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Article 5

The Latest Developments in Article 9

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MS. HILLINGER: Good afternoon. Our topic is Latest Developments in Article 9. Revised Article 9 is going to be three years old in July. It is a little too young to predict what it is going to be like as a grownup, but I think we can make two generalizations at least in its toddler-hood. First, it is going to work well for corporations, limited liability companies, and Wall Street deals. It is not going to work so well for general partnerships, individuals, and deals that Cousin Vinny puts together. Second, Revised Article 9 states two very different sets of rules. One set governs conflicts between the Article 9 secured party and another Article 9 secured party or a buyer. A second set of rules governs the conflict between the Article 9 secured party and a lien creditor, in particular, the bankruptcy trustee. In that gun fight at OK Corral at high noon, Article 9 does its very best to make sure the bankruptcy trustee is the one facing the blinding sun with no gun in its holster.

Now, we obviously have a limited period of time for discussion this afternoon. We are going to hit on a few issues that we think are hot and interesting.

Professor Maggie Livingston wrote an article entitled, *Survey of Cases Decided under Revised Article 9.*[1] Maggie identifies and addresses all Revised Article 9 cases through the middle of 2003. It is a terrific article. The article contains a clear analysis of the case law. If you want to get the low-down on the Article 9 case law in the space of an hour, I strongly recommend that you read that article.

The next source of Revised Article 9 case law is a website maintained by Professor Keith Rowley at the University of Nevada-Las Vegas. That website lists all cases decided under Revised Article 9 or mentioning Revised Article 9. The website briefly summarizes each case. It, too, is very helpful.

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* This is an edited version of the transcript from second panel at the DEPAUL BUSINESS AND COMMERCIAL LAW JOURNAL SYMPOSIUM, *Emerging Trends in Commercial Law: Surviving Tomorrow's Challenges*, held on April 15, 2004.

1. Margit Livingston, *Survey of Cases Decided Under Revised Article 9: There's Not Much New Under the Sun*, 2 DEPAUL BUS. & COMM. L. J. 47 (2003).

This afternoon, we want to call your attention to cases of interest. Mark and I want to conduct this last session as a conversation.

We are lucky enough to have Professor Livingston in the audience, and we want to invite her *sua sponte* to join us. We invite all of you to ask questions.

We are going to start with the debtor's name for purposes of the financing statement. Section 9-502(a)(1) says that a financing statement is sufficient only if it provides the name of the debtor. Going a little further into the Code, section 9-503 expands on the requirement of the debtor's name. Section 9-503 distinguishes between a registered organization and other debtors. For a registered organization, the name must be the name indicated on the public record of the debtor's jurisdiction of organization. So the rule for registered organizations is pretty easy. The debtor's name is the name that is on the record in the jurisdiction in which the debtor organized.

For debtors who are individuals or non-registered organizations, section 9-503(a)(4) says: "a financing statement sufficiently provides the name of the debtor . . . only if it provides the individual or organizational name of the debtor." It does not tell us what an individual debtor's name is. It does not say the financing statement must give the debtor's correct name. It does not say the financing statement must give the debtor's full name. It does not say the financing statement must give the debtor's legal name. It just says the financing statement must give the debtor's individual name, if the debtor is an individual, or the debtor's organizational name, if the debtor is an organization.

Section 9-521(a) provides a suggested sample national standard UCC-1 form. Above the block for the debtor's name, it says, in larger font, "DEBTOR'S EXACT FULL LEGAL NAME." In the space for individual debtor names, the form has a space for last name, first name, middle name, and suffix.

Those are the statutory requirements concerning the debtor's name on a financing statement. Section 9-506 states the test for the sufficiency of a financing statement. A financing statement is seriously misleading, and, therefore, ineffective, if it fails to provide the name of the debtor in accordance with section 9-503 unless a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, would disclose a financing statement.

The question is, what is the debtor's name for purposes of a valid financing statement, or, when will a filed financing statement be effective? Maggie and Mark. Would you like to talk about the case law?

MR. LEIPOLD: It is easy. I just get the exact legal name off the debtor's birth certificate.

MS. HILLINGER: Maggie?

