Autos, Title Certificates and UCC 9-103: The Draftsmen Try Again

Ralph J. Rohner
The Catholic University of America, Columbus School of Law

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Recommended Citation
Ralph J. Rohner, Autos, Title Certificates and UCC 9-103: The Draftsmen Try Again, 27 BUS. LAW. 1177 (1972).
The publication in April 1971 of the Final Report of the Review Committee for Article 9 of the Uniform Commercial Code has un-closeted many of the skeletons in the Secured Transactions portion of the Code. One of them—the subject of this paper—is the constant problem of recognition of foreign security interests on motor vehicles covered by certificates of title. The key Code section, 9-103(4), has been criticized by courts and commentators as an example of "obtuseness, internal ambiguity and lack of specificity," and "blunderous draftsmanship." It is completely rewritten in the Final Report, and the pertinent revised portion of 9-103 reads as follows:

(2) Certificate of title.

"(a) This subsection applies to goods covered by a certificate of title issued under a statute of this state or of another jurisdiction which requires indication of a security interest on the certificate as a condition of perfection.

"(b) Except as otherwise provided in this subsection, perfection and the effect of perfection or non-perfection of the security interest are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until four months after the goods are removed from that jurisdiction and thereafter until the goods are registered in another jurisdiction, but in any event not beyond surrender of the certificate. After the expiration of that period, the goods are not covered by the certificate of title within the meaning of this section.

"(c) Except with respect to the rights of a buyer described in the next paragraph, a security interest, perfected in another jurisdiction otherwise than by notation on a certification [sic] of title, in goods brought into this state and thereafter covered by a certificate of title issued by this state is subject to the rules stated in paragraph (d) of subsection (1)."
“(d) If goods are brought into this state while a security interest therein is perfected in any manner under the law of the jurisdiction from which the goods are removed and a certificate of title is issued by this state and the certificate does not show that the goods are subject to the security interest or that they may be subject to security interests not shown on the certificate, the security interest is subordinate to the rights of a buyer of the goods who is not in the business of selling goods of that kind to the extent that he gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest.”

In the meantime, while the Review Committee labored, the courts could not ignore disputes involving out-of-state security interests in titled motor vehicles. The accumulation of case law as well as the present language of 9-103(4) require some attention in order fairly to assess the worth of the proposed new version.

Statutory Background

The Code draftsmen have never been quite sure of their ground in dealing with foreign security interests, and this uneasiness is most apparent in their treatment of motor vehicles. There was a pre-Code conflict of laws maxim to the effect that the lex situs—the law of the place where the property was when the security interest attached—governed its effectiveness despite removal of the property to another state, unless the creditor consented to the removal. But as early as 1948, a commentator could review the automobile cases of the prior year and find that four of the six of them protected the local purchaser rather than the foreign lienor, on grounds hardly reconcilable with each other, much less with the prevailing maxim.

Certificate of title acts had been enacted in many states and in many of them liens were required to be noted on the certificate as a condition of validity. The Code draftsmen considered the possibility of including certificate-of-title provisions in the original Code, but backed off in favor of an effort by the Conference of Motor Vehicle Commissioners. Instead, the Code deferred its own filing scheme to existing certificate of title laws and upgraded "incomplete" title acts to "complete" or "exclusive" ones where notation of the security interest on the certificate would be the only method of perfection.

With respect to the conflict-of-law problems, the Code sought a middle ground between total protection of either the foreign creditor or

7. UCC 9-302(3)(b); UCC 9-302(4).
the local purchaser. Security interests in "equipment" motor vehicles were to be recognized if perfected where the debtor had his chief place of business, under 9-103(2). Otherwise, under 9-103(3), a foreign perfected interest "continues perfected in this state for four months and also thereafter if within the four month period it is perfected in this state." 9-103(4) was not in the original Code. This addition arose in the context of the New York Law Revision Commission study of the Code and appeared in the 1956 Recommendations of the Editorial Board for the Uniform Commercial Code and as part of the official text in 1957. It provides:

"(4) Notwithstanding subsections (2) and (3), 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 interest in the property as a condition of perfection, then the perfection is governed by the law of the jurisdiction which issued the certificate."

Meanwhile, in 1952 the National Conference of Commissioners on Uniform State Laws took up the project of writing a uniform title act; in 1955 the Uniform Motor Vehicle Certificate of Title and Anti-Theft Act was approved by the Commissioners and by the ABA with the express purpose "to facilitate vehicle sales and sales financing by simplifying procedures for transfers and the creation and perfection of liens." The Act, however, has gained only grudging acceptance in the states, and a recent study of certificate of title legislation reveals tremendous non-uniformity in the title acts currently in force.

The Article 9 Review Committee has worked since 1967, and has published two Preliminary Drafts both of which are wholly superseded by the Final Report. In general comments appended to their Report, the Committee explains its redrafting of 9-103:

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8. This origin has been traced in part through unpublished correspondence between the NYLRC and the NCCUSL Article 9 Subcommittee. See, Comment, Perfection of Security Interests in Multi-State Transactions When Property is Covered By A Certificate of Title, 47 B. U. L. REV. 430, 434 n. 18 (1967).


