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"REVISED" UCC ARTICLE 9 PREVIEW

The 2001 Oregon legislature will undoubtedly pass most of the new "Revised Article 9" of the Uniform Commercial Code, introduced as Senate Bill 171. The intent of the National Conference on Commissioners of Uniform State Laws ("NCCUSL") is for Revised Article 9 to take effect on July 1, 2001. The purpose of this article is to alert Oregon practitioners that the change is coming, preview the more significant changes in existing law, and highlight some potential malpractice issues.

RESEARCH TOOLS

The Official Comments prepared by the NCCUSL for each section of the uniform draft of Revised Article 9 should be your first resource. The Comments will likely become part of the legislative history of the version adopted by the Oregon legislature. The Comments provide the reasoning of the drafters and illuminate the changes made from old Article 9. The 1999 (West) Supplement to J. White & R. Summers *Uniform Commercial Code* (a paperback called "Uniform Commercial Code Secured Transactions Fifth Edition") contains an extensive analysis of Revised Article 9. Also, the ABA Section of Business Law has published *The New Article 9 Uniform Commercial Code* (paperback) edited by Corinne Cooper.

TRANSITION RULES

The first and perhaps most significant malpractice trap is presented by the new law's national effective date of July 1, 2001. The new law's complex "transition rules" provide several "grandfathering" provisions covering both security agreements and financing statements. Under new UCC 9-703, if a security agreement is enforceable under the old law prior to July 1, 2001, but the security agreement would be unenforceable under the new law, the security agreement remains enforceable for a period of one year (through July 1, 2002). If the defect in the security agreement is corrected under the new law within the one-year grace period, the security agreement is enforceable after July 1, 2002.

All financing statements that are effective under the old law as of the effective date of July 1, 2001 remain effective until their 5-year lapse date occurs under the old law. The statement may then be continued by the filing of an "initial financing statement in lieu of continuation statement." New UCC 9-702 to 9-706. The initial financing statement in lieu of continuation must be filed in the appropriate state under the new law (in the state where the debtor is located). The new statement can be filed at any time and the new statement will lapse five years after the date it was filed. For the first five years after July 1, 2001, creditors searching for financing statements may have to search in multiple jurisdictions because of the new rules providing for filing financing statements in the state where the debtor is located. (New UCC 9-301 and 9-307 discussed below.)

If a security interest is perfected under the old law by a method other than filing and the new law requires a filing to perfect, the security interest remains perfected for one year until July 1, 2002. If the defect in perfection is cured by filing within the grace period, the security interest remains perfected thereafter.

SCOPE ISSUES

The new law now includes commercial bank accounts (new UCC 9-104), "health-care-insurance

receivables" (new UCC 9-109(d)(8)), and software that has been "licensed to the debtor" (new UCC 9-408) as collateral in which a security interest may be granted.

Banks perfect a security interest in bank accounts automatically if the account is maintained at the bank. Creditors other than banks need an agreement authenticated by the debtor and the bank that the bank will pay the money over to the creditor pursuant to the creditor's instructions or by the opening of an account in the creditor's name.

"Health-care-insurance receivables" are the obligations of health care insurers to doctors and other medical services providers.

"Software" is now included in Article 9's definition of "general intangibles." New UCC 9-102(a)(75) and 9-102(a)(44) provide that the definition of "goods" includes software that is "embedded in goods," but that software is not "goods" if the software "consists solely of the medium in which the program is embedded." An example of software embedded in goods is a computer chip incorporated in an automobile engine. Software licenses can be collateral even in the face of anti-assignment clauses; however, the secured creditor is not allowed to use, sell, or otherwise dispose of the license without the licensor's consent.

PERFECTION AND FILING ISSUES

As noted above, banks perfect security interests in bank accounts automatically if the debtor's account is maintained at the bank. Creditors other than banks need an agreement by the debtor allowing the bank to pay the money over to the creditor pursuant to the creditor's instructions or directing the opening of an account in the creditor's name. Under either scenario, perfection is via "control" as provided in new UCC 9-104(a). The control agreement among the bank, debtor, and secured party must be authenticated. Under new UCC 9-104(b), the secured party has control, even if the debtor retains the right to direct disposition of funds from the deposit account (most cases).

