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08/04/2003 05:25 PM

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Subject: [Ucclaw-l] Revised Article 9 Case Update (May 2003)

A number of new opinions have issued since my May 1st update that should be of interest to commercial law professors, as well as judges, practitioners, and other professionals whose work includes commercial transactions, commercial litigation, or bankruptcy. What follows is not a comprehensive list of cases, you can find that on the following web page, which I will update periodically:

http://www.law.unlv.edu/faculty/rowley/article_9_updates1.htm

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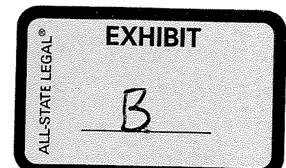
The following reported cases apply or discuss one or more substantive provision(s) of Revised Article 9. If you are aware of other such cases, please notify me via e-mail at keith.rowley@ccmail.nevada.edu.

1. New Cases Applying Revised Article 9

dd. Fidelity & Deposit Co. of Md. v. Royal Bank of Pa., No. Civ. A. 02-2674, 2003 WL 21250558 (E.D. Pa. May 1, 2003) (refusing to grant summary judgment on cross-motions by the plaintiff-surety and the defendant-secured creditor with respect to secured creditor's notice of the principal-debtor's default prior to the secured creditor's receipt of payment from the principal-debtor's customer, which the secured creditor used to pay down the credit it had extended to the principal-debtor; while the court recognized the general rule that funds received by the secured creditor before the surety had paid any claims against the surety bond were not subject to equitable subrogation, it left open the question whether, if the secured creditor had ample notice that the principal-debtor had defaulted before the secured creditor received the funds, it took with constructive notice of the surety's claim);

ee. In re Spearing Tool & Mfg. Co., 292 B.R. 579 (Bankr. E.D. Mich. 2003) (holding that R9-503(1)(a) does not affect the validity of a federal tax lien filing that was not made under the debtor's registered name -- the IRS filed against "Spearing Tool & MFG Company, Inc.," rather than "Spearing Tool and Manufacturing Co." -- and was not revealed by a search using the standard search logic of the filing office) (Thanks to Brendan Best for alerting me to this one.);

ff. In re Pasteurized Eggs Corp., Nos. 02-13086-JMD & 02-1148 JMD, ___ B.R. ___, 2003 WL 21474218 (Bankr. D.N.H. May 30, 2003) (holding that a security interest in a patent must be perfected by filing a UCC-1 in the appropriate state; filing in the U.S. PTO is insufficient o perfect the secured party's interest);



gg. In re Erwin, No. 02-10227, 02-5176, 2003 WL 21513158 (Bankr. D. Kan. June 27, 2003) (holding that a UCC-1 filed against "Mike Erwin," rather than "Michael A. Erwin," was not seriously misleading, despite the fact that a search using the "Michael A. Erwin" did not reveal the UCC-1 filed against "Mike Erwin," because R9 does not specify what name is to be used for an individual debtor and the UCC-1 filed against "Mike Erwin" -- the name by which the debtor was generally known -- served the "notice" function and would have been found by a searcher "exercis[ing] some reasonable diligence in formulating" its search request) (Jeff Paxton alerted me to this case the same day I found it on Westlaw. Thanks, Jeff.);

hh. In re Quisenberry, No. 02-20609-JLJ-13, 03-2004, ___ B.R. ___, 2003 WL 21730097 (Bankr. N.D. Tex. June 30, 2003) (holding that bank, which exercised a right of setoff, less than 90 days before the debtor filed bankruptcy, by applying the amount of a check payable to the debtor to reduce the outstanding balance of the debtor's indebtedness to the bank, did not do so pursuant to its security agreement with the debtor, because the security agreement did not describe the collateral to include any non-proceeds and there was no evidence that the check was proceeds of the identified collateral); and

ii. Sovereign Bank v. Alvarado, No. X06CV990152752S, 2003 WL 21771751 (Conn. Super. Ct. July 15, 2003) (holding that summary judgment was inappropriate on the commercial reasonableness of the secured creditor's post-repossession sale of the collateral where, despite the fact that the secured creditor credited the debtor with the fair market value of the collateral at the time of resale, rather than the actual resale price, thereby reducing the debtor's deficiency, the secured creditor failed to offer any evidence in support of its summary judgment motion that the sale was commercially reasonable).

2. New Cases Discussing R9 in Dicta

s. First Bethany Bank & Trust, N.A. v. Arvest United Bank, No. 97,310, ___ P.3d ___, 2003 WL 21448549 (Okla. June 24, 2003) (holding that PMSIs in accounts are not entitled to super-priority under OA9-312(4) because accounts are "intangibles" that the debtor cannot "possess" -- a position the court says is reinforced by R9-312, which replaced OA9-324, and which limits super-priority to PMSIs in tangibles and software).