“Section 9-103 was drafted [originally] in the light of the uncertainty whether the Code would be widely adopted, and the emphasis was on conflicting rules of law and a desire to make the Code rules applicable where such a result was justified under general principles. Today, when 51 jurisdictions have adopted the Code, situations of actual conflict in rules of law within the ambit of the Code will be few, and the emphasis may shift to the question of certainty as to where to file in order to perfect security interests.”

Whether this quest for certainty can succeed remains to be seen.

Commercial Context

As of October 1971 there was more than $37 billion of automobile paper outstanding in the hands of commercial banks, finance companies and other lenders; close to $3 billion worth of new automobile installment credit is extended each month. Over 8 million cars were sold at retail in 1970, and fully two-thirds of them are sold on an installment credit basis. Countless numbers of these vehicles are removed each year from one state to another on a permanent basis, and whether the mover be a skip-state buyer, a thief, a serviceman changing duty stations, or simply an average man changing his job and residence, the sheer mobility of the automobile creates for the creditor the problem of protecting himself against third parties in the second state.

Among those third parties who can become claimants to the vehicle, used car dealers and sub-purchasers are perhaps the most common—they are the often-unwitting fences for crooks bent on unloading hot cars. Lending institutions in the second state may take new security interests in the car. Judgment creditors of the original purchasers (or of any sub-purchaser) may attempt to levy on it. And more and more, with the spiralling rate of consumer bankruptcies, the third-party claimant is a trustee in bankruptcy.

As noted, the pre-Code cases paid lip service to the Restatement maxim that the original creditor remained protected unless he consented to removal, but that rule was called a “verbal strait jacket” in a study which identified at least 10 distinct grounds on which courts at times refused to enforce foreign liens. In certificate of title cases also, recognition of the foreign lien was considered to be the majority

15. Id. at A 58.
17. Id. at 44.
rule. But again cases holding for the local purchaser arose and probably reached their peak in Ohio in 1964 in Commercial Credit Corp. v. Pottmeyer where the court acknowledged that a clean Ohio certificate bestowed a kind of negotiability on automobiles.

The policy question can be simply posed: whether it is fairer and more in accord with commercial reality to give extended protection to a secured creditor whose collateral is taken out of the state, or to give an expanded kind of bona fide purchaser status to persons who deal with the vehicle after it has been removed. The sub-considerations, though, are numerous and at times conflicting. Enhancement of foreign certificates necessarily undercuts the reliability of local ones. Preventive techniques are available to both the creditor and to the purchaser, but not always in equal measure—a finance company may utilize the services of investigative agencies to trace vehicles, but a consumer buying a used car can hardly be expected to question the reliability of a title certificate issued by his own motor vehicle registrar.

Opportunities and risks vary. Banks extending automobile credit only to low-risk customers are often simply unconcerned about reperfection in other states or are content to rely on non-filing insurance. Creditors, though, do have readily available handbooks advising precisely what steps are necessary to reperfect anywhere in the country. Many automobile financers operate nationwide and are therefore not forced to trace or investigate at a distance. Used car dealers may be expected to investigate the origins of vehicles they purchase, but should a trustee as representative of general creditors of a purchaser or owner be allocated substantial investigatory duties and risks?

In short, both the traditional rule, and the rule of UCC 9-103(4), have been criticized generally as being inconsistent with the notions of bona fide purchaser protection in other parts of the Code, but at the moment subsection (4) as interpreted remains basically creditor-oriented.

The Code Provisions in Action

Even without reference to the cases, there are at least these problems with 9-103(4):

1. The subsection applies "Notwithstanding subsections (2) and (3) . . . ." By its terms it displaces entirely the other rules in 9-103, including the rules for commercial ("equipment") vehicles in 9-103 (2), the four-month grace period in subsection (3), and the limitation on the secured creditor's protection when he knows of the removal within 30 days after attachment. To apply the section literally has been challenged as inconsistent with the rest of 9-103 and as giving the secured creditor greater protection than necessary.25

2. Subsection (4) applies only where the certificate is issued under a statute "which requires indication on a certificate of title of any security interest in the property as a condition of perfection, . . . ." It may be arguable whether a particular statute "requires" indication on a certificate; the apparent reference is to "complete" title acts, but one study26 has shown that the great variety among title acts make this reference uncertain. For example, the Connecticut statute27 provides that a security interest is perfected by delivery to the commissioner of any outstanding certificate, plus an application and the required fee: there is no explicit requirement that the security interest be actually noted on the certificate as a condition of perfection. At least twenty states have such provisions,28 but thus far there has been no litigation on the precise point.

