TEN HOT TOPICS FOR BANKS UNDER THE UCC

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I. LOUISIANA SUPREME COURT REJECTS DISCOVERY RULE IN CHECK CONVERSION CASE UNDER THE UCC

Specialized Loan Servicing, LLC v. January, 80 UCC Rep.2d 1225, 2013 La. Lexis 1561 (La. 2013)

*A classic forged endorsement case, involving a check in the amount of $142,242, was governed by UCC 9-320

*Nonuniform Louisiana UCC 3-420(f) provides that "[a]ny action for conversion prescribes in one year." This contrasts with the standard UCC statute of limitations for bank misbehavior of three years, found in UCC 3-118.

*The UCC leaves to other state law when a cause of action "accrues".

*Louisiana High Court rules that allowing discovery rule to toll statute of limitations would be a "displacement" of statutory law, prohibited by UCC 1-103.

*Public policy supporting the rule: certainty, finality and uniformity (almost all other states reject the discovery rule for UCC conversion actions)

*A well-reasoned dissent by Justice Knoll focuses on the fairness of the discovery rule, the fact that it has been applied often in Louisiana tort law, and is more consistent with the three-year statute of limitations that applies elsewhere in the country.

*The case contains a comprehensive collection of judicial decisions from around the country. At the present time, all states reject the discovery rule for UCC conversion claims except Colorado, Florida, New Mexico and Massachusetts.

*Compare *Groue v. Capital One Bank,* 47 So.3d. 1038, 2010 La. App. Lexis 1211 (La. App. 2010)(bank customer who failed to notify bank of forged checks within 30 days of receipt of monthly statement, as required by the deposit agreement, was precluded from recovering from the bank; court relies on one-year reporting deadline imposed by UCC 4-406(f), reduced by contract as allowed by UCC 4-103), and *Marx v. Whitney Nat'l Bank,* 713 So.2d 1142, 1998 La. Lexis 2342 (La. 1998)(court invokes "repeater rule" of 4-406(d)(2), which imposes on the depositor the risk of loss on all subsequent forgeries by the same wrongdoer after the customer had a reasonable time to detect an initial forgery if the bank honored subsequent forgeries prior to notice).

II. BANK WIRE CUSTOMER WHO REJECTS "DUAL CONTROL" ASSUMES RISK OF CORPORATE ACCOUNT TAKEOVER

Choice Escrow & Land Title, LLC v. BancorpSouth Bank, 2013 U.S. Dist. Lexis 36746 (W.D. Mo. 2013)

*Bank customer signed up for Internet-based wire transfer services and rejected the bank's offer of a security procedure that included a requirement of "dual control" over outgoing wires. Missouri federal district court ruled that, by rejecting the bank's offer, the customer bore the risk of a fraudster wiring funds out of the customer's account by hacking into the computer of a single company employee. The loss-allocation rules of the UCC, coupled with the agreement of the parties, shifted the risk of loss from the bank to the customer, to the tune of $440,000. The bank obtained summary judgment on the ground that, as a matter of law, the outgoing wire had been verified pursuant to a "commercially reasonable security procedure."

*The applicable UCC rules: 4A-204 (baseline rule is that loss caused by an unauthorized outgoing wire is on the bank); 4A-202(b)(but if bank and customer have agreed to verify pursuant to a commercially reasonable security procedure, and the wire is released under that procedure, it is effective even though not authorized); and 4A-202(c)(security procedure is deemed to be commercially reasonable if it is chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer and the customer agreed in writing to be bound by any payment order accepted by the bank in compliance with the security procedure chosen by the customer).

*The security procedure chosen by Choice Escrow was user name and password of either of two company employees.

*Court relies heavily on Comment to UCC 4A-203: "Sometimes an informed customer refuses a security procedure that is commercially reasonable and suitable for that customer and insists on using a higher-risk procedure because it is more convenient or cheaper. In that case…the customer has voluntarily assumed the risk of failure of the procedure and cannot shift the loss to the bank."

*The bank did not act in bad faith and the rejected procedure of "dual control" was commercially reasonable under FFIEC standards.

III. THE NEW AMENDMENTS TO ARTICLE 9

- The problem with individual debtor names under prior law

- The huge amount of litigation on improper names:

    - In one famous case, the debtor's name was "Brooks L. Dickerson", but the court allowed use of his nickname "Louie Dickerson". *Peoples Bank v. Bryan Brothers,* 504 F.3d 549 (5th Cir. 2007).

