Can a Buyer and Secured Party Rely on Certificate of Title? - Part IV: The Wilserv Case

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By Alvin C. Harrell and Fred H. Miller

On Jan. 24, 2008, the 10th Circuit U.S. Court of Appeals issued its opinion in Malloy v. Wilserv Credit Union (In re Harper), holding that a Muscogee (Creek) Nation certificate of title (CT) is not a CT as that term is defined in the Uniform Commercial Code (UCC). While the 10th Circuit opinion presents a largely sound analysis of the UCC, the analysis is not complete in some respects, and the holding casts doubts on numerous transactions involving tribal CTs, suggesting a need to immediately address the statutory deficiencies evidenced by the 10th Circuit decision.

THE WILSERV CASE

The facts in Wilserv fit a pattern that has become familiar to Oklahoma bankruptcy, commercial and consumer lawyers. A tribal member living in Oklahoma purchased a vehicle on credit and chose to have the CT and license tag issued by the tribe. The initial purchase-money secured transaction was later refinanced by Wilserv Credit Union, which paid off the prior creditor and followed the Creek Nation procedure for perfecting the security interest by "lien entry" on the tribal CT. When the debtor filed bankruptcy in the Northern District of Oklahoma, the bankruptcy trustee asserted that the credit union's security interest was unperfected under Oklahoma Article 9 (because there was no lien entry under the Oklahoma CT law) and therefore the security interest was subordinate to (and essentially avoided by) the trustee's lien creditor status in bankruptcy. While this argument was disingenuous as to the Oklahoma CT law (which does not apply to a CT created by another jurisdiction), it raised the question whether the Creek Nation CT qualified as a CT for perfection purposes under Article 9.

BACKGROUND

As noted in previous articles in this journal, Oklahoma bankruptcy courts (and the Oklahoma Legislature) have wrestled with these issues for years, sometimes seeming to dance around the basic issue (validity of "lien entry" perfection on a tribal CT) but in the process creating some of the most thorough case law ever created with respect to this complex set of issues (which involves an interplay between traditional choice of law analyses, federal bankruptcy and constitutional law, tribal law and procedures, the UCC and state CT laws). These cases have properly concluded, among other things, that a vehicle subject to a legally insufficient tribal CT can be consumer goods subject to the PMSI automatic perfection rule at UCC section 9-309(1), but have also gone astray by suggesting that amendments to the Oklahoma
CT law can directly cure deficiencies in the CT law of another jurisdiction.\textsuperscript{14} As a response to all of this, the nonuniform Oklahoma amendments to Oklahoma Article 9 at title 12A Okla. Stat. section 1-9-311(a)(4)\textsuperscript{15} were thought to be sufficient to address the Article 9 consequences of deficiencies in an applicable tribal CT law.\textsuperscript{16} In all of this (until Wilserv), the results were generally satisfactory, in the sense of upholding the reasonable expectations of the parties under their contracts and the UCC, and avoiding an unjust forfeiture, but in some cases the underlying analysis (or the legislative response) included shortcomings that left a trail of pitfalls and uncertainty for subsequent parties and transactions.\textsuperscript{17}

These problems became apparent in Wilserv, where the facts did not fit the creative solutions that had saved the parties’ bargains in the prior cases, and as a result, the 10th Circuit’s straightforward analysis of Article 9 serves to illuminate some dramatic deficiencies in current law.

ALTERNATIVE SOLUTIONS

In Wilserv, the secured party’s primary fallback position, as an alternative to tribal CT “lien entry” perfection, was automatic perfection for a PMSI under section 9-309(1). This theory was rejected on grounds that the transaction was a refinance of the PMSI by a different creditor. However, Wilserv also asserted subrogation to the rights of the prior PMSI, and the 10th Circuit opinion seems overly strict in its rejection of this argument.\textsuperscript{18} The court also stated that subrogation to the prior secured party’s lien entry perfection would be useless because the prior lien entry had been terminated, but this likewise seems fundamentally incorrect, as the prior PMSI perfection did not depend on the lien entry.\textsuperscript{19} The nonuniform Oklahoma Article 9 amendment at section 1-9-311(a)(4) did not help, in the court’s view, because more than 30 days had elapsed before the credit union’s tribal lien entry was effectuated,\textsuperscript{20} and in any event because the court concluded that there was no Creek Nation CT or secured transactions law as required in the UCC.\textsuperscript{21} Thus, the crucial issue considered by the court was whether the Creek Nation CT qualified as a CT pursuant to the requirements for CT perfection under UCC Article 9.