MS. LIVINGSTON: It is a little more complicated. We have a couple of cases coming out of bankruptcy courts in Kansas in which individuals were debtors, and the filing secured party used a nickname. One involved a debtor named Michael Erwin, and the name on the financing statement was Mike Erwin.[2] The other involved a debtor named Terrance Kinderknecht, and the name on the financing statement was Terry Kinderknecht.[3] In both cases, when the debtors went into bankruptcy, the court held that the use of the nickname on the financing statement was adequate.

MR. LEIPOLD: So now I have to look under nicknames? Those are easy nicknames. What if it is a less obvious nickname?

MS. LIVINGSTON: It could be a problem. I think what the courts are doing is they are going back to the reasonably diligent searcher standard that had existed before Revised Article 9 went into effect. The courts are saying that searchers have to search as if something really depended on it. So they cannot just plug in the debtor's name on a driver's license or the name on a Social Security card and be done with it. They have to think about names that the debtor might be commonly using and use those as well because that is what you do if you are conducting a serious search. If you really want to find something in the public records, you will use common variations of the debtor's name.

MR. LEIPOLD: Well, I guess I thought the whole purpose of Revised Article 9 was to require an exact name so that I would only need to look at the organizational documents. Now, you are telling me I have got to go back to the old ways and come up with a bunch of different names to make sure I have covered my bases, or to rely on the case law? This does not make much sense.

MS. LIVINGSTON: I think that is right. For registered organizations, the statute says to use the name of the organization that is the official registered name. But it does not say that for individuals or for non-registered organizations. So is the implication that the drafters wanted to create more leeway?

MR. LEIPOLD: Maybe there was not a real concern about individual debtors, which is what many of us deal with. I can not speak for

2. Nazar v. Bucklin Nat'l Bank (*In re* Erwin), No. 02-10227, 2003 Bankr. LEXIS 692 (Bankr. D. Kan. June 27, 2003).

3. Clark v. Deere & Co. (*In re* Kinderknecht), 300 B.R. 47 (Bankr. D. Kan. 2003), *rev'd* 308 B.R. 71 (B.A.P. 10th Cir. 2004).

the audience. So my question is, what is a diligent search? How many variations should I come up with?

In the *Erwin* case, the judge suggested you could search under "Irwin." Well, that might be easy, that might be a relatively small increase in my research results, but how about "Smith?" Do I have to look at "Smith" and every variation on the first initial? I mean, how many pages of searches do I have to go through to be reasonable?

MS. LIVINGSTON: We are not told. Part of the problem also is that different states, and some of you may have encountered this, maintain different databases for their financing statements. So you have an official Secretary of State database, but then you will have unofficial databases too. Sometimes the Secretary of State itself is maintaining both an official database and an unofficial database.

There are also searches you can do on Westlaw and Lexis, which are controlled by different search parameters. So I do not know where we are left because section 9-506 of the Code talks about doing a search under the debtor's correct name using the filing office's standard search logic. That search logic is going to vary a lot from state to state. If you have a national practice, you are going to have to become aware of the search logic in every individual state.

MS. HILLINGER: If I might add too, in the second case coming out of Kansas, dealing with an individual, the debtor's name was Terrance Kinderknecht. It was a bankruptcy case. Mr. Kinderknecht had signed his bankruptcy petition "Terry Kinderknecht." The court said a reasonable search required the bankruptcy trustee to search under the name under which the debtor signed the petition.

MR. LEIPOLD: Which is one of the questions that I, as a bankruptcy trustee, have to ask: "What names do you go by? What are all of your aliases? What is your maiden name?"

MS. HILLINGER: What happens if the debtor does not file bankruptcy?

MS. LIVINGSTON: Why should it make a difference what name the debtor used on the bankruptcy petition?

MS. HILLINGER: (to the audience) How do you all search? Do you search? Does anybody here search? No one searches? Your practices all intersect with Bankruptcy, do they not? No one here has done a search?

AUDIENCE MEMBER: I search as broadly as I can.

MS. HILLINGER: Why do you do that?

AUDIENCE MEMBER: Just in case.

MS. HILLINGER: What happens if you find something under the nickname "Butch?" Do you tell your client not to go forward with the loan?

AUDIENCE MEMBER: It depends specifically on the facts. It would cause me at least to ask the question whether it is possible that this financing statement that says "Butch" is good or not good.

MS. HILLINGER: How do you know?