    - In another notable case, the debtor's full name was "Terrance Joseph Kinderknecht", and the court invalidated a financing statement that used his nickname "Terry Kinderknecht". *In re Kinderknecht*, 308 B.R. 71 (10th Cir. BAP 2004).

    - Contrast *In re Miller,* 2012 U.S. Dist. Lexis 116275 (C.D. Ill. 2012)(court rejects debtor's "legal" name on birth certificate in favor of name on driver's license), with *In re Green,* 2012 Bankr. Lexis 5347 (Bankr. D. N.M. 2012)(court determines that "legal name is "Ronald Jackson Green" and rejects driver's license name ("Ron Green").

    - In this litigation, bankruptcy trustees routinely do filing searches to determine whether the name is "seriously misleading" under the third-party search test of UCC 9-506.

The new amendments to Article 9: using the driver's license name as <u>the gold</u> <u>standard</u> for the financing statement.

- How serious is the problem of fouling up individual debtor names?

- The new amendments have now been enacted in 45 states, effective 7/1/13.

- California just enacted the amendments; New York hasn't done so yet; ditto for Alabama, Arizona, Oklahoma and Vermont.

The fighting issue during the enactment process: Should a state adopt Alternative A (a financing statement is effective only if it uses the debtor's name as found on the driver's license) or Alternative B (a financing statement is sufficient if it uses the driver's license name, but other name variations are okay for purposes of perfecting against the debtor's bankruptcy trustee—this is called the "safe harbor" approach).

- Alternative A has the benefit of certainty and reduced searching of the UCC records, while Alternative B gives secured lenders more leeway in perfection of a security interest against the debtor's bankruptcy trustee.

- Alternative A deals with both perfection and priority, while Alternative B deals only with perfection.

- State enactment of Alternative A has outpaced enactment of Alternative B (Alaska, Colorado, Connecticut, Delaware, New Hampshire, Oregon and Wyoming) by a whopping margin of 6:1.

- The key role played by the American bankers Association and its Task force.

- **LOUISIANA HAS CHOSEN ALTERNATIVE A.**

The five-year transition issue for non-driver's license names used on financing statements filed before 7/1/13; See Example in Comments to UCC 9-801:

> Example: Debtor's "individual" name is "Lon Debtor." On November 8, 2012 the debtor (who operates his business as a sole proprietorship) grants a security interest in certain manufacturing equipment to Secured Party (SP), who correctly files a financing statement against "Lon Debtor." On July 1, 2013 the new amendments, including Alternative A, take effect in the debtor's state of residence. The debtor's unexpired driver's license indicates the name "Polonius Debtor". Assuming that a proper search would not disclose the financing statement, the name "Lon Debtor" is insufficient to perfect SP's security interest under the new law. Under new UCC 9-805(b), the filing remains effective until SP continues its financing statement, at which time it must be amended to reflect the debtor's driver's license name.

Under the new amendments, what individual debtor names should be used for filing and searching?

- What if the debtor doesn't have a driver's license?
- What if the debtor's driver's license is issued by another state?
- What about driver's licenses that show nicknames, misspellings, or suffixes?
- What if the driver's license expires?
- What if the debtor's name changes on the license?
- What about real estate mortgages filed as fixture filings?
- How broad does your search of the UCC records have to be? The federal tax lien problem.

Other New Amendments to Article 9

- For collateral that is being administered by an executor, administrator or other personal representative of a decedent, Revised UCC 9-503(a)(2) provides that the financing statement must use the **name of the decedent** as the "debtor" and, in a separate part of the financing statement (line 5 box), indicate that the collateral is being administered by a personal representative.

- For collateral that is held in trust, Revised UCC 9-503(a)(3) provides that the financing statement must use the **name of the trust** as the "debtor" or, if the trust does not specify a name, use the name of the settler. In addition, the financing statement must indicate in a separate part of the form (line 5 box), that the collateral is held in trust.

- The new amendments broaden the definition of "certificate of title" to better accommodate electronic notation of liens on titled motor vehicles. The new law also makes it clear that the lien can be perfected upon mere application for a certificate of title, if state law so provides.

- There is a new definition of "public organic record", to make it clear that, for entity debtors, this includes only entity-formation documents, not other public records like "assumed name" registers. This change clarifies present law.

- The new amendments broaden the definition of "registered organization", to pick up organizations formed without the need of a "public organic record", but formed only when a public filing has been made, or with enabling legislation. Special rules on business trusts as debtors.

