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Volume 15, Number 2 November/December 2005

Lending in Indian Country

The story behind the Model Tribal Secured Transaction Law

By Susan Woodrow and Fred Miller

What happens when American Indians try to get loans? Too often, they are refused. Laws are needed.

Many American Indian tribes and nations, tribal entities, Indian-owned businesses located in Indian Country (defined in 18 U.S.C. §1151 essentially as reservations, dependent Indian communities and Indian allotments), and individual Indians living in Indian Country, have encountered significant barriers when seeking loans or other financing from outside sources.

While the causes are varied, one reason frequently cited is the lack or insufficiency of tribal commercial law, particularly law governing secured credit, to protect the parties in a business transaction that would fall within a tribe's jurisdiction. When rules governing creditor/debtor relationships are uncertain or nonexistent, risks to creditors increase and creditors may either refuse to extend credit or may increase the interest rate and other costs of the transaction to offset the risk.

Adequate tribal commercial law may not exist because tribes are sovereign governments, and while subject to federal law, they are generally not subject to state civil laws. Therefore, state commercial law is typically not applicable to transactions within a tribe's jurisdiction. Furthermore, the recognition of a need for tribal commercial law is a fairly recent phenomenon: The growing movement of tribal self-determination over the last couple of decades has concurrently led to an increase in gaming and other tribal economic development pursuits, such as the development of tribal natural resources. As a result, tribes and their members

are increasingly interacting commercially with creditors and other businesses located outside of Indian Country.

To support this growing commercial activity, many tribes are seeking ways to build sound legal and business infrastructure to accommodate their growing cross-border commercial activity. However, for a tribe to develop its own commercial law is a significant task. While it would be easy to merely borrow state commercial law, that approach often does not sufficiently meet specific tribal cultural and other needs, and may be viewed as lessening tribal sovereignty. The need, therefore, for a model tribal secured transaction law is timely.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) many years ago developed the Uniform Commercial Code (UCC or code), which includes Article 9 on personal property security, as state law to provide a consistent legal environment for commercial transactions among parties in a given jurisdiction and between parties located in different jurisdictions.

Although states have modified the various articles of the code in some respects to accommodate needs specific to their respective business, legal and cultural environments, the code is uniform with respect to core principles and much detail. The benefit of uniformity, or harmonization, is that business can be transacted across governmental borders with relative ease, thus encouraging and enabling economic growth and development.

NCCUSL has recognized that there is a need to harmonize personal property security law not only among states, but also among tribes, and between tribes and states, to aid tribal economic development and to benefit tribal members. Toward this end, NCCUSL created a Committee on Liaison with American Indian Tribes and Nations (the committee). Based on suggestions from tribes and other interested parties, the committee determined that while some tribes have adopted various versions of UCC Article 9, few have amended their versions to incorporate the revisions made to Article 9 by NCCUSL in 1999.

Moreover, many tribes, to the extent the committee was able to determine, have not yet adopted any type of secured transaction law or other commercial laws such as those that govern sales or leases of goods or that facilitate banking transactions.

Against this background, the committee has drafted a model tribal secured transaction law (the Model Act or MTA) based on UCC Article 9, but that is significantly modified to both recognize tribal sovereignty concerns and to be more suitable for the needs of most tribes. For example:

- Fixtures are a type of "hybrid" property that has characteristics of both real and personal property. Fixtures are covered by the Model Act. However, the Model Act will not apply to a fixture if the real property to which the fixture is attached is not alienable because of federal law restrictions that would consider the fixture as well as the real estate covered by the federal restriction on alienation.

Property is considered "alienable" only if the debtor has a right to transfer the debtor's interest in the property. Property, such as a fixture, that is attached to trust land or other restricted land may not be freely alienable or transferable under federal law. The Model Act makes clear that it does not apply to a security interest in a fixture or other property that, because it is attached to trust land or other land that under federal law cannot be freely transferred, is not alienable.