AUDIENCE MEMBER: I do not know.

MR. LEIPOLD: We are getting paid to sort of protect the home front at the beginning, not at the end of the day. What is troubling is if you come across the financing statement on a new loan, there has been some representation on the documents that your loan is going to be the first priority loan. If I come across a financing statement that I did not know about, the first thought that pops into my head is fraud. I am getting taken, and my client is probably getting taken because there is this errant financing statement.

MS. HILLINGER: So it is in the searcher's best interest to find out in the beginning whether the debtor is lying and not to go through the loan?

MS. LIVINGSTON: So if the debtor is giving his name differently to different people, does that raise questions about the debtor's honesty?

MR. LEIPOLD: Obviously it depends on the facts, but you presumably have some representation that there are no other financing statements. Or there may be a representation that there may be financing statements out there, but all the loans have been paid off. The financing statements just stay in place for a period of time. It is sort of the "drawer theory" of financing statements.

In fact, I am hoping that the debtor gives me the detail or the information so I can actually source that financing statement. Recently, I have had situations where the only way I could find the financing statement was by having the number of the previously filed financing statement.

Speaking as a bankruptcy lawyer, I would say that the first question always revolves around fraud. The next question is why did I not know about this going into it? In order to manage client expectations, I do not want to be surprised. If I am surprised, my first response is pretty reactionary. I am convinced that something is going on if I am not told.

MR. NIMMER: The real issue is not the one you are talking about, but the other side. That is, how badly do you have to have done a filing before you lose in bankruptcy? It is not a question of what you search for, but how you file. If I use the word "Terry" rather than "Terrance," am I at risk? This is a different issue from searching.

MS. HILLINGER: Do you think there should be different rules depending on whether it is tested in bankruptcy or outside bankruptcy?

MR. NIMMER: Yes. I suspect if you ever had a case in which the real issue is searching by a real creditor, you might very well get a different outcome. I think the Bankruptcy Court is looking at a different issue. They are basically asking if this guy has it so badly wrong that I should throw him out of court? It is a different issue.

MR. LEIPOLD: From many judges' perspective, the issue is not so much "did they get it wrong," but "is there some way I can carve out something for the unsecured creditors." That is a motivation. Remember, that was the history under old Article 9.

MR. NIMMER: Yes, but those two courts could have easily said "Terry" is not "Terrance," so, therefore, it is invalid. However, they did not say this.

MS. HILLINGER: That is right.

MR. NIMMER: So they really were asking a different question.

MS. LIVINGSTON: I think part of the issue is that the trustee is not a reliance creditor. In other words, the trustee did not lend against the debtor's assets based on having viewed information in the public files. One thing that the three of us have talked about is whether Article 9 should be amended to say that unperfected security interests stand up against lien creditors. This would ease the burden on filing creditors who get things wrong on the financing statement because they would still survive in bankruptcy. However, you would lose your priority against later purchasers or later secured parties who actually relied on the public records.

AUDIENCE MEMBER: I will do the search or have the search done, and then I will pay extra to have the Secretary of State, the only filing place in Connecticut, do its own search. Then, I will give them all sorts of possibilities: in the case of "Smith," three or four spellings; in the case of "Erwin," with an "i" or with an "e". I will pay the Secretary of State and get a certificate from them. If they screw up, I have at least covered myself with the lenders I am searching for by doing my own search.

MS. HILLINGER: That is interesting too, because in the two Kansas cases we are talking about, it was possible to get a certified report from the Kansas Secretary of State's Office by giving them certain names to search or one could do one's own search using Access Kansas. The court in *Kinderknecht* said that searchers should be using Access Kansas to search, even though they could get a certified report from the Secretary of State that would show certain results. The searcher should go the extra mile and use Access Kansas because it is more flexible and accepts greater parameters within the search logic.

MR. LEIPOLD: Does Article 9 say I only really have to look at the official report?

MS. LIVINGSTON: It does.

MS. HILLINGER: Who cares?

MS. LIVINGSTON: There is a comment to Article 9, section 9-506, which says a financing statement that is seriously misleading is ineffective even if it is disclosed by 1) using a search logic other than that of the filing office to search the official records, or 2) using the filing office's standard search logic to search a database other than that of the filing office. The comment is pretty clear in saying we do not expect you to be using unorthodox search methods or unofficial databases. You have a right to enter a name into the official Secretary of State's database and see what that produces.

