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SECURITY INTERESTS IN MOTOR VEHICLES: A CONFLICT IN KENTUCKY LAW

INTRODUCTION

The Uniform Commercial Code (UCC)¹ is "intended to be a comprehensive treatment of the entire field"² of commercial law and its adoption represents a state's decision to join with other states to bring uniformity to this area of the law. This uniformity is attained by having one body of law control all commercial law problems for all states.³ To encourage uniformity and to prevent arguably inconsistent state laws from interfering with the uniform application of the Code, Kentucky's highest court has adopted the rule of construction that the Code is "plenary and exclusive except where the legislature has clearly indicated otherwise."⁴

However, in the area of motor vehicle security interests, Kentucky has encountered problems integrating extra-Code law with certain provisions of the Code.⁵ Difficulties arise from the relationship between UCC § 9-302, UCC § 9-103(4), and Kentucky's motor vehicle registration law.

Under the Code, security interests in property for which state law requires a certificate of title reflecting all liens on that property are exempted from the filing requirements of UCC § 9-302(1) for perfection.⁶ Kentucky has such a statute,⁷ but has

¹ The Uniform Commercial Code [hereinafter cited as UCC] was adopted by the 1958 Kentucky General Assembly, 1958 Ky. Acts, ch. 77, and is codified as Chapter 355 of the Kentucky Revised Statutes [hereinafter cited as KRS]. Since the ten articles of the Code are assigned section numbers 355.1-101 through 355.10-102 inclusive, citations in this comment are made to the UCC section only, omitting the KRS prefix. Furthermore, all references to the Code, unless otherwise indicated, are to the 1962 version as adopted in Kentucky.

² Whiteside & Lewis, *Kentucky's Commercial Code—Some Initial Problems in Security*, 50 Ky. L.J. 61, 67 (1961).

³ See UCC § 1-102(2)(c). It should be noted that although an overwhelming objective of the UCC is uniformity in the commercial laws of the various states, the draftsmen were cognizant of the important supplemental role to be played by "the principles of law and equity" of each adopting state. See UCC § 1-103.

⁴ *Lincoln Bank & Trust Co. v. Queenan*, 344 S.W.2d 383, 385 (Ky. 1961).

⁵ See, e.g., *General Motors Acceptance Corp. v. Hodge*, 485 S.W.2d 894 (Ky. 1972); *Lincoln Bank & Trust Co. v. Queenan*, 344 S.W.2d 383 (Ky. 1961); Fitzgerald, *The Crazy Quilt of Commercial Law: A Study in Legislative Patchwork*, 54 Ky. L.J. 85 (1965).

⁶ UCC § 9-302(3)(b). See note 13 *infra* for the text of this section.

⁷ KRS § 186.045 (Supp. 1976). The pertinent text of the statute is:

not exempted property within the statute's scope from the Code's filing requirements.⁸ Instead, the Supreme Court and the legislature have effectively required both filing and the notation of liens on the certificate of title.⁹ The cases¹⁰ and the statute¹¹ make it unclear whether the notation of liens on the certificate of title is a condition necessary in order to perfect a security interest in a motor vehicle. This is significant not only for intrastate priority interests, but for the special conflicts of law rule provided by the Code. The perfection of security interests in property for which a security interest must be noted on a certificate of title is determined by the law of the state which issued the certificate:

If personal property is covered by a certificate of title issued under a statute of this state or any other jurisdiction which requires indication on a certificate of title of any security

(1) Financing statements relating to vehicles required to be registered in Kentucky by the county clerk shall be filed in the office of the county clerk of the county in which the debtor resides, or, if the debtor is a nonresident, in the office of the county clerk in which the vehicle is principally operated.

