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Book Reviews

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BOOK REVIEWS

THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE. By *Barkley Clark*. Warren, Gorham & Lamont: Boston, Massachusetts 1980 (with 1982 Supplement).

*Reviewed by Professor Wilfredo Caraballo.**

Creating a volume which can be used as a research aid by many who have common interests but differing perspectives poses a major challenge for the source book author. With legal source books the writer must contend with law students new to the subject, law professors teaching classes, practitioners structuring financing arrangements and judges seeking specific solutions. Professor Barkley Clark's *The Law of Secured Transactions Under the Uniform Commercial Code*[1] successfully meets the needs of this highly diverse audience.

Professor Clark's book analyzes and explains Article Nine of the Uniform Commercial Code. The UCC is relatively new,[2] and Article Nine supersedes all previous security devices in personal property and fixtures.[3] Understanding the article's structure and methodology becomes important when undertaking an excursion through Article Nine since the perspective of the searcher will influence the analysis throughout. Thus, the four primary categories of users—law students, law teachers, practitioners (usually attorneys), and judges—will have different needs.

An example of these diverging needs can be seen in a transaction which touches several jurisdictions. The basic question is simple: which jurisdiction's laws govern? An incorrect answer to this question leaves the creditor without the full protection afforded by Article

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1 B. CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (1980 & Supp. 1982).

2 Pennsylvania, the first state to adopt the Uniform Commercial Code, did so in 1953, effective July 1, 1954.

3 U.C.C. § 9-102(1) states:

> Except as otherwise provided in Section 9-104 on excluded transactions, this Article applies:
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> (a) To any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts; and also
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> (b) To any sale of accounts or chattel paper.

Nine.[4] The law teacher will lead the student through the various sections that need to be analyzed to answer the jurisdiction question. Both student and teacher focus on the operations involved in determining which law governs. The practitioner's paramount concern, on the other hand, is to do whatever it takes to best protect the client. In many instances, the practitioner will conclude that as a practical matter, this requires following the rules of all jurisdictions the transaction touches. The judge, by way of contrast, will look at the parties' actions to determine both the appropriate jurisdiction and the correct result under that jurisdiction's law.

Commentators in the area of commercial law are hard put to satisfy these diverse interests. Many have tried; few have actually succeeded. The hornbook by James J. White and Robert Summers,[5] which has met with widespread popularity and acclaim,[6] has been the most successful venture thus far. Indeed, until now, this book has been without strong competition. In my opinion they have, for Article Nine, met their match in *The Law of Secured Transactions Under the Uniform Commercial Code* by Barkley Clark.

Professor Clark tells us that his book "is aimed at those who *deal* in personal property security interests, both commercial and consumer" (p. iii) (emphasis added). Although this sentence appears to narrow the scope of his book to the practitioner's world, the actual scope is quite expansive. Professor Clark has done an excellent job of providing sufficient information and explanation for all, regardless of their perspective.

The book is divided into four parts (plus appendices ranging from excerpts of statutes relevant to secured transactions to state variations in Article Nine).

Part One, entitled "Elements of the Security Interests," starts off with "Aids to Interpreting Article Nine" (pp. 1-3 to 1-8) and then proceeds to probe Article Nine and all of its nuances. Clark designed Part One's approach illustrate Article Nine's methodology. The concepts are carefully unraveled and developed with numerous hy-

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4 An example of a multi-state problem is as follows:

> Bank in State X makes a loan to Debtor, against equipment that Debtor has in her store in State X. Debtor also owns a store in State Y (of the same type as that in State X). Bank perfects its security interest in State X. Debtor removes the collateral subject to the security interest to her store in State Y.
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> Q. Does Bank's security interest in State X extend to State Y?

5 J. WHITE AND R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE (2d ed. 1980).

6 Cohen, Book Review, 10 S.H.U. L. REV. 981, 981 (1980); Peters, Book Review, 71 MICH. L. REV. 1487 (1973); Clark, Book Review, 58 CORNELL L. Q. 1273 (1973).

potheticals used to demonstrate the Article Nine approach to problem solving.

