

DUDE, WHERE'S MY CAR? HOW THE PROPOSED UNIFORM CERTIFICATE OF TITLE ACT ADDRESSES CONFLICTS BETWEEN THE TEXAS CERTIFICATE OF TITLE ACT AND THE UNIFORM COMMERCIAL CODE

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I. DUDE, WHERE'S MY CAR?: THE COMMON PROBLEM

Commonly, when purchasing a vehicle, a consumer, whom we will call Joe, goes to a dealership and looks around for an affordable and suitable vehicle. After haggling with the salesperson over the terms, making a deal, and arranging a form of payment, Joe fills out paperwork to transfer the ownership of the vehicle and pays the dealer to cover the titling expenses, which the dealer promises to send to the state certificate of title (“CT”) office so that the ownership of record may be transferred to Joe pursuant to the state’s CT law.¹

Joe leaves the dealership with the new car, perhaps a little nervous about all the money spent and the additional debt incurred. After Joe is gone, the dealership, which may be experiencing legal and/or financial problems and perhaps is even insolvent, may use the money Joe paid, including that intended to cover the ownership transfer costs, to pay other creditors. Later, stretched to the limit, the dealer may run short of funds and default on the dealer’s inventory or other loan with a bank, before transferring the CT for Joe’s car. Then, maybe two weeks after purchasing the car, Joe attempts to leave home for work, but instead finds his vehicle in the process of being repossessed by the bank.²

Joe, extremely confused and irritated, may find that, while Joe filled out the appropriate documentation needed for a CT application, the dealer did not file the documentation with the state CT office, which means that the bank with the dealership inventory loan still claims a security interest in the vehicle.³ When the dealership defaulted, the bank searched for and repossessed the collateral for its loan, including Joe’s new car.⁴ Now, Joe must file a declaratory action and argue that a judge should declare Joe to be the proper owner under generally applicable laws including the Uniform Commercial Code (“UCC”), property and contract laws, and perhaps equitable principles, the applicable CT law, and even the Bankruptcy Code. Each of these laws is challenging in this context, and the relations between them add to the complexity. Joe may be facing a very expensive (and uneconomical) lawsuit as his only legal remedy.

¹ It should be noted that in most such transactions ownership passes to the buyer under the sales contract at the time of the sale, pursuant to state property and contract law (including Uniform Commercial Code (U.C.C.) Article 2), independently of the state CT law. The additional ownership documentation executed by the dealer (for example, a CT or certificate of origin) at the time of sale or (more commonly) later facilitates the buyer’s application for a new CT but is not essential to the transfer of ownership. *See, e.g.*, U.C.C. §§ 2-401 to 2-403. However, it may be necessary as part of the buyer’s application for the license tags needed in order to drive the vehicle on public roads.

² An even more common version of this scenario arises when Joe cannot obtain a license tag, and therefore cannot drive the car, because the dealer has failed to transfer the CT documentation as promised. *See id.*

³ Although Joe is the legal owner of the vehicle, the records of the state CT office, the secured lender, and perhaps even the dealer still reflect ownership by the dealer, indicating to these parties that the vehicle remains collateral for the bank’s loan. Inventory or “floor-plan” financing means “[a] loan that is secured by merchandise and paid off as the goods are sold . . . Also termed *floor planning*.” BLACK’S LAW DICTIONARY 663 (9th ed. 2009). In effect, this is a loan secured by the dealer’s inventory.

⁴ In some cases the secured party who is unable to locate the vehicle may report the vehicle stolen, creating a significant potential for Joe’s arrest, which could result in additional hassle, embarrassment, and problems for Joe. *See, e.g.*, *Gallas v. Car Biz, Inc.*, 914 S.W.2d 592, 594–95 (Tex. App.—Dallas 1995, writ denied).

This type of situation poses a very real set of problems for the average Joe; and buying a car is a significant investment for many people. Given that approximately “70 million motor vehicles are titled in the United States” each year, the opportunity for these issues to arise occurs frequently.⁵ Problems like Joe’s potentially arise each time a dealer sells a vehicle but does not transfer a CT or certificate of origin to the buyer at the time of purchase.⁶ If the buyer leaves the dealership with an executed CT, the bank’s security interest in the vehicle clearly is cut off; however, common practice among car dealers is to buy or sell a vehicle and transfer the CT at a later date.⁷

Joe’s problems arise in part because confusing state CT laws have led even appellate courts to apply conflicting rules to this situation.⁸ For example, in Texas the courts have applied the UCC and the Texas Certificate of Title Act (Texas CT law) in conflicting ways, creating a split among the Texas appellate courts.⁹ This conflict poses significant problems for consumers and other vehicle purchasers: Under the UCC, the purchaser is entitled to possession and ownership of the vehicle even without a transfer of the CT;¹⁰ however, some CT laws can be interpreted to provide that a sale is void without a CT transfer. Some courts

⁵ See the Uniform Certificate of Title Act (“UCOTA”). Prefatory Note at 1 (2006). Texas law requires: “The owner of a motor vehicle that is required to be registered in this state must apply for a certificate of title of the vehicle before selling or disposing of the vehicle.” TEX. TRANSP. CODE ANN. § 501.022(c) (West 2007). Among other things, in our sample scenario Joe will be in violation of this and similar statutory requirements, some of which carry heavy penalties.

⁶ See *infra* Part III.

⁷ See U.C.C. § 9-320 (buyer in ordinary course of business takes free of security interest created by the seller). However, even this simple point can become muddled in the context of confusing CT laws. If the vehicle is new (i.e., has never been covered by a CT) a certificate of origin is required rather than a CT. See, e.g., Alvin C. Harrell, *The Uniform Certificate of Title Act: Myths and Realities*, 39 UCC L.J. 1 (2006); see also TEX. TRANSP. CODE ANN. § 501.0234(f). Section 501.0234(f) states, “A seller has a reasonable time to comply with the terms of Subsection (a)(1) and is not in violation of that provision during the time the seller is making a good faith effort to comply. Notwithstanding compliance with this chapter, equitable title to a vehicle passes to the purchaser of the vehicle at the time the vehicle is the subject of a sale that is enforceable by either party.” TEX. TRANSP. CODE ANN. § 501.0234(f). Section 501.0234(a)(1), referred to above, requires that: [a] person who sells at the first or subsequent sale a motor vehicle and holds a general distinguishing number, [essentially meaning the individual is a registered dealer or wholesaler of vehicles,] . . . shall: . . . in the time and manner provided by law, apply, in the name of the purchaser of the vehicle, for the registration of the vehicle, if the vehicle is to be registered, and a certificate of title for the vehicle and file with the appropriate designated agent each document necessary to transfer title to or register the vehicle TEX. TRANSP. CODE ANN. § 501.0234(a)(1) (West 2007).

