Oklahoma Comments and the 2010 Amendments to UCC Article 9  
By Fred H. Miller

I. Uniform Laws in Oklahoma and Procedure for Enactment  
A. Structure and Procedure of OBA Section and the Oklahoma ULC Commissioners  

The Oklahoma Bar Association (OBA) Financial Institutions and Commercial Law (FICL) Section includes a Uniform Laws Committee and that Committee has a Legislative Review Subcommittee. The function of the Legislative Review Subcommittee is to review each uniform law suggested for enactment in Oklahoma by the Uniform Law Commissioners from Oklahoma (Oklahoma Commissioners) to the National Conference of Commissioners on Uniform State Laws (the Uniform Law Commission, or ULC). The Uniform Law Commissioners (commissioners) are appointed by the state government, to research and promulgate uniform laws for consideration by each of the fifty-three jurisdictions in the ULC (the fifty states, D.C., Puerto Rico, and the U.S. Virgin Islands). Once the ULC approves a uniform law, it is the duty of each state’s Commissioners to endeavor to get that statute enacted in their state.

Pursuant to that duty, the Oklahoma Commissioners work with the OBA to assess the suitability of a proposed statute for enactment in Oklahoma. The members of the Legislative Review Subcommittee, meeting together, review the proposed statute in coordination with a review of then present Oklahoma law, or the absence of it, or, if no member of the Legislative Review Subcommittee is practicing in the area of work, in coordination with OBA members in the area of the proposed law from other parts of the OBA.

At the conclusion of a study, the members involved in the study prepare a brief report on their recommendation which is delivered to the Oklahoma Commissioners, who then may use it in conjunction with legislative efforts to enact the proposed uniform law. The report is not an OBA product nor does it necessarily represent the views of the OBA, but rather is a collective recommendation of individual practicing lawyers and academic members of the OBA for consideration by the Oklahoma Commissioners and members of the Oklahoma Legislature.

This process recognizes uniform laws as an important part of the federal system and as an alternative to federal legislation in appropriate areas, while allowing for some local diversity in and integration with state laws, and at the same time providing the necessary uniformity in approach on core issues so that transactions across state lines and citizen movement among jurisdictions is not impaired by unnecessary differences in applicable state laws. This creates a rare if not unique mechanism for reconciling and integrating nationally-uniform laws with related local laws and issues. To illustrate, consider the Uniform Consumer Credit Code in Oklahoma prepared by the ULC in the late 1960s and early 1970s. This statute modernized Oklahoma law and also coordinated well with the similar statutes enacted in a number of other states. It also has allowed Oklahoma to have more effective administration of the law and indeed an exemption from federal law in important areas, and thus has avoided most of the incessant litigation that has occupied this area of the law for a number of years in other states.

B. Oklahoma Comments  

The report prepared by the Legislative Review Subcommittee for the Oklahoma Commissioners and the Oklahoma Legislature serves a useful purpose in pointing out (if that is the case) why the proposed law is needed. The obvious point then arises: Would that not be

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helpful as well for practicing attorneys and law professors? The report itself however is basically a bullet-point summary of the proposed law and recommendation and, aside from any recommendation for repeal or amendment of other law, often does not cover in detail how it may change existing or related Oklahoma law as to specific issues, including case law. Therefore, considering that members of the Legislative Review Subcommittee serve as volunteers without compensation and that the FICL Section should serve its members and the OBA as well, an expanded report seemed to represent a good service. This is the thought behind the Oklahoma Comments.

West Publishing (now Thomson Reuters) has long published the uniform laws when enacted in Oklahoma, and the Official Comments to them, in the Oklahoma Statutes Annotated. Some time ago, the FICL Section approached representatives of the publisher and asked if they would be interested in also publishing Oklahoma Comments for the newly-enacted uniform laws, along the lines stated above. The answer was yes, and this has been the practice for several decades (the publisher pays the OBA a modest fee for these Comments). As a result, Oklahoma Comments are published in Oklahoma Statutes Annotated, the members who wrote them are identified, the OBA obtains funds for various projects, and Oklahoma attorneys receive guidance on the new law and its impact in Oklahoma. However, as noted below, an unusual situation arose with respect to 2010 amendments to the uniform text of Uniform Commercial Code (UCC) Article 9.

II. UCC Article 9
A. History

Article 9 is the most innovative part of the UCC. For example, UCC Article 2 was built on the existing foundation of the Uniform Sales Act, and Articles 3 and 4 were based on the Uniform Negotiable Instruments Law and existing state Bank Collection Codes; in contrast, Article 9 borrowed from a number of separate and disparate uniform and non-uniform acts like conditional sales acts, trust receipts acts, and chattel mortgage statutes, and combined them for the first time into a unitary secured transaction theory, while retaining the important separate characteristics of purchase money transactions and the like. The limits of human vision ultimately became apparent, however, and important 1972 amendments were the result. The next major effort was in 1990 – 1999. Oklahoma enacted these changes and a number of coordinating amendments along the way, as other parts of the UCC also were amended or enacted and corresponding changes in UCC Article 9 were necessitated. Indeed, recognizing the importance of this process to the continuing vitality of state law, Oklahoma has been among the first to enact UCC amendments or revisions, which has provided a beneficial legal climate and reduced or eliminated difficult choice of law problems created by the non-uniformity that other states have experienced. Nonetheless, this has been accomplished with accommodation of local Oklahoma concerns. For example, the official text of UCC sections 9-406(j) and 9-408(e) is designed to override statutes, rules or regulation that are inconsistent with the policy of Article 9 against terms or legal restrictions restricting assignments, but Oklahoma instead elected to preserve public policy restrictions for certain types of transactions.

B. 2010 Article 9 Amendments
1. Need for the Amendments

2. See, e.g., PEB Report, Effect of Non-Uniform Scope Provisions in Revised Article 9 of the Uniform Commercial Code, December 1, 2004; Legislative Note to UCC § 9-801.

No statute, let alone one as complicated as UCC Article 9, can long serve in its original form without amendment. Different court decisions arise due to ambiguity, new developments occur, and so on, all of which need to be addressed. Such was the case with Article 9 by 2008. For example, the basic means to perfect a security interest is by filing a financing statement. An important aspect of that financing statement is the name of the debtor as that is how the financing statement is indexed and thus findable by persons who may want to acquire the personal property that is collateral or a secured party that may wish to lend to the debtor and take that property as collateral. UCC section 9-502(a)(1) states that a financing statement is sufficient only if it provides the name of the debtor. But in the case of an individual debtor, for example, what name is that? Is it the name on the driver’s license, on the birth certificate, or what?

The issue generally does not arise in consumer transactions because filing seldom is used there to perfect, given that UCC section 9-310(b)(2) provides, by reference to UCC section 9-309(1), that generally filing is not necessary for a purchase-money security interest in consumer goods, and any other type of security interest in consumer goods may not be permitted. Moreover, the issue does not arise with regard to collateral covered by a certificate of title, because these transactions are indexed by the vehicle identification number (VIN) rather than the debtor’s name, in the state certificate of title records.

That leaves the issue of the debtor’s name to arise largely in other, business purpose transactions. In that context, absent the 2010 amendments, section 9-503 tells us that a debtor’s trade name does not sufficiently provide the name of the debtor, but says little else. There are enough sole proprietorship transactions, however, that non-uniform amendments began being enacted to address the uncertainty. Such a resolution is fine, but if it creates diversity then the benefits of uniformity erode and pretty soon the states lose what a uniform law provides and return to the uncertainty and choice of law problems that pre-UCC case law development engendered. The demise of the 2003 and 2005 UCC Article 2 amendments, now withdrawn by the ULC, well illustrates this as more published cases are decided under UCC Article 2 every year than cases under almost all other UCC Articles combined, partly because Article 2 has not been amended since it was first enacted over fifty years ago.