Part One best addresses students' needs and perspective. Professor Clark, in great detail, lays out the fundamentals in such a way that the student should be able to work through Article Nine without much conceptual difficulty. For example, standard forms are reproduced so that the student can see what a financing statement actually looks like (pp. 2-31, 2-75). Professor Clark has done such a thorough job for the law student that his book might discourage students from the traditional classroom model of learning. I say this partly in jest, and partly seriously, for the teacher who assigns this book for his or her course would be hard pressed to supplement it in the classroom. An example of Professor Clark's discussion of the attachment requirement in perfecting the security interest[7] illustrates his skill in describing fundamental concepts (p. 2-3). As a teacher, I have found attachment to be a very difficult concept for students.[8] Without an understanding of this foundation concept, students usually find it almost impossible to develop subsequent concepts. The author addresses this problem as follows:

> Some creditors have a difficult time understanding the difference between "attachment" and "perfection." A good example is the confusion of the lender in *Kansas State Bank v. Overseas Motosport, Inc.*, involving a purchase money loan to enable the debtor to buy a new motorcycle. The borrower executed a security agreement in favor of the bank, but the bank failed to get its lien noted on the certificate of title. When the debtor skipped town with his new motorcycle, the bank failed to go after him because it assumed that failure to note the lien left it without any enforceable security interest. In fact, the bank could have repossessed the motorcycle even in the absence of perfection, since the security interest had attached. The failure to perfect only affected the bank's rights as against third parties. In the case at hand, there were no third parties, such as a trustee in bankruptcy, or an innocent purchaser, who laid claim to the motorcycle. The bank simply goofed in assuming that failure to perfect made the security interest unenforceable as against the debtor himself. Under both versions of Article Nine, when the debtor signed the security agreement, the bank was left with an

7 U.C.C. § 9-303(1) states: "A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken . . . ." An example of a step required is filing a financing statement; U.C.C. § 9-203(1) states that attachment occurs when there is a 1) written security agreement (proper as to form), 2) value is given by the secured creditor, 3) "the debtor has rights in the collateral."

8 The difficulty, in my experience, is that most students expect that attachment is something tangible, instead of a state of affairs. Once all of the requirements of U.C.C. § 9-203(1) are satisfied attachment simply "is."

> "attached" security interest, enforceable against the debtor (p. 2-4) (footnotes omitted).

This paragraph marvelously elucidates the importance of attachment, both as a concept independent of perfection and as the precondition for perfection. The importance of attachment as an enforceability concept irrespective of third parties' rights comes through loud and clear.

Part One also reflects the practitioner's perspective. Professor Clark provides eleven "typical clauses" (pp. 2-9 to 2-11) found in security agreements and, in addition, gives advice on how to adjust each to provide for the uniqueness of some transactions (p. 2-11). In another section, Professor Clark provides fourteen examples of what constitutes default (p. 4-5), making it eminently clear that the practitioner must take care to define default to fit the particular transaction. This section on default is particularly well designed, replete with sound advice (pp. 4-7 to 4-9) and in-depth analyses of the problems facing a secured creditor upon default by the debtor, including the various constitutional issues which may arise (p. 4-31). Professor Clark's analysis of the various options available to the secured creditor upon default includes not only those arising directly from Article Nine but also several based on common sense and good business judgment. Each option is separately analyzed with a view to laying out its strengths and weaknesses and any judicial reactions (§§ 4.4-4.6 and 4.7 beginning at p. 4-24).

Throughout Part One (and other parts as well), Professor Clark endeavors to blend the relevant case law into his analysis. Professor Clark does not hesitate to be critical of a decision, as when he dubs one case "the World's Worst U.C.C. Decision" (p. 3-67). His analysis should aid the judiciary since he not only criticizes decisions but also recommends what he considers to be better results with appropriate support for his conclusions (p. 3-67). In general, Professor Clark has not satisfied himself with simply laying out Article Nine and citing the relevant case law; instead, he has affirmatively ferretted out some of the more difficult problems.

In most cases, Professor Clark does a very good job of contending with the difficult questions. In one instance, however, he disposes of a problem in a manner which is in my opinion incomplete. Section 9-307(1) of the Uniform Commercial Code insulates "buyers in the ordinary course of business" from security interests on goods they have purchased.[9] This section enables, for example, retail buyers to

9 U.C.C. § 9-307(1) states:

receive merchandise free of a security interest to which it may have been subject to as "inventory." However, the language of § 9-307(1) provides only that the buyer takes free of security interests "created by his seller." Professor Clark argues that the "created by seller" language is an "exception to the rule of § 9-307(1), which in general protects the reliance interest of a good-faith buyer from a dealer" (p. 3-24). He intends the following example to show how a serious problem for the consumer is created by the language of § 9-307(1):

> Bank takes a security interest in all of Dealer-1's appliances, and files a financing statement with the Secretary of State. Dealer-1 wrongfully sells his inventory in (bulk) to Dealer-2. Consumers buy appliances from Dealer-2 (p. 3-23).