⁸ Compare, e.g., *Park Cities Ltd. P’ship. v. Transpo Funding Corp.*, 131 S.W.3d 654 (Tex. App.—Dallas 2004, no pet.) (holding that the CT law applies); and *Gallas*, 914 S.W.2d at 594–95 (holding that the CT law applies), and *Morey v. Page*, 802 S.W.2d 779 (Tex. App.—Dallas 1990, no writ) (holding that the CT law applies), and *Pfluger v. Colquitt*, 620 S.W.2d 739 (Tex. Civ. App.—Dallas 1981, writ ref’d n.r.e.) (holding that the CT law applies), with *Vibbert v. PAR, Inc.*, 224 S.W.3d 317, 324 (Tex. App.—El Paso 2006, no pet, h.) (holding that the UCC applies), and *First Nat’l Bank v. Buss*, 143 S.W.3d 915 (Tex. App.—Corpus Christi 2004, pet. denied) (holding that the UCC applies), and *Hudson Buick v. Gooch*, 7 S.W.3d 191 (Tex. App.—Tyler 1999, pet. denied) (holding that the UCC applies). In reality, of course, both the UCC and the CT law apply; but as noted *infra* the interface between them is so poorly defined in the CT laws that unnecessary conflicts are either created or perceived.

⁹ Texas adopted the UCC into the Texas Business and Commerce Code in 1965; therefore, the term “Code” as used in case decisions may refer to either the Uniform Commercial Code or its codified version in Texas, the Texas Business and Commerce Code. See TEX. BUS. & COM. CODE ANN. §§ 1.01–11.108 (West 2002).

¹⁰ See *supra* note 1.

have held that in these circumstances the dealership never transferred the right of possession and ownership to the purchaser; therefore, those rights accrued to the lender when the dealer defaulted.¹¹ As noted, a legal battle to determine ownership of the vehicle can be expensive and burdensome, with costs easily exceeding the value of the vehicle; this can be devastating for someone who purchased the vehicle as needed transportation. The transaction often leaves the buyer in no position to join in a legal battle over the money paid to the dealer at the time of purchase, and possibly the vehicle itself.¹²

The split among the Texas appellate courts on these issues mirrors national developments; it arises because the party claiming a valid transfer of ownership and severance of the security interest (the buyer) generally relies on the UCC, while the secured party claiming the right to the vehicle via a security interest cites the CT law.¹³ The party citing the UCC argues that, although the CT was not transferred to him or her, he or she is protected as a buyer in ordinary course of business (“BIOCOB”) as against a security interest created by the seller; however, the party citing the CT law claims that without a transferred CT no sale occurred and therefore there is no BIOCOB, and the security interest remains intact.¹⁴ In Texas, appellate courts have split over whether the CT law or the UCC controls.¹⁵

The confusion in Texas has occurred even though the Texas CT law has a reverse preemption clause, which seems to resolve the issue, by stating: “Chapters 1-9, Business and Commerce UCC, control over a conflicting provision of this chapter.”¹⁶ Under this language one might logically conclude that the UCC controls, but some courts have concluded that no conflict exists because the court interprets statutes so that any apparent conflict may be harmonized.¹⁷ Again, one might logically conclude that this means an interstitial CT law (designed largely as an anti-fraud device)¹⁸ would be viewed in conformity with the comprehensive law governing sales of goods and security interests (the UCC). The UCC

¹¹ See *Park Cities Ltd. P'ship.*, 131 S.W.3d at 654 (the CT law applies); *Gallas*, 914 S.W.2d at 594-95 (the CT law applies); *Morey*, 802 S.W.2d at 779 (the CT law applies); *Pfluger*, 620 S.W.2d at 739; cf. *Vibbert*, 224 S.W.3d at 324 (the UCC applies); *Buss*, 143 S.W.3d at 915 (the UCC applies); *Gooch*, 7 S.W.3d at 191 (the UCC applies).

¹² See cases cited *supra* notes 8 and 11. Two consequences usually follow a loss for the buyer in this type of litigation: Either the buyer will lose all money paid at the time of purchase, typically a down payment plus the cost of tags, title documentation, and license, or will lose that money plus the vehicle. If the buyer loses only the money paid at the time of purchase that usually means the buyer came to an agreement with the secured party to make payments directly to the secured party so that the buyer could keep the vehicle. Of course, it is also possible that the buyer could lose the vehicle and money paid, *and* be liable for repayment of loan proceeds paid by the buyer's lender to the dealer.

¹³ See cases cited *supra* at notes 8 and 11.

¹⁴ *Id.* The UCC and the Texas Business and Commerce Code define a buyer in the ordinary course of business as: . . . a person that buys goods in good faith and without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A buyer buys good in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practice. U.C.C. § 1-201(b)(9); TEX. BUS. & COM. CODE ANN. § 1.201(b)(9) (West Supp. 2007).

¹⁵ See cases cited *supra* at notes 8 and 11.

¹⁶ See TEX. TRANSP. CODE ANN. § 501.005 (West 2007). Given the problems in Texas, as noted here, even with this seemingly clear provision, one can only imagine the problems lurking in other states that lack such language.

¹⁷ See, e.g., *Pfluger*, 620 S.W.2d at 741-42 (citing other cases).