3. There are two possible time references in subsection (4), neither of which is clearly compelled. The vehicle must be covered by a certificate, but when? At the time of entry into the state or at the time some third-party claim arises? The section simply is unclear, and neither the comments29 nor the Editorial Board's 1956 "Reason for Change"30 shed any light. If the time of entry is meant, then subsection (3) applies whenever a non-titled car comes into the state.

4. It is unclear from the language of 9-103(4) when a vehicle is "covered" by a certificate. What happens when application is made for a certificate of title, but the car is removed to another state before the title is officially issued? What if a state with no significant contacts with the transaction issues a certificate noting the lien? Should that

28. Seventeen states are identified by Ward, supra note 11, at 259-60. Three additional states—Massachusetts, Minnesota and Vermont—have adopted the same provision since 1969. See, note 10, supra.
29. Comment 3 to 9-103 says: "Where property is covered by a certificate of title, the governing rule is stated in subsection (4) of this section." Comment 7 redundantly says the same thing.
30. 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 257:
"Subsection (4) is new to avoid the possible necessity of duplicating perfection the the case of vehicles subject to a certificate of title law requiring compliance therewith to perfect security interests. The certificate of title law requirements are adopted as the test for perfection."
certificate be recognized? Even worse, what if two certificates are outstanding at the same time? Professor Gilmore\textsuperscript{31} concedes that 9-103(4) presently says nothing about the multiple-certificate situation, and several cases have had to struggle with the problem on their own.

5. Beyond statutory construction of subsection (4), it is impossible to discern with any confidence the intent of its draftsmen. Section 9-302(3) of the Code encourages the retention of certificate of title laws, and supports the view that notation of liens on certificates which can move with the vehicle and which must be surrendered upon sale or reregistration of it, is the preferable method of preventing secret liens and of protecting the legitimate interests of the creditor. The specific reason given for adding 9-103(4) is “to avoid the possible necessity of duplicating perfection . . . .” Duplication either by filing or by notation on a certificate would only be necessary if some original perfection were about to expire. Arguably, then, the draftsmen were concerned about the four-month grace period in 9-103(3) (which would apply in the absence of subsection (4)), and preferred to give the creditor unlimited protection if he noted his interest on a title certificate. This view reinforces the conclusion that the vehicle must be covered by the certificate at the time of entry, but it gives no effect to the alternative phrase “under a statute of this state,” for if the interest were in fact noted on a local certificate there would be no need for “duplication of perfection.”

Alternatively, the draftsmen were concerned that certificates of title might not be given extra-territorial effect\textsuperscript{32} and wrote subsection (4) to assure that foreign certificates would be recognized and also to encourage out-of-state lenders to apply for local certificates if it were contemplated the vehicle would be brought into the enacting state. If this is so, the section is still unclear whether blanket protection is intended, or whether the four-month grace period or the knowledge-of-removal limitations from 9-103(3) should be carried over.

A. The Stamper Problem

Perhaps the most notorious controversy under 9-103(4) concerns vehicles brought from non-title to title states where clean certificates are issued before disposition of the vehicles to innocent purchasers. Does subsection (4) apply to the exclusion of subsection (3), thereby protecting the purchaser under the clean certificate? Or is it implied in subsection (4) that the title certificate controls perfection only if the certificate had been issued at the time the vehicle was imported? The cases conflict. In \textit{GMAC v. Mannheim Motor Auction},\textsuperscript{33} a

\textsuperscript{31} I G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 623 (1965).


Pennsylvania County Court in an alternate holding ruled that subsection (4) cut off the rights of the out-of-state creditor whose interest was not noted on the Pennsylvania certificate at the time third-parties acquired rights in the vehicle. This holding has been held contrary to and overruled by the subsequent Pennsylvania opinion in *Casterline v. GMAC*, but closer scrutiny indicates the cases are distinguishable: *Casterline* concerned events occurring in 1957, more than two years before the enactment of 9-103(4) in Pennsylvania; it was therefore controlled by the more general rule of subsection (3), while the dispute in *Mannheim* was subject to the special certificate of title rule in subsection (4).

Within a year, though, the New York Appellate Division cited *Casterline* for the proposition that 9-103(4) had no application to an automobile sold and encumbered in a non-title state and then removed to a state which required notation of liens on title certificates. The court thereby read into subsection (4) a time reference—*i.e.*, the subsection applied only when the vehicle was covered by a certificate at the time of entry. Moreover, said the court, 9-103(3) gave the creditor an "absolute period of four months within which to trace the vehicle and re-perfect, and a resale within the four months did not divest the creditor's rights even though he failed to trace or re-perfect at all."

Then in 1966, the New Jersey Superior Court borrowed language from the New York case and held, in *1st Nat'l Bank of Bay Shore v. Stamper*, that resales in New Jersey, within 4 months, under clean certificates of title did not cut off the rights of a New York bank whose security interest was properly filed under that state's conditional sales law. The troublesome parts of *Stamper* are that the sub-purchasers were apparently not automobile dealers but individual consumers, and the bank did not discover the removal until 11 months after it had occurred and 6 months after the original purchaser ceased making his monthly payments. The holding thus ignored the legitimate expectations of consumer buyers under local clean certificates and rewarded the creditor despite his lack of diligence.