Professor Clark correctly states that, since Dealer-2 did not create the security interest, the consumer takes subject to the security interest of the bank which may now replevy the appliance from the consumer (p. 3-23). By inserting the fact that the sale from Dealer-1 to Dealer-2 was wrongful, Professor Clark has misleadingly given the impression that the result depends on the wrongfulness of the sale. For example, the sale could be of a large number of appliances by a manufacturer to a retailer. Assuming that the security interest was created by the manufacturer, the retailer takes free of the bank's security interest by operation of § 9-307(1).[10] But is the consumer who buys from the retailer protected from the bank? Section 9-207 does not appear to help the consumer since the retailer did not create the security interest. Section 9-307 does not require the concept of a wrongful sale.

Professor Clark would protect the consumer in his hypothetical, and I assume in mine as well, by resorting to common law concepts, made available by section 1-103 of the Code.[11] Other authors have also attempted to find a solution to his type of problem by resorting

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> A buyer in ordinary course of business (subsection (1) of Section 1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

10 *See* Bank of Utica v. Castle Ford, Inc, 36 App. Div. 2d 6, 317 N.Y.S. 2d 542, 8 U.C.C. Rep. Serv. 910 (4th Dept. 1971); Sherrock v. Commercial Credit Corp., 290 A.2d 648, 10 U.C.C. Rep. Serv. 523 (Del. 1972).

11 U.C.C. § 103 states:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

to § 1-103 and § 2-403.[12] The principal argument offered is that the common law "shelter principle" would protect the innocent consumer. The shelter principle states that the buyer would get all of the rights that his seller had or could convey.[13] Professor Clark himself, however, states that the "created by his seller" language "is the reverse of the 'shelter' rule" (p. 3-23) and an "exception to the rule of § 9-307(1), which in general protects the reliance interest of a good-faith buyer from a dealer" (p. 3-24). The shelter principle may not be available as an adjunct of § 9-307.[14] Professor Clark should have pursued this point further.

Part Two of *The Law of Secured Transactions Under the Uniform Commercial Code* focuses on the interplay of federal law, in particular bankruptcy law, and Article Nine. The Bankruptcy Reform Act of 1978[15] [hereinafter Reform Act] is set out in its historical context. For example, the manifold powers of the trustee are developed, explained, and contrasted with those under the previous Bankruptcy Act of 1898[16] [hereinafter Bankruptcy Act]. Professor Clark, once again, does an excellent job of focusing on the problems within the Reform Act and offers sound advice as to how these problem areas should be avoided or cleared up.

Professor Clark's discussion of the floating lien provides a good example of his treatment of bankruptcy issues.[17] Professor Clark introduces us to the floating lien problem and its resolution under the Bankruptcy Act (p. 6-32). He then lays out the Reform Act's treat-

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12 *See* Dugan, *Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code*, 48 U. COLO. L. REV. 333 (1975). *See also* Knapp, *Protecting the Buyer of Previously Encumbered Goods: Another Plea for Revision of U.C.C. Section 9-307(1)*, 15 ARIZ. L. REV. 861 (1973).

13 A version of the shelter principle is contained in U.C.C. § 2-403(1).

14 U.C.C. § 9-306(2) makes it clear that the security interest continues no matter what the disposition of the collateral, when it states: "Except where *this Article* provides . . ." (emphasis added), which in my opinion means that the only applicable exception is § 9-307. U.C.C. § 9-307(1) is an exception, but it is specifically limited as to its application.

15 Bankruptcy Reform Act of 1978, Pat. L. No. 95-598, 92 Stat. 2549, 11 U.S.C. §§ 1-1160 (Supp. 1978).

16 Bankruptcy Act of July 1, 1898, ch. 541, 30 Stat. 544, as amended, by Act of July 22, 1938, ch. 575, 52 Stat. 840.

17 The "floating lien" is best described as follows:

> Assume that a bank is willing to lend a retailer enough money to which the retailer may purchase her inventory, i.e., goods for resale. It is clear to both parties that the inventory purchased with the loan is intended to be sold to third parties. It is also clear that some of the proceeds from the sales will be paid to the bank while some of it will be used to purchase additional inventory. The bank will wish to have its security interest extend to the after-acquired inventory. This interest that it has in the after-acquired inventory is deemed to be a lien which floats over all to which it is subject.

ment of the floating lien and explains how Congress intended the Reform Act to provide an "ultimate" solution to the floating lien problem which had been so troublesome under the Bankruptcy Act (p. 6-43). He then proceeds to show how new problems have been created (p. 6-44).