THE ARTICLE 9 REQUIREMENTS

The Article 9 requirements for a CT appear in the definition of that term at section 9-102(a)(10), and are essentially repeated at section 9-311(a)(2) and (3) (which defer to an applicable CT law for perfection purposes). Section 9-303 is a choice of law rule determining which jurisdiction has the applicable law, if a qualifying CT has been created. If no qualifying CT has been created, choice of law issues must be resolved outside section 9-303.

The 10th Circuit opinion in Wilserv does not dwell on the historical reasons for the somewhat cumbersome Article 9 language defining “certificate of title,”\textsuperscript{22} and at one point seems to misuse the terminology (by suggesting that the applicable tribal CT law must refer to “perfection,” a test that many state CT laws would fail and something clearly not required by Article 9). But the court gets it basically right: Article 9 requires a state (or tribal) CT law that provides for an indication on the CT as a means or result of a procedure providing priority over lien creditors via the underlying law of that jurisdiction.

In the states and some tribal jurisdictions this underlying law is Article 9, but the Article 9 test for a CT does not require that the applicable priority rules be in Article 9, or the UCC, or even in a statute. The test at sections 9-102(a)(10) and 9-311(a)(2) and (3) merely requires a CT law that is designed to result in an indication on a CT (for purposes of notice to third parties) and (in conjunction with other law) priority over a subsequent lien creditor. Thus, the Amici brief argued that the test in a case like Wilserv is whether that result would occur under the “whole law” (including the “common law”) of the tribe. The 10th Circuit rejected this argument, perhaps too summarily, as noted below.

IMPLICATIONS OF WILSERV

This is where the 10th Circuit diverged from the path of analysis advocated by the Amici and your authors. The Wilserv opinion seems almost dismissive of the suggestion that an analysis of tribal common law is required, to determine the likely result under tribal law, for purposes of the definition in Article 9 section 9-102(a)(10), stating in effect that “here there is too little [tribal law] to go on” and therefore there was no basis for determining priority under tribal law as required by Article 9.\textsuperscript{24} Though it is not your authors’ view,\textsuperscript{25} it appears that the court was persuaded, by the paucity of evidence on this issue in the record, that there was no such tribal law to apply. In combination
with the complexity of the issues and the somewhat cumbersome language in Article 9 section 9-102(a)(10), it is perhaps not surprising that the court focused its attention on the paucity of CT and secured transactions law in the tribal jurisdiction. But this leaves the issue open for more litigation, on a case-by-case, tribe-by-tribe basis, with new litigation required every time a tribe changes its law, to determine whether tribal law meets this test. In effect, the next court to confront this kind of case will likely have to face the issue avoided by the 10th Circuit in Wilserv: What would be the result in a priority dispute under tribal law? Over a period of time it is likely that this kind of litigation will lead to recognition, or development, of a quite satisfactory structure of tribal common law in each tribal jurisdiction, and this may already exist, at least in some cases. It is likely the federal courts will ultimately recognize this, although at best some expensive and protracted litigation will be necessary in tribal, as well as bankruptcy and other federal courts, before this solution is reached. Indeed, because of the multiplicity of tribes and the diversity of their legal systems, it is possible that multiple bankruptcy and federal appellate decisions may be necessary for each tribe that issues CTs, in order to resolve these issues. In the meantime, thousands of existing and future vehicle sales and secured transactions will be left in a state of uncertainty.