37. 93 N.J. Super. 150, 225 A.2d 162, 3 UCC REP. SERV. 949 (1966). The critical holding was (3 UCC REP. SERV., at 960):

> "The note by the draftsmen makes clear subsection 4 does not have application to an automobile which was sold under a conditional sales contract in a state which does not require 'indication on a certificate of title of any security interest in the property as a condition of perfection,' and which was subsequently brought into a state which had such a requirement."

This sentence is taken verbatim from the *Churchill Motors* opinion (1 UCC REP. SERV., at 379-80).
The original *Mannheim* rationale—that 9-103(4) by its terms applies when a local certificate is issued before resale but after removal—has not been lost in the mist either. In *Phil Phillips Ford, Inc. v. St. Paul F. & M. Ins. Co.*, a car had been brought into Texas from Oklahoma (which issued certificates but did not require notation of liens thereon). A clean Texas certificate was issued and the car sold to plaintiff dealer. The Oklahoma secured party repossessed the car off plaintiff's lot, and he sued for conversion. A summary judgment for the defendant creditor was affirmed because of technical defects in the transfer and sale to the plaintiff, but in the course of the opinion the Texas court made it clear that but for those defects it would have protected the local dealer. The court rejected the *Stamper-Churchill Motors* view, preferring the *Mannheim* approach which gives prevailing weight to the local clean certificate. The court also noted that the UCC "has abrogated our decision" in *Bank of Atlanta v. Fretz*, the classic pre-Code case protecting the foreign creditor, and that the Article 9 Review Committee had rejected the *Stamper* approach in its Preliminary Draft No. 2.

The Final Report deals explicitly with the *Stamper* situation in 9-103(2)(d). The Review Committee explains that it believes "more protection should be given to the local 'clean' certificate of title than was accorded in "*Stamper*," and the provision quite narrowly protects only "a buyer of the goods who is not in the business of selling goods of that kind . . . ," and only if the certificate does not disclose the lien or the foreign origin. While the intent is praiseworthy as consumer protection policy, one can wonder whether the assumption is valid that no local dealer merits the same protection. Part of the justification of the new rule must be to enhance the reliability of the local certificate. If that certificate does not even indicate that the car has an out-of-state origin, it is questionable whether the new provision properly discriminates between dealers and others. If the car has also been re-registered and carries local tags as well as a clean certificate there is nothing to put even the most conscientious dealer on notice of an actual or possible foreign security interest. Probably the best justification for the new rule is that it openly imposes the risk on dealers as a cost of doing business.

There is, however, some measure of protection in the proposed new Article 9 for dealers who acquire used cars relying on clean local certificates, and in this respect the new Code approves the result of the *Mannheim* case and at least the theory of the *Phil Phillips Ford* opinion. New 9-103(2)(c) provides that in non-title to title state situations, the controlling rule is that stated in 9-103(1)(d) for documents, instruments and ordinary goods. That subsection then reverses the other

38. 465 S.W.2d 933, 8 UCC REP. SERV. 1331 (Tex. Sup. Ct. 1971).
part of the *Stamper-Churchill Motors* holdings: that under old 9-103 (3) the foreign creditor had four months of absolute protection not retroactively lost by failure to trace and re-perfect within that period. Subsection (1) (d) (i) states that after the four-month period (or the expiration of perfection in the other state) "the security interest becomes unperfected . . . and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal." (Emphasis added.)

If, as is common, the skip-state buyer resells to a car dealer shortly after removal of the car into the state, all local purchasers and sub-purchasers will now be protected no matter when they purchase unless the out-of-state creditor is diligent in tracing the car and re-perfecting within four months. The new Code rule should therefore be read to impose a significant portion of the skip-state risk on the original secured party who can either absorb it in his discount rate or through insurance, or minimize it through efficient tracing.

One anomaly remains, and is perhaps accented by the new 9-103 (1) (d) (i). While the creditor is encouraged by the four-month rule to follow his collateral, no pressure is put on him to re-perfect immediately if he discovers the removal early in the four-month period. If he learns of removal on, say, the 20th day, he can sit idly by until the 120th day and still defeat all intervening claimants. A strange policy which motivates businessmen to seek information but not to respond promptly to it!

**B. Perfection Via Out-of-State Certificate of Title**

A literal reading of 9-103(4) says that where a vehicle is covered by an appropriate certificate of title when removed to another state, and that certificate notes the outstanding security interest, the interest will continue perfected in the second state. But does perfection continue indefinitely or is the four-month limitation impliedly carried over from subsection (3)? When is a vehicle appropriately "covered" by a certificate? What happens when there are two certificates outstanding at the same time, only one of which notes the security interest?