¹⁸ See *infra* Part II.B.

clearly protects a BIOCOP from a seller's security interest. However, if the court applies the CT law to the exclusion of contrary provisions in the UCC, on grounds that there is no conflict, the lender's security interest may be held superior to the innocent buyer's right of ownership, costing the buyer the money paid for the vehicle and, possibly, the vehicle itself.¹⁹ Ultimately, the *Pfluger* court noted that the plain meaning of the UCC contradicts this interpretation of the CT law, so the *Gallas* court's conclusion that no conflict exists is incorrect, as each law leads to diametrically opposed results.²⁰

To address such conflicts between the UCC and state CT laws, in both intrastate and interstate contexts, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") (now also known as the Uniform Law Commissioners, or "ULC") approved and recommends adoption of the Uniform Certificate of Title Act ("UCOTA") by the states.²¹ UCOTA provides needed protections for buyers and lessees in the ordinary course of business in these circumstances, and reconciles existing conflicts with the UCC.²² Contained within UCOTA are provisions which recognize and follow UCC section 9-320, thereby protecting the BIOCOP in a vehicle purchase and making clear that a sale to a BIOCOP terminates a security interest in the vehicle created by the seller.²³ UCOTA also recognizes the entrustment rule in UCC section 2-403(2), which provides that any ownership interest of a secured party who entrusts the vehicle to a merchant seller is cut off by a sale of the vehicle to a BIOCOP.²⁴ Even when the CT is not executed to the buyer, which is the common scenario in retail sales, UCOTA clarifies that an otherwise qualified buyer qualifies as a BIOCOP.²⁵

¹⁹ See *supra* note 12; cases cited *supra* at notes 8 and 11; and *infra* Part III.

²⁰ See *Pfluger*, 620 S.W.2d at 741-42; cases cited *supra* at notes 8 and 11.

²¹ See, e.g., Edwin E. Smith, *The Effect of the Uniform Certificate of Title Act on Secured Transactions*, CONSUMER FINANCE LAW QUARTERLY REPORT, Vol. 60, 366, 366 (Summer 2006).

²² *Id.* at 388.

²³ *Id.* Section 9.320 of the Texas Business and Commerce Code, Texas's version of section 9-320 of the UCC, states:

- a) . . . [A] buyer in ordinary course of business . . . takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence.
- b) . . . [A] buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a security interest, even if perfected, if the buyer buys:
 1. without knowledge of the security interest;
 2. for value;
 3. primarily for the buyer's personal, family, or household purposes; and
 4. before the filing of a financing statement covering the goods.

TEX. BUS. & COM. CODE ANN. § 9.320(a)-(b) (West 2002).

²⁴ See, e.g., *Smith*, *supra* note 21, at 388. Section 2.403(b) of the Texas Business and Commerce Code, Texas's version of U.C.C. § 2-403(2), states: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." TEX. BUS. & COM. CODE ANN. § 2.403(b) (West 1994).

²⁵ See, e.g., *Smith*, *supra* note 21, at 388.

These important issues clearly support the proposed adoption of UCOTA. In analyzing these issues, this article discusses the current split created at the state appellate court level in Texas and how the adoption of UCOTA can remedy that split. Part II. of this article analyzes the legislative intent and purposes behind adoption of the Texas UCC and the Texas CT law.²⁶ Part III. examines the particular laws applied in various appellate cases and the reasoning the courts have used to support application of those laws to the specific situation.²⁷ Part IV. describes UCOTA, and its purposes, and how those purposes apply to the conflicts in Texas.²⁸ Part V. advocates that the Texas Legislature adopt UCOTA, as the obvious and simple solution to these problems.²⁹ Ultimately, this article advocates Texas's adoption of the UCOTA as the best means to resolve conflicting applications of the CT law and UCC, to bring Texas law into conformity with common business and CT practices, and to protect the reasonable expectations and interests of innocent consumers.

II. A WAR OF ATTRITION: THE TEXAS CT LAW VERSUS THE UCC

A. Introduction

Texas enacted both the UCC and the CT law with purposes that are generally consistent and obvious; however, changing conditions, ambiguous provisions and poor draftsmanship in the CT law, and evolving issues have challenged those apparent purposes over time, leading to conflicts in applications of the statutes that were not foreseen or intended.³⁰ In comparing these cases with the legislative intent of the UCC and the CT law, one can readily see how the courts' applications of these laws often does not match the legislature's intentions and how adoption of the UCOTA can properly realign Texas law.³¹

B. The Texas CT Law

The legislature provided insight into the intent behind its adoption of the Texas CT law through the text of the law.³² Section 501.003 of the Texas CT law provides directions on construction of the law.³³ It states that courts should liberally construe the Texas CT law in order "to lessen and prevent: (1) the theft of motor vehicles; (2) the importation into this state of and traffic in motor vehicles that are stolen; and (3) the sale of an encumbered motor vehicle without the enforced disclosure to the purchaser of a lien secured by the vehicle."³⁴ The legislature first enacted a CT law in 1939 to establish a CT system to accomplish these purposes for motor vehicles.³⁵ Thus, two basic purposes have been recognized for establishing

²⁶ See discussion *infra* at Part II.

²⁷ See discussion *infra* at Part III.

²⁸ See discussion *infra* at Part IV.

²⁹ See discussion *infra* at Part V.

³⁰ See discussion *infra* at Parts III.A–B.

³¹ See discussion *infra* at Parts III.A–B.

³² See *infra* text accompanying notes 33–34.

³³ See TEX. TRANSP. CODE ANN. § 501.003 (West 2007).

³⁴ *Id.* (according to Reviser's Note (1): "the legislative intent and public policy intended by the statute" is shown by the operative provisions of the law).

³⁵ Millard H. Ruud, *Amendment of the Certificate of Title Act to Conform it to the Uniform Commercial Code*,

the Texas CT law: (1) to document the authority of the person named in the CT to deal with the ownership of the vehicle, which facilitates transfers of ownership and deters trafficking in stolen vehicles; and (2) to provide a means by which the security interest in motor vehicles may be perfected through compliance with the CT law.³⁶

Following adoption of the UCC in Texas, the legislature also enacted the above noted section 501.005 of the CT law, giving the UCC primacy in conflicts between the two laws; therefore, that section's intent is separate from that of the rest of the Texas CT law.³⁷ The Texas Legislature thus amended the CT law to conform with the purposes of the UCC.³⁸ The principal purpose of this amendment was to remove the provisions of the Texas CT law repealed by implication when the legislature adopted the UCC.³⁹ The legislature obviously believed that the continued presence of these impliedly repealed statutes presented the potential for confusion and miscarriages of justice.⁴⁰ The legislature also made other changes to the Texas CT law, in addition to deletion of the provisions repealed by implication, in an effort to assure consistency between the Texas CT law and the UCC.⁴¹ The legislature then inserted section 65, now section 501.005, to be a catch-all, to cover any remaining conflicts not specifically addressed in the amendment.⁴² A purpose of inserting this section was to minimize the risk of harmful judicial errors, e.g., during a delay between the first litigation in a trial court, where someone might erroneously contend or conclude that the Texas CT law controls over the UCC, and an appellate court's action to correct the erroneous interpretation.⁴³ Moreover, in Texas, where the legislature meets only every two years, a considerable amount of time could pass before the legislature could amend the Texas CT law to correct specific conflicts brought to its attention via the court system. In the meantime, important transactions could be impaired.