That of course, is the beauty of a rational codification — done right, in conformity with common expectations and other applicable law, and with due regard for the need to avoid creating new problems, codification bypasses the expensive and lengthy process of developing a visible common law structure. Perhaps the good news in Wilserv, along with the 10th Circuit’s largely straightforward analysis of Article 9, is that the tribes (and the state of Oklahoma) have been alerted in an unmistakable manner to the need for an up-to-date legal structure to support these common CT transactions. Fortunately, ready-made uniform laws are available, in the form of UCOTA and Article 9, that will enable the tribes to easily adopt modern, clear and nonintrusive laws to put them on a par with (or even ahead of) the states on these issues. And, even if not all of the tribes do so, the states can enact UCOTA, thereby creating an optimal “backup” rule for cases involving tribes that do not protect their own CTs.

LESSONS FOR PRIVATE PARTIES AND THE STATES

For private parties, particularly creditors, the immediate lesson is clear: Unless Oklahoma enacts UCOTA, avoid non-PMSI secured transactions involving CTs created by tribes that do not have a comprehensive structure of CT and secured transactions laws. A PMSI in a vehicle that is consumer goods (unfortunately, this determination involves a sometimes difficult set of issues — see, e.g., UCC section 9-102(a)(23)) should be automatically perfected under law like section 9-309(1), though as noted this may be viewed by some as creating a secret lien and is not the best solution from a policy standpoint. A secured party also can try to meet the thirty day requirement of the nonuniform Oklahoma Article 9 amendment at section 1-9-311(a)(4), which should be effective in the right case (although under Wilserv only if the tribal CT qualifies as such under section 1-9A-102(a)(10), which means the tribe must have an adequate secured transactions law and CT procedure, and in any event only if Oklahoma Article 9 is applied). Of course, some of the tribes in Oklahoma have enacted Article 9 and some have enacted UCOTA. This will solve the problem for those tribes. Tribes that enact Article 9 and UCOTA can issue CTs that will be accepted for all purposes, just like a state-issued CT. Even in a worst-case scenario (such as the facts in Wilserv, where none of these theories was said to work), the Wilserv analysis leaves open an invitation for the secured party to argue in...
every case that the specific tribal law or procedure in question satisfies the UCC test for a CT and perfection law. It is probable that in the next case the secured party will not leave the record bare on these issues. As noted, the subrogation issue is also fact-specific and deserves further exploration in future cases, and a formal assignment of a prior PMSI would bolster the secured party’s position, even if taken after the refinance transaction. Absent prompt enactment of UCOTA in Oklahoma, however, it seems likely that these issues will be litigated again and again, until the state law issues and tribal common laws are fully clarified. This may require years, even decades, of litigation, but it provides multi-faceted opportunities to avoid unjust enrichment in individual cases.

For the state of Oklahoma, the obvious solution to these problems is to enact UCOTA. If UCOTA is enacted, it will apply in the Wilsero scenario pursuant to the choice of law rule at UCOTA section 4, in cases where a qualifying tribal CT has not been issued. UCOTA sections 25-26 then allow a secured party to perfect its security interest by filing a security-interest statement (essentially what is now called a lien entry form) with the state CT office (or a tag agent). If a vehicle is covered by a tribal CT which does not qualify as a CT under Article 9, section 9-102(a)(10), UCOTA would allow this method of perfection with the state CT office (assuming the state CT office wishes to accept these filings\(^2\)). This would allow such filings as a “back-up” to the uncertainties of tribal CT perfection, allowing perfection by a filing with the CT office in cases where there is any uncertainty as to whether a valid tribal CT has been issued, a needed option given the large number of tribes and the unlikelihood that they will all enact UCOTA and Article 9. Thus would also provide maximum public notice, in both the state CT records and on the tribal CT.