What is the relevance of Oklahoma Comments to this? In the right context, State Comments not only can address the reasons for a new statute, and how that law fits existing jurisprudence, but perhaps can provide interpretive guidance as to present unamended State law, e.g., in circumstances where a State fails to enact revisions clarifying the meaning of uniform text of a Uniform Act, as opposed to changing existing law. The unfortunate factual example is Oklahoma. Due to some misunderstandings about the role of uniform laws in Oklahoma, which do not dictate to the Legislature as this discussion has demonstrated but rather assist the Legislature in preserving effective state law, and due to partisan politics, Oklahoma is basically the only state to fail to enact the 2010 amendments to UCC Article 9 even though they have been

5. See UCC Article 9 pt.5.
6. See: Federal Trade Commission Credit Practices Rule, 16 CFR § 444.2(a)(4) (it is an unfair act or practice to take a nonpossessional security interest in household goods other than a purchase money security interest); Oklahoma Consumer Protection Act, 15 Okla. Stat. § 753(18)(prohibiting an unfair or deceptive trade practice); and 14A Oklahoma Stat. § 2-407 (collateral is limited in a credit sale to the property sold with some exceptions).
7. See UCC § 9-311(a) (referencing the state certificate of title lien entry system).
introduced several times (the bill is on the Governor’s desk in New York). This does not promote the public good for debtors or creditors, and instead it promotes additional expense in lawyering transactions to try to overcome defective and nonuniform statutory rules and, inevitably, additional litigation expense. Indeed, instead of being beneficial, the bill to enact the Article 9 2010 amendments in Oklahoma was encumbered by a gratuitous provision, to move the filing system from the Oklahoma County Clerk to the Secretary of State’s office without a proper transition and at considerable expense for no stated reason, and another to abolish the Oklahoma Uniform Law Commission and thus a process that has worked and continues to work well.

However, the 2010 amendments to the uniform text of UCC Article 9 in part provide amendments to the Official Comments. These need no legislative action to the extent they constitute interpretation of and guidance to current Oklahoma law. Indeed, they are commonly not part of the legislative enactment and can be followed once known. More than that, many of the statutory changes are interpretations or guidelines to the proper reading of prior Article 9 provisions, and thus are not new law. If a court is looking for guidance on an issue, it may need to look no further than to the latest interpretation on that issue in the Official Comments, even if the statutory clarification has not been enacted, just as courts always have used the Official Comments and PEB Commentary. Similarly, state-specific Comments may assist this process. That is the purpose of new Oklahoma Comments, as described below.

2. The Legal Basis for Oklahoma Comments and the Article 9 Amendments

UCC section 1-103(a) states fundamental goals for the UCC. The goals articulated at section 1-103(a)(1) (to simplify, clarify and modernize the law governing commercial transactions) and section 1-103(a)(3) (to make uniform the law among the various jurisdictions) are served if Oklahoma law, as nearly as possible, is clear on as many points as possible, and accords with similar law in other jurisdictions. Given that basically every state except Oklahoma has enacted the 2010 amendments to UCC Article 9, and past experience demonstrates that the Oklahoma Legislature may not enact the Article 9 amendments until politics change and that could be some time in the future, and further that many of those amendments, given the Oklahoma Comments process, essentially can be achieved in Oklahoma without the need for legislative action, extensive 2010 Oklahoma Comments were published in the Oklahoma Statutes annotated in late 2014; in most cases, though not all, these Comments should be effective upon publication. These new Oklahoma Comments address the impact of the 2010 amendments to the uniform text of Article 9, and the impact in Oklahoma of the failure to enact those amendments.

To be clear, an Oklahoma Comment is not as good as a legislative enactment; the former may or may not be followed by a court, even given the command in section 1-103(a), and thus is not the same as a legislation in an enacted statute. But these Oklahoma Comments, coupled with and supported by the broad ability to vary the effect of UCC provisions by agreement in UCC section 1-302(a), which includes course of performance and dealing and usage of trade, are likely to be helpful and certainly better than no law at all on otherwise unresolved issues.

3. Details of the Article 9 Oklahoma Comments


9. See UCC § 1-103 and § 1-201(b)(3). Arguably the 2010 amendments as enacted in the other states reflect usage of trade.

As described below, there are three types of changes in the 2010 amendments to the uniform text of Article 9.

a. **Style Changes**

So-called “style” changes are those where better language is substituted for previous wording with no change in substance. An example is the change in section 9-311(a)(2), where “certificate of title” is struck in the first line in favor of adding “of title” after “certificate” in subsections (a)(2) and (3). These changes obviously can be followed but are not discussed here; they are identified in the 2010 Oklahoma Comments.

b. **Updates**

Updates are illustrated by the change in section 9-102(a)(7) to the term “authenticate,” to bring it in line with the standard term “record,” adopted by the ULC after the 1999 amendments to Article 9 were adopted; or the change in Official Comment 3 to section 9-102, changing the citation from section 1-109 to section 1-107, needed due to changes in UCC Article 1, as enacted in Oklahoma and other states. Again these are not substantive changes, and they can be followed in Oklahoma; they are not discussed here but are in the 2010 Oklahoma Comments.

c. **Substantive Changes**

There are also substantive changes in the 2010 amendments to the uniform text of Article 9, some interpretive and some not. The interpretive ones can be followed in Oklahoma notwithstanding the failure to enact the 2010 amendments, but not the substantive ones. The discussion of some representative examples follows. It should be noted, however, that the OBA Legislative Review Subcommittee may provide additional representative or amended Oklahoma Comments in future years in response to subsequent developments, e.g., if the Oklahoma Legislature enacts the 2010 amendments.

### III. Impact of the 2010 Amendments

A. **Certificates of Title**

UCC section 9-102(a)(10) is revised in the 2010 amendments to permit the Article 9 definition of “Certificate of title” to accommodate:

- electronic lien entry (i.e., security interest) perfection systems; and
- state certificate of title act provisions that otherwise may not be clear on this issue.

There is concern that some states are issuing certificates of title and registering lien entries (i.e., security interests), in electronic form or otherwise, without an adequate legal framework. This implicates Article 9, as UCC section 9-311(a) requires perfection pursuant to the applicable certificate of title act, based on the definition of a certificate of title at UCC section 9-102(a)(10). Absent enactment of a modern certificate of title statute that recognizes electronic titles, such as the Uniform Certificate of Title Act (UCOTA) (another uniform act approved for enactment in Oklahoma but which the Legislature has not acted upon), state law may not provide an adequate basis for electronic certificates of title or electronic perfection pursuant to Article 9. Since Oklahoma has not enacted the 2010 amendments, the present certificate of title definition in Oklahoma UCC section 1-9-102(a)(10) states that the term “[c]ertificate of title”:

11. UCC § 9-301(a) on choice of law, which potentially could avoid the problem of non-enactment in Oklahoma by allowing selection of the law of another state that has enacted the 2010 amendments, is of limited utility because UCC § 1-301 limits the choice on many Article 9 matters and thus precludes selecting the law of a state that has enacted the 2010 amendments as a general solution to the Oklahoma Legislature’s failure, even were that approach otherwise acceptable.
means a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest’s obtaining priority over the rights of a lien creditor with respect to the collateral.