AUDIENCE MEMBER: Do many of the search sites allow you to put in partial names or to put in initials and things like that? Would the official search logic allow you to put in "Kinderknecht" and the initial "T" as the first name?

MS. HILLINGER: Yes.

MS. LIVINGSTON: Yes.

AUDIENCE MEMBER: So based upon the fact the Code does not require an individual's "full exact legal name," it seems to me that "Terry" is a name that would be found using the standard search logic.

MS. HILLINGER: There are two questions. First, what a prudent, risk-averse attorney does when representing a creditor? Second, what courts do given what the law says. Let me change the situation to a deal with a search involving a corporate name. We have a case involving a name change when an individual sole proprietorship became a corporation.[4] The original filed financing statement said something like "Randy A. Vincent d/b/a Summit Staffing." However, the actual corporate name was "Summit Staffing of Polk County, Inc." The court said the filed financing statement under "Randy A. Vincent d/b/a Summit Staffing" was effective. The filed financing statement remained effective despite the change.

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4. *In re* Summit Staffing Polk County, Inc., 305 B.R. 347 (Bankr. M.D. Fla. 2003).

Now, could someone find the filed financing statement searching under the new debtor's name? No. Why then was the filed financing statement effective? According to the court, a searcher has a duty to use reasonable diligence in examining the search results. So even though a search under the registered organization name did not reveal the filed financing statement, the searcher had an obligation to look at the search results and see if the name was somewhere on a previous or subsequent screen.

MR. LEIPOLD: I think there are really a couple of points on that. One is how extensive your search should be. I think the court in *Summit* sort of talks about it as an alphabetical index. You theoretically could go through the entire alphabet looking for this name, but at some point, it becomes unreasonable. The question always is how far you should look.

I think the other component is that access to online filing information will become available on your PC at your desk. In some situations, in some states, you submit the name, you get results, and you get the one name. Eventually, you will be able to do your own search because the official search will be online. You will be able to access the official system for a price and do the search right then and there. Rather than blaming the Secretary of State's office because they did not go back far enough, the onus would be upon you as the practitioner to decide how far you are going to look. Do you look at all of the names which start with "S?" Some of these other names are going to be pretty common. "Summit" may be easier.

MS. HILLINGER: It seems to me the question is who has the burden. Should the searcher have the burden to undertake multiple searches? Or, should the filer have the responsibility to get the debtor's name right?

Now, we forgot to talk about the Michigan district court case, *In re Spearing Tool and Mfg Co.*,[5] which is the only court that we know of that has gone the other way.

MR. LEIPOLD: It was a Federal Tax Lien Act case. The lower court had decided that the secured creditor should have looked under "Spearing Tool and *Mfg*" because the IRS had filed its tax lien using "Mfg" rather than "Manufacturing." Having reached that conclusion, the bankruptcy court decided in favor of the IRS. The district court's opinion is a little different. The district court concluded that you should only have to do what is reasonable, which is the $64,000 question. Article 9 says you should search under the exact legal name of

5. Crestmark Bank v. IRS (*In re* Spearing Tool and Mfg. Co.), 292 B.R. 579 (E.D. Mich. 2003).

the organization. Therefore, the inference is that it is somehow not reasonable to look for "Mfg," even though it was used by the IRS.

I think the result is somewhat helpful. As a practitioner, I cannot interpret this case to mean that I can just rely on a search of the debtor's exact legal name because I know there are courts out there that require searches of abbreviations. Also, since this is really a tax lien case, not an Article 9 case, I am not sure it is fair to say what is reasonable to look for in a tax lien search is what a search pursuant to Article 9 would require.

MS. HILLINGER: Except that the district court did say that it judges how you search for a federal tax lien using the most modern and enlightened approach in terms of commercial behavior and in this environment, that is Revised Article 9.

MR. LEIPOLD: But under old Article 9, I would have looked under "Mfg."

MS. HILLINGER: That is right. The court was talking about a rigid computerized search. The court said that a searcher could only use the Michigan Secretary of State's Office to search, because individuals do not have access to the database. Thus, a searcher has the right to rely on the one search, a search under the debtor's exact legal name as it was recorded in the debtor's Articles of Incorporation.