There is not much else that can be done by the states to directly address the issue of tribal CTs. CTs created by the state CT office are not directly implicated by the Wilsero decision, and there is little that a state can do to directly save tribal CTs unless the tribes themselves act to do so. Clearly it is inadvisable to make additional nonuniform amendments to Oklahoma Article 9, as that would risk considerable additional harm and unintended consequences, create more conflicts of law and nonuniformity, and muddy these turbulent waters even more (in the bargain creating new interstate choice of law issues — which can quickly become a quagmire). Moreover, there are other problems with the current Oklahoma CT law, some of which have been noted\(^3\) and some of which are lurking beneath the surface but seem to be percolating. Absent enactment of UCOTA, it is quite possible that there will be state law equivalents of the Wilsero problem.\(^2\) Enactment of UCOTA in Oklahoma will resolve these problems, as well as allowing tribal CT transactions to continue while the tribes struggle with their own law reform efforts. As noted more specifically below, the alternative is to leave these issues and large numbers of tribal CTs in a state of legal limbo, at great cost to tribal members, creditors and vehicle dealers, and to the detriment of the economy of the state.

LIFE WITHOUT UCOTA

If Oklahoma does not enact UCOTA, as noted above the resolution of the issues discussed in this article will be complicated. But for transactions already outstanding, and those completed before any UCOTA effective date, some of these issues cannot be avoided. The following brief analysis may be helpful in such cases.

The starting point for an application of Oklahoma UCC Article 9 to a secured transaction is the choice of law rule in UCC Article 1 at section 1-301 and (assuming section 1-301 leads the analysis to Article 9) the scope provision at Article 9 section 9-109. In a case like Wilsero, this means that Oklahoma Article 9 applies to determine perfection and priority of the security interest, absent application of an applicable CT perfection law under section 9-311(a).\(^2\) Section 9-303 (the choice of law rule for CT transactions under Article 9) does not apply unless a qualifying CT has been created. This leaves perfection and priority subject to the general Article 9 choice of law rule at section 9-301, absent a suitable CT perfection law such as UCOTA.

This situation is potentially unsatisfactory from the standpoint of secured transactions law because section 9-301 refers to the law of the jurisdiction where the debtor is located (and in the Wilsero scenario, this could mean either Oklahoma or Indian country). In any event, Oklahoma does not have an appropriate state law perfection system for vehicles covered by an adequate tribal CT law.\(^2\) As noted, if the security interest is a PMSI in consumer...
goods, it would be automatically perfected under section 9-309(1), assuming Article 9 applies, solving the problem for the secured party but without any state law notice to interested parties.  And for the secured party, qualifying for this Article 9 protection involves several risky requirements, especially in the case of a refinancing, as illustrated in the Wilserv court's analysis of these issues.

Absent a PMSI the analysis is even murkier. As noted, section 9-301 refers to the law of the debtor’s location. In a case like Wilserv, that could mean a choice of tribal law and (absent a qualifying tribal statute) a required analysis of tribal common law. In Wilserv the Amici argued that such an analysis was required under Article 9 sections 9-102(a)(10) and 9-311(a), to determine the adequacy of the CT and priority under that law. That argument was summarily rejected by the 10th Circuit. Your authors continue to believe that the Amici argument is correct, but section 9-301 probably leads to the same result. Thus, an analysis of tribal law may be unavoidable in a case like Wilserv, because Article 9 section 9-301 may refer to tribal law to determine perfection and priorities for a debtor located in Indian country, e.g., with regard to collateral registered with the tribe and owned by a tribal member resident in Indian country, absent a qualifying CT law (such as UCOTA) under section 9-311(a).

Unfortunately, however, the analysis under section 9-301 is not so clear-cut as the equivalent analysis under sections 9-102(a)(10) and 9-311(a), as advocated by the Amici in Wilserv, all but assuring extended litigation on this additional point (the location of a tribal member resident in Indian country). There is currently no precedent on this issue, meaning that another appeal to the 10th Circuit may be needed to resolve it.

If it is determined that these analyses do not adequately address or resolve the issue, i.e., if it is determined that this is an issue not covered by Article 9 (a so-called “omitted case”), then it would have to be resolved under other applicable law. This opens the analysis to any manner of common law and choice of law analyses, the scope of which we can only hint at here. But this is likely to lead, at some level, to analysis of the relevant tribal law, as advocated by the Amici in Wilserv. By rejecting this as a straightforward analysis under Article 9 sections 9-102(a)(10) and 9-311(a), the 10th Circuit has mandated a more difficult and uncertain analysis likely to lead to the same result.