**Duration of perfection.** The cases have produced nearly uniform holdings on the question of the duration of perfection based on the out-of-state certificate. The stakes here can be quite high, for if the security interest becomes unperfected four months after removal, any subsequent creditor or purchaser without notice will defeat the secured creditor. Expectably, most of the cases are bankruptcy proceedings where the trustee as hypothetical lien creditor under section 70(c) of the Bankruptcy Act challenges the creditor.

The bankrupt in *In re White* had purchased and titled his vehicle (a mobile home) in Virginia. The Virginia title act required notation
of liens on the certificate as a condition of validity and the creditor
bank's interest was so noted. The bankrupt then moved to New York
and seven months later filed a voluntary petition in bankruptcy. The
District Court reversed the Referee's finding that 9-103(3) controlled
and the bank's perfection expired after four months, concluding instead
that while subsection (4) "lacks the clarity desirable" it completely
displaces subsection (3) in this situation. Unless so construed, said the
court, "subsection (4) would have little or no meaning." Thus, since
it was stipulated that the lien was properly perfected under the laws
of Virginia, it continued perfected beyond 4 months in New York.

Cases since White have relied on its opinion in resolving the same
issue.\(^42\) In one\(^43\) the same result was reached without reference to UCC
9-103 at all, but based instead on the provisions of the Georgia ver-
sion of the Uniform Motor Vehicle Certificate of Title Act. One referee
tried to distinguish the White holding on the ground that the vehicle
there had moved from a title state to a non-title state, while in his
case the vehicle had been taken to a second title state. The court re-
jected the distinction\(^44\) as vitiating the clear meaning of 9-103(4).

The Review Committee says that new section 9-103(2)(b) "af-
firms In re White and later cases in their interpretation of the relation-
ship between the certificate of title provision of existing subsection (4)
and the four months rule of existing subsection (3)."\(^46\) In the process
they have also done more.

New 9-103(2)(b) provides that perfection is controlled by the for-
ign certificate "until four months after the goods are removed from
that jurisdiction and thereafter until the goods are registered in an-
other jurisdiction, but in any event not beyond surrender of the cer-
tificate." The section thus answers one question the White case left
unresolved: is the perfection based on the foreign certificate really
indefinite? The answer is no—the certificate ceases to be effective
either when it is surrendered or the vehicle is "registered" after four
months in the second state. Since registration usually involves the ap-
lication for and issuance of tags in the second state, and since virtu-
ally every state will require surrender of existing certificates and the

\(^42\) In re Friedman, Bank. No. 34520, 4 UCC REP. SERV. 890 (D. Conn.
1967); GMAC v. Whisnant, 387 F.2d 774, 4 UCC REP. SERV. 1016 (5th Cir.
1968); In re Caraway, Bank. No. 28858N, 4 UCC REP. SERV. 1099 (W.D. Mich.
1968); In re Worsley, Bank. No. 65-8436, 4 UCC REP. SERV. 1180 (E.D. Mich.
1967); In re Fougeric, Bank. No. 67-84-ND, 5 UCC REP. SERV. 410 (D. Me.
1968); Streule v. Gulf Finance Corp., 265 A.2d 298, 7 UCC REP. SERV. 734
(D.C. App. 1970); In re Canter, Bank. No. 9918, 8 UCC REP. SERV. 252 (E.D.
Tenn. 1970); In re Smith, 311 F. Supp. 900, 7 UCC REP. SERV. 948 (W.D. Va.
1970), aff'd sub nom., Callaehan v. Commercial Credit Corp., 437 F.2d 898, 8
UCC REP. SERV. 901 (4th Cir. 1971).

\(^43\) Green v. King Edward Employees Fed. Cred. Union, 373 F.2d 613 (5th
Cir. 1967).

\(^44\) In re Smith, 311 F. Supp. 900, 7 UCC REP. SERV. 948 (W.D. Va. 1970),

\(^45\) Comment G-11, FINAL REPORT, at 239.
issuance of new local ones, this is an appropriate point to require the creditor to re-perfect. If the creditor has wisely retained the certificate, it will know of the attempted reregistration. In the balance here, too, is the legitimate interest of the receiving state in seeing that all vehicles kept and driven regularly in the state are registered and that their owners have paid the appropriate fees.

Having so wrought, the Review Committee perceived it had created a new problem for itself—i.e., what to do if the vehicle is reregistered shortly after removal without surrender of the outstanding certificate on which the lien is noted? The Committee's comment says in that event "the security interest . . . remains perfected for four months after removal under Section 9-103(2)(c) . . . for there is no reason why rights on removal of collateral perfected on a certificate of title should receive less favorable treatment than rights in collateral otherwise perfected."46 The intent may be clear, but the language in the provision itself is intricate and strained. One can also challenge again the policy decision which permits the secured creditor with notice of removal and of reregistration to wait (safely, if he keeps the certificate) until the four months are about to run before he re-perfect.