- The Model Act contains a section not in UCC Article 9 that recognizes and protects the sovereign immunity of the tribe or nation and its agencies and instrumentalities (MTA §9-102).
- The Model Act includes as a "usage of trade" a local custom or tradition of the tribe. An implementation guide, which accompanies the Model Act and is designed to assist a tribe in adapting and working with the law after its enactment, points out that if a provision of the Model Act conflicts with a tribal custom or tradition, the tribe should consider which should take precedence and specify that result in its enactment of the law. An example would be a custom that prohibits the transfer of certain artifacts or sacred objects out of tribal possession (MTA §9-114).

- The Model Act adopts a nonuniform provision on choice of law, somewhat like former UCC §1-105, that preserves tribal jurisdiction and sovereignty even if another law applies to the transaction or a part of the transaction (MTA §9-117).
- The Model Act adopts a significantly different rule than UCC Article 9 as to the applicable law to govern perfection, the effect of perfection or nonperfection and priority. It provides that tribal law generally will govern if the security interest was created according to it or from the time the debtor or a transferee of the collateral who becomes a debtor becomes subject to the law (MTA §9-301).

The Model Act is designed to be a stand-alone statute, and so it necessarily includes key related provisions from other parts of the UCC. Thus MTA §9-107 defines "notice" and "knowledge," which appear in Article 1 of the UCC, MTA §9-109 copies the Article 1 provision distinguishing a lease from a security interest, and MTA §9-113 sets out the general obligation of good faith.

The Model Act applies to sales and leases of goods, negotiable instruments, bank deposits and collections, and other commercial activities within the scope of the UCC to the extent that those activities are involved in a secured transaction. To reduce the complexity of the Model Act, rather than adopt the rules of those UCC articles, it instead provides that its application to these types of transactions is to be determined from the context involved with due regard for consistency in application with uniform principles of commercial and contract law operative in the United States. See MTA §9-110. See also MTA §9-106(b) as to terms used but not defined.

Finally, the implementation guide prepared by the committee notes explicitly that a tribe may wish to consider other laws in relation to its enactment of the Model Act, such as a certificate of title act and consumer protection laws.

To illustrate the need for the former type of law, consider a creditor that acquires a security interest in a debtor's vehicle. While the taking of the security interest is governed by the Model Act, the perfection of it may not be, as is the case under UCC Article 9 itself. See MTA §9-311(a)(2). Rather, the means of perfection may appear to be governed by a tribal certificate of title law. A tribe must consider whether its certificate of title law is adequate, or whether to enact one.

Several bankruptcy cases in Oklahoma have questioned whether a bank's security interest in a vehicle registered with a tribe was perfected because the certificate of title law of the tribe arguably did not require the interest to be perfected by notation on the title. NCCUSL has a modern certificate of title law that a tribe might use in this regard. Failing such a law, and except for purchase money security interests, perfection would have to be by filing, a method that most jurisdictions outside of Indian Country have rejected.

In designing the Model Act, the committee received significant guidance from a number of tribes whose representatives participated in the drafting efforts, including representatives of or legal counsel for the Sac and Fox Nation, the Cherokee Nation, the Navajo Nation, the Chitimacha Nation, the Oneida Nation, the Crow Nation, the Chickasaw Nation, the Confederated Tribes of Warm Springs, and several California rancherias. This guidance proved invaluable, helping the committee to address key cultural and other issues unique to tribes.

In preparing the Model Act, the committee had several objectives in mind. The first was to create a uniform tribal secured transaction law that is, to the extent reasonable, consistent with UCC Revised Article 9. Thus, with some variance, Parts 2, 3, 4 and 6 of the Model Act closely track those parts of UCC Article 9. Part 1 does as well, although it adds definitions and certain substantive provisions from UCC Article 1 and provisions to adapt the model law to tribal needs and concerns.

Even Part 5 on filing does not greatly vary from Part 5 of UCC Article 9, except that much detail concerning a filing system is relegated to regulation, a model form of which is contained in the implementation guide. See MTA §9-

112 on administration of the Model Act and authority to promulgate regulations.