For example, a traditional choice of law analysis likely will be necessary, consistent with UCC section 1-301, applying the “most significant relationship” test of the Second Restatement, with broad deference to the choice of the parties. This would allow the parties to address the “omitted” issue in the security agreement, at least as to future transactions. Alternatively, it is logical to argue that tribal membership, together with tribal registration of the vehicle, and perhaps bolstered by a contractual choice of law, together indicate that the location of the debtor is Indian country and tribal law should apply, both under the UCC and a traditional choice of law analysis.

While these arguments appear sound, it may take years, or even decades, to resolve them through multiple bankruptcy cases, state lawsuits, tribal litigation and appellate decisions, given the summary treatment of these issues in Wilserv and the lack of any alternative judicial precedent. The adverse impact on the Oklahoma economy, tribal members, other Oklahoma residents and important private transactions is apparent. Fortunately, enactment of UCOTA offers a quick and simple alternative, if the state (and tribes) want to solve these problems more easily.

Fortunately, enactment of UCOTA offers a quick and simple alternative, if the state (and tribes) want to solve these problems more easily.
CONCLUSION

If the state and tribes enact UCOTA, and the tribes enact Article 9, it will not only avoid further Wilserv cases (and the associated economic and legal disruptions), it will place Oklahoma and the Oklahoma tribes together, at the forefront of a new era of modern, clear and uniform laws governing important CT issues and secured transactions. This is a distinction worthy of our best efforts.

