). But cf. *infra* note 48.

47. 295 P.3d at 1094-95, ¶2, 2012 WL 5334761, at *5, ¶2.

48. See, e.g., *supra* notes 32 & 34. Many of the cases construing the good faith requirement arise in the context of UCC Articles 3 and 4, e.g., when parties claim that a bank owes a duty (based on good faith or similar concepts) to non-customers, or there is a claim to HDC status. Claims based on a duty to non-customers are almost universally rejected. See, e.g.: Alvin C. Harrell, Case Note: "Supreme Court of South Carolina Rejects Tort of Negligent Enablement," 57 *Consumer Fin. L.Q. Rep.* 96 (2003); 13 *West's Legal Forms, Commercial Transactions, Negotiable Instruments* §3.19 (Bradford Stone, Fred H. Miller & Alvin C. Harrell, 1998 & 2011-2012 Supp.) (discussing good faith and notice under the UCC). See also: *Continental Bank N.A. v. Modansky*, 997 F.2d 309 (7th Cir. 1993) (there is no duty of good faith in negotiating contract terms); *Susitna Ltd. v. Pacific First Federal*, 846 P.2d 438 (Ore. App. 1993) (there is no fiduciary duty in a contractual relation); *Roberts v. Wells Fargo AG Credit Corp.*, 900 F.2d 1169 (10th Cir. 1993) (same). This case law makes clear that the duty of good faith is limited to performance and enforcement of a contract between the contracting parties. See also UCC §1-304 & cmt. 1. Without more than the facts in *Bank of Beaver City*, as stated in the Supreme Court opinions, there do not appear to be any "contested facts" relating to the duty of good faith that would provide the basis for a remand. See also *infra* note 49.

49. This suggests an entirely different issue from whether the bank exercised good faith in its dealings with the debtor for purposes of §2-403(1). The quoted language does not address the issue of good faith; it does not suggest any element of unfairness in the way the bank treated the debtor. Quite the contrary, it suggests that the bank may have treated the debtor too favorably (which is not a breach of the duty of good faith). Note also that being "in bed" with a debtor is not a legally-defined standard. Presumably the dissent is inferring that there might have been some kind of control relationship or other collusion between the bank and the debtor. See, e.g., *supra* this text and notes 27-29. But this is a very different thing from the issue of whether the bank was treating its debtor fairly, as required by the duty of good faith. It can be noted again that the factors cited by the dissent (knowledge of the debtor's poor financial condition; tolerating the debtor selling goods "out of trust"; and paying overdrafts) are not evidence of either "control" by the bank or unfairness to its customer. See, e.g., Alvin C. Harrell, Case Note: "Matter of Fabricators — Equitable Subordination and Insider Control," 48 *Consumer Fin. L.Q. Rep.* 110 (1994) (noting the elements of "control"); Peter G. Pierce III & Alvin C. Harrell, "Financiers as Fiduciaries: an Examination of Recent Trends in Lender Liability," 42 *Okla. L. Rev.* 79 (1989) (same, and the impact of good faith); *supra* note 48.

50. *Bank of Beaver City*, 295 P.3d at 1095, ¶3, 2012 WL 5334761, at *5, ¶3 (dissenting op.).

51. *Id.*, ¶4.

52. As noted, there was no apparent evidence of control in this case. See *supra* notes 36 & 49.

53. See *supra* this text and notes 32-34 & 48 - 49.

54. See, e.g., *id.*

55. An analogy would be a check-kiting scenario. See, e.g., Harrell, *supra* note 27; Miller & Harrell, *supra* note 34, at 126 - 27.

56. Which Barretts' could easily have done, as even the dissent admits. See *Bank of Beaver City*, 295 P.3d at 1095, ¶5, 2012 WL 5334761, at *6, ¶5. The dissent characterized the bank's behavior as "devious." *Id.* But on the facts as stated that is neither accurate nor relevant. Your author appreciates that the standard for defeating a summary judgment motion is low, but it should be necessary at least to cite an argument that supports the desired legal position. In *Bank of Beaver City* the arguments of Barretts' did not state a cause of action because the alleged facts did not indicate the breach of any duty. See also *supra* notes 42 - 43.

57. *Bank of Beaver City*, 295 P.3d at 1095-96, ¶1, 2012 WL 5334761, at *6, ¶1 (Gurich, J., joined by Colbert, V.C.J. & Reif, J., dissenting).

58. *Id.* (citing various authorities).

59. *Id.*, at n. 2. This change in the definition of good faith should not make any difference as to the issues in this case, as (by its nature) good faith is a duty that can run only to those with whom one has dealt. However, the UCC change makes this point even more clear on the facts of this case. See *supra* notes 32-34.

60. As apparent in some of the cases. See, e.g., *supra* notes 33 - 34 & 48 - 49.

61. See *supra* this text and notes 31 - 36 & 48 - 49.

62. See, e.g., *id.*

63. UCC Article 3, applicable to this case to the extent that Barretts' was seeking to enforce dishonored checks written by the debtor, expressly recognizes this: "[I]n an action to enforce the obligation of a party to pay an instrument, the obligor may not assert . . . a defense . . . or claim . . . of another person . . ." UCC §3-305(c).

64. This is the most basic of legal principles. Absent privity or some other basis for a duty, one cannot assert the legal rights of others. See, e.g., *supra* note 63.

65. UCC §§1-201(b)(29), (30) & 2-403(1). This basic point is reinforced by the reference to a "good faith purchase," indicating that it is the purchase that must be in good faith, and the requirement for the purchaser to give "value." Obviously, the obligation to give value, like the obligation to act in good faith, could not run directly to third parties or the world at large.

66. This standard is all that can be reasonable expected of any purchaser.

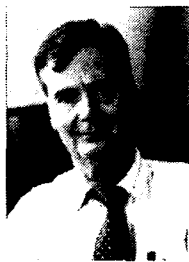
67. See, e.g., *supra* notes 33 - 34 & 48 - 49.

68. *Bank of Beaver City*, 295 P.3d at 1096, ¶1, 2012 WL 5334761, at *6, ¶1 (dissenting op.). Most if not all of the cases cited *id.* at n. 2 properly interpret §2-403(1) and are contrary to the conclusion quoted in the text above.

69. *Bank of Beaver City*, 295 P.3d at 1092-93, at ¶¶14 & 15, 2012 WL 5334761, at *4, ¶¶14 & 15 (citations omitted).

70. *Id.* at ¶17.

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