(2)(a) Whenever a financing statement required by KRS chapter 355 relating to any vehicle registered or required to be registered in Kentucky for use on the highway is presented to a county clerk for filing, such clerk shall also immediately note information required by the department relative thereto on the owner's copy of the registration or transfer receipt issued for the current registration period as noted in subsection (2) of KRS 186.170, which the secured party must obtain and present to the county clerk, along with the financing statement, within ten (10) days after execution of the security agreement. The Clerk shall also note such information on the clerk's copy of the registration or transfer receipt maintained in his office in numerical order. The clerk noting the information on the owner's copy of the registration or transfer receipt shall return such receipt to the owner within five (5) days after making such notation

(3) For failure to present both the current receipt and financing statement within the time prescribed by subsection (2)(a), the secured party shall pay a penalty of two dollars (\$2.00) to the county clerk as a prerequisite for noting the security interest on the current receipt. The penalty, less the county clerk's commission of five per cent (5%), shall be remitted to the department.

⁸ *Lincoln Bank & Trust Co. v. Queenan*, 344 S.W.2d 383 (Ky. 1961).

⁹ *Id.* See also 1978 Ky. Acts, ch. 84, § 5(3) (amending KRS § 186.045(3)) in which the penalty for failure to present the registration receipt for filing was increased from a \$2.00 fine to a prohibition against ever perfecting by filing.

¹⁰ *General Motors Acceptance Corp. v. Hodge*, 485 S.W.2d 894 (Ky. 1972); *Lincoln Bank & Trust Co. v. Queenan*, 344 S.W.2d 383 (Ky. 1961).

¹¹ KRS § 186.045, as amended by 1978 Ky. Acts, ch. 84, § 5.

interest in the property as a condition of perfection, then the perfection is governed by the law of the jurisdiction which issued the certificate.¹²

Whether Kentucky requires notation of liens "as a condition of perfection" is important in determining whether Kentucky law will govern a potential priority contest in which the choice of law can make a difference in outcome. The state of confusion in this area of commercial law indicates a need for re-evaluation of motor vehicle security interests.

I. THE RATIONALE OF UCC § 9-302

UCC § 9-302¹³ attempts to "integrate" Article 9 with each state's certificate of title act.¹⁴ The Code draftsmen added this provision after plans were abandoned to include a uniform certificate of title provision within the Code.¹⁵ The purpose of UCC § 9-302(3)(b) is to exempt from the Code's filing requirements property subject to a state statute which provides an adequate system for perfecting security interests by notation on a certificate of title.¹⁶ This exemption is intended to prevent conflicts which might otherwise arise if both the state statute and the Code provided perfection requirements for the same property.¹⁷ If UCC § 9-302(4) is to have any significance, certificate of title acts should provide the exclusive means for perfecting security interests in motor vehicles in those states having such acts.¹⁸

¹² UCC § 9-103(4).

¹³ As adopted in Kentucky, UCC § 9-302 states in relevant part:

(3) The filing provisions of this article do not apply to a security interest in property subject to a statute:

.....

(b) of this state which provides for central filing of, or which requires indication on a certificate of title of, such security interests in such property.

(4) A security interest in property covered by a statute described in subsection (3) can be perfected only by registration or filing under that statute or by indication of the security interest on a certificate of title or a duplicate thereof by a public official.

¹⁴ 1 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 572-78 (1965).

¹⁵ 1 G. GILMORE, *supra* note 14, at 572-73.

¹⁶ See UCC § 9-320, Comment 8 (1962 Official Text). UCC § 9-302(6) alternative A (Kentucky's version) exempts property for which notation is required. Alternative B exempts property for which notation "may" be indicated. 1 G. GILMORE, *supra* note 14, at 572.

¹⁷ See UCC § 9-302(4).

¹⁸ Whiteside and Lewis, *supra* note 2, at 73; 1 G. GILMORE, *supra* note 14, at 573-74.

Because the draftsmen contemplated title acts which provide for "the exclusive method of perfecting a security interest in a motor vehicle,"¹⁹ the fact that many states have statutes which do not provide the exclusive means of perfection causes difficulty in applying UCC § 9-302.²⁰ The various states can be divided into three groups: filing states, exclusive title states, and non-exclusive title states.²¹ Filing states are those without any type of certificate of title law; there is no notation requirement and perfection is accomplished by filing.²² An exclusive certificate of title state requires the notation of liens as the exclusive method of perfection.²³ Non-exclusive title states either permit or require the notation of liens, but the notation does not alone constitute perfection. Perfection is accomplished in such jurisdictions by either filing alone or by both filing and notation.²⁴ The primary difficulty lies with non-exclusive title states. The question is whether notation is either "required"²⁵ so as to be exempt from Article 9 filing requirements or is a "condition of perfection"²⁶ for the preference given in 9-103(4) in choice-of-law questions.