1. No. 07-5016 (10th Cir. Jan. 24, 2008).
2. See UCC §§ 9-102(a)(10), 9-311(a). Unless otherwise noted, citations herein are to the uniform text of the UCC; the equivalent Oklahoma sections are codified in Title 12A Okla. Stat. §§ 1-9-101 — 1-9-709.
3. One of your authors participated in preparing an Amici Brief in the Wilserv appeal, with Jason C. Boesch, on behalf of the Oklahoma Credit Union League and the Oklahoma Bankers Association, arguing that the Creek Nation CT should be recognized as a CT under the UCC. While the 10th Circuit disagreed as to this ultimate conclusion, for reasons relating to tribal law as discussed below, the court’s analysis of the UCC CT is largely correct and provides some additional guidance in this area of law.
4. This basic fact pattern has been explained previously in this journal. See Alvin C. Harrell, Can a Buyer and Secured Party Rely on a Certificate of Title? Part III: Tribal CTs, 77 Okla. Bar J. 547 (2006).
5. As noted by the 10th Circuit, tribal members are authorized to choose this option. See Wilserv, Slip. Op. at 16-17.
6. The characterization of the transaction as a refinancing was said to preclude Wilserv from directly asserting the automatic perfection available for a purchase-money security interest (PMSI) under UCC § 9-309(1). See Wilserv, Slip. Op. at 8. However as discussed infra in Part IV, the court may have been overly dismissive of the Wilserv claim of subrogation to the PMSI of the prior creditor. Moreover, there are other arguments on behalf of PMSI status in these circumstances, which were not fully explored in Wilserv. For example, PMSI status does not require any particular time period proximity between the connected events, only that there be such a connection. See, e.g., National Bank of Commerce v. First National Bank & Trust Co. of Tulsa, 446 P.2d 277 (S.Ct. Okla. 1968); Oklahoma Comments to UCC §§ 1-9-103. Thus Wilserv may have had a PMSI in its own right, as well as a claim to PMSI status by subrogation. Moreover, in addition to Wilserv’s apparent right to be subrogated to the PMSI rights of the prior secured party, there was nothing to prevent Wilserv from taking an assignment of those rights, even after the litigation had begun (subject to the effect of the Bankruptcy Code). See supra note 4, at 547. Thus Wilserv may have had a PMSI in its own right, as well as a claim to PMSI status by subrogation (if it was timely in taking an assignment of those rights).
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8. The court’s analysis of the UCC CT is largely correct and provides some additional guidance in this area of law.
9. See 11 U.S.C. § 544(a). Note that the trustee may have other avoidance powers under the Bankruptcy Code, e.g., 11 U.S.C. § 547. However, these were not at issue in Wilserv.
10. See UCC §§ 9-109, 9-303, and 9-311.
11. See supra this text and note 2. The relation between state and tribal law in this context is quite interesting. See, e.g., supra note 6, and infra Part VIII. Because the initial applicable law was the 10th Circuit bankruptcy law regarding a security interest is UCC §§ 1-301 and 9-109, and the tribal CT must meet the requirements of § 9-102(a)(10) before an application of tribal law CT is triggered by §§ 9-303 and 9-311(a). Once that happens, the tribal law takes over as to perfection and priority, and state law becomes largely irrelevant as to those issues (while other applicable law remains determinative as to scope, attachment, and enforcement). But if there is not an adequate tribal CT and secured transactions law, which qualifies under § 9-102(a)(10), tribal law does not apply under § 9-303. Whether tribal law or the applicable state Article 9 then is the governing law depends on a choice of law analysis, unless § 9-311(a) refers to an applicable state CT law. The current Oklahoma CT law does not qualify for the reference at § 9-311(a) in these circumstances, though UCOTA does. See infra parts V. and VI. Thus, enactment of UCOTA is the obvious solution to this problem. Id. Absent the enactment of UCOTA, a further choice of law analysis must be conducted under § 9-301(1), an ambiguous exercise in the context of Indian country in Oklahoma. See infra Parts VII. and VIII. This argues strongly for enactment of UCOTA.
12. Absent UCOTA, however, the choice of law issues are very challenging, at multiple levels. See infra Part VIII.
13. Assuming the state version or a similar tribal version of Article 9 exists and is applicable, Malloy v. Bank of Commerce (In re Dalton), No. 04-40205-R S Bank N.D. Okla. May 16, 2005), Dalton provides a correct but a result that could have such vehicles subject to a “secret lien” (in the sense of automatic perfection in a context where that is not normally expected) that endangers innocent parties and transactions. However, it should be noted that the result is not entirely “secret,” as the notation of the security interest on the tribal CT is effective as notice even if the CT does not qualify as such under Article 9. Still, automatic perfection as to CT goods is not a satisfactory solution from a policy perspective.
16. See, e.g., Harrell, supra note 4, at 547 and 551. In Wilserv, the 10th Circuit declined to opine significantly on this amendment, because it concluded that the amendment was not applicable on the facts of this case (e.g., the credit union did not obtain its tribal lien entry within 30 days, as provided in § 1-311(a)(4)). Moreover, the court indicated that application of § 1-9-311(a)(4) is predicated on the existence of a tribal CT or secured transactions law (Wilserv, Slip Op. at 13), casting some doubt on the effectiveness of § 1-9-311(a)(4) in cases where (as in Wilserv) the court concludes that no such law exists, even if the 30 day limit is met. Still, it should be noted that § 1-9-311(a)(4) was drafted so as to permit any tribal CT procedure or perfection method. It appears that this issue deserves more consideration than it has yet received in the cases.
17. See Harrell, supra note 4. See also supra notes 6 and 11.
18. See Wilserv, Slip Op. at 18-19. The Wilserv argument that there was a sufficient nexus between its loan and the borrower’s purchase of the collateral is necessarily a case-by-case issue, but perhaps one worthy of more attention than it received in Wilserv. See supra note 6. Arguably a refinancing creditor can have a PMSI by reason of this nexus. Moreover, a refinancing creditor can obtain PMSI status by subrogation — that is what subrogation means, and the law a formal assignment in these circumstances (cited by the court, Wilserv, Slip Op. at 18) is a reason for application of the equitable doctrine, not an argument against it. See, e.g., French Lumber Co. v. Comer & R all Real Co., 195 N.E. 2d 507 (Mass. 1964). Contrary to the court’s suggestion (Wilserv, Slip Op. at 19), the doctrine does not require fraud, merely unjust enrichment (which was surely present here). The Wilserv court’s