It can be argued that this definition does not accommodate an electronic lien entry system, absent a written certificate of title. As noted, some states have implemented electronic lien or certificate of title systems, in an effort to take advantage of the benefits of modern technology, but without fully considering the impact on related legal issues and requirements (including the requirements for an Article 9 security interest). For example, some states allow electronic notation of a security interest in state records, purportedly as an alternative means of perfecting a security interest where a traditional certificate of title is not issued. It is possible that this would not comply with the requirements of Oklahoma Article 9 at Oklahoma UCC sections 1-9-102(a)(10) and 1-9-311.

Part of the problem is that the term “certificate” as defined in Oklahoma Article 9 section 1-9-102(a)(10) does not include an electronic record or records in the state’s certificate of title files. Some electronic lien or certificate of title procedures might support an interpretation that allows recognition of an electronic record as a certificate of title sufficient for purposes of perfection under Article 9, but the issue is not clear, and in any event few certificate of title acts (other than UCOTA) contemplate or resolve the full range of resulting implications for certificate of title transactions.

The 2010 amendments to the uniform text of Article 9 address this problem by adding the following sentence to the definition of “certificate of title” at section 9-102(a)(10):

The term includes another record maintained as an alternative to a certificate of title by the governmental unit that issues certificates of title if a statute permits the security interest in question to be indicated on the record as a condition or result of the security interest’s obtaining priority over the rights of a lien creditor with respect to the collateral.

The 2010 amendments also add the following explanatory text to the Official Comments for the definition:

The first sentence of the definition of “certificate of title” [at section 9-102(a)(10)] includes certificates consisting of tangible records, of electronic records, and of combinations of tangible and electronic records.

In many States, a certificate of title covering goods that are encumbered by a security interest is delivered to the secured party by the issuing authority. To eliminate the need for the issuance of a paper certificate [of title] under these circumstances, several States have revised their certificate of title statutes to permit or require a State agency to maintain an electronic record that evidences ownership of the goods and in which a security interest in the goods may be noted. The second sentence of the definition provides that such a record is a “certificate of title” if it is in fact maintained as an alternative to the issuance of a paper certificate of title, regardless of whether the certificate of title statute provides that the record is a certificate of title and even if the statute does not expressly state that the record is maintained instead of issuing a paper certificate.

While this does not fully resolve the wide range of legal issues relating to the use of an electronic record as the substitute for a written certificate of title (as does UCOTA), it reduces the risk that these deficiencies in state certificate of title acts will inadvertently impair the perfection of security interests under Article 9. In addition, consider the 2010 amendments to the
Official Comment to section 9-311, which added the following language to the Official Comments for the definition of “certificate of title” at section 9-102(a)(10):

Statutes often require applicants for a certificate of title to identify all security interests on the application and require the issuing agency to indicate the identified security interests on the certificate. Some of these statutes provide that priority over the rights of a lien creditor (i.e., perfection of a security interest) in goods covered by the certificate occurs upon indication of the security interest on the certificate; that is, they provide for the indication of the security interest on the certificate as “condition” of perfection. Other statutes contemplate that perfection is achieved upon the occurrence of another act, e.g., delivery of the application to the issuing agency, that “results” in the indication of the security interest on the certificate. [This is the case in Oklahoma.] A certificate governed by either type of statute can qualify as a “certificate of title” under this Article. The statute providing for the indication of a security interest need not expressly state the connection between the indication and perfection. For example, a certificate issued pursuant to a statute that requires applications to identify security interests, requires the issuing agency to indicate the identified security interests on the certificate, but is silent concerning the legal consequences of the indication would be a “certificate of title” if, under a judicial interpretation of the statute, perfection of a security interest is a legal consequence of the indication. Likewise, a certificate would be a “certificate of title” if another statute provides, expressly or as interpreted, the requisite connection between the indication and perfection.

Unfortunately, without actual enactment of the 2010 amendments in Oklahoma, the Oklahoma Legislative Review Subcommittee does not believe these changes can be considered guidance for an interpretation of present Oklahoma law. However, a 2010 amendment to Official Comment 11 to section 9-102(a)(10) that references a part of the Oklahoma definition of certificate of title and alludes to electronic records may be of some use.

On the other hand, the 2010 amendments in the Official Comments to section 9-311 clarify an issue involving the meaning of existing law, as regards statutory language requiring that the certificate of title statute provide that a security interest is to be indicated on the certificate of title as a condition or result of the security interest’s obtaining priority over the rights of a lien creditor. As an official Comment and interpretation, this should be persuasive authority in Oklahoma. However, enactment of UCOTA as well as the 2010 amendments would provide a comprehensive resolution, bringing the Oklahoma certificate of title law into coordination with not only Article 9, but also other parts of the UCC, like UCC Article 2, as well as enhancing efficiency through electronic titles and fraud protection.

B. Registered Organizations

The 2010 amendments to the uniform text of section 9-102(a)(68) and (71) change the definition of the term “Registered organization” and add a new provision defining the related idea of a “Public organic record.” These changes clarify what is a registered organization, what is a public organic record, and the proper characterization of trusts. As such they clarify


13. See also the 2010 amendments to Official Comment 11 to § 9-102, discussing the change in § 9-102(a)(71) and the addition of § 9-102(a)(68).
present law and therefore should be persuasive authority in Oklahoma, as noted in the 2010 Oklahoma Comments.

C. Assignment of Payment Rights

It is unclear under Oklahoma Article 9 whether the assignment of a right to payment on collateral, e.g., a right to collect the payment stream from chattel paper (see the definition at Oklahoma section 1-9-102(a)(11)) creates an interest that is the same type of collateral (e.g., chattel paper) or something else (e.g., an account or payment intangible -- see the definitions at sections 1-9-102(a)(2) and (61)). This may affect perfection of the assignee’s security interest, and the priority of the assignee as against a subsequent purchaser, e.g., of the chattel paper.

This is addressed in the 2010 amendments at section 9-102 Official Comments 5.a., b. and d. Additions to Official Comment 5.a. specify that a right to payment arising out of the use of a credit or charge card is an “account” (while recognizing that other, related payment rights such as transaction settlement charges are not). In Official Comment 5.b., the former fourth paragraph (referencing alternative means of creating electronic chattel paper) was deleted as part of the 2010 amendments.

The biggest changes are in Official Comment 5.d. (e.g., for the definitions of “General intangible;” and “Payment Intangible”). The fourth paragraph of Official Comment 5.d. was extensively revised in the 2010 amendments, specifying that a right to payment “is frequently buttressed by ancillary rights, such as rights arising from covenants... and the lessor’s rights with respect to leased goods....” The prior text of Official Comment 5.d. remains in place, stating, i.e., that these rights are part of the payment rights to which they relate (e.g., chattel paper) and are not a separate property interest or type of collateral.

The 2010 amendments to Official Comment 5.d. then add three explanatory sentences providing, i.e., that an assignment of the collateral carries with it these ancillary rights (e.g., assignment of a lessor’s right to payment “also transfers the lessor’s rights with respect to the leased goods under Section 2A-523.”). This is contrary to the analysis in In re Commercial Money Center, Inc.14 Thus, if the lessor’s rights are “evidenced by chattel paper, then an assignment of the lessor’s rights to payment constitutes an assignment of chattel paper.” Moreover, an agreement to the contrary may be effective between the parties but does not alter the statutory characterization of the collateral for purposes of Article 9.15 These changes in the Official Comments of course need no legislative action and can be regarded as clarifying present law. Therefore they should be effective in Oklahoma, even without the 2010 amendments.