II. KENTUCKY'S MOTOR VEHICLE REGISTRATION ACT AND UCC § 9-302

A significant question which arises from the foregoing discussion is whether Kentucky's Vehicle Registration Act requires notation of liens on the certification of title as a "condition of perfection." The present Kentucky statute per-

¹⁹ 1 G. GILMORE, *supra* note 14, at 573.

²⁰ See Ward, *Interstate Perfection of the Motor Vehicle Security Interest: A Bottleneck in Section 9-103*, 34 ALB. L. REV. 251, 257-65 (1970).

²¹ 1 G. GILMORE, *supra* note 14, at 553. Comment, *The California Used Car Dealer and the Foreign Lien—A Study in the Conflict of Laws*, 47 CALIF. L. REV. 543, 546-48 app. A-D. See also Ward, *supra* note 20, at 257-64 for a detailed analysis of the different certificate of title acts adopted by various states.

²² 1 G. GILMORE, *supra* note 14, at 553; Comment, *supra* note 21, at 547-48.

²³ 1 G. GILMORE, *supra* note 14, at 553; Comment, *supra* note 21, at 546-47.

²⁴ 1 G. GILMORE, *supra* note 14, at 553; Comment, *supra* note 21, at 547.

²⁵ UCC § 9-302(3)(b) exempts security interests from the Code's filing requirements for property subject to a statute "which requires" notation of liens.

²⁶ UCC § 9-103(4) provides that perfection of security interests in property covered by a statute which requires notation "as a condition of perfection" is governed by the "law of the jurisdiction which issued the certificate."

taining to the creation of security interests in motor vehicles²⁷ was enacted after repeal of a similar statute²⁸ which had been enacted "to effect the benefits of the so-called motor vehicle 'certificate of title' laws . . . without removing the fee business from the county clerks."²⁹ The legislative intention to have the former statute function as a certificate of title act was partially frustrated in its first judicial test. The Court stated in *Lincoln Bank & Trust Co. v. Queenan*:

[I]t is our opinion that although it is the filing of the financing statement that perfects the interest of the secured creditor, independently of the execution by the various parties and county clerks of their duties under KRS 186.195, the county clerk may refuse to record a financing statement in the absence of compliance with KRS 186.195.³⁰

Thus the Court effectively required both filing and the notation of liens on the registration receipt.³¹ Although filing was the condition that perfected the security interest, the county clerk could require notation by refusing to file a statement that did not comply with the registration receipt statute.

Given the dual requirements placed on the secured party, it seemed unlikely that a security interest would ever be filed and *not* noted on the registration. However, Professors Whiteside and Lewis envisioned two situations in which this might occur.³² One situation hypothesized was an after-acquired property clause covering equipment and a motor vehicle covered by such a clause. It is probable that the security interest would not be reflected on the registration receipt. The other situation anticipated neglect by a county clerk. Professors Whiteside and Lewis predicted that the secured party who filed would be protected.³³ The opposite result was reached in *General Motors Acceptance Corporation v. Hodge*,³⁴ a case in-

²⁷ KRS § 186.045 (Supp. 1976). See note 7, *supra*, for the relevant text of that statute.

²⁸ KRS § 186.195 (repealed by 1964 Ky. Acts, ch. 59 § 6).

²⁹ *Lincoln Bank & Trust Co. v. Queenan*, 344 S.W.2d 383, 386 (Ky. 1961).

³⁰ *Id.* at 387.

³¹ Whiteside & Lewis, *supra* note 2, at 74-75; Whiteside, *Amending the Uniform Commercial Code*, 51 Ky. L.J. 3, 10 (1962). Professor Whiteside felt that the legislature codified the result in *Queenan* by amending § 186.195 in 1962. *Id.* at 11, 15.