MR. LEIPOLD: I do not expect the IRS to change its policies for how it files lien claims any time soon. I think we will always potentially face that issue. If you are in a jurisdiction where you can look at a broader capacity of names, then the question maybe is what is reasonable. In this case, I should have picked up the IRS lien.

MS. HILLINGER: Also, we should note the case involved a real creditor who was making advances and checking periodically for tax liens; it had searched under the exact legal name of the debtor, found nothing, continued to make advances, and was harmed. Nevertheless, the bankruptcy court said the tax lien was valid.

AUDIENCE MEMBER: Do you see how this could develop over a few years? Those of us who are going to be extra cautious will actually search more broadly, even though the statute only requires a search of the exact registered name. Sooner or later, more judges are going to ask what people really do and we are going to have to say we search broadly. The judges will eventually say if that is what a reasonable person does, then that is how we will interpret it.

AUDIENCE MEMBER: Is a reasonable search test only applied to individuals, or is it also applied to corporations? If it applies to corporations as well, is there a conflict?

MS. HILLINGER: Well, the statute evaluates the sufficiency of the debtor's name by testing it according to a search under the debtor's name. You have to go back to section 9-503 to find out what the debtor's name is. The debtor's name is going to be different depending on whether the debtor is a registered organization or something else. If you do a search under the debtor's name, as defined or not defined, and you uncover the financing statement, it is effective even though the financing statement did not give the "debtor's name."

AUDIENCE MEMBER: But the first section says for it to be effective, you have to use the exact name.

MS. HILLINGER: That is right only for registered organizations.

AUDIENCE MEMBER: If you use the exact name, how does the second section create an exception? Even though we may find the statement, it is not under that name. The first section says you have to use the exact name.

MS. LIVINGSTON: I always thought there was a little bit of a fudge factor in section 9-506(b) which says, except as provided in (c), a financing statement that fails sufficiently to provide the name of the debtor in accordance with section 9-503(a) is seriously misleading. Then the statute goes on to talk about searching under the debtor's correct name. I always thought that if courts wanted to give the filing creditor some wiggle room, they would go back to section 9-506(b) and say a financing statement actually did provide the name of the debtor even if the name provided was not the debtor's exact legal name. So we do not even get to see whether you are running a search. We are going to say it is okay because, according to the way we view section 9-503, you did sufficiently provide the name of the debtor.

MS. HILLINGER: The Code does not tell us what is the legal name or the correct name for an individual or a non-registered organization. As the Revisors liberalized everything else to make the world safe for secured parties, they said the next killing field would be the debtor's name because they had really tightened the screws on that requirement. I am not sure whether that is true.

Let me go on to the next topic, which involves a commercial tort claim or general intangible, and proceeds. The case *In re Wiersma*[6] is a story about electrocuted and shocked cows. A dairy farmer hired someone to provide electrical services on his farm. Apparently, the electrical services were faulty. Many of the debtor's cows were electrocuted. Milk production went way down, and the farmer filed bankruptcy.

6. 283 B.R. 294 (Bank. D. Idaho 2002).

The debtor-farmer had a secured creditor. The creditor had a perfected security interest his cows and milk and his general intangibles. The bankruptcy trustee argued that the debtor's cause of action against the electrical supplier was a commercial tort claim. Because the creditor's security agreement did not create a security interest in the debtor's commercial tort claim, the creditor did not have an interest in it. Any recovery would therefore go to the bankruptcy estate. The creditor argued that the cause of action was not a commercial tort claim but a general intangible. The court said the definition of commercial tort claim is a claim that arises in tort. The court then said that the real question was when does a claim arise in tort? Although there was no case law under Article 9, there was a lot of case law on a related issue. There is an Idaho statute that says the attorney for the prevailing side in a contract claim can get attorneys' fees. According to that case law, a claim arises in contract if the contract is integral to the claim. Even if the plaintiff is suing for negligence, fraud, consumer protection, the source of the problem derives from the contract. The claim arises in contract. The claim does not arise in tort. The court in *Wiersma* said, but for the contract with this electrical supplier, there would have been no claim. Therefore, the claim arose in contract, not in tort. Therefore, it was a general intangible, the creditor was perfected, and the proceeds went first to satisfy the secured creditor's claim.