D. Utility Fixtures

The 2010 amendments add a warning at section 9-301 Official Comment 5(b) regarding transmitting utility fixture filings.16 Pursuant to the warning, filers should note that, if the fixtures are located in more than one state, filing a financing statement with the proper office in all such states will be necessary to perfect a security interest in all collateral fixtures. This warning merely interprets existing law, and therefore is relevant in Oklahoma. Article 9 does not determine what is a fixture but does exclude ordinary building materials incorporated into an improvement like bricks and lumber.17 What is a fixture is determined by other state law.18

14. 350 B.R. 465 (9th Cir. BAP 2006).
15. See generally UCC § 1-302, and Official Comment 1.
16. In Oklahoma, the proper filing office for transmitting utility fixture filings is the office of the Secretary of State.
E. Location of Organization

The 2010 amendments added the following language to the end of section 9-307(f)(2) in the uniform text, in reference to the designation by a registered organization of its location: “including by designating its main office, home office, or other comparable office.” In general, section 9-307(f) establishes the location of entities organized under the laws of the United States (e.g., national banks), and the location of a branch or agency of a bank not organized under the laws of the United States or a state (e.g., a foreign bank branch), for purposes of choice of law under section 9-301. Such location first will be controlled by the laws of the United States; however, if the law of the United States is silent, then the entity’s location may be the state designated by the entity, if the law of the United States authorizes such entity to designate its state of location. The language added by the 2010 amendments provides illustrations of how and where an entity may designate its location. UCC section 9-307(f)(3) retains the prior language stating that, if neither of the first two options designate a debtor’s location, then the debtor’s location shall be the District of Columbia. As noted in the 2010 Oklahoma Comments, this 2010 amendment to the uniform text merely illustrates the effects of the existing statutory language, and therefore should be effective in Oklahoma despite Oklahoma’s failure to enact the 2010 amendments.

The 2010 amendments also add guidance in Official Comment 2 regarding the location of common-law trusts for the purposes of filing financing statements. The 2010 amendments recognize that, since a common law trust is not an entity and cannot own property, “the debtor with respect to property held in a common-law trust typically is the trustee of the trust acting in the capacity of trustee.” Thus, the location of a common-law trust for filing purposes is typically the location of the trustee. The added language also notes that a beneficiary may be a debtor as to the beneficiary’s interest, but not as to trust property. In situations where more than one trustee exists in multiple jurisdictions, the 2010 amendments recommend filing in all relevant jurisdictions to insures perfection. As noted in the 2010 Oklahoma Comments, this should be effective in Oklahoma as a correct interpretation of present law, since the Official Comments are not enacted by the legislature in any event.

F. Assignment Issues

It is clear under Oklahoma section 1-9-310(c) and other law that the assignee of a perfected security interest is not required to re-file (or otherwise re-perfect) in order to maintain and assert the assignor’s perfection and priority. An aberrational case to the contrary was clearly incorrect; this decision was reversed on appeal and has been rejected by other courts. This issue was considered a prospect for drafting in the 2010 amendments. However, the drafters

18. See, e.g., In re K&A Servicing, Inc., 47 B.R. 807 (Bankr. N.D. Tex. 1985) (test is actual or constructive annexation of the goods to realty or to something appurtenant to realty, appropriateness of the use of the goods to the purpose or actual use of the realty, and the intention of the party placing the goods on the realty to make the goods a permanent and integral part of the realty). See also: as to plumbing, O’Dell v. Kunkel’s, Inc., 581 P.2d 878 (Okla. 1978); as to mining equipment, In re Producers Energy Corp., 11 B.R. 669 (Bankr. W.D. Okla. 1981); as to buildings, Widick v. Phillips Petroleum Co., 173 Okla. 325, 49 P.2d 132 (Okla. 1935); and as to mobile homes, Parsons v. Lender Service, Inc., 801 P.2d 739 (Okla. App. 1990).

concluded that the text of Article 9 was already clear on this point, and consequently no changes were made in the 2010 amendments on this issue.

The 2010 amendments also do not address the issue of “trafficking” in financing statements, e.g., where a creditor takes assignment of a filed financing statement even though it does not yet have a security interest or to take advantage of the priority created by a future advances clause. This issue also was left to the case law. But see, e.g., Rentenbach Constructors, Inc. v. CM Partnership, 20 and Wooding v. Cinfed Employees Federal Credit Union 21 (later reversed on appeal), for examples of some of the confusing issues than can arise. In re Branch 22 offers a more conventional analysis.

G. New Debtors and a Change in the Choice of Law

Issues relating to changes in the governing law and new debtors (a person that becomes bound as a new debtor 23 by a security agreement previously entered into by another person 24) are addressed in the 2010 amendments at sections 9-508, 9-316 and 9-326, and include the addition of new sub-sections 9-316(h) and (i) and a revision of section 9-326.

Focusing on UCC section 9-316(h) and (i) in the 2010 amendments, these provisions are new and provide that, for collateral that becomes subject to attachment of a security interest within four months after the location of the debtor changes (compare section 9-316(a) through (b) which deal with security interests that attach and are perfected before the debtor changes its location), a financing statement filed in the debtor’s prior state before the change is effective to perfect the security interest. This perfects the security interest of a secured party who makes an early filing before the change of location and later obtains attachment after the debtor’s change of location but within the four month period. If the security interest subsequently becomes perfected in the debtor’s new state before it would have become unperfected in the prior state or the expiration of four months after the change (whichever comes first), it remains perfected thereafter in the new state, “as if the debtor had not changed its location.” Similarly, if a financing statement naming the original debtor has been correctly filed in a state and a new debtor is located in a new state, the financing statement is effective as to collateral owned or acquired by the new debtor within four months after the new debtor became subject to the security interest under section 9-203(d), to the same extent as the original debtor would be bound. 25 If the security interest is reperfected in the new state before the expiration of the four month period or the time the security interest is would have become unperfected in the prior state (whichever comes first), it remains perfected thereafter. 26 Otherwise, it becomes unperfected at the end of that period and is thereafter deemed “never to have been perfected” as against a purchaser for value. These provisions clarify some important uncertainties in the statutory text prior to the 2010 amendments.

Two examples from the Official Comments illustrate these issues, essentially as follows:

First, suppose the debtor is an individual whose principal residence is in Texas and grants

23. See UCC § 9-203(d).
24. UCC § 9-102(a)(56).
25. § 9-316(i)(1).
26. § 9-316(i)(2).
a security interest in his or her existing and after acquired inventory, which is perfected by a filing in Texas on January 2, 2014. On March 31, 2014 the debtor relocates to New Mexico. New Mexico law will now govern under sections 9-301 and 9-307. Under section 9-316(a) the security interest in inventory on hand will remain perfected for four months after the relocation. Under New Mexico section 9-316(h) the security interest in inventory acquired within the four months after the debtor’s relocation changed also is perfected.

Second, assume the same facts as in the prior illustration, except the debtor is a Texas corporation and on March 31, 2014 merges into a surviving New Mexico corporation (Survivor). Upon the merger, New Mexico law governs under sections 9-301 and 9-307. Under New Mexico section 9-316(a) the security interest in the inventory Survivor acquired in the merger remains perfected for one year and by reason of the merger Survivor becomes bound under debtor’s security agreement, pursuant to section 9-203(d), and the secured party acquires a claim on all of Survivor’s inventory, even that in which the debtor never had an interest, and under section 9-316(i) that interest is perfected in inventory Survivor acquired before and within four months after becoming bound. If perfected in New Mexico before the end of four months, the security interest will remain perfected. Otherwise, it becomes unperfected at the end of four months, and retroactively against a purchaser for value.