This amendment, added in section 6 of the Texas CT law, created the provision that expressly recognizes the UCC's primacy in the event of a conflict with the Texas CT law, as currently found at Texas Transportation Code section 501.005.⁴⁴ The subsequent section of the

33 TEX. B.J. 968, 968 (1970).

³⁶ *Id.* See also U.C.C. Article 9 §§ 9-102(a)(10), 9-109, 9-310, and 9-311(a) (establishing required criteria for the CT law in order to accomplish the latter purpose).

³⁷ Section 501.005 is also consistent with the role of the CT law in relation to the UCC. See U.C.C. Article 9 §§ 9-102(a)(10), 9-109, 9-310, and 9-311(a); see also TEX. TRANSP. CODE ANN. § 501.005 (West 2007) (stating: "Chapters 1-9, Business & Commerce Code [the provisions of the UCC], control over a conflicting provision of this chapter."). Thus, section 501.005 essentially recognizes that UCC Article 9 is the primary law governing security interests (see section 9-109), and that the CT law has only a supplementary rule (as limited at U.C.C. § 9-311(a)).

³⁸ See Act of May 10, 1971, 62d Leg., R.S., ch. 123, §§ 1-8, 1971 Tex. Gen. Laws 895 (amended 1973 and 1995).

³⁹ Ruud, *supra* note 35, at 969.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*; see also *supra* note 37; TEX. TRANSP. CODE ANN. § 501.005 (West 2007).

⁴³ Ruud, *supra* note 35, at 969. This purpose recognizes the major harm that can be done to consumers while the legal system adjusts an erroneous trial court interpretation on issues that are common yet inherently difficult and susceptible to confusion.

⁴⁴ See Act of May 10, 1971, 62d Leg., R.S., ch. 123, § 6, 1971 Tex. Gen. Laws 895 (amended 1973 and 1995) (current version at TEX. TRANSP. CODE ANN. § 501.005 (West 2007)).

amendment, section 7, noted the importance of these changes in declaring the necessity to immediately and expressly repeal sections of the Texas CT law that conflicted with the UCC, already repealed by implication, in order to remove any doubt and provide consistency between the Texas CT law and the UCC.⁴⁵

Shortly after the legislature amended the CT law to expressly clarify that the UCC repealed conflicting sections of the Texas CT law, the Houston Court of Appeals (Houston court) decided *Nelms v. Gulf Coast State Bank*,⁴⁶ a case requiring the court to determine the intent behind the legislature's actions. Before the legislature enacted the UCC, the Texas CT law provided rules governing the priority of a security interest in a vehicle covered by a Texas CT.⁴⁷ Under these provisions of the Texas CT law, a mechanic's lien would be subordinate to a security interest.⁴⁸ Because the sections of the Texas CT law that provided for priority of a security interest were not expressly repealed upon the Texas Legislature's adoption of the UCC, but were only repealed by implication, uncertainty regarding the priority of mechanic's liens on automobiles arose.⁴⁹

As noted, in response to this uncertainty, the legislature amended the Texas CT law in conjunction with enactment of the UCC; this not only removed many of the conflicting provisions from the Texas CT law, but also included the noted savings clause (now section 501.005) to clear up future confusion involving the primacy of the UCC over the Texas CT law.⁵⁰ Ultimately, the *Nelms* court concluded that "the legislature must be presumed to have intended some amendment of existing law."⁵¹ To find otherwise would contradict the legislative process.⁵² The reasoning of the court in *Nelms* followed the comments of Professor Millard R. Ruud regarding the 1971 amendment of the Act.⁵³ Professor Ruud said of the four repealed provisions of the CT law, which dealt with the priority of various parties holding security interests in a motor vehicle against one another and against creditors and purchasers, that "[t]hese matters are now governed by the priority provisions of Chapter 9 [UCC Article 9]. . . ."⁵⁴

The Texas Legislature intended to facilitate transfers of ownership (and perfection of

⁴⁵ See Act of May 10, 1971, 62d Leg., R.S., ch. 123, § 7, 1971 Tex. Gen. Laws 895 (calling the need for an expedited vote and immediate effectiveness an emergency).

⁴⁶ *Nelms v. Gulf Coast State Bank*, 516 S.W.2d 421 (Tex. Civ. App.—Houston [1st Dist.] 1974), *aff'd*, 525 S.W.2d 866 (Tex. 1975). *Nelms* involved a dispute over ownership of a vehicle between a mechanic, who held a mechanic's lien on the vehicle, and the security interest of the bank with whom the owner of the vehicle was in arrears. *Id.* at 422.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 423; see also Ruud, *supra* note 35, at 968–69.

⁵⁰ *Nelms*, 516 S.W.2d at 423.

⁵¹ See *id.* at 424.

⁵² *Id.*

⁵³ Ruud, *supra* note 35, at 969.

⁵⁴ *Id.* Since that time, priority has been governed by UCC Article 9, and the scope of the Texas CT law has been limited to the process of perfection. See U.C.C. §§ 9-109, 9-311.

security interests) through the Texas CT law, not to hinder or prevent them.⁵⁵ The legislature passed the Texas CT law with the knowledge that it would not stop all sales and trafficking of stolen vehicles, but merely deter them.⁵⁶ However, the legislature felt the necessity to return again to the Texas CT law and amend it following the adoption of the UCC in an effort to provide consistency with the UCC.⁵⁷ Clearly the legislature did not intend to exclude protection of an innocent buyer in circumstances like Joe's, when it adopted and later amended the Texas CT law, and thus the legislature indicated a clear purpose of making the Texas CT law consistent with the UCC.⁵⁸ In adopting the UCC, the legislature intended to protect innocent buyers, a consistent theme throughout the UCC; the legislature reinforced this intention when it passed what is now section 501.005 of the Texas Transportation Code, deferring to the UCC in the event of a conflict with the CT law.⁵⁹