The multiple-certificate situation. Because state motor vehicle departments regularly require the surrender of outstanding certificates before registering a vehicle, or before issuing a new local certificate, the likelihood of there being more than one certificate at the same time is slim. But it can happen. Clerks are human and may simply fail to demand surrender of the certificate. And as Comment 4(b) to new 9-103 puts it, "various fraudulent devices based on allegations of loss of the certificate of title enable a dishonest person to obtain both an original and a duplicate of title; to have a security interest shown on only one thereof; and then to effect a transfer into a new state on the basis of the clean certificate, no matter how diligent the officers in the second state may be." (Precisely this kind of fraud produced the bizarre Ohio holding in Commercial Credit Corp. v. Pottmeyer47 in 1964).

By everyone's admission, the present version of 9-103(4) does not say anything about multiple certificate situations. The reported Code decisions thus far are all by bankruptcy referees.

In In re Schoeller48 a car covered by a Florida certificate which noted the security interest was brought to Connecticut. An application was submitted for a Connecticut certificate; the application disclosed the Florida lien but failed to indicate the date of that lien as required under the Connecticut title act. The Florida certificate was not surrendered (the opinion does not indicate why: it was probably still held by the reclaiming creditor), but a Connecticut certificate was issued in due course and the debtor later went bankrupt. The Florida creditor would

46. Comment G-12, FINAL REPORT, at 240.
47. 176 Ohio St. 1, 197 N.E.2d 343 (1964).
lose to the trustee if the Connecticut certificate controlled, because the omitted date was fatal to the perfection of its interest on that certificate. The referee noted that 9-103(4)’s “singular wording contemplates the existence of only one certificate of title at a time,” and found

“that the legislature intended a Connecticut certificate of title to eliminate and to supersede any previous certificate that may have issued. And it follows that when a Connecticut certificate is the presently existing one then, . . . it is ‘the certificate’ and whether or not any previously granted security in a motor vehicle remains perfected is governed by Connecticut law.”

A similar fact pattern generated a similar ruling in a Michigan bankruptcy in 1969. The referee held that 9-103(4) “has application only when a certificate of title of a foreign jurisdiction remains extant. When a new certificate of title is issued by another state such state becomes ‘the jurisdiction which issued the certificate.’”

Later, another Michigan bankruptcy referee cited and followed the rationale of Schoeller and Edwards, but had to deal with a new element. A car was purchased, titled and encumbered in Georgia, and the certificate noted the lien. When the owner took the car into Michigan, he promptly applied for a Michigan title and listed the Georgia lien on the application. Bankruptcy occurred three days before the new certificate was physically issued. The referee thus had to determine which was the controlling certificate (if the Michigan one, creditor would lose to the trustee for failure also to file a financing statement, a unique requirement under the Michigan version of 9-302(4)); he reasoned that under 9-103(4) perfection was controlled by Michigan law only when a Michigan certificate was actually “issued”. The date of actual issuance is the key date (rather than the date of application for the title) since that is the date effective notice is given through the Michigan certificate—i.e., there will be no gap period when the lien is governed by Michigan law but when an inquiry would not disclose it. And since the Michigan certificate had not been issued on the date of bankruptcy, the Georgia certificate still controlled and the creditor was permitted to reclaim.

Although the comments to the revised 9-103 mention the multiple certificate problem, the statutory language does not clearly solve it and may confound it. The foreign certificate will generally control until surrendered, or until reregistration. Subsection (2)(b) provides that

49. 4 UCC REP. SERV., at 1097.
52. MICH. STATS. ANN., §19.9302(4): “... the filing required ... is not only the filing with the secretary of state of an application for a certificate of title ... , but in addition the filing of a financing statement ...”
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"after the expiration of that period the goods are not covered by the certificate of title within the meaning of this section." The implication is that the goods are covered by the original certificate until then. If by fraud or otherwise both a foreign and a local certificate of title are issued and outstanding, this language would seem to give continuing and controlling effect, indefinitely, to the first certificate. Such a result would contradict Schoeller and Edwards, would undermine the reliability of duly issued certificates, and would conflict in virtually every certificate-of-title state with the requirement that outstanding certificates be surrendered upon issuance of new ones. In terms of risk-allocation principles, the contest is not strictly between an innocent foreign creditor and an innocent local claimant because interposed between the wrongdoer and the local purchaser is the official functioning of the motor vehicle department, on which the purchaser ought to be entitled to rely.

There is nothing in the comments of the Review Committee to indicate this unfortunate construction was intended, and the question is how to avoid it? One way is to read the above-quoted language as not being the exclusive statement of when the coverage of the original certificate ends; another determinant would be the issuance of a second certificate. Support for this view may be found in the general phrasing throughout new 9-103 (2) which apparently contemplates that only a single certificate can cover the vehicle at any one time. In short, the rationale of Referee Trevethan in Schoeller should not be discarded.