These changes clarify perfection issues that may arise, and protect secured parties against losing perfection in circumstances where a debtor or a new debtor acquires after-acquired property after the relevant identity or location of the debtor has changed pursuant to section 1-9-301.27 Otherwise, the security interest will become unperfected and “is deemed never to have been perfected as against a purchaser of the collateral for value.”28 Absent these provisions, it can be argued under present Oklahoma section 1-9-301 that, unless there is an immediate filing in the new state, there is no perfection. This would be bad policy and represents an oversight in the statutory language if a contrary interpretation of present law is not possible, but absent enactment of the 2010 amendments this remains unresolved, creating a potential pitfall for secured parties where debtors relocate to Oklahoma.

UCC section 9-326 contains special rules governing the priority of competing security interests in collateral acquired by a new debtor other than by transfer from the original debtor. The rules do not differ depending on whether the same jurisdiction or different jurisdictions are involved. Thus, suppose a secured party (SP-1) has a security interest perfected by filing in X Corp’s existing and after-acquired inventory, and a second secured party (SP-2) has a perfected security interest by filing security interest in Z Corp’s existing and after-acquired inventory. Z Corp becomes bound as debtor by X Corp’s security agreement and then Z Corp acquires a new item of inventory. But for section 9-326(a), SP-1’s interest is subordinated to SP-2’s. The same result would obtain if SP-1 and SP-2 were in different jurisdictions, given section 9-316(i)(1).29 UCC section 9-326 also contains other rules not discussed that, again, go beyond interpretation. As noted in the 2010 Oklahoma Comments, these issues continue to be unresolved in Oklahoma due to the failure to enact the 2010 amendments.

H. Pre-Filed Financing Statements

The deletion of the debtor’s signature requirement from the financing statement led to the

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27. UCC §§ 9-316(h)(1) and 9-316(h)(2) as revised in the 2010 amendments.
28. See also the 2010 amendments at Official Comments 7 & 8 to § 9-316.
29. See UCC § 9-326, Official Comment 2.
requirement for some other form of debtor authorization. An executed security agreement covering the same collateral suffices. But what about where there is a pre-filing?

The 2010 amendments, at the end of Official Comment 4 to section 9-509, note that, when a financing statement that is ineffective when filed becomes effective thereafter, perhaps because the initial filing was not authorized and becomes authorized by a later security agreement, the policy underlying notice filing determines the “time for filing” for the purpose of section 9-509(a)(1), i.e., when the initial financing statement was filed since, even though initially ineffective, it still serves to give inquiry notice.

To be distinguished is the issue in In re Motors Liquidation Company. The latter issue may be framed as whether a lender need merely authorize the act of filing, or, as involved in the case, must a lender authorize the termination of the particular security interest? On appeal to the United States Court of Appeals for the Second Circuit, that court decided the issue was one of first impression in interpreting the UCC and certified the question to the appropriate state court, so at this writing we do not yet have an answer. The case involved an erroneous filing of a broad termination statement by mistake by the secured party’s agent, who had general authority to accomplish a filing but arguably was not authorized under common law doctrines of actual, implied or apparent authority to file the erroneous termination statement, even though the filings had been reviewed by the secured party lenders. The lower court opinion held that the filing of the termination statement was ineffective to terminate the security interest as it was unauthorized and ineffective under UCC sections 9-509 and 9-510. Technically the decision is a correct interpretation of Article 9 because filings are for notice rather than to describe the actual state of affairs. However, while this clearly applies to initial financing statements, it is not so obvious that it makes sense with respect to termination statements. Thus, the case raises the question of what constitutes “authorization” in this context and perhaps the role of mistake under UCC section 1-103(b).

Also to be distinguished is Scotto Restaurant Group, where the court held that a financing statement not authorized at the time of filing was ineffective despite later authorization in a security agreement. The case ignores Official Comment 3 to section 9-509 and is clearly incorrect.

I. Section 9-332

UCC section 9-332 sets a high standard (collusion) to prevent a security interest in money as proceeds or in a deposit account from impeding use of funds for payment and settlement of transactions. As of mid-2014, the use of so-called “bitcoins” and the like seems to be gaining traction as a form of “currency,” i.e., as a payment method. Some sellers are willing and able to take bitcoins in payment for goods or services sold. If that payment instead were made in cash, or by a check out of a deposit account, any security interest in that cash or account as proceeds of the claim of a secured party that has a security interest in inventory would not impair the further

30. See UCC §§ 9-502, 9-509(a)(1), and 9-510.
31. See UCC § 9-509(b).
32. See also Official Comment 3 to § 9-509.
33. 486 B.R. 596 (Bankr. 2013).
use of the payment by the seller for payment of debt or other transfers to a third party. This is consistent policy under UCC Article 9 – see, for example, sections 9-320 and 9-321 – and is particularly strong with respect to “currency.” However, section 9-332 cannot be construed to protect the receiver of bitcoins. Whether the policy mentioned above should allow a court to reach the same result presently remains an unanswered question.

J. Debtor’s Name

As noted, the issue of what is a debtor’s correct name to meet the requirement of UCC section 9-502(a)(1) was the genesis for many of the 2010 amendments to UCC Article 9, and it has been a significant issue in Oklahoma as well. Official Comment 2 to section 9-506 provides in part that searchers are not expected to ascertain nicknames, trade names, and the like by which the debtor may be known, even if the debtor is known in some contexts by the name provided and even if the searcher knows or has reason to know the name provided refers to the debtor.

The 2010 amendments made a number of changes to section 9-503 and other sections relating to the proper debtor’s name for the financing statement when: the debtor is a registered organization; the collateral is held in a trust that is a registered organization; the collateral is being administered by the personal representative of a decedent (in which case the proper name is the name of the decedent); the collateral is held in a trust that is not a registered organization or the debtor is an individual.

As to an individual debtor, the preferable rule, based on its incorporation in the bills introduced in Oklahoma to enact in the 2010 amendments (Alternative A) is the name of the debtor on an issued, unexpired driver’s license or, if there is no such license, the individual name of the debtor or the surname and first personal name of the debtor. There is an Alternative B but it has been selected by only a few states and was not the choice in the Oklahoma bills. For non-registered business organizations, if the debtor has a name, it should be used, and if not, the names of the partners, members, associates or other persons comprising the debtor should be used in a manner that each name provided would be sufficient if the person named were the debtor.

There are further rules in the 2010 amendments at section 9-503(f) as to: determining the

37. See UCC §§ 9-332, 9-315(a)(2), (c) and (d).

38. See supra Part II.B.1. For example, see In re Patriot Electric and Mechanical, Inc., 2014 Bankr. LEXIS 1962 (Bankr. D.Md. 2014). Initially, the debtor’s correct name was Patriot Electric, Inc. and the filing used that name. Later the name was amended to Patriot Electric and Mechanical, Inc. A continuation statement was filed under the old name even though the lender received communications with the new name. Patriot went bankrupt and as debtor in possession pounced on the outdated filing and argued the continuation was ineffective as seriously misleading. The court held the filing was good as a search under the name “patriotelectric” would turn up the filing as Maryland’s search logic eliminates spaces between words and excludes suffixes such as “Inc.” The problem here is the Code does not set a standard search logic even though a model regulation does, but that is not universally adopted. A search this flexible (which also is wrong. See UCC § 9-506(c); the search must be under the debtor’s correct name. That was not done here and it made the search virtually impossible) puts a great burden on the searcher, and more certainty therefore is desirable. It also does not give the filer enough incentive to be alert to the name changes, a clear problem here. That is a goal the 2010 amendments seek to achieve.