C. The UCC

Before the UCC became effective in Texas in 1966, the Texas CT law was undoubtedly the law to which a court would turn in a situation such as Joe's.⁶⁰ The UCC included an intentional shift toward protecting the innocent purchaser, and the legislature amended the CT law to reflect this change.⁶¹ Significant effort was undertaken by citizens all around the state to get the UCC passed in Texas.⁶² The public effort to enact the UCC began as early as 1951, with a resolution to study the UCC's effect on Texas law.⁶³ Legislators introduced legislation to enact the UCC in 1951, 1953, 1963, and 1965 (a reminder of how difficult it is to enact landmark legislation, even when the need and benefits are so apparent), and the Governor signed the UCC bill into law on June 18, 1965, effective July 1, 1966.⁶⁴

The Texas Legislature, emphasizing the importance of reforming the outdated laws governing commercial transactions in Texas and the importance of clarity and uniformity in state laws, made few variations in adopting the 1962 Official Text of the UCC as approved by

⁵⁵ *Vibbert v. Par, Inc.*, 224 S.W.3d 317, 321–22 (Tex. App.—El Paso 2006); *see also supra* notes 33–36 and accompanying text.

⁵⁶ *See supra* notes 33–36 and accompanying text; *see also* Rudd, *supra* note 35, at 968.

⁵⁷ *See supra* notes 33–45 and accompanying text.

⁵⁸ *See supra* Part II. Evidence of the legislature's intended deference to the UCC exists in overwhelming abundance: the UCC is the later and comprehensive act, the legislature repealed a number of the Texas CT law's conflicting provisions, and the legislature then inserted a savings clause (now § 501.005) to clear up any future confusion relating to the primacy of the UCC. *See* Rudd, *supra* note 35, at 968–69. *See also* the plain meaning of UCC §§ 9-109, 9-310, and 9-311. Even with this abundant evidence, confusion still exists in some courts over which law the court should apply. *See infra* Part III, Adoption of the UCOTA should be the legislature's next step, and hopefully last, in clarifying these intentions. *See infra* Part V.

⁵⁹ *See infra* notes 33–58 and accompanying text; *see also infra* notes 61–90 and accompanying text.

⁶⁰ Millard H. Ruud, *The Texas Legislative History of the Uniform Commercial Code*, 44 TEX. L. REV. 597, 597–600 (1966).

⁶¹ *See supra* notes 33–58 and accompanying text.

⁶² *See* Ruud, *supra* note 60, at 597–600.

⁶³ *Id.* at 597.

⁶⁴ *Id.* at 597–600. The legislation introduced from 1951–1965 ranged from a resolution to study the UCC to numerous recommendations for adoption. *Id.*

NCCUSL.⁶⁵ In his speech given at the Texas Institute on the Uniform Commercial Code on October 1, 1965, Professor Frederic K. Spies said that UCC Article 2 “in many ways remains the most conceptually perfect of any parts of the [UCC].”⁶⁶ It is UCC Articles 2 and 9 that vehicle purchasers rely on to assure and protect their ownership of the vehicle against claims including unknown secured parties.⁶⁷

A Texas case has noted that, at least in part, the intent of the legislature in adopting the UCC was to shift this risk of loss.⁶⁸ In *Gallas v. Car Biz, Inc.*,⁶⁹ the appellant argued that the legislature intended to shift the loss to the car dealer based on principles of equity when the legislature enacted section 2.403 of the Texas UCC (section 2-403 in the uniform text). The court dismissed this argument, noting that it already had determined that the CT law controlled in the case.⁷⁰ However, based on the purposes of the UCC, the appellant’s argument had merit.⁷¹ Clearly, UCC section 2-403 “tends to favor the good faith purchaser over the original owner.”⁷²

“This theory is, of course, founded upon the public policy that protection should be afforded consumers in commercial transactions.”⁷³ The UCC, in recognition of that public policy, favors a BIOCOB over the seller’s secured party, and the Texas Legislature reinforced its belief in this public policy by inserting section 501.005 into the Texas CT law, reinforcing the primacy of the UCC in the event of a conflict between the two.⁷⁴ The *Gallas* court noted that “[o]ne of the declared purposes of the [UCC] is to simplify, clarify, and modernize the law governing commercial transactions.”⁷⁵ The court further described the UCC as a “general

⁶⁵ *Id.* at 627. Texas has adopted a number of revisions to the UCC since adopting the 1962 Official Text in 1965. See JOHN E. KRAHMER, 12 TEX. PRAC. SERIES § 24.1, at 5 (3d ed. 2005). Articles 2 and 9 of the UCC are particularly relevant to the issues discussed in this article, and while the NCCUSL released a new version of Article 2 in 2003. Texas and most other states have yet to adopt it. See *id.* The Texas Legislature, however, did adopt the 1999 revised version of Article 9, which took effect in 2001. See TEX. BUS. & COM. CODE ANN. §§ 9.101-9.709 (West 2002).

⁶⁶ Frederic K. Spies, *Uniform Commercial Code: Article 2—Sales; Performance and Remedies*, 44 TEX. L. REV. 629, 644 (1966).

⁶⁷ See *Vibbert v. PAR, Inc.*, 224 S.W.3d 317, 324 (Tex. App.—El Paso March 23, 2006, no pet. h.); *Park Cities Ltd. P’ship. v. Transpo Funding Corp.*, 131 S.W.3d 654 (Tex. App.—Dallas 2004, no pet.); *First Nat’l Bank of El Campo, TX v. Buss*, 143 S.W.3d 915 (Tex. App.—Corpus Christi 2004, pet. denied); *Hudson Buick, Pontiac, GMC Truck Co. v. Gooch*, 7 S.W.3d 191 (Tex. App.—Tyler 1999, pet. denied); *Gallas v. Car Biz, Inc.*, 914 S.W.2d 592, 594–95 (Tex. App.—Dallas 1995, writ denied); *Morey v. Page*, 802 S.W.2d 779 (Tex. App.—Dallas 1990, no writ); *Pfluger v. Colquitt*, 620 S.W.2d 739 (Tex. Civ. App.—Dallas 1981, writ ref’d n.r.e.).

⁶⁸ *Gallas*, 914 S.W.2d at 595.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See *infra* notes 72–90.

⁷² Krahmer, *supra* note 65, § 25.66, at 161.