Among the provisions recognizing particular tribal concerns, such as tribal sovereignty and immunity and tribal customs and traditions, the Model Act through the implementation guide recognizes that many tribes by law create tribal liens to secure various obligations. The Model Act excludes these liens (MTA §9-111(c)), but the guide cautions that a tribe should consider whether and to what extent a tribal lien should take priority over a perfected security interest and so provide in its adaptation of the Model Act.

The committee also recognized that many provisions of UCC Revised Article 9 were unlikely to be appropriate or relevant in Indian Country until possibly sometime in the future, and if included at this time would add unneeded complexity to a tribal secured transaction law. Thus, the Model Act is a shorter and less complex law than UCC Article 9. That should ease enactment of a modern law at the present time, but will allow also for amendments as a tribe's business environment develops.

To illustrate, MTA §9-110 does not include coverage of agricultural liens as does UCC Article 9, nor security interests that arise under other articles of the UCC, such as Articles 2 and 2A and Article 4, which articles most tribes have not enacted. If, nonetheless, tribal law should recognize a similar type of claim, MTA §9-110(b) directs a court to apply the model law to the transaction considering uniform principles of commercial and contract law operative in the United States.

The Model Act also does not have provisions that recognize the concept of control such as those in UCC §§9-104, 9-105 and 9-107 on control of deposit accounts, electronic chattel paper and letter-of-credit rights. However, it is anticipated that should such an issue arise, a court could reason by analogy to the context of control with respect to investment accounts.

Another illustration relates to the exclusion of buyers of farm products from a person engaged in farming operations as an ordinary course buyer. While this tracks UCC Article 9, it is unclear if and how the Food Security Act would apply in this context to protect such buyers. The Model Act therefore sets out a procedure that protects a buyer who gets a notarized statement from the farmer that identifies any secured parties, if the buyer then gets prior consent to the sale or pays the sale proceeds accordingly.

A second objective of the committee was to create a model tribal secured transaction law that provides appropriate options for selected provisions for tribes, recognizing that the legal, business and cultural environments of tribes differ from region to region and from tribe to tribe.

The rules of the Model Act governing filing are an example. UCC Revised Article 9 sets up a modern filing system structure to ensure public notice of most security interests. At least one tribe has entered into an agreement with the state in which the tribe is located to use the state's filing system. Since all filings are then made in one system, searches are easier and the relatively small volume of filings made under tribal law warrants the tribe avoiding the cost of operating its own filing system for minimal activity.

Other tribes, however, have or may elect to set up their own filing systems, or to establish a collaborative filing system managed by a consortium of tribes. The Model Act leaves open these options. It also provides for much filing system detail to be governed by regulation. UCC Article 9 follows that approach for some details of a filing system (see UCC §9-526), but the Model Act leaves much more detail to regulation, thus reducing its length and complexity. A tribe or group of tribes wishing to go further statutorily could do so, however, and the implementation guide prepared by the committee provides guidance to assure harmonization.

The committee believes that it has achieved its objectives and, in doing so, has developed a model tribal secured transaction law that will meet the legal and business needs of many tribes. Because the Model Act was prepared with

advice from tribal representatives, it should also be compatible with tribal cultures and consistent with tribal sovereignty. The Model Act thus will ease the task of tribes considering adoption of a modern commercial law. Most significantly, it will benefit tribal consumers, businesses owned by tribal members or the tribes themselves, as well as nontribal lenders, businesses and others who seek to conduct business in Indian Country.

About NCCUSL

The National Conference of Commissioners on Uniform State Laws was founded in 1892 at the suggestion of the American Bar Association to research and prepare proposed laws on subjects suitable for enactment by the states to achieve uniformity in state laws.

Members of the conference are appointed by state government, serve without compensation, and periodically meet in committees, joined by advisers from the ABA and representatives of interested groups, to prepare drafts for discussion once a year at the week-long annual meeting of the conference.

Once a uniform act is approved by the conference, it is submitted for consideration to the ABA House of Delegates and submitted to the legislatures of the several states. Among the products of the conference are the Uniform Commercial Code, the Uniform Partnership and Limited Partnership Acts, the Uniform Probate Code, and many other widely adopted statutes.

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