- The new amendments give expanded rights of secured parties based on post-filing changes: (1) security interests that attach after the debtor changes location (four-month rule) and (2) collateral acquired by a new debtor.

- The new amendments broaden the definition of "control" of electronic chattel paper for attachment and perfection purposes. The move in recent years from paper to electronic chattel paper. A newborn industry is providing "collateral vaults". Impact on securitization. The new amendment allows "control" with third-party custodians. There is also a new amendment on how to handle "hybrid chattel paper".

- Assignability restrictions governing receivables don't apply to foreclosure.

- Information statements now allowed for secured parties (for unauthorized termination statements), not just for debtors (for unauthorized financing statements). We may soon see new amendments to Article 9 that deal with the growing problem of "bogus filings".

- Retroactive ratification of unauthorized filings.

- Validation of public and private internet foreclosure sales.

- Changes in UCC forms.

IV. TERMINATING THE WRONG FINANCING STATEMENT: A COLOSSAL UCC FILING ERROR

In re Motors Liquidation Co., 486 B.R. 596 (Bankr. S.D.N.Y. 2013)

- The issue was whether the court should give effect to a mistakenly filed termination statement on a $1.5 billion secured loan.

- Much to the relief of the secured lender (JPMorgan Chase), the bankruptcy court ruled that the termination statement was "unauthorized" under the rules of Article 9, and thus ineffective to render the security interest unperfected.

Synopsis of Events

- $300M "synthetic lease" facility to GM for the acquisition of real estate in 2001.

- $1.5B term loan facility secured by GM equipment and fixtures at 42 manufacturing facilities in 2006.

- 28 financing statements were filed, including the key financing statement #6416808 4 which was filed with the Delaware Secretary of State.

- GM decided to repay the synthetic lease facility in 2008, balance of $150M.

- Mayer Brown paralegal conducted a UCC search to determine what termination statements needed to be filed; Mayer Brown represented GM, the debtor.

- The closing documents mistakenly included a reference to "#64168084."

- After GM filed bankruptcy, the error was discovered.

- The unsecured creditors committee filed an adversary proceeding, arguing that JPM Chase's security interest on the term loan was unperfected.

- The unsecured creditors argued that the termination statement was authorized even if mistaken and irrespective of the intent of the parties.

- In the present case, the debtor and its counsel were authorized by the banks to file a termination statement referring to original financing statement #64168084.

- The unsecured creditors relied heavily on *In re Kitchin Equip. Co. of Virginia, Inc.,* 960 F.2d 1242, 17 UCC Rep.2d 322 (4th Cir. 1992) where the secured creditor mistakenly checked the "termination" box on the UCC-3, rather than the “partial release” box.

- New York bankruptcy court sided with the secured lenders – the mistaken termination statement was not "authorized" under general principles of agency law, which supplement Article 9 under UCC 1-103. Case is now on direct appeal to the Second Circuit.

- How would the case have come out if the error had been made by employees of JPM Chase, the secured lender?

- In *In re Hickory Printing Group*, 479 B.R. 388, 78 UCC Rep.2d 314 (Bankr.W.D.N.C. 2012), bank conceded that while its employee's filing of a termination statement was a mistake, it was still authorized, so bank inadvertently lost collateral worth millions.

Key UCC Rules Governing Termination Statements

1. Under UCC 9-509(d), a person may file a termination statement only if the secured party of record authorizes the filing.

2. Under 9-510(a), a filed termination statement is effective only to the extent it was authorized.

3. Under 9-513(d), upon the filing of a termination statement in the correct filing office, the original financing statement to which the termination statement relates ceases to be effective if filing of the termination statement was authorized by the secured party of record.

Key Take-aways from the NY case:

- Secured lenders need to carefully review all financing statements on file when authorizing the filing of any termination statement.

- A single financing statement may perfect a security interest for multiple loans, or different financing statements by the same secured party may perfect a security interest for different loans.

- Consider attaching copies of original financing statements to termination statements for comparison before filing.

- Searchers need to circle back with secured parties to verify that all termination statements have been authorized.

The 2010 amendments to Article 9 contain a new provision:

- Secured party are allowed to file an "information statement" explaining that a filed termination statement is inaccurate or unauthorized. UCC 9-518(c) and (d).

- This is parallel to the right of a debtor to file an information statement to express the belief that a financing statement is inaccurate or unauthorized.