³² Whiteside & Lewis, *supra* note 2, at 74 n.52.

³³ *Id.*

³⁴ 485 S.W.2d 894 (Ky. 1972). Although the *Hodge* Court was interpreting a differ-

volving a clerk's neglect. In *Hodge*, a secured party filed a financing statement and noted the lien on the first registration receipt as required by the new statute. But in subsequent transfers and reregistration, the county clerk inadvertently failed to indicate the secured party's lien. Eventually, after numerous other transfers, the debtor defaulted and the secured party sought to repossess the vehicle from the subsequent purchaser.³⁵

At first glance, the facts of *Hodge* appear to set up a typical Code priority contest. The secured party believed this to be the case and framed its argument in terms of a priority conflict between a perfected secured party and a subsequent purchaser.³⁶ However, the Court did not consider the questions of perfection and priority. Instead, the Court framed the issue as follows:

We are, therefore, squarely faced with the question of whom should the law protect - the purchaser without notice or the lien holder, when the Act requires the Clerk to place the notice of the lien on the registration receipt and does not provide for the legal consequences when he fails to do so?³⁷

ent statute from that interpreted in the *Queenan* case, the two statutes were nearly identical with respect to the requirement regarding notation of liens. Compare 1958 Ky. Acts, ch. 82, § 4(2) (codified as KRS § 186.195, this was the statute interpreted in the *Queenan* case) with KRS § 186.045(2)(a) (the statute involved in the *Hodge* case). The *Hodge* Court saw the new statute as intending "to permit the transfer of automobiles with complete reliance upon the registration receipt as to any liens thereon." 485 S.W.2d at 896. The Court expressed doubt about whether this goal had been reached. *Id.* It seems likely that the legislature had simply made the filing and notation requirements more *explicit*, without actually changing the legal effect of notation or lack thereof. Cf. Fitzgerald, *supra* note 5, at 87.

³⁵ 485 S.W.2d at 895.

³⁶ Brief for Appellant at 10, *General Motors Acceptance Corp. v. Hodge*, 485 S.W.2d 894 (Ky. 1971):

Kentucky is not a "CERTIFICATE OF TITLE" state and conflicting interests in motor vehicles are governed by the Uniform Commercial Code. . . . In *Lincoln Bank & Trust Company v. Queenan*, . . . the Court . . . noted that KRS 186.195, which with certain changes is now KRS 186.045, complements the recording provisions of the Commercial Code. The Court noted . . . that a prospective buyer or lender has two sources of protective notice to one of which he may be easier assessed than to the other. However, the Court went on to note that it was the filing of the financing statement that perfects the interest of the creditor, independently of the execution by the various parties and county clerks of their duties under KRS 186.195 which is now KRS 186.045.

³⁷ 485 S.W.2d at 896.

The Court's decision to protect the "purchaser without notice" rather than the secured party³⁸ added confusion to the requirements for perfecting security interests in motor vehicles. The holding in *Hodge* implicitly overruled *Lincoln Bank* insofar as *Lincoln Bank* held that a security interest was perfected by the filing of a financing statement. Furthermore, *Hodge* conflicted with an earlier case which held that the filing of a financing statement constituted constructive notice.³⁹ Since the appellee in *Hodge* was portrayed as a purchaser without notice, the Court clearly did not consider the filing of a financing statement sufficient under these facts to constitute notice.

Perhaps the most serious fault of the decision in *Hodge* was its failure to resolve the issue of whether motor vehicle security interests are perfected by Code filing alone or whether the notation of liens on the registration receipt is also required. Had the Court decided whether the secured party was perfected or unperfected, there would have been little difficulty in applying the Code's priority provisions to determine the parties' rights in the collateral. Unfortunately, the Court disregarded the Code and avoided the opportunity to clarify the law as to motor vehicle security interests.