39. See, e.g., In re Thriftway Auto Supply, Inc., 39 F.3d 1193 (1994) (identification of the debtor as ‘Thriftway Auto Stores” when the correct name was “Thriftway Auto Supply, Inc.” was not seriously misleading; the use of a trade name similar to the legal name was not seriously misleading).

40. See UCC § 1-9-102(a)(70) defining registered organization.
name of a decedent; a preferable rule where an individual has more than one driver’s license (the most recent one); and in section 9-503(h) for the name of the settlor or testator in the case of a trust.

All of these provisions, while not appearing in Oklahoma UCC section 1-9-503 as the 2010 amendments are not Oklahoma law, appear to be common-sense interpretations of the current Oklahoma statute, and given that virtually all states have enacted the 2010 amendments they should be followed in Oklahoma as an interpretation of present section 1-9-503 pursuant to the policy of UCC section 1-103(a) enacted in Oklahoma. However, while it is believed these statutory provisions can be regarded as interpretations of present law, and should be followed pursuant to UCC section 1-103(a)(3) since to date virtually every jurisdiction has enacted them, they are not the same as having the law enacted in Oklahoma, and thus the interpretation should only be applied cautiously and on a prospective basis rather than retroactively as reflecting the present rule. The fact is that some uncertainty remains as to Oklahoma law on these points.

A simple example demonstrates why. Oklahoma section 1-9-503(a)(4) provides that if the debtor has a name, the financing statement must provide the individual name of the debtor. Let us suppose the secured party provides the name on the debtor’s driver’s license, but subsequently the debtor legally changes his or her name. Under present law the name on the driver’s license should not be good now as the name of the debtor (assuming initially it was). Even though the secured party perhaps should soon discover the change, which we will assume makes the financing statement seriously misleading under Oklahoma UCC section 1-9-506, to render the financing statement in that case ineffective retroactively by applying the interpretation would be unwarranted. Rather the interpretation should only be applied after these Oklahoma Comments are available and known about, perhaps for some months after their publication. Hopefully, Oklahoma courts will be reasonable in dealing with this obviously unsatisfactory situation.

The 2010 amendments substantially revise the Official Comments to UCC section 9-503 to elaborate on the statutory changes. To the extent the statutory changes are or can be regarded as an interpretation of present Oklahoma law, these comment changes can likewise be viewed as additional guidance on the proper interpretation of present Oklahoma UCC section 1-9-503. Official Comment 2, for example, substantially elaborates as to collateral held in trust, collateral administered by a personal representative, and individuals.

There are some nuances in this matter that need even more focus. Suppose a sole proprietorship obtains a bank loan secured by the individual’s inventory. The individual’s name is Frederick H. Miller but his current, unexpired driver’s license gives the name as Fred Miller, or maybe a nickname of “Fast Fred Miller.” Using that name would be required under the 2010 amendments, but to do so in Oklahoma obviously would be quite unwise. Now suppose that the correct name, Frederick H. Miller, is on the debtor’s driver’s license and the filing reflects this. The license expires, and the debtor renews it, but the tag agent gets the name mixed up and the license is issued in the name Ferd Miller. That would require a refiling under the 2010 amendments, but that should not be done in Oklahoma. Clearly, using the name on the driver’s license as the correct name normally makes sense, but not always, and in those cases using the fall-back position in the 2010 amendments of the surname and first personal name of the debtor is what should be done. As to that, Official Comment 2.d. provides some interesting reading,
noting pitfalls that may exist. 41

If there is any doubt about an individual debtor’s name, a secured party may choose to file multiple financing statements that provide a number of possible names for the debtor and a searcher may similarly choose to search under a number of possible names. However, this is unsatisfactory for a number of policy reasons. Note that, even if the name provided in an initial financing statement is correct, the filing office nevertheless must reject the financing statement if it does not identify an individual debtor’s surname (e.g., if it is not clear whether the debtor’s name is Perry Mason or Mason Perry).

New section 9-503(d) in the 2010 amendments makes clear that when the secured party is a representative, a financing statement is sufficient if it names the secured party, whether or not it indicates any representative capacity. Similarly, a financing statement that names a representative of the secured party is sufficient, even if it does not indicate the representative capacity. For example, assume debtor creates a security interest in favor of Bank X, Bank Y, and Bank Z, but not to their representative, the collateral agent (Bank A). The collateral agent is not itself a secured party. 42 Under sections 9-502(a) and 9-503(d), a financing statement is effective if it names as secured party Bank A and not the actual secured parties, even if it omits Bank A’s representative capacity. This reading can be regarded as a proper interpretation of present law in Oklahoma, despite the lack of the 2010 amendments, since information can be obtained in either case. Each person whose name is provided in an initial financing statement as the name of the secured party or representative of the secured party is a secured party of record. 43

UCC section 9-503(e) in the 2010 amendments also makes explicit another point that is implicit under Oklahoma Article 9: A financing statement may provide the name of more than one debtor and secured party. With respect to records relating to more than one debtor, see section 9-520(d). With respect to financing statements providing the name of more than one secured party, see sections 9-509(e) and 9-510(b).

The 2010 amendments make related clarifying changes in section 9-507 and in Official Comment 4 that do not change the substance. That provision addresses cases in which a filed financing statement provides a name that at the time of filing is a correct name for the debtor but at a later time no longer does so. Examples are furnished as to when section 9-507(c) applies. Example 1 involves the name of the debtor as shown on the debtor’s driver’s license and the debtor later by court order changes the name but not the name on the driver’s license so section 9-507(c) does not apply under the 2010 amendments but would in Oklahoma. Example 2, where the driver’s license expires, the debtor has changed names by court order, and no new license is issued so the name from the license is now insufficient, would make section 9-507(c) applicable in Oklahoma as well as in a state that enacted the 2010 amendments.

IV. Unresolved Issues

Even though the 2010 amendments clear up a number of troublesome issues, in or associated with a statute like UCC Article 9 there always will be more issues. A few of these are noted below.

A. Proceeds


42. See UCC § 9-102.

43. UCC § 9-511.
The concept of “proceeds” always has been clear but can be complicated to apply. In most cases the UCC definition of “proceeds” and the Official Comments that elaborate on that definition raise few issues. However, In re Milton Abeles, LLC 44 is not such a case. There the court held that proceeds of a fraudulent conveyance avoidance action that the debtor’s trustee collected were not identifiable proceeds of bank’s security interest in the debtor’s deposit account, as in fact, the collected funds were proceeds of the avoidance action and thus belonged instead to the trustee and were after-acquired property subject to Bankruptcy Code section 552. As another illustration, suppose a business both sells and leases inventory items and grants a security interest in this collateral. A lessee of an item of inventory may or may not take subject to a perfected security interest in the item, pursuant to UCC Article 2A, but does the lender with a perfected security interest in the inventory of the business also obtain a claim on the rent payable by the lessee as proceeds? That depends on whether the lease is a disposition and the rent is collected on account of collateral. Pursuant to the definition of “proceeds” in UCC section 9-102(a)(64)(A) and (B), proceeds include whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral or collected on account of the collateral. Thus, the answer is: the rental payments constitute proceeds. After all, even if it is a lease for less than the economic life of the goods, so it is a so-called “true lease” and not a secured transaction under UCC section 1-203(b)(1), the lease involves erosion of the value of the goods leased and thus a disposition of that value in return for a price/rent. 45 That is true even though the lease is for a short term. 46