V. TAX REFUNDS AS COLLATERAL

In re TOUSA, Inc., 406 B.R. 421 (Bankr. S.D. Fla. 2009)

- Was a $207 million tax refund, paid to the debtor (a Florida real estate developer) following commencement of its Chapter 11voidable as a preference?

- The court ruled that the security interest was voidable because it could not attach, as a matter of federal law, until the end of the 2007 taxable year—which was within 90 days of the bankruptcy filing.

- The creditors' loan documentation, including the financing statement, referenced: "All general intangibles, now owned or hereafter acquired," but the security interest did not attach until Jan. 1, 2008 because of the IRS rules.

In re TMCI Electronics, 279 B.R. 552 (Bankr. N.D. Calif. 2000)

- Bank's security interest in general intangibles didn't extend to big tax refund because debtor didn't acquire rights in the refund until the end of its taxable year, which occurred after the bankruptcy filing.

- At the time of the bankruptcy filing, the tax refund was a "mere expectancy" so that the security interest never attached under UCC 9-203.

- Instead, the refund was a post-bankruptcy asset under Section 552 of the Bankruptcy Code.

Expect More Litigation

- The Great Recession that began in 2008.

- Increased importance of loss-carryback tax refunds.

- Consider going beyond PMSIs in the equipment you finance, and include a broad reference to "general intangibles," as well as other equipment of the debtor.

VI. THE FATE OF SECURED CREDITORS IS DETERMINED BY THE SEARCH LOGIC

- In general, Article 9 requires that a financing statement list the name of the debtor, the name of the secured party (or its representative), and a description of the collateral. 9-502(a). Errors in any of the required information can undermine the effectiveness of the financing statement. Section 9-506 provides that a financing statement is effective despite minor errors/omissions if they do not make the filing "serious misleading." When the financing statement is indexed, small errors can lead to big problems if the search logic employed by the filing office cannot retrieve the financing statement.

- In *In re C.W. Mining Co.*, 488 B.R. 715 (D. Utah 2013), a big group of secured creditors was wiped out by the inflexible search logic of the Utah UCC filing office.

    1. Each of the creditors filed financing statements that identified the debtor as "CW Mining Company", even though the debtor's name in the official Utah corporate records was "C.W. Mining Company."

    2. For lack of two periods, the creditors lost $2.8 million.

    3. The creditors could not take advantage of the "escape hatch" found in UCC 9-506. UCC 9-506 excuses a "seriously misleading" name if a search of the records in the filing office using the Debtor's correct name would reveal the financing statement. In this case, the Utah UCC search logic was too rigid. The Bankruptcy Trustee produced an affidavit from the director of the Utah division of corporations who stated that a search of "C.W. Mining Company" would not reveal the financing statements.

4. The court put it this way: "In short, the legislature elected to leave the fate of those creditors that fail to comply with the strict naming requirement of UCC 9-503 in the hands of those that develop and manage the filing office's search logic."

5. The Utah case reflects continuing challenges in properly identifying corporate debtor names.

- These rules are not changed by the new amendments to Article 9, which focus on creating more certainty for the names of individual business debtors.

- What documents would you use to get the accurate name? UCC 9-503 provides the parameters:

    1. For a registered organization – i.e. corporation, LLC, etc., determine the state of organization/incorporation and use the public records of that state to get the exact name (punctuation counts). Do not rely on a trade name.

    2. For a trust request the organic trust document using either the name of the trust or the settler.

- According to a 2007 ABA Business Law presentation, those states without model standard search logic include: Utah, Florida, Georgia, Virginia, Colorado, North Dakota, and Vermont.

VII. CONTINUING CHALLENGES IN THE REALM OF COLLATERAL DESCRIPTIONS

- Describing collateral correctly is always important, but it becomes crucial when the security interest needs to be enforced, a competing lender arrives, or a bankruptcy trustee (or unsecured creditor committee) reviews the transaction. As the loan is documented (or purchased), the secured party needs to review the papers with an eye towards enforcement. Contemplating a borrower bankruptcy, however unlikely it may seem at the time, is important because some rules change in bankruptcy. For example, section 552 of the Bankruptcy Code creates a general rule that a security interest is cut off in post-bankruptcy property generated by prepetition collateral. While there are exceptions, they are specific and sloppy drafting will take a lender out of the exception. One very broad exception is the "proceeds" exception, thus protecting a lender whose collateral is sold after bankruptcy is filed. 11 U.S.C. § 552(b)(1).