Professor Clark identifies one of these problems as the Reform Act's "improvement of position test" to resolve "after-acquired collateral" issues in the context of the floating liens.[18] This test mandates comparison of the difference between value of the collateral and the debt on the date of the filing of the petition in bankruptcy with the difference between the value of the collateral and the debt on the 90th day[19] prior to that filing. If the creditor has improved his position between those two dates by this measure, he is deemed to have been preferred by the amount by which he has been improved, thereby enabling the trustee to claim the improvement (preference) for the estate.[20] This test, however, contains valuation problems which can cause nightmares.[21] Professor Clark adequately treats the various problems, though he could have gone further in elaborating on his proposed results in these situations.

Part Three makes perhaps Professor Clark's most substantial contribution to all who work with Article Nine. Here Professor Clark outshines the work of White and Summers by dissecting Article Nine as it "applies to specific transactions."

Part Three closely scrutinizes the kinds of property which may be pledged and the intricacies of the pledge as a security device. In addition, this part discusses in great detail a number of non-possessory financing arrangements, including agricultural financing (p. 8-1), with its special rules (p. 8-6), equipment financing (p. 9-1), and the special multi-state problems which an equipment creditor must face (p. 9-6), financing accounts and inventory (p. 10-11), and the special problem of the floating lien in these types of collateral (p. 10-2), executory contracts (p. 11-1), and the assignability problems (pp. 11-6), consumer credit transactions with special emphasis on debtor rights upon default (supplementing the chapter on default in Part One) (p. 12-1), and finally, oil and gas financing (p. 13-1), with the conflict of personal property versus real estate (p. 13-4).

In this part of the book, Professor Clark seems primarily con-

18 Section 547c(5) of Reform Act.

19 *See* Section 547 of Reform Act (for insiders it would be one year, not 90 days).

20 Section 547c(5) of Reform Act.

21 Cohen, *"Value" Judgments: Accounts Receivable Financing and Voidable Preferences Under the New Bankruptcy Code*, 66 MINN. L. REV. 639 (1982).

cerned with the practitioner. He develops the myriad of problems that arise in applying Article Nine to particular financing arrangements with a view to helping the practitioner avoid the pitfalls of each type of transaction (pp. 12-22 to 12-80). However, in this part all users get an opportunity to test the concepts introduced earlier in the book.

Part Three's essence can be captured in a section on the Agricultural Financing where the author states that "[i]n light of the tremendous burst of litigation involving the farm products exception under § 9-307, the following bits of advice seem appropriate for the secured lender. . ."(p. 8-36). He then proceeds to list his advice and concludes "the purchasers' case will be enhanced by . . . [tips]" (p. 8-36). However:

> In this writer's view, the farm products exception is hard to justify on the merits. It has led to a welter of litigation that reflects confusion and lack of uniformity. Farmers and ranchers are big kids these days. The farm products exception treats them like innocent consumers. It smacks of paternalism in the same way as the 1962 Code's prohibition against after-acquired property clauses covering crops. The crop provision was deleted in the 1972 version of Article 9. The farm products exception in the § 9-307 should also be deleted by the Commissioners on Uniform State Laws. If federal lending agencies such as FHA seek to reinstate the exception in Congress, the policy issue should be aired in that forum (p. 8-38).

Lastly, the 1962 version of the Code created many glaring problems. In response to this, the 1972 official text was promulgated and presented to the states. Part Four explains the extent and nature of each change. All changes are dealt with in the order in which one would discuss them in Article 9, with explanations for each. Once again, Professor Clark does not simply lay out the material but uses this part of his book to drive home the impact of the 1972 changes on particular types of financing arrangements.

The Appendices contain two sections of interest to researchers. Appendix B contains the General Comment on the "Approach of the Review Committee for Article Nine." This provides ready access for practitioner and the student of Article Nine to the words of the parties authoring the 1972 changes. Appendix C contains a table of state variations of Article Nine. This is an essential table for the practitioner who after all, must deal with the actual law of actual states.

Professor Clark has put together an excellent resource book. He has managed to understand the needs of his audience by focusing on their different needs and perspectives. The law student is brought along slowly and carefully and is given all of the information necessary to understand the nature of an Article Nine transaction. The law professor can learn from Professor Clark's methodology. The law teacher is also challenged by Professor Clark's own judgments and interpretations. As a law teacher himself, he understands the law teacher's perspective and he strives, with success, to build up a difficulty level which allows the teacher to build on the base he sets down. The practitioner is given sound advice on how to protect his or her client's interests. Professor Clark makes sure that the various transactions are dissected in such a way as to give the practitioner options on how to proceed. Finally the judge is exposed to a scholarly endeavor which will be of value in attempting to make decisions and interpret the law.