Recently the United States Court of Appeals for the Sixth Circuit decided 1st Source Bank v. Wilson Bank and Trust 47. Beginning in 2004, 1st Source Bank financed the garage operations of K & K Trucking on a secured basis. The security agreement claimed as collateral the debtor’s tractors, trailers, accounts receivable and proceeds, but the financing statement left out accounts receivable. Later Wilson Bank and others also loaned K & K money and their agreements and financing statements claimed all accounts receivable now outstanding or thereafter arising. In 2009 there was a default and Wilson Bank and the others collected K & K’s accounts. Some accounts were bills owed by customers of K & K for cartage using K & K’s tractors and trailers, which were equipment and not inventory. 1st Source claimed these accounts as proceeds, based on the first to file rule at UCC section 9-322(a) and, if the accounts had been proceeds of the equipment, its claim would have succeeded notwithstanding the omission of accounts from the description in its financing statement.

However, the court concluded that income from the use of equipment is not proceeds. Is that correct, given the PEB Commentary? After all, as the tractors and trailers were used, the use would cause, through wear and tear, a decline in value, and the income due to their use could be said to be a sort of disposition or what is collected on account of collateral. But if that were the law the court said, and the fruits and products from the use of collateral were proceeds, every creditor with a security interest in equipment would have a security interest in all items produced by the equipment. Neither the PEB Commentary, nor the existing case law go that far, the court

45. Compare the definition of “sale” in UCC § 2-106(1).
47. 2013 W 309126 (6th Cir. 2013).
Would it be troublesome had the court reached a different result in the 1st Source Bank case and held that income from use of equipment could constitute proceeds? Certainly the reach of the proceeds definition is quite broad even without that extension, and with such an extension there would be a greater chance of conflict with other parties and perhaps an adverse effect on the utilization of proceeds for subsequent transactions. But it would be a matter of degree rather than a new risk, and there are a number of existing protections that could minimize the consequences, including the difficulty of identifying the proceeds, the short carryover of perfected status and the resulting need to reperfect in some cases, and the substantial protections afforded a transferee of proceeds under UCC sections 9-317, 9-320 and 9-321, 9-330, 9-332, among other provisions.

Another recent case on what can be “proceeds” is *In re Dayton Title Agency, Inc.*\(^4^9\) Dayton served as an intermediary in real estate closings. It facilitated a loan by White to one Chari. When the loan became due, Chari deposited a check in payment of the loan in Dayton’s account at PNC. Dayton then issued a check to White. Next day provisional credit had been given to Dayton for the Chari check, meaning Dayton could use the funds even though not yet collected. White then exchanged the Dayton check for a cashier’s check drawn on PNC. Unfortunately, the Chari check turned out to be forged and drawn on a non-existent account. PNC then exercised its right to charge back on the Chari check against Dayton and froze Dayton’s bank account, resulting in Dayton’s bankruptcy. The trustee in bankruptcy then sued White to recover what White had received on the basis the payment was a fraudulent transfer of an asset (the provisional credit to Dayton) of Dayton’s.

The problem was, under UCC section 4-210 PNC had a security interest in the Chari check. To the extent that was true, the fraudulent transfer claim was not good because the Ohio fraudulent transfer law denied “asset” status to property to the extent it was encumbered by a valid lien. The Sixth Circuit ruled that the security interest of the bank attached to the Chari check (and later its proceeds) at the time of deposit, thus, for example, allowing suit against its drawer to enforce the drawer’s liability on the instrument\(^5^0\) and held that the provisionally-credited funds used to issue the White check were not proceeds of the Chari check within the purview of the UCC, as a forged check drawn on a non-existent account was not likely to have any proceeds. With that ruling, absent a security interest on the provisional funds, those funds could be an asset for the fraudulent transfer action.

**B. Bankruptcy and Vehicle Repossessions**

Bankruptcy always is lurking as a threat to an Article 9 security interest. In *In re Grewal*,\(^5^1\) the debtor went bankrupt and the automatic stay kicked in. Assume the collateral was a car with personal property in it, the security interest had been foreclosed pre-petition, and the secured party refused to allow the debtor to collect the items (in the case it was real property that was foreclosed, but the issue is the same). The debtor sued for a violation of the stay and the...

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50. See UCC § 3-414.

court found: (1) the creditor had notice of the bankruptcy petition; and (2) the creditor willfully violated the stay; but (3) there were no damages as the debtor presented no evidence of the value of the property. The secured party was ordered to return the personal property.

C. Bankruptcy Preference Payments

Another case involving real property but that holds a message for an Article 9 secured party is In re Vassau.\textsuperscript{52} Within ninety days of their Chapter 7 bankruptcy petition the debtors made ten payments to the senior lienholder. These were catch-up payments. The value of the collateral exceeded what was owed to the senior secured party but was less than what was owed to that creditor and a junior creditor. Both creditors were the same person. The payments were all credited to other than principal (interest, late charges, etc.) but these charges were covered by the senior lien.

The bankruptcy trustee sought to recover the amount of the payments as a preference, not from the senior secured party but from the junior, even though they were one and the same person. The preference claim was upheld even though a fully secured party cannot be subject to a preference challenge, but separately the junior of course could be as it had had its claim increased by the payments, in short, the court separated the bank’s claims even though they were held by the same person. The question of whether the payments were in ordinary course was reserved.

D. Attachment – Rights in the Collateral

In order to have a non-possessory or non-control security interest under UCC section 9-203, there must be an authenticated written security agreement, value must be given, and the debtor must have “rights in the collateral.” In MBK Services, Inc. v. Cole Taylor Bank,\textsuperscript{53} the first two criteria were present. The UCC does not elucidate on what will constitute “rights in the collateral,” but Illinois law indicates it may include possession by the debtor, ownership of the property, consent by the owner to use the owner’s property as collateral, or estoppel in the context where the owner has allowed another to appear as the owner or has allowed a full power of disposition over the property so that an innocent person is led into dealing with such apparent ownership. Here MBK entered into a service contract with SMS, SMS would collect the money from its services which were based on what MBK provided, SMS would deduct its cut from those funds, and remit the balance to MBK to cover its costs and a profit. In 2008, SMS collected $2.1 million deposited in its account, claimed $628,000 of it as its cut, but never delivered the balance to MBK. In 2007, SMS had borrowed over $5 million from Cole Taylor Bank and granted the bank a security interest in its assets, which was perfected by a properly filed financing statement. SMS defaulted on the loan in 2008, all its assets were sold, and the $3 million proceeds turned over to the bank. MBK then sued alleging a “constructive trust” based on its “ownership of those assets.”

The court held that MBK was estopped to assert its claim, or to deny the bank’s perfected interest, on the basis that UCC Article 9 gives protection to perfected secured creditors over unsecured creditor claims and, although “rights in the collateral” are not defined, it is enough for a debtor to have possession of property where the true owner of the property (here perhaps MBK) consents to the debtor’s use of that property as collateral. There also is a flavor in the opinion that MBK failed to protect itself by a subordination agreement, an agreement for SMS to hold the money in an express trust, or to have the money deposited in a joint SMS/MBK bank

\textsuperscript{52} 499 B.R. 864 (Bankr. S.D. Cal. 2013).