- One case dealing with the "proceeds" exception to the bankruptcy rule is: *In re Lake at Las Vegas Joint Venture LLC*, 497 Fed. Appx. 709, 2012 U.S. Lexis 22471 (9th Cir. 2012).

    1. Court ruled that the "proceeds" exception did not apply to a security agreement that defined the collateral as the "payments" or "future payments" derived from a land development contract. The proceeds exception would have applied had the security agreement described, as collateral, the prepetition contract that gave rise to the post-petition payments by the obligor (a local government entity).

    2. This 9th Circuit decision is a warning to all secured lenders. The collateral description in a security agreement must be drafted with an eye toward debtor bankruptcy. Distinguish carefully between after-acquired property and post-petition proceeds of prepetition collateral.

    3. For failing to make that simple distinction, the secured creditor lost collateral worth millions.

- The case of *In re Brown* is a decision where the secured lender used the wrong Article 9 categories to describe its collateral. 479 B.R. 112 (Bankr. D. Kan. 2012).

    1. The security agreement described the debtor's interest in an LLC as "preferred stock", "investment property", and "securities." The LLC units didn't fit any of these cubbyholes.

    2. In letting the secured creditor off the hook, the Kansas bankruptcy court noted a leading decision by the Kansas supreme court, John *Deere Co. v. Butler County Implement, Inc.*, 655 P.2d 124, 36 UCC Rep. 957 (Kan. 1982). The court stressed that no third party could have been misled by the secured lender's failure to properly categorize the collateral.

        a. But were the secured creditors really victorious?

        b. Costs/Fees/Hassle

        c. Lesson here is to read the UCC

i. Use the specific description i.e. "10 membership units in Kansas Medical Center LLC"; or

ii. Use the correct UCC category: "general intangibles owned by the debtor."

- *In re Pickle Logging, Inc.*, 286 B.R. 181, 49 UCC Rep. 2d 971 (Bankr. M.D. Ga. 2002).

1. John Deere's security interest in a piece of logging equipment was unperfected because of an error in the serial number description of the equipment; competing blanket filers had priority.

2. The takeaway: get the right category or use an accurate item-specific description.

VIII. DOES BANKRUPTCY EXCUSE FILING OF A CONTINUATION STATEMENT?

- *Summary* - Since the enactment of the Bankruptcy Code in 1978, lenders are well versed in the automatic stay, i.e., that special injunction that arises immediately upon the filing of a bankruptcy case. 11 U.S.C. § 362(a). The automatic stay prohibits collection actions as well as actions affecting a debtor's property. For many years, the Bankruptcy Code was silent as to whether the filing of a continuation statement was permitted without first seeking and obtaining relief from the automatic stay. The UCC rules on continuation statements are set forth below. The damages for not filing a continuation statement include the loss of your collateral to a competing lender or subsequent purchaser for value. What happens then, when a bankruptcy is filed during the period in which a continuation statement is due? Can the lender use the fact of the bankruptcy filing and the imposition of the automatic stay to shield itself from the harsh consequences of failing to file the continuation statement?

- *UCC* Rules:

1. A continuation statement must be filed within 5 years after the filing of the original financing statement. UCC 9-515(a).

2. Filing must occur within the 6-month window prior to the end of the 5-year period.

3. Premature filing, like tardy filing, can be fatal.

4. If no continuation statement is filed and the initial financing statement lapses, the security interest becomes unperfected and thus exposed to a trustee in bankruptcy or any other competing third party.

5. Lapse is retroactive with respect to pre-lapse purchasers for value (including competing secured creditors), though not with respect to prior judgment creditors. UCC 9-515(c).

6. Under the pre-2001 version of Article 9, lapse of the security interest was "tolled" if the debtor filed bankruptcy.

- *Bankruptcy* Code:

1. In 1994 Congress amended Section 362(b)(3) of the Bankruptcy Code to excuse post-petition UCC filings from the automatic stay. In other words, no relief from the automatic stay is necessary. The continuation statement is permitted notwithstanding the bankruptcy.

2. In 2001, Article 9 was amended to eliminate the "tolling" rule.

- *The* above changes to the UCC and the Bankruptcy Code make it clear that secured creditors have a duty to file a timely post-bankruptcy continuation statement, at least to protect against subsequent purchasers.

- *What happens when the lender fails to file and a bankruptcy is the result?*

1. Since the debtor's bankruptcy trustee is a hypothetical "lien creditor", but not a "purchaser", failure to file a post-bankruptcy continuation statement should not render the security interest unperfected as against the trustee.