New UCC 9-301 and 9-307 provide that financing statements must be filed only where the debtor is "located." Corporations, LLCs, and limited partnerships are "located" in the state where they are organized. Other businesses are "located" at their "chief executive office." Individuals are "located" at their principal residence. All of the complex multiple state perfection rules in old UCC 9-103 that were based on types of collateral such as "mobile" goods have been eliminated, except for the transition period discussed above. New UCC 9-316 provides several rules governing changes in the debtor's location to another jurisdiction and transfers of collateral to a person in another jurisdiction that becomes a debtor. There is a four-month grace period for filing in the new jurisdiction after the debtor changes its location from one state to another, and a one-year grace period for transfers of collateral to a person in a different state.

Two significant new filing rules that do not change existing Oregon law are the mandatory central filing rule (financing statements other than fixture filings are filed with the Secretary of State) (new UCC 9-501) and the filing of financing statements for agricultural liens (new UCC 9-109(a), 9-310(a), and 9-322). Oregon will likely not adopt Revised Article 9's requirement that agricultural lien claimants file financing statements. The existing agricultural lien statutes in ORS Chapter 87 should remain on the books and banks and other farm production lenders should not have the advantage over suppliers, storers, shippers, and laborers that they will have in most other states.

Another significant change is that financing statements may, under new UCC 9-504(2), describe the collateral as "all assets" or "all personal property." **Warning! This is not the case for collateral descriptions in security agreements.** Lawyers should continue to describe collateral in security agreements using Article 9's classifications such as "all equipment," "all inventory and accounts receivable," and "general intangibles." Be sure to include the after-acquired property clause, when applicable.

A change brought about by electronic filing technology is that under new UCC 9-502 and 9-509, the debtor need not sign the financing statement. The security agreement must, however, authorize the secured party to file the financing statement under new UCC 9-502. There is also a provision under new 9-518 that allows for challenging "bogus" electronic filings. With respect to the security agreement, the debtor need only "authenticate" the agreement by an electronic signature, a "mouse click," or verbal assent in a recorded telephone conversation.

FORECLOSURE ISSUES

New UCC 9-626 adopts the "Oregon Rule" on the issue of whether violations of the commercial reasonableness standard for disposing of collateral after default bar a secured creditor's claim for a deficiency judgment. Thus, there will be no change to existing Oregon law which already provides for a rebuttable presumption that the value of the collateral was equal to the price obtained on disposition. The debtor must come forward with evidence that the alleged defects in notice, time, or manner of sale caused the creditor to realize less on disposition than it should have. The burden then shifts to the creditor to prove otherwise. In cases where the collateral is bought by the foreclosing secured party or a related party and the debtor can show that the sale price was "significantly below" the price that an unrelated party would have paid, the court must calculate the deficiency based on the price that an unrelated party would have paid at a commercially reasonable disposition. New UCC 9-615. Also, under new UCC 9-620, a secured creditor may conduct a "partial strict foreclosure" by taking the collateral in partial satisfaction of the debt. Under the old law, only "full strict foreclosures" were permissible.

There are several new foreclosure notice requirements under the new law. In commercial cases, all parties that have filed financing statements must be given notice of the foreclosure disposition. New UCC 9-611. Under the old law, if other filers wanted notice of the disposition, they had to so notify the foreclosing creditor. In consumer cases, new UCC 9-614 provides a specific form for notice to consumer debtors of the planned foreclosure. Also, where the secured creditor makes a written attempt to collect a deficiency in a consumer case, the creditor must provide the debtor with a statement of how the deficiency was calculated, including costs and attorney fees. New UCC 9-615.

CONCLUSION

By far the most significant changes in the law for Oregon lawyers are the changes in the location of filing and choice of law rules. Although these changes make perfection of security interests simpler and less complicated, the need for the complex transition rules that get us from the old ways to the new ones unfortunately create many malpractice traps for the unwary. Please look for a future *In Brief* article dealing specifically with the transition rules and these malpractice traps once the legislature has passed Revised Article 9 and the July 1, 2001 effective date looms large.

Brent G. Summers
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The following are internet resources on this topic:

Commercial Finance Association:
www.cfa.com
(Site index at bottom - select Revised Article 9.)

Intercounty Clearance Corp.:
www.intercountyclearance.com
(Select RA9 Resource Center on left of screen.)

Consumers Union:
www.consumersunion.org/finance/summwc100.htm

CT Corporation:
www.cch-lis.com/update/news/article9_archives.html

American Bar Association-Business Law:
www.abanet.org/buslaw/cfs-ucc/ucc/article9