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19. Wilser, Slip Op. at 16-17. Subrogation only requires stepping into the shoes of a prior creditor's automatic PMSI perfection, which does not rely on a prior CT lien entry. See UCC § 9-309(1). See also Dan B. Dobbs, Restatements 251-52 (1978) (noting that subrogation is an equitable remedy intended to avoid unjust enrichment and that it carries with it any security of the party who was paid). Equitable subordination, in contrast was properly rejected by the 10th Circuit as a theory in the case. See Wilser, Slip Op. at 16-17. See also UCC Article 1, § 1-103(b) (2001 uniform text).

20. Such delays are common in CT transactions, another problem that can be fixed by enactment of UCOTA. See UCOTA §§ 25-26 (allowing perfection of the security interest before the CT is issued). Note that the UCOTA accomplishes the difficult task of providing a CT law that qualifies as such under Article 9 §§ 9-102(a)(10) and 9-311(a), so as to provide a satisfactory means of perfection in the absence of an application for a CT. See id., supra this text and note 11, and UCOTA §§ 4, 11, and 25. It is essential for the state's CT law to capture this nuanced relation between the state UCC and CT law, and tribal laws. UCOTA accomplishes this purpose; current CT laws do not.

21. Wilser, Slip Op. at 13 and 15. Arguably this was another erroneous conclusion. See supra note 16. See supra notes 11, 16 and 20 as to how UCOTA would resolve this.

22. See e.g., Harrell, supra note 4, at 548-549 for a brief description of this history.


24. Wilser, Slip Op. at 15. One may suspect that a tribal court might differ, and it seems that this should be the point under the Article 9 test, though one must also admit that the preferred evidence on this issue in the record was nil. For this reason the Amici urged remand.

25. Id. As noted, the Amici brief argued that the 10th Circuit should remand the case for a determination of this issue pursuant to whatever tribal law exists.

26. See supra note 22.

27. Unless of course the tribe enacts UCOTA and Article 9, in which case the tribal law will clearly meet the standards of the UCC and this litigation can be avoided.

28. See supra note 13. Among other things, this solution means that a prospective purchaser or secured creditor has no means under state law to discover a security interest in goods covered by such a CT, although as a practical matter (as noted supra at note 13) the notation on a tribal CT may provide notice.

29. Note that this does not impose any duty on the CT office. It simply means that if the filing is accepted the security interest is perfected under Article 9 § 9-311(a), thereby resolving the perfection and priority problem. In addition, assuming the CT office maintains and indexes a file, this will provide a convenient and intuitive central filing system for records of security interests perfected on tribal CTs.

30. See supra this text at notes 10 and 14.

31. See, e.g., Bruce A. Campbell, Ohio Car Buyers, Their Financiers, and "Informers" Beware: Certificate of Title Control in Ohio, 60 Consumer Fin. L.J. Rep. 216 (2006) (noting the effects of inadequate coordination between the CT law and Article 9 in Ohio). Oklahoma has some of these same (or equivalent) problems.

32. As noted supra at Part VII, Wilser leaves the door open to litigation in every such case as to the adequacy of the tribal law and procedure at issue in the case. The possibility that a secured party might prevail on that argument should not be discounted, but absent UCOTA and Article 9 it is a fact-intensive analysis, and not a prudent basis for new transactions going forward.

33. It should be noted again that enactment of UCOTA will cure this deficiency. See supra Part VII.

34. See supra note 27.

35. See, e.g., § 1-105(b).

36. These theories are reflected in the general UCC choice of law rule at § 1-301.

37. Arguably the limits on party autonomy for perfection issues, at UCC § 1-301, would not apply due to the nature of an "omitted case." This would allow the parties to a new transaction to prescribe application of tribal law to perfection and priority issues. Indeed, it seems feasible that the parties to an existing contract could amend that contract to resolve an ambiguity or "omitted" issue by subsequent agreement.

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