3. Other Interesting New Cases

l. In re Midland Transportation Co., 292 B.R. 181, 50 U.C.C. Rep. Serv. 2d 579 (Bankr. N.D. Iowa 2003) (discussing the interplay of Article 9 and the Iowa certificate of title statute, and holding that a putative secured creditor whose interest had neither attached ? because it did not either possess the collateral or have a security agreement signed by the debtor ? nor been perfected in accordance with the certificate of title statute

prior to the debtor's bankruptcy filing was an unsecured creditor against whose claims the bankruptcy trustee had priority) (N.B.: I previously characterized this case as discussing the interplay between R9 and the Iowa title statute, having been hoodwinked by the court's repeated citations to the 2001 Iowa Code, which contains R9, not OA9. However, as Chris Hoving subsequently pointed out, the court is, in fact, discussing OA9, not R9 ? though differences between the two appear irrelevant to the court's discussion and holding);

n. In re Ortiz, 295 B.R. 158 (B.A.P. 1st Cir. 2003) (applying Puerto Rico's Commercial Transactions Act, which incorporates some, but not all of Article 9, and holding, based on Article 9 cases from other jurisdictions, that the creditor, inter alia, did not have an enforceable security interest in the debtor's assets because the sole document signed by the debtor did not evidence a security interest);

o. In re Corvette Collection of Boston, Inc., 294 B.R. 409 (Bankr. S.D. Fla. 2003) (following Valley Media and holding that the consignors lost priority to the consignee's TiB because the consignors failed to file a UCC-1, a notice of lien with the Florida DMV, or otherwise provide notice that they owned the vehicles in question; as a result, the consignors were unsecured creditors of the consignee, despite the fact that the consignors still held the original certificates of title on the consigned vehicles at the time the consignee filed bankruptcy);

p. In re Argo Financial, Inc., No. 02-30395, ___ F.3d ___, 2003 WL 21536985 (5th Cir. July 8, 2003) (holding, 2-1, that R9 yielded to the Louisiana Civil Code provision dealing with perfecting an interest in a motor vehicle; Judge Emilio Garza concurred in the result, but held that the court could and should have reached the same conclusion by applying R9 because the collateral at issue was not the motor vehicles themselves, but chattel paper evidencing the retail purchaser's obligation to make installment payments and the seller's security interest in the motor vehicles until the purchaser paid in full);

q. Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc., No. C4-02-530, ___ N.W.2d ___, 2003 WL 21709308 (Minn. July 24, 2003) (considering arguments from both sides invoking some aspect of the definition of "general intangibles" in R9-102(a)(42) in trying to decide whether the term "intangibles ? related to the [seller's] Snowmobile Program" in an asset purchase agreement included the seller's antitrust claims against the buyer); and

r. In re Doctor's Hospital of Hyde Park, Inc., No. 02-3254, ___ F. 3d ___, 2003 WL 21730747 (7th Cir. July 28, 2003) (considering the interaction of former 9-318 with the Illinois Comptroller Act ("ICA"), and concluding that the Illinois legislature intended for the ICA to "trump" Article 9 to give the State priority over assignees of State contracts in the event of bankruptcy) (N.B.: Judge Posner commented that R9-404 did not change any of the language in OA9-318 material to its decision; therefore, one can imagine the same result if the ICA was challenged using R9-404, rather than OA9-318.).

4. Recently Published Cases

The following cases, on which I reported earlier, have been published since May 1, 2003:

In re Atlantic Orient Corp., 290 B.R. 456, 49 U.C.C. Rep. Serv. 2d 1138 (Bankr. D.N.H. 2003);

In re AvCentral, Inc., 289 B.R. 170, 49 U.C.C. Rep. Serv. 2d 1336 (Bankr. D. Kan. 2003);

In re Custer, 50 U.C.C. Rep. Serv. 2d 608, 2003 WL 1807137 (Bankr. N.D. Iowa 2003);

Dean Machinery Co. v. Union Bank, 106 S.W.3d 510, 50 U.C.C. Rep. Serv. 2d 431 (Mo. Ct. App. 2003);

Morgan v. Farmers & Merchants Bank, ___ So. 2d ___, 49 U.C.C. Rep. Serv. 2d 1019 (Ala. 2003);

In re Morgan, 291 B.R. 795, 50 U.C.C. Rep. Serv. 2d 596 (Bankr. E.D. Tenn. 2003);

Motors Acceptance Corp. v. Rozier, 290 B.R. 910, 50 U.C.C. Rep. Serv. 2d 313 (M.D. Ga. 2003);

Systran Financial Services Corp. v. Giant Cement Holding, Inc., 252 F. Supp. 2d 500, 50 U.C.C. Rep. Serv. 2d 305 (N.D. Ohio 2003);

Vornado PS, LLC v. Primestone Investment Partners, LP, 821 A.2d 296, 49 U.C.C. Rep. Serv. 2d 1348 (Del. Ch. 2002).

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