⁷³ *Pfluger*, 620 S.W.2d 739, 743–47 (Stephens, J., concurring).

⁷⁴ See Krahmer, *supra* note 65, § 25.66, at 161; see also *supra* note 58 and accompanying text; U.C.C. § 9-320. Article 9 clearly has primacy over the CT law, except to the extent that Article 9 expressly defers to the CT law (as to the mechanics of perfection by a CT lien entry procedure). See U.C.C. §§ 9-102(a)(10), 9-109, 9-311(a). However, there is no similar UCC regime to address the relation between the CT law and UCC Article 2. As noted *infra* at Part IV., UCOTA solves this problem.

⁷⁵ *Gallas v. Car Biz, Inc.*, 914 S.W.2d 592, 594 (Tex. App.—Dallas 1995, writ denied) (Wright J., dissenting)

body of law intended as a unified coverage of its subject matter . . . [and] some transactions in motor vehicles are expressly governed thereby.”⁷⁶

Two sections of the Texas UCC, sections 2.403 and 9.230 (sections 2-403 and 9-320 in the uniform text), deserve emphasis for the frequency with which they arise in Texas cases involving disputes over application of the UCC and the Texas CT law.⁷⁷ In enacting section 2.403, the legislature intended that the UCC “state a uniform and simplified policy on good faith purchase of goods,” restating the better case law and the series of former uniform statutes that governed the law together in a consolidated location.⁷⁸

Section 2.403(a) specifically provides for protection of a good faith purchaser for value.⁷⁹ This provision also follows the basic policy in the law, of allowing the transferor to transfer such ownership rights as he or she holds.⁸⁰ Moreover, section 2.403 applies to any form of purchase, and dispels past issues of contention by specifying that it applies even if: (1) the purchaser deceives the transferor as to the purchaser’s identity; (2) a check is given in payment for the purchase and it is later dishonored; (3) an agreement existed that the transaction would be a cash sale; or (4) the delivery was procured through fraud, even if punishable under criminal law.⁸¹ Section 2.403 also protects the buyer from a “reservation of property or other hidden interest” so long as that buyer is a BIOCOB, i.e., buying from a dealer’s inventory.⁸²

Moreover, the section 2.403 “entrustment” principle is carried beyond inventory to include a bailment, where the bailee deals in goods of the kind held.⁸³ This principle allows the BIOCOB to acquire greater rights than the seller (bailee) held at time of sale.⁸⁴ Thus, if the seller/bailee sells to a BIOCOB, the seller transfers all rights of the bailor in the property to the buyer.⁸⁵ Lastly, the drafters used the term “buyer in ordinary course of business” (BIOCOB) in order to provide protection for innocent buyers while allowing some flexibility to the court for cases outside the ordinary course of business.⁸⁶

(quoting *Assocs. Discount Corp. v. Rattan Chevrolet, Inc.*, 462 S.W.2d 546, 548 (Tex. 1970)).

⁷⁶ *Id.* (alterations in original) (quoting *Assocs. Discount Corp.*, 462 S.W.2d at 548 (citations omitted)).

⁷⁷ *See infra* Part III.

⁷⁸ TEX. BUS. & COM. CODE ANN. § 2.403 cmt. Purposes of Changes (West 1994).

⁷⁹ *Id.* § 2.403 cmt. 1.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* § 2.403 cmt. 2. This principle makes complete sense from the standpoint of the party, be it a consignor or lender, who entrusted the goods to the seller because the apparent purpose of such a transaction is to sell the goods and convert them to cash. There can be no other common expectation when one delivers goods to a merchant who sells goods of that kind. *See id.*

⁸³ *Id.*

⁸⁴ Krahmer, *supra* note 65, § 25.66, at 162.

⁸⁵ *Id.*

⁸⁶ *See* TEX. BUS. & COM. CODE ANN. § 2.403 cmt. 3 (West 1994). In the entrustment context, “the transfer must be to a ‘buyer in the ordinary course of business’ and not merely to a good faith purchaser for value,” Krahmer, *supra* note 65, § 25.66, at 162 (citation omitted). To find a situation like that of our Joe Consumer (*see supra* Part 1.), involving a good faith purchaser for value, to be outside the ordinary course of business, a court would have to act both unreasonably and unjustly.

Section 9.320 is the Article 9 version of this rule. It clarifies the circumstances where “a buyer of goods take[s] free of a security interest” even if that security interest is perfected.⁸⁷ This section should be understood in relation to Article 2 section 2.403, which contains general rules on the sale of goods subject to security interests.⁸⁸ The purpose underlying section 9.320 “is to allow ordinary course of business sales out of financed inventory.”⁸⁹

When all of this is applied correctly, courts hold that a BIOCOB obtains ownership of the vehicle free and clear of competing ownership claims of the seller and any bailee and entrustor, and any security interests created by the seller (such as an inventory loan), even absent a transfer of the CT, because the buyer’s ownership interest is superior to that of the competing parties.⁹⁰ Seemingly, this policy is clear in the law, as expressly articulated in our national law of commerce, the UCC. How, then, can one explain the periodic confusion in the case law?

III. PRACTICE MAKES . . . WELL . . . NOT PERFECT: CONFLICTS IN THE TEXAS CASE LAW

A. Interpreting the Texas CT Law

The Dallas Court of Appeals (Dallas court) consistently (and erroneously) has applied the CT law in dealing with situations where a BIOCOB does not obtain execution of the CT covering the purchased vehicle, through some fault of the seller.⁹¹ When this happens, the Dallas court has found that no sale occurred because the CT law requires that the CT be transferred at the time of sale.⁹² In this view, if the dealer did not transfer the CT to the buyer at the time of sale, no sale occurred.⁹³ In such cases, the buyer often argues that, because section 501.005 of the CT law provides that “[c]hapters 1-9, [of the] . . . [UCC] control over

⁸⁷ TEX. BUS. & COM. CODE ANN. § 9.320 cmt. 1 (West 2002).