The "Lichtenstein" certificate. Professor Gilmore said it first:

"[I]f . . . the principality of Lichtenstein issues a certificate of title covering a truck owned by a debtor whose chief place of business is in Massachusetts (a Code state) and if the truck has never been operated in . . . Lichtenstein, then the purported 'certificate of title' is merely waste paper and nothing in § 9-103(4) gives it any 'jural significance.' The certificate of title must then be 'validly' issued, but nothing in the Code sheds any light on 'validity.'" 53

Neither does anything in the new version of 9-103 address the question of which out-of-state certificates must be given effect.

A classic case came before Referee Nims in the western district of Michigan in 1968. 54 Bankrupt had purchased a truck in Indiana for use in his hauling business which he operated from his Michigan home. To get the benefit of lower Indiana license and sales tax charges, he had the vehicle registered and titled in Indiana, by using his sister's address. The lien was noted on the certificate. The referee rejected the creditor's claim based on the Indiana certificate, holding that in light

53. 1 G. Gilmore, supra note 31, at 327.
of the purpose of Article 9 to give notice of security interests, Indiana was an improper place to perfect a security interest in a vehicle kept in Michigan.

A year later, however, the same referee found his earlier holding inapposite where the bankrupt maintained a home in Michigan, but lived during the week in a hotel in Chicago near the truck terminal at which he worked. He purchased a car, listed his Chicago address and had the car titled in Illinois, disclosing a lien. Here Illinois was considered a proper place to perfect, and the security interest noted on the Illinois certificate was respected in the bankruptcy proceeding in Michigan.

How often these fact patterns arise is uncertain. How often litigants and courts recognize the Lichtenstein issue is also uncertain. At the same time, there is little substantive discussion of when the issuing state's contacts with the transaction are so weak that its certificate should be disregarded. The Michigan cases suggest the debtor's domicile is critical, but in another bankruptcy matter in Tennessee the referee upheld a security interest noted on a Virginia certificate where Virginia's only connection with the bankrupt was that the seller of the vehicle (a mobile home) was located there.

To talk about "sufficient contacts" suggests that the issue is one of the jurisdiction of the issuing state. Certainly a prime place to look to see whether a given certificate properly covers a vehicle is to the certificate-of-title act of the issuing state. What does it say or suggest about its own scope? Is it intended and can it have extra-territorial application? Was the certificate properly issued in the first place? Has it expired? In these latter two instances, the certificate either was not "issued", or no longer "covers" the vehicle in the sense of new 9-103 (2) (b).

But the question may also be one of choice of law. Being free to enforce rights under the foreign certificate or not, should the forum state do so where the issuing state has only tenuous connection to the transaction and where there is substantial likelihood of misleading local purchasers or creditors? Or does new 9-103 preempt any inquiry beyond satisfaction of its terms?

Old 9-103 suggested at several points that the goods must at least have been located in the state of origin for the security interest to be valid. New 9-103(2)(b) in turn protects rights under a foreign certificate for a period of time after "the goods are removed from that

56. A potential Lichtenstein problem in GMAC v. Whisnant, 387 F.2d 774, 4 UCC REP. SERV. 1016 (5th Cir. 1968), was ignored by the court but questioned in V. COUNTRYMAN & A. KAUFMAN, COMMERCIAL LAW: CASES AND MATERIALS 299-300 (1971).
jurisdiction", intimating that the goods must have been kept there on some kind of permanent basis.

Doubtless there are considerations besides property location and debtor's domicile that can enter into the determination whether a foreign certificate should be given effect. They are beyond the scope of this paper. The point is that despite the apparently comprehensive language of the new 9-103(2), some corollary principles concerning the "Lichtenstein certificate" are emerging in the caselaw and will undoubtedly continue to do so.

The tardy certificate. A final problem has arisen in several cases where servicemen returning from overseas, or about to change duty stations in the United States, purchase automobiles and take them to other states before the certificate of title is issued in the state of purchase. For collateral generally, both the old and the new versions of 9-103 provide special rules for the situation where it is contemplated that goods will be removed out of state within thirty days—in both versions the law of the second state controls. But because both old and new 9-103 treat certificates of title separately these rules do not affect title-certificate situations, and the question then arises whether a foreign certificate issued after removal should be given effect.

In two bankruptcy cases in Maine, Referee Cyr read subsection (4) of old 9-103 to require that the certificate be actually issued at the time the vehicle was brought into the forum state. Since issuance followed removal, the security interest was not perfected on entry and should have been filed in Maine. This analysis seems unexceptionable if one implies into subsection (4) the time-of-entry reference, but that reference is not explicit in either the old or the new statutory provision. As the Stamper case shows, old 9-103(4) necessarily refers to some point in time, but the new 9-103(2)(a) states simply that it "applies to goods covered by a certificate of title issued under a statute of this state or of another jurisdiction...." In the Maine cases the vehicles were certainly covered by an issued certificate on the date of bankruptcy, and assuming the issuing state was a proper state to certificate the vehicle there seems no strong reason to deny effect to liens noted on that certificate because of the fortuitous chronology which saw the debtor move before the motor vehicle department did.

