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The Revised UCC Article 9 Secured Transaction Simplification Experience

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I. Achieving Accuracy and Understandability

Speaking and writing clearly, plainly, and understandably is not something that always comes naturally to me. I recall the occasion when I co-authored an article with a colleague of mine many years ago. There are always points where the co-authors get quite frustrated with each other and hands slam down on the table and all sorts of things get said. I recall looking over a sentence that I had written that had six commas, one semi-colon, a dash and a parenthetical phrase that had brackets inside of it. My co-author finally got exasperated. He slammed his hand on the table and said, "Cohen, the problem with you is that you would rather be right than interesting."

Of course, while the goal is to get it right, it must also be possible for others to understand the work product. This is the perspective that I brought with me to the drafting process to revise Article 9 of the Uniform Commercial Code.

II. Need for Article 9 Revision

Article 9 is often referred to as the "crown jewel" of the Uniform Commercial Code. In many ways it transformed the American credit economy. It has been a remarkably successful uniform law. However, forty years after its initial drafting was

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completed, it was beginning to show its age. It was time for revision.

Forty years is quite a long life span for a statute, especially one that transformed the economy the way Article 9 did. It was good enough to be successfully applied to types of transactions that did not exist and could not even be anticipated at the time it was written. Nevertheless, it was time for a revision. While many needs were identified in the revision process, they often were centered around a couple of major points.

The most important point was the need for greater certainty with respect to the rights of third parties. When there is a secured credit transaction, there is a need for greater certainty with respect to the relative rights of competing creditors and their debtors. Consequently, if you are trying to get greater certainty as opposed to merely stating vague or broad principles, very often the thought process suggests that more words will accomplish that goal.

III. Ten Year Drafting Process

The drafting process went on for a number of years. It took almost a decade from the appointment of a study committee to production of a finished product. As the process was going on and the draft was being put together, the statute that we hold up to the world as an example became something requiring two hands to hold. It was getting long and complicated and difficult to understand. It was also beginning to get to the point where, in fact, the rules stated in the draft were correct. It was technically precise. However, it could only be understood if you were there at the table while it was being written, or the experience at the table was passed down to you through the oral history. After you knew what it meant, you could read it and see that yes, it did say what its author claimed it said.

IV. Use of Simplification Task Force

This procedure is a very inefficient way to write law. Accordingly, we made great efforts to try to change it. We made great efforts primarily not because of an advanced plan, but because of the urging, prodding, the insistence of Professor Louis Del Duca and others that we had to produce a statute that was not only right but could be understood by those who were not at the drafting table. The result was that part way through the drafting process, (in retrospect too late in the drafting process), a

"Simplification Task Force"[1] was put together with respect to the draft. Their task was not to change the answers to any situation, but to make those answers understandable to those who read the statute without the benefit of having listened to it being debated and drafted. The Simplification Task Force tried to apply the fairly basic principles discussed in the Chicago-Kent[2] article. They include basic principles such as active voice, short sentences (all these things which are foreign to transactional lawyers such as simple words), and some visual techniques that make it much easier to read a statute, such as having a series of rules or items appear vertically down a page, rather than horizontally in a run-on sentence.

Use of these techniques add remarkably to the ability to comprehend what is going on. You can see some of the examples of the "before and after" simplification in that article. The result was that some improvements were made.

V. Use of Subsection Headings

One other improvement I should note very briefly is that after great battles within the U.C.C. style process, we were actually able to add sub-section headings in the form, captions not just as a title of a section but as to what topic individual sub-sections addressed. This makes understanding much easier particularly when you have a long section.

Ultimate result: we made some improvement. We would have made more improvement had we started earlier, had this been a built-in part of the process. However, this is the first time this process has ever been undertaken in drafting in the U.C.C. I think we have a better product because of it.

VI. Lessons to Be Learned

What lessons can we learn from this experience other than starting early, which I think is an important goal. One thing is to remember why it is that we are doing this. Unlike the earlier plain language projects where the goal is informed consent of someone entering into a transaction, use of plain language techniques in drafting a statute is a little bit different. You have to remember the different audience to which the product is addressed. Even more

1. Louis F. Del Duca, Vincent C. DeLiberato, Jr., David L. Hostetter, Kenneth C. Kettering, and Steven O. Weise.

2. Louis F. Del Duca et al., *Simplification in Drafting—The Uniform Commercial Code Article 9 Experience*, 74 CHI.-KENT L. REV. 1309 (1999).

important is how do you do it and, of course, that could take hours. I will attempt to briefly describe some of the lessons I have learned which may or may not be generalizeable to other statutes, but will at least provide a place to start our discussion. They are fairly basic.

The first lesson I learned (which in some ways is the most counter-intuitive) is that plain language is the last thing you ought to think of in your initial drafting. By that I do not mean it is unimportant or that you should forget it, but that the thing you ought to initially focus on is to "get it right." Getting it right is a long, difficult process. It involves complexity of thought. It involves coming up with exceptions. It is where I get my commas and semi-colons and parentheses with nested brackets and the dashes and the footnotes. Sometimes when you are trying to get it right, you cannot yet see the simplifying principle. Yet you have to go through the exercise of getting it right. Once you think you have got it right, then it is easier to back up and try to apply the principles that other speakers will talk about today in order to make it understandable. However, if you introduce that too early in the process, at least my experience is, you can come up with simple and wrong. It is better to come up with right and then as simple as possible than it is simple and wrong. After you have gotten the details, you should think about identifying a unifying principle.

The most important simplification principle is "try it." There is a great natural resistance of drafters of statutes just as there is for drafters of transactional documents—to believe that it could not possibly be the case that anything they write could be stated more simply or more effectively. This is the mystique you have to break through. You can break through that mystique and convince the drafters by working along side them and convince them that their work will live longer through the ages if lay people, attorneys, and more importantly, judges (not all of whom are experts in the area in which the statute speaks) can understand it. Judges are more likely to give the answer that the drafters wanted and attorneys are much more likely to enter into transactions believing that the answer will be the answer that the drafters wanted, if in fact that answer can be ascertained in advance with some degree of reliability and predictability. Clear, understandable drafting brings about the very certainty in transactional results that often is the major goal of these statutes.

We made some progress along the way in Article 9. We hope to make greater progress in the other U.C.C. projects that are still

in progress. However, the goal is not one that will ever be finished. It is a process that we are always trying to improve. I think we have a better Article 9 Revision as a result of the efforts of those who in fact, much more than I, were pushing for this simplification, clarification and basic understandability.

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