⁸⁸ Krahmer, *supra* note 65, § 25.66, at 163; *see* TEX. BUS. & COM. CODE ANN. § 9.320 cmt. 1 (West 2002). The Texas Legislature did adopt an exception to section 9.320 in subsection (e) (also in the uniform text), providing that “[s]ubsection (a) and (b) do not affect a security interest in goods in the possession of the secured party under Section 9.313.” *Id.* § 9.320(e). Also included in section 9.320 is a subsection for dealing with a buyer of oil, gas, and other minerals in the ordinary course of business. *Id.* § 9.320(d). The legislature could have also included an exception for vehicles, as it did for goods perfected under section 9.313 and for oil, gas, and other minerals, had it desired to protect the security interests on dealers’ inventories or vehicles above all others. *Cf. id.* § 9.320(d)-(e) (West 2002).

⁸⁹ Krahmer, *supra* note 65, § 34.24, at 701.

⁹⁰ *Vibbert v. PAR, Inc.*, 224 S.W.3d 317, 324 (Tex. App.—El Paso March 23, 2006, no pet. h.) (applying the UCC and protecting the buyer); *First Nat’l Bank of El Campo, TX v. Buss*, 143 S.W.3d 915 (Tex. App.—Corpus Christi 2004, pet. denied) (applying the UCC and protecting the buyer); *Hudson Buick, Pontiac, GMC Truck Co. v. Gooch*, 7 S.W.3d 191 (Tex. App.—Tyler 1999, pet. denied) (applying the UCC and protecting the buyer).

⁹¹ *See Park Cities Ltd. P’ship. v. Trasnsपो Funding Corp.*, 131 S.W.3d 654 (Tex. App.—Dallas 2004, no pet.); *Gallas v. Car Biz, Inc.*, 914 S.W.2d 592, 594–95 (Tex. App.—Dallas 1995, writ denied); *Morey v. Page*, 802 S.W.2d 779 (Tex. App.—Dallas 1990, no writ); *Pfluger v. Colquitt*, 620 S.W.2d 739 (Tex. Civ. App.—Dallas 1981, writ ref’d n.r.e.) (UCC).

⁹² *See Park Cities Ltd. P’ship.*, 131 S.W.3d at 659–60; *Gallas*, 914 S.W.2d at 594; *Morey*, 802 S.W.2d at 783; *Pfluger*, 620 S.W.2d at 741.

⁹³ *See Park Cities Ltd. P’ship.*, 131 S.W.3d at 659–60; *Gallas*, 914 S.W.2d at 594; *Morey*, 802 S.W.2d at 783; *Pfluger*, 620 S.W.2d at 741. Aside from the fact that this is contrary to law (as noted below), this is blatantly unfair to the buyer, since execution of the CT is within the control of the seller and the common practice in dealer sales is to defer transfer of the CT until after the sale.

conflicting provisions of this chapter,” the UCC controls these cases.⁹⁴ However, the Dallas court has answered that since sections 2.401(b), 2.403(a), and 9.320 of the UCC refer to a “purchaser” and a “buyer” respectively, a “‘sale’ or ‘other voluntary transaction creating an interest in the property’” is required to make someone a purchaser or a buyer and to trigger application of the two provisions of the UCC pursuant to section 501.005 of the CT law.⁹⁵ Since the Dallas court has concluded that without transfer of the CT no sale occurs, it also has concluded that the relevant provisions of the UCC (intended to protect buyers in this scenario) are not applicable because they only apply in the event of a sale.⁹⁶

Gallas is an example of the Dallas court’s application of this reasoning. In *Gallas*, a licensed car dealership, Car Biz, sold a motor vehicle to a used car dealer, Stamper.⁹⁷ Stamper issued Car Biz a sight draft for the vehicle, a 1992 Ford Explorer, and Car Biz allowed Stamper to take possession of the vehicle.⁹⁸ Car Biz did not execute or deliver the CT to the buyer (Stamper) at the time of the sale, but as is customary began the process of transferring

⁹⁴ See *Park Cities Ltd. P’ship.*, 131 S.W.3d at 659–60; *Gallas*, 914 S.W.2d at 594; *Morey*, 802 S.W.2d at 783; *Pfluger*, 620 S.W.2d at 741.

⁹⁵ This is clearly an incorrect application of the law to these facts, as the UCC defines such terms as “purchase” and “sale” to include transactions intended to pass title in the future, as well as immediate transfers of ownership. See U.C.C. § 2-401 (excerpted below). Moreover, the definition of “[b]uyer in ordinary course of business” at § 1-201(b)(9) (Texas § 1.201(b)(9)) defines that term by reference to customary practices in the industry, and does not require an immediate passage of title. See *supra* note 14; see also TEX. BUS. & COM. CODE ANN. § 2.401(b) (West Supp. 2007); TEX. BUS. & COM. CODE ANN. § 2.403(a) (Vernon 1994); *Park Cities Ltd. P’ship.*, 131 S.W.3d at 659–60. Section 2.401(b) of the Texas Business and Commerce Code states:

Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place

TEX. BUS. & COM. CODE ANN. § 2.401(b) (West Supp. 2007). Section 2.403(a) of the Texas Business and Commerce Code states:

a) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

1. the transferor was deceived as to the identity of the purchaser, or
2. the delivery was in exchange for a check which is later dishonored, or
3. it was agreed that the transaction was to be a “cash sale”, or
4. the delivery was procured through fraud punishable as larcenous under the criminal law.

TEX. BUS. & COM. CODE ANN. § 2.403(a) (West1994).

⁹⁶ See *Park Cities Ltd. P’ship.*, 131 S.W.3d at 659–60; *Gallas*, 914 S.W.2d at 594; *Morey*, 802 S.W.2d at 783; *Pfluger*, 620 S.W.2d at 741; see *supra* this text Part II. Note that, among other problems with this view, it ignores the applicable definition of “sale” in UCC Article 2. See, e.g., U.C.C. § 2-401; *supra* note 95.

⁹⁷ See *Gallas*, 914 S.W.2d at 592–93.