Especially is this true where "perfection" in the issuing state dates from the filing of the application for the certificate, or where issuance of the certificate retroactively perfects the interest in the issuing state. Referee Cyr noted the possible impact of the latter kind of rule in one of his opinions, but did not consider the 10-day retroactive-perfection

58. In re Erwin, Bank. No. 70-218 ND, 8 UCC REP. SERV. 1399 (D. Me. 1971); In re Zimmardi, Bank. No. 70-187 ND, 8 UCC REP. SERV. 1396 (D. Me. 1971).

59. See, text, supra, at nn. 33-37.

60. In re Erwin, Bank. No. 70-218 ND, 8 UCC REP. SERV. 1399 (D. Me. 1971).
provision of the Arkansas title act to be controlling so long as no certificate had actually issued by the time the car was taken out of Arkansas.

On the other hand, as noted earlier, if the lien is considered perfected before actual physical notation on a certificate, arguably that certificate is not one to which 9-103(4) even applies: that section requires "indication of a security interest on the certificate as a condition of perfection." (Emphasis added.) By this view the Maine cases are correct, and no foreign creditor gets the benefit of 9-103(4) unless his interest is marked on the certificate and the certificate has been fully processed through the motor vehicle department before removal of the vehicle.

The resolution of this matter of when the certificate must be issued is probably not of great moment, but it points up anew the virtual impossibility of tying up in succinct and uniform statutory language all the possible loose ends of transactional patterns as complex as certificate-of-title cases can be.

Conclusion

Problems existed with 9-103(4) from the moment it was drafted. The critical ones are addressed in the proposed new version of 9-103 (2) but with only partially salutary results. The innocent consumer buyer gets some additional protection, as do other local purchasers where there is no re-perfection within four months. The multiple-certificate situation is not clearly resolved, and the subliminal "Lichtenstein" problem is not even confronted.

At its best the revision is a band-aid on a crippled limb. If clear and uniform rules are the goal, the bedrock problem with respect to security interests in certificated vehicles is not the UCC's choice of law rule but the gross non-uniformity among certificate acts and systems. The Commissioners on Uniform State Laws find themselves sponsoring two uniform acts—the UCC and the Uniform Motor Vehicle Certificate of Title Act—which contain incompatible provisions. Systems for the perfection of vehicle security interests are as diverse as, for example, Maine and Michigan. The former requires either municipal

61. In one case where goods were removed to Tennessee almost two months before the Virginia certificate was issued, the court either did not see the problem at all or preferred to ignore it. The Virginia creditor was protected through the "tardy" certificate. In re Canter, Bank. No. 9918, 8 UCC REP. SERV. 252 (E.D. Tenn. 1970).

62. At several points the Review Committee acknowledges these incompatibilities and urges conforming changes in certificate of title laws. FINAL REPORT, at 238, 240. Georgia enacted both the UCC and the Uniform Certificate of Title Act without reconciling the two, and the resulting uncertainty about which applies in a given situation is revealed in GMAC v. Whisnant, 387 F.2d 774, 4 UCC REP. SERV. 1016 (5th Cir. 1968). Connecticut, on the other hand, modified its version of the Uniform Certificate of Title Act to avoid conflicts with the UCC. See, In re Scannell, Bank. No. H 6107, 3 UCC REP. SERV. 884 (D. Conn. 1966).
or central state filing of a financing statement, while in the latter both county filing of a financing statement and notation on a certificate of title are necessary.

No amount of tinkering with choice of law rules can produce the desired certainty in the law without considerable standardization of certificate of title legislation. The decision in the UCC to defer to such statutes seems well-nigh irrevocable, and the question becomes what possibilities are there realistically for achieving statutory uniformity.

One possibility would be a takeover of motor vehicle registrations by the federal government. This suggestion is undoubtedly anathema to state officials on countless grounds amounting in sum to an improper preemption of state functions by the federal government. Huge displacements of personnel and expertise would be needed to create the new bureaucracy, and perhaps most significantly vehicle registration and certification revenues would become federal revenues. Historically, one of the foremost reasons why the Commissioners on Uniform State Laws set about drafting the Uniform Motor Vehicle Certificate of Title and Anti-Theft Act in the 1950's was "to prevent the invasion by the Federal Government of the field of certificates of title threatened by proposed federal legislation." 63

The alternative, then, is renewed efforts toward the adoption of uniform legislation by the proponents of state-control of certificates of title. A first step ought to be a reconsideration by the NCCUSL of its uniform title act to harmonize it with the UCC in all respects. The follow-up would be the kind of concerted promotion and lobbying effort as was used for the UCC, with the support, hopefully, of the motor vehicle commissioners, the ABA and any other interested groups. In the meantime—and despite the Review Committee's improvement of 9-103—the problems will almost certainly not diminish.