2. This is the clear teaching of Example 2 to Comment 3 in UCC 9-515.

3. Failure to file a continuation statement could be fatal as against a "purchaser" from the debtor, including a competing secured creditor such as a DIP financer in a Chapter 11 bankruptcy.

- *Three* recent decisions miss the boat in this area because the court failed to read the Official Comments to UCC 9-515.
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1. *In re Miller Bros. Lumber Co., Inc.*, 77 UCC Rep.2d 525, 2012 WL 1601316 (Bankr. M.D. N.C. 2012).

2. *In re Highland Const. Management Services, LP*, 2013 WL 1336918 (Bankr. E.D. Va. 2013).

- *In re Wilkinson*, 77 UCC Rep.2d 363, 2012 WL 1192780 (Bankr. N.D.N.Y. 2012).

IX. SELLER OF GRAIN CAN'T RELY ON "RESERVATION OF TITLE" IF THE BUYER GOES BANKRUPT

- The North Carolina ethanol case: *In re Clean Burn Fuels, LLC*, 2013 Bankr. Lexis 2009 (Bankr. M.D.N.C. 2013): Can a seller of corn under a requirements contract retrieve the corn (or its proceeds) from a buyer that has gone bankrupt if the seller never perfected a security interest in the corn?

- Seller (Perdue) contended that the corn it had delivered to the buyer's ethanol plant was not "property of Clean burn's bankruptcy estate" because of a "reservation of title" provision in the sales contract.

- Buyer's bankruptcy trustee countered that, applying the law of sales under Article 2 of the UCC, a completed sale took place upon delivery of the corn to the plant site. The trustee relied on UCC 2-401, which provides: "Any retention or reservation by the seller

of the title (property) in goods shipped or delivered to the buyer is limited to a reservation of a security interest."

- Because Perdue failed to perfect its security interest in the corn, the trustee prevailed under the strongarm clause. Perdue was left with an unsecured claim. Not a nice day for Perdue.

- Perdue's argument that it had perfected its security interest by "possession," based on its employee's right to stop the flow of corn to the "weightbelt" by throwing a switch. The court ruled that the debtor had continuing "control" over the corn, precluding possession by Perdue.

- The big takeaway for ADM: Perdue's $4.8 million error could have been avoided by spending $20 to file a financing statement against the debtor.

- Would the case have come out differently if the sales contract had specified that "delivery" occurred at the time that "title passed at the weighbelt?

- See the newsletter story about this case reproduced later in the materials.

X. DOES AN AG LENDER'S COMPLIANCE WITH THE FOOD SECURITY ACT PROTECT IT FROM THE RECOUPMENT RIGHTS OF AN ORDINARY COURSE BUYER OF GRAIN?

- The Nebraska case: *Farm Credit Services of America, PCA v. Cargill, Inc.*, 8:11 CV 360 (D. Neb. 2013), set forth in the September 2013 issue of the Secured Transactions newsletter reproduced later in the materials.

- The debtor's secured lender for the debtor's 2010 corn crop complied with the FSA by filing an "effective financing statement" under the federal statute. It also filed a UCC financing statement.

- Cargill failed to cut a check payable jointly to the PCA and the farmer for corn that was delivered under the sales contract. The PCA sued in replevin to recover the 114,448 bushels of corn that had been delivered by the debtor to Cargill, but which Cargill never paid for based on its perceived setoff rights.

- Cargill contended that it was an "account debtor" under UCC 4-404(a) whose setoff trumped the interest of the secured lender.

- Nebraska court gave priority to the PCA based on its compliance with the FSA, and the Court considered the UCC recoupment/setoff rights to be "irrelevant".

- Cargill relied heavily on a South Dakota case that allowed recoupment against a secured lender: *Consolidated Nutrition, L.C. v. IBP, Inc.*, 669 NW2d 126, 51 UCC Rep.2d 329 (S.D. 2003). The PCA in the Nebraska case contended that this case was distinguishable, based on noncompliance with the FSA.

- The mighty clash between the FSA and the UCC: can we reconcile the two bodies of law?

- The court never mentions the nonuniform version of UCC 9-320(f), which provides that "[n]o buyer shall be allowed to take advantage of and apply the right of offset to defeat a priority established by any lien or security interest."

- The Nebraska case is currently on appeal to the Eighth Circuit.