MR. LEIPOLD: Are PIK payments proceeds under Revised Article 9?

MS. HILLINGER: That is unclear. In *Stallings*,[7] the debtor farmer grew sugar beets. The government had been doing some spraying. Some of the spray blew over onto the debtor's land and destroyed his beet crop. The debtor filed bankruptcy. After the petition was filed, the government created a program to reimburse farmers for their losses.

There were two questions in the case. First, were these government payments property of the debtor's bankruptcy estate? Second, did the creditor, who had a security interest in the debtor's crops and general intangibles, have a claim to those payments? What would you say in terms of whether the payments were property of the debtor-farmer's estate? The program authorizing the payments did not exist until after the debtor filed bankruptcy. The court said the debtor's right to reimbursement for his crop loss was not property of his estate. The debtor did not have a property interest at the commencement of the

7. *In re* Stallings, 290 B.R. 777 (Bankr. Idaho 2003).

case. At most, the debtor had an expectancy. If a debtor does not have a property interest as of the commencement of his case, whatever it is does not become property of the estate.

What about the creditor's claim to payments? Did it have a security interest in them? First, section 552(a) invalidates after-acquired property clauses in bankruptcy. The property here—the debtor's right to payment—only came into existence postpetition. Therefore, the creditor's interest in the debtor's current and after-acquired general intangibles would not attach to this postpetition right to payment.

Was the debtor's postpetition right to reimbursement proceeds? This court said it might have concluded it was proceeds had it been able to decide the issue on a clean slate but, given that circuit's precedent, it was not proceeds. Paying for a crop that was not produced is not proceeds of the crop.

Now, other courts will come to different conclusions. I am sure many of you are aware of PIK payment and payment-in-kind programs. Under former Article 9, some courts concluded they were proceeds of crops and therefore subject to the crop lender's security interest. Others held they were not. It seems that issue continues under Revised Article 9 despite its significantly expanded definition of proceeds.

When reading *In re Goncalvez*,[8] I realized how stark the difference is between perfection and priority under Revised Article 9. Revised Article 9 states two very different sets of rules: one set for the contest between Article 9 secured creditor and the bankruptcy trustee-lien creditor, and another for the Article 9 secured creditor in conflict with claimants other than the bankruptcy trustee.

In *Goncalvez*, you had a debtor who bought a car in New York. The creditor had a security interest, which lien it duly noted on the certificate of title ("COT"). The debtor moved to Ohio and received a new, clean certificate of title. The creditor never did anything. Two months later, the debtor filed bankruptcy. The bankruptcy trustee argued:

> The debtor is now in Ohio. There is a new certificate of title issued by Ohio. The COT does not note the creditor's lien. There has been a change in the law. Ohio law now controls. The creditor is not perfected. The creditor's interest is therefore avoidable.

First, the parties both thought old Article 9 applied. The court said, "No, Revised Article 9 applies." The general rule I have gleaned from the cases is the date the bankruptcy petition is filed determines

8. 291 B.R. 441 (Bankr. S.D. Ohio 2003).

whether old Article 9 or Revised Article 9 applies. So, if the bankruptcy petition is filed after the effective date of Revised Article 9, then Revised Article 9 applies. It seems all of the courts are in agreement on that. Because the debtor had filed bankruptcy after Revised Article 9's effective date, Revised Article 9 controlled.

Second, the opinion ruled on the trustee's motion for summary judgment. It did not get into much substance.

Anyway, the court said that getting a COT from a new state means there is a change in the governing law, but that does not necessarily mean the creditor loses its perfection. Section 9-316(d) says a creditor's interest remains effective unless the issuing state says perfection lapses. When does an issuing state's law say a creditor's perfection lapses? And if it says nothing, the creditor's perfection continues on and on, even though no one has notice of its interest.

MS. LIVINGSTON: One of the comments to section 9-316 talks about the possibility that state A's certificate of title law could provide that once the state A certificate is surrendered in state B, it ceases to be effective. You could have that type of situation.

MR. LEIPOLD: That assumes the lender does not hold onto the COT. The lender is presumably holding on to it.

MS. LIVINGSTON: So it is going to be a rare case where the certificate is actually surrendered.