Because of the vague and inconsistent reasoning of the *Hodge* case, its precedential value is uncertain. The Court noted that the legislature had amended the vehicle registration statute but that the amendment had not "succeeded in overruling the *Lincoln Bank* case or in assuring subsequent creditors that they can rely on the registration receipt."⁴⁰ But even though the Court expressed uncertainty as to whether a purchaser could rely on the requirement for notation of liens, a purchaser whose only defense was that no lien was noted on the registration paper was protected. Obviously, the Court placed great significance on the absence of the lien notation on the certificate of registration.

³⁸ *Id.* at 896-97.

³⁹ *Corbin Deposit Bank v. King*, 384 S.W.2d 302 (Ky. 1964).

⁴⁰ 485 S.W.2d at 896 (quoting *Fitzgerald*, *supra* note 5).

III. PROBLEMS IN APPLYING UCC § 9-103 IN CONJUNCTION WITH UCC § 9-302

Section 9-103⁴¹ is another Code provision which creates problems because of its interrelationship with Kentucky's Vehicle Registration Act.⁴² This section was drafted to make the Code conflicts of law rules applicable where justified under general conflicts of law principles.⁴³ Specifically, UCC § 9-103(4) was added to avoid the necessity of duplicating perfection⁴⁴ and to provide the secured party with extensive protection if the security interest is perfected by notation on a certificate of title.⁴⁵ The Code nonetheless manifests a definite preference for certificate of title states which can be demonstrated by analysis of the following fact situations.

A. *Non-Title State v. Title State Conflicts*

If a motor vehicle security interest is perfected in a non-title state and the subject property is removed to a title state, the issuance of a certificate by the title state would generally trigger the application of § 9-103(4). In that instance, the title state's law would then determine the requirements for perfection,⁴⁶ resulting in priority for the party who perfects by nota-

⁴¹ See text accompanying note 12 *supra* for the relevant text of § 9-103(4).

⁴² For discussion of UCC § 9-103 and attendant problems, see generally Furnish, *Multistate Security Interests in Automobiles Under UCC Section 9-103*, ARIZ. ST. L.J. 293 (1975); Rohner, *Autos, Title Certificates and UCC 9-103: The Draftsmen Try Again* 27 BUS. LAW. 1177, 1183 (1972); Weintraub, *Choice of Law in Secured Personal Property Transactions: The Impact of Article 9 on the Uniform Commercial Code*, 68 MICH. L. REV. 683 (1968); Note, *Interstate Movement of Motor Vehicles: Certificate of Title Acts and the Uniform Commercial Code*, 9 CREIGHTON L. REV. 610 (1968); Note, *Interstate Movement of Motor Vehicles Subject to Security Interests: A Case for Repealing UCC § 9-103(4)*, 54 CORNELL L. REV. 610 (1968); Comment, *Section 9-103 and the Interstate Movement of Goods*, 9 B.C. INDUS. AND COM. L. REV. 72 (1968); Comment, *Uniform Commercial Code—Perfection of Security Interests in Multi-State Transactions When Property is Covered by a Certificate of Title*, 47 B.U.L. REV. 430 (1967).

⁴³ REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, FINAL REPORT 229-30 (1971). See generally Funk, *The Proposed Revision of Article 9 of the Uniform Commercial Code* (Part 1) 26 BUS. LAW. 1465 (1971); (Part 2) 27 BUS. LAW. 321 (1971).

⁴⁴ Rohner, *supra* note 42, at 1183.

⁴⁵ See text accompanying notes 46-54 *infra* for discussion of this protection.

⁴⁶ *Phil Phillips Ford, Inc. v. St. Paul Fire and Marine Ins. Co.*, 465 S.W.2d 933 (Tex. 1971). See also Ward, *supra* note 20, at 268-69; Note, *Uniform Commercial Code*, 50 TEX. L. REV. 423 (1972). See generally Note, *Dealers Beware: A New Section 9-103*

tion even though much later in time than the filing. However, some courts hold that § 9-103(4) does not apply when a vehicle is removed from a non-title state to a title state.⁴⁷ These courts apply § 9-103(3) and the secured party in the non-title state remains perfected for four months.⁴⁸