Finally, the MBK court also held that the rules of UCC Article 9 displace inconsistent results with those rules under other law, pursuant to UCC section 1-103(b), which here precluded the constructive trust doctrine but not estoppel.

E. Consignments

The 1990 - 1999 revision of Article 9 took true consignments for sale out of UCC Article 2 section 2-326 since: (1) the line between a true consignment and a bailment often was unclear; and (2) creditors could be misled and due to that filing under Article 9 was employed instead of relying on Article 2 in many commercial consignments. The 1999 revision put most true consignments under Article 9 as a type of purchase money security interest. Some problems, however, still exist. For one, determining the line between a transfer for sale and a bailment can still pose a problem, as well as valuation because the goods must be valued at $1,000 or more to qualify for inclusion under Article 9. That in turn engenders a problem of what laws govern true consignments of goods valued at less than $1,000 or which are consumer goods, which exclusion involves many consumer transactions. Another problem can be what evidence shows that the merchant is not generally known by its creditors to be substantially engaged in selling the goods of others.

Perhaps the he most significant problem among these is determining whether the goods are consumer goods. For example, are high-priced art objects, or expensive jewelry, or other expensive collector items, consumer goods, or are they investments for a hopeful profit, or both? UCC section 9-102(a)(23) defines “consumer goods” as goods that are used or bought for use primarily for personal, family, or household purposes, which in context clearly is less than helpful. Is that they are not a correct conclusion from the two definitions of “consumer goods” and “consignment”? On another important issue there is some case law that provides guidance on what it means to be “generally known by creditors…” i.e., known by a (majority in number, not in value), and what “substantially engaged in selling the goods of others” means (i.e., twenty percent or more of sales volume). UCC section 2-326 on sale or return could be argued instead to characterize the transaction, but that puts the goods at risk to creditors without a clue as to protection and absent proper drafting is an uphill battle to find the consignee is instead a “buyer.”

Perhaps the best advice for a consigner is to: (1) specify the value and purpose of the goods (this “sort of” works for Truth in Lending Act disclosure purposes) and the nature of the transaction; (2) file a financing statement as a true consignment is a purchase-money security interest; and (3) follow the rules for purchase-money security interests in inventory, including notice to conflicting secured parties under section 9-324(b). Perhaps in the next round of amendments to Article 9, Article 9 should be amended to deal further with this.

UCC section 9-109(c)(2) excludes from the scope of Article 9 a transaction subject to another statute of the enacting state that expressly governs the creation, perfection, priority or

56. UCC § 9-102(a)(20)(B) & (c).
58. And see In re Morgansen’s Ltd., 302 B.R. 784 (Bankr. E.D.N.Y. 2003) (goods valued at over $1,000 or more are not consumer goods).
enforcement of a security interest created by the state or a governmental unit of the state. The purpose here is to apply Article 9 to governmental debtors except where another statute governs the issue in question. Delphi Automotive Systems, LLC v. Capital Community Economic/Industrial Development Corp. illustrates how this provision can work. The transaction was stated to be a lease of equipment. There also was a competing secured loan on all the lessee’s property. The lease instead was found to be a secured transaction, and as such unperfected, and under Article 9 it would lose priority to the perfected secured loan, unless the lessor as a secured party was excluded from Article 9. Under the relevant Kentucky provision in Article 9, the intermediate appellate court held that secured transactions were beyond Article 9’s scope when a governmental unit was either a borrower or a lender, and so concluded the lessor’s interest was superior to that of the perfected secured loan. On further appeal to the Kentucky Supreme Court the exclusion at section 9-109(c)(2) was properly narrowed to cases where the governmental unit is a borrower and not a secured party, citing Farmers & Merchants National Bank v. Fairview State Bank. Thus in Delphi the transactions were governed by Article 9 and the perfected secured loan had priority.

Is this the result that today would obtain in Oklahoma? The Farmers & Merchants National Bank case was decided under former section 9-104(e), which excluded “a transfer by a government or governmental subdivision or agency,” which is how the Kentucky statute in the case read. Nonetheless, presumably another case would come out the same as the result in the Delphi case under the present less exclusionary provision, absent a contrary other state statute.

G. TILA

The Truth in Lending Act (TILA), implemented by Regulation Z, requires certain disclosures to be delivered to consumers. One disclosure, for both open-end credit transactions like the use of a credit card and closed-end credit transactions like a car loan, is whether a security interest will be acquired. Regulation Z section 1026.1(a)(25) defines the term “security interest” basically much like UCC Article 9 does, as “an interest in property that secures performance of a consumer credit obligation and that is recognized by state or Federal law,” but excluding “incidental interests” such as interests in proceeds or after acquired property and interests that arise solely by operation of law except in connection with the right of rescission.

In Smith v. Cash Store Management, Inc., the payday lender had disclosed the post-dated check taken in such transactions, also called deferred deposit loans, as a security interest and, when sued for a disclosure violation, was found to be in compliance. Other cases followed.

60. See also § 9-109(c)(3) for a statute of another state or a foreign country.
61. See Official Comment 9 to § 9-109.
64. 15 U.S.C. § 1601 et seq.
65. 12 CFR §§ 1026.1 et seq.
67. Compare UCC § 9-102(c) & § 1-201(b)(35).
68. 195 F.3d 325 (7th Cir. 1999).
including *Davis v. Cash for Payday, Inc.*,\(^6\) where the disclosure was not made and a TILA violation was found. The next issue was whether an electronic fund transfer authorization qualified. In *Pickett v. First Citizens Bank*,\(^7\) the court logically found the same result, as did the court in *Randle v. AmeriCash Loans, LLC*.\(^8\)

A version of the issue has come up in Oklahoma in reference to the deferred deposit lending statute,\(^9\) and whether a remotely-created check can qualify as an “instrument,” defined at 59 Okla. Stat. section 3102(9) as a personal check, a negotiable order of withdrawal (NOW), or an authorization to transfer or withdraw funds from a deposit account of the debtor signed by the debtor and made payable to a deferred deposit lender in a deferred deposit loan. While there may be a bit of a stretch since Oklahoma does not define a remotely-created check (compare UCC section 3-103(a)(16) – an item drawn on a consumer account which is not created by the payor bank and does not have a handwritten signature purporting to be the signature of the drawer --not enacted in Oklahoma), I think there is a fit.

What is more troubling is the context that gave rise to the issue. The remotely-created check would be used if the paper check when deposited failed to clear. In *Federal Trade Commission v. Landmark Clearing, Inc.*,\(^7\) which involved an ACH transfer and a remotely-created check or payment order (defined as in unenacted in Oklahoma UCC § 3-103(a)(16)), defendants were permanently enjoined from processing these instruments. However, this was in the context of telemarketing, which differs from the issue in the context raised in Oklahoma and the FTC rule at 16 C.F.R. Part 310, which does not appear to cover the Oklahoma context involved here either, as 16 C.F.R. section 310.2 (dd) defines “telemarketing” to be a plan, program, or campaign which is conducted to induce the purchase of goods, services, or a charitable contribution.

In the end, the answers in the Oklahoma context seem unsettled, but in context, why not simply represent the original post-dated check?

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\(^6\) 193 F.R.D. 518 (N.D. Ill. 2000).
\(^7\) 2010 WL1910520 (N.D. Ill. 2010).
\(^8\) 403 Ill. App. 3d 529, 942 N.E.2d 1200 (Ill. App. 2010).
\(^9\) 59 Okla. Stat §§ 3101 et seq.
\(^7\) Civil No. 4:11cv826 (E.D. Tex. 2011).