MS. HILLINGER: The last issue I want to talk about is the *Lewis*[9] case from the Eleventh Circuit. *Lewis* says a creditor's prepetition repossession of a car, even though the creditor does not sell it prepetition, basically divests the debtor of any meaningful ownership interest in the car. Therefore, the car was not property of the Chapter 13 debtor's bankruptcy estate, and the debtor could not get the car back. The Eleventh Circuit used Alabama conversion law to reach its conclusion. It never mentioned Article 9. That is okay, even though Article 9 controlled. The issue was tested again in Florida and went all the way back up to the Eleventh Circuit.[10] In that case, the Eleventh Circuit used Florida's certificate of title statute to hold the creditor owned the car when it repossessed it. Therefore, the only right the debtor had at the commencement of his bankruptcy case was the right to redeem under Article 9. The Chapter 13 debtor could not simply pay the present value of the creditor's secured claim and some amount on the deficiency claim.

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9. Charles R. Hall Motors v. Lewis (*In re* Lewis), 137 F.3d 1280 (11th Cir. 1998).

10. Bell-Tel. Fed. Credit Union v. Kalter (*In re* Kalter), 292 F.3d 1350 (11th Cir. 2002).

Recently, there was a bankruptcy court decision in Georgia that said *Lewis* was based on Alabama conversion law.[11] The Florida case was based on Florida's certificate of title law. The court wanted to base *its* decision on Article 9 law. And, under Article 9, a debtor retains an ownership interest if the collateral has not been sold prepetition. That decision is presently on appeal to the Eleventh Circuit. The Eleventh Circuit has certified the question to the Georgia Supreme Court.

Meanwhile, other cases in other jurisdictions have taken different positions. For example, in Oklahoma, a prepetition seizure does not divest the debtor of ownership, and the debtor has the right to redeem according to the Chapter 13 rules.[12]

MR. LEIPOLD: I thought the *Lewis* issue was decided by *Whiting Pools*[13] in the early Eighties? I thought this all got resolved. I thought *Whiting Pools* said, if some rights remain when the debtor goes into bankruptcy, the debtor has the ability to acquire a turnover order and bring the collateral back into the estate?

MS. HILLINGER: You remember right, Mark. This is how the Eleventh Circuit gets around *Whiting Pools*. Federal law, of course, trumps state law. *Whiting Pools* is federal law. But, the Supreme Court in *Butner*[14] said that you go to state law to determine whether someone has an interest in property. Therefore, the Eleventh Circuit went to Alabama law, and under Alabama conversion law, so says the Eleventh Circuit, when property is repossessed, that divests the debtor of a meaningful ownership interest. So the court is quite clever in terms of *Whiting Pools*. Now, a lot of courts think that the Eleventh Circuit is wrong. Nevertheless, the case is out there, and secured creditors are making the *Lewis* argument everywhere.

MS. LIVINGSTON: What do you define as a "meaningful ownership interest?"

MS. HILLINGER: Well, I do not think that the debtor in *Whiting Pools* had a *meaningful* ownership interest. I do not consider the right to notice of a tax sale, the right to surplus and the right to redeem particularly meaningful. The Supreme Court said that, so long as a debtor has those rights or some kind of ownership interest defined as no prepetition sale to a third party, i.e., title to the property, the property itself is property of the estate.

11. Motors Acceptance Corp. v. Rozier, 290 B.R. 910 (Bankr. M.D. Ga. 2003), *aff'd* 2004 U.S. App. LEXIS 14950 (11th Cir. 2004).

12. *In re* Robinson, 285 B.R. 732 (Bankr. W.D. Okla. 2002).

13. United States v. Whiting Pools, 462 U.S. 198 (1983).

14. Butner v. United States, 440 U.S. 48 (1979).

MR. LEIPOLD: If secured creditors are able to repossess cars and not have to turn them over, you have pretty much wiped out a whole class of Chapter 13 debtors. Debtors without cars cannot make their plan payments because they cannot get to their job and they cannot get a new car. I thought *Whiting Pools* was really saying we need to prevent this from basically upsetting the whole statutory scheme Congress was trying to put into place.

MS. HILLINGER: *Whiting Pools* is policy driven and it does facilitate reorganization. A debtor, without its assets, cannot reorganize. Nevertheless, the Eleventh Circuit did not buy that. Thank you.