B. *Title State v. Non-Title State Conflicts*

The Code's preference for certificate of title states is also demonstrated when a motor vehicle security interest is perfected in a title state and removed to a non-title state. In this situation, the interest perfected in the title state continues in the non-title state until it expires in the issuing state.⁴⁹

C. *Title State v. Title State Conflicts*

Motor vehicle security interests perfected in a certificate of title state and removed to another certificate of title state will not ordinarily create any problems. In the typical case, the first certificate will be surrendered and any lien noted thereon will be transferred to the new certificate.⁵⁰ Occasionally though, through either fraud⁵¹ or administrative error, multiple certificates may exist covering the same vehicle. In this situation, most writers agree that the 1962 Code has no express

For Texas, 26 BAYLOR L. REV. 275 (1974). This is the view adopted in the 1972 Code with respect to buyers "not in the business of selling goods of that kind . . . and without knowledge of the security interest." UCC § 9-103(2)(c)-(d) (1972 version). Persons not in this category have four months to perfect in the second state. *Id.* at 9-103 (1)(d).

⁴⁷ *First Nat'l Bank v. Stamper*, 225 A.2d 162 (N.J. Super. Ct. 1966); Note, *Interstate Movement of Motor Vehicles: Certificate of Title Acts and the Uniform Commercial Code*, *supra* note 42, at 385; Comment, *Uniform Commercial Code—Perfection of Security Interests in Multi-State Transactions when Property is Covered by a Certificate of Title*, *supra* note 42.

⁴⁸ Note, *Interstate Movement of Motor Vehicles: Certificate of Title Acts and the Uniform Commercial Code*, *supra* note 42, at 382-84.

⁴⁹ *In re White*, 266 F. Supp. 863 (N.D.N.Y. 1967); Rohner, *supra* note 42, at 1178 n.42; Ward, *supra* note 20, at 269. The 1972 Code provides for a similar result if there has not been a surrender of the certificate or reregistration in the second state. UCC § 9-103(2)(b) and comment 4(c) (1972 version).

⁵⁰ Note, *Interstate Movement of Motor Vehicles: Certificate of Title Acts and the Uniform Commercial Code*, *supra* note 42, at 394; 1 G. GILMORE, *supra* note 14, at 623.

⁵¹ See *Furnish*, *supra* note 42, at 301; J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 861 (1972); Leary, *Horse and Buggy Lien Law and Migratory Automobiles*, 96 PA. L. REV. 455 (1948); 1 G. GILMORE, *supra* note 14, at 623.

application.⁵² But in reading the title acts together with § 9-103, it becomes apparent that the Code envisioned having only one certificate covering a motor vehicle.⁵³ Whether or not a second clean certificate is the result of fraud or administrative error, the courts generally favor the later issued certificate.⁵⁴

D. UCC § 9-103(4) in Kentucky

Construction of Kentucky's motor vehicle law so that the notation of liens is a condition of perfection would qualify a security interest perfected in Kentucky for preferential treatment under § 9-103(4). This preferential treatment results from the application of Kentucky law to protect security interests perfected in Kentucky. However, the application of UCC § 9-103(4) presents a problem because it must be read together with UCC § 9-302 to determine whether the state's certificate of title law requires the notation of liens as a condition of perfection. Since Kentucky is not an "exclusive" certificate of title state, notation may not be a condition of perfection and security interests perfected in Kentucky, even though the liens are noted, may not qualify for the preference of § 9-103(4). Since *Lincoln Bank* held that the notation of liens was not a "condition of perfection" and the validity of *Lincoln Bank* was undermined by *Hodge*, there is uncertainty as to what the conditions are for perfection of motor vehicle security interests in Kentucky.

IV. A POSSIBLE RESOLUTION

As indicated by the preceding sections, UCC § 9-302 exempts from the Code's filing requirements property in which a security interest can be perfected by the notation of liens on the certificate of title. In effect, to apply UCC § 9-302, the courts

⁵² Note, *Interstate Movement of Motor Vehicles: Certificate of Title Acts and the Uniform Commercial Code*, *supra* note 42, at 393. See 1 G. GILMORE, *supra* note 14, at 623.