⁹⁸ *Id.* at 593.

the CT to Stamper.⁹⁹

Stamper sold the vehicle three days later to Gallas for \$14,000, which Gallas paid to Stamper.¹⁰⁰ Gallas filled out an application for a CT, relying on Stamper's representation that the CT was "in transit or in transfer," and received possession of the vehicle.¹⁰¹ Before the Texas Department of Transportation performed any CT transfer, Car Biz's bank informed it that Stamper's draft had been dishonored; therefore, Car Biz did not complete the CT transfer.¹⁰² Car Biz reported the vehicle stolen, resulting in Gallas's arrest, and then applied for and received a new CT.¹⁰³ Gallas filed an action seeking a declaration that he owned the vehicle and specific performance of the ownership transfer, along with asserting other claims in conversion and estoppel.¹⁰⁴ Car Biz counterclaimed for a declaration of ownership and possession of the vehicle.¹⁰⁵ The trial court granted Car Biz's motion for judgment notwithstanding the verdict, declaring Car Biz the owner and ordering Gallas to deliver the vehicle to Car Biz.¹⁰⁶

The Dallas court, in reviewing Car Biz's motion for judgment notwithstanding the verdict, addressed application of the Texas CT law and the UCC, as well as the applicable case law precedent.¹⁰⁷ Car Biz argued that, pursuant to the Texas CT law, Stamper did not have "good title" because he had not obtained execution of the CT and, therefore, Stamper could not pass ownership to Gallas.¹⁰⁸ Gallas responded that section 2.403(b) of the UCC controls the passage of ownership.¹⁰⁹ He argued that Car Biz entrusted the vehicle to Stamper giving Stamper "the power to transfer all rights in the vehicle"¹¹⁰

The Dallas court noted that in *Morey v. Page* and *Pfluger v. Colquitt*¹¹¹ the court had addressed the same issue. Quoting *Pluger*, the Dallas court interpreted section 2.403(b) of the

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 594–95.

¹⁰⁸ *Id.* at 594; *see also* Tex. Transp. Code Ann. §§ 501.071, .073 (Vernon 2007).

¹⁰⁹ *See Gallas*, 914 S.W.2d at 594. Section 2.403(b) of the Texas Business and Commerce Code. Texas's adopted version of section 2-403(2) of the UCC, states: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." TEX. BUS. & COM. CODE ANN. § 2.403(b) (West 1994).

¹¹⁰ *See Gallas*, 914 S.W.2d at 594.

¹¹¹ *Id.*; *see generally* *Morey v. Page*, 802 S.W.2d 779, 783–84 (Tex. App.—Dallas 1990, no writ) (finding that the Texas CT law controls a transaction for motor vehicles without proper transfer of title); *Pfluger v. Colquitt*, 620 S.W.2d 739, 741–42 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.) (determining that the Texas CT law limits the power to transfer ownership of a vehicle, and controls). Interestingly, both *Pfluger* and *Morey* relied primarily on agency law to determine the Texas CT law to be controlling. *See Morey*, 802 S.W.2d at 783–84; *Pfluger*, 620 S.W.2d at 741–42.

Texas UCC as giving to the merchant the same rights to transfer which the entruster had.¹¹² However, the Dallas court further concluded that the Texas CT law is a limit on this power of the entruster; if the person entrusting the property to the merchant did not have the ownership required to sell the vehicle, then the merchant cannot sell the vehicle either.¹¹³ The Dallas court then held that “because [*Gallas*] involves the sale of a motor vehicle without proper transfer of the certificate of title . . . it is, likewise, governed by the [CT law].”¹¹⁴ The Dallas court responded in a circular manner to *Gallas*'s assertion that the legislature, in enacting section 2.403, intended to shift the burden of this loss to parties in Car Biz's position, stating that the court already had determined that the Texas CT law controlled. The court then stated that *Gallas* was free to pursue a cause of action against Stamper.¹¹⁵

Gallas is striking in its misapplication of the plain meaning of the UCC and for disregarding the clear intent of the legislature, and was the subject of a strong dissenting opinion. In the dissent, Justice Wright began by noting the provision of the Texas CT law stating that the UCC controls “in instances where the [UCC] and the [Texas CT law] conflict.”¹¹⁶ Justice Wright concluded that, under sections 2.401 and 2.403(a)-(b) of the Texas UCC, *Gallas* should recover based upon the jury's fact-findings with regards to those sections.¹¹⁷ Justice Wright noted that the majority did not discuss these sections because the majority felt that addressing those sections of the UCC would be improper since *Gallas* did not specifically assert them on appeal; however, Justice Wright noted that *Gallas* asserted the applicability of the UCC on appeal, and concluded that a failure to cite specific sections amounted to a failure to cite a specific piece of authority rather than the failure to raise an issue on appeal.¹¹⁸

¹¹² *Gallas*, 914 S.W.2d at 594 (quoting *Pfluger*, 620 S.W.2d at 741–42).

¹¹³ *Id.* (quoting *Pfluger*, 620 S.W.2d at 741–42). Note that, while it may be true as a general principle that the entrustment rule only transfers the rights of the entruster, in this case Car Biz was the owner/entruster and clearly transferred its ownership rights to Stamper under UCC Article 2.

¹¹⁴ *Gallas*, 914 S.W.2d. at 595.

¹¹⁵ *Id.* This is clearly beside the point and inferior to the remedy provided by the UCC and intended by the legislature. Moreover, the *Gallas* court relied on a case stating (contrary to the decision in *Gallas*) that “a sale between the parties is not rendered void by non-compliance with the [CT law].” *Id.* (citing *Cash v. Lebowitz*, 734 S.W.2d 396, 398 (Tex. App.—Dallas 1987, writ ref'd n.r.e.)). By this reasoning, the *Gallas* court should have found that the sale to *Gallas* was “not rendered void by non-compliance with the [CT law],” that *Gallas* was therefore a buyer protected under UCC Article 2, and that Car Biz could pursue a remedy against Stamper. *Id.* (citing *Cash*, 734 S.W.2d at 398). The *Gallas* court seemed to find comfort in the fact that an avenue for recovery remained available to *Gallas* via Stamper; but if the sale was valid between the parties, as the court claimed, then the court should have held that *Gallas* was protected as the purchaser. *See id.* Undoubtedly, if the court found for *Gallas*, Car Biz would have pursued its remedy against Stamper. Moreover, this result would properly reflect that Car Biz was the party at fault, not *Gallas*.

¹¹⁶ *Id.* (Wright, J. dissenting); *see also* TEX. TRANSP. CODE ANN. § 501.005 (West 2007).

¹¹⁷ *Gallas*, 914 S.W.2d at 596 (Wright, J. dissenting). Regarding sections 2.401 and 2.403 of the Texas UCC, the jury found:

- (1) Stamper purchased the vehicle from [Car Biz];
- (2) [Car Biz] delivered the vehicle to Stamper under a purchase transaction;
- (3) [Car Biz] entrusted possession of