⁵³ Note, *Interstate Movement of Motor Vehicles: Certificate of Title Acts and the Uniform Commercial Code*, *supra* note 42, at 393; *In re Edwards*, 6 UCC REP. SERV. 1124 (E.D. Mich. 1969); *In re Schoeller*, 4 UCC REP. SERV. 1093 (D. Conn. 1968).

⁵⁴ Furnish, *supra* note 42, at 301. The 1972 code provides protection for the original secured party if multiple certificates exist. UCC § 9-102(2)(b) and comment 4(c). However, this protection is not provided for secured parties if there are subsequent buyers who rely on a "clean" certificate. UCC § 9-103(2)(b), (d) and comment 4(c)-(d).

must look to the state's title law to see if it requires the notation of liens as a condition of perfection.

This determination will indicate whether secured parties in Kentucky can claim the benefit of UCC § 9-103(4).⁵⁵ Much of Kentucky's problem in interpretation of its title law stems from the Court's decision in *Lincoln Bank*. As Judge Palmore noted, the Court faced a "treacherous" question.⁵⁶ The problem confronted by the Court was twofold: construe UCC § 9-302 and the Kentucky motor vehicle registration statute so as to require the notation of liens on the registration receipt and at the same time define the requirements for perfection in such a way as to protect the clerks' filing fee business⁵⁷ by not exempting motor vehicles from the Code's filing requirements.

To resolve this dilemma, the Court held that the notation of liens on a certificate of title was not required to perfect a security interest; therefore, the UCC § 9-302 exemption from filing did not apply. However, the Court added that the clerk could refuse to file a financing statement unless the lien was noted on the registration receipt.⁵⁸ Most significantly, the Court held the perfection was accomplished independently of the notation.⁵⁹

Unfortunately, the Court's ingenuity in *Lincoln Bank* has proved to be inadequate. The decision did avoid exempting motor vehicles from the Code's filing requirements and did give some bite to the notation requirement of the registration statute, but it failed to resolve what effect the absence of a notation has on a filed financing statement.

The problem left unanswered by the Court in *Lincoln Bank* arose later in *Hodge*. In that case, the Court confronted the problem of protecting a purchaser's reliance on a registra-

⁵⁵ Compare J. WHITE & R. SUMMERS, *supra* note 51, at 856 n.198, with Ward, *supra* note 20, at 258, and Note, *Interstate Movement of Motor Vehicles Subject to Security Interests: A Case for Repealing UCC 9-103(4)*, *supra* note 42, at 613-14 n.12. These commentators disagree as to whether Kentucky is a certificate of title state. Significantly, none has considered the registration statute in light of the judicial construction given it by the Kentucky Court. Professor Gilmore concluded that Kentucky required both filing and notation. 1 G. GILMORE, *supra* note 14, at 574 n.2. Ward, *supra* note 20, concluded that Kentucky qualifies for protection under § 9-103(4). *Id.* at 258.

⁵⁶ 344 S.W.2d at 386.

⁵⁷ *Id.*

⁵⁸ *Id.* at 387.

⁵⁹ *Id.*

tion receipt whereon no lien was noted, although a financing statement had been filed which indicated a security interest in the automobile. However, the Court did not decide the issue under Article 9 because, applying the reasoning of *Lincoln Bank*, filing would have perfected the security interest and the absence of notation would have been of no significance. In effect, the Court was forced to abandon the Code in order to protect the purchaser, thus creating confusion.

Moreover, *Lincoln Bank* set out perfection requirements that discouraged reliance on the registration receipt. When the *Hodge* Court was confronted with a purchaser who had relied on the registration receipt, it avoided the opportunity to define the requirements for perfection of security interests in motor vehicles and created doubt as to the continuing validity of *Lincoln Bank's* requirements for perfection. The end result is confusion in the case law concerning motor vehicle security interests.

If the Court in *Lincoln Bank* had so desired, it could have interpreted UCC § 9-302 and the Kentucky title statute so as to avoid this problem. Subsection 9-302(3)(b) exempts from the Code's filing requirements property perfected under those statutes which require the indication of liens on the certificate of title. It is certainly clear that both KRS § 186.045 and its predecessor, KRS § 186.195, were intended to require the notation of liens on the registration receipt. Consequently, property covered by these statutes should have been exempted from the Code's filing requirements under § 9-302(3)(b).

This does not mean that there cannot also be a filing requirement.⁶⁰ Since the Kentucky statute clearly calls for filing in addition to the notation, KRS § 355.9-302(4) should be amended to require both notation and filing as required by KRS § 186.045.⁶¹ An alternate solution would be a judicial in-

⁶⁰ Commentators have favored the abolition of the filing requirement and adoption of an exclusive certificate of title law. Whiteside, *supra* note 31, at 12; Whiteside & Lewis, *supra* note 2, at 76; Fitzgerald, *supra* note 5, at 90.

⁶¹ Suggested amendment to KRS § 355.9-302 based on MICH. COMP. LAWS ANN. § 440-9302 (Supp. 1977):

(3) The filing provisions of this article do not apply to a security interest in property subject to a statute

. . . .

(b) of this state which provides for central filing of security interests in such property, or a vehicle which is not inventory held for a sale for which a

terpretation explicitly accepting the same result. This construction of UCC § 9-302 would clearly require notation as a condition of perfection. Kentucky would then be entitled to those benefits the Code provides for certificate to title states under UCC § 9-103.

Recent attempts by the Kentucky General Assembly to coerce secured parties to file do little to clear the confusion which surrounds the application of UCC § 9-103. The 1978 legislature amended Kentucky's motor vehicle law, KRS § 186.045, by increasing the penalty for failure of the secured party to present the financing statement within the prescribed time limit for violation.⁶² The penalty prior to the amendment had been a two dollar fine. Under the amendment, a late-filing party "shall not be allowed thereafter to file the financing statement in order to perfect the security interest thereon."⁶³ This amendment, by stronger implication than *Lincoln Bank*, makes filing *and* notation required in Kentucky. However, not only is this a heavy-handed way to coerce filing, it is doubtful whether such a limitation can be put on perfection.⁶⁴ The attempted effect of this amendment—requiring both notation and filing—could be achieved by a proper amendment to KRS § 355.9-302.⁶⁵ Such an amendment would not only protect sub-

registration receipt is required under the provisions of KRS § 186.040.

(4) A security interest in property covered by a statute described in subsection (3) can be perfected only by registration or filing under that statute: except that in the case of a security interest in a vehicle which is not inventory held for sale or referred to in subsection (3) or an accessory as referred to therein, the filing required to perfect such security interest is the filing of a financing statement with the local clerk as provided in KRS § 186.045.

The above suggested amendment makes it clear that both filing and notation are required to perfect a security interest in a motor vehicle. KRS § 186.045 could be amended to reflect that filing is no longer required under § .9-302, but under § 186.045.

⁶² 1978 Ky. Acts, ch. 84, § 5(3) (amending KRS § 186.045(3)). Kentucky's registration statute has been criticized for its lack of sanction for noncompliance. Whiteside & Lewis, *supra* note 2, at 75, Fitzgerald, *supra* note 5, at 87.

⁶³ 1978 Ky. Acts, ch. 84, § 5(3) (amending KRS § 186.045(3)).

⁶⁴ See 78 KY. OP. ATT'Y GEN. 423, stating that such an amendment "supplants the Code" and is "a mistake which is not truly indicative of the legislative intent." The effect of this amendment may become clear once a decision is reached in *Hardin County Fiscal Court v. Logsdon*, No. 78-CI-553 (Hardin Circuit Court, filed Aug. 2, 1978). In this petition for declaratory judgment the Hardin County Fiscal Court and the Hardin County Court Clerk are asking for a judicial construction of the new amendment.

⁶⁵ See note 61 *supra* for a proposed amendment.

sequent purchasers but would make clear the application of UCC 9-103(4) to Kentucky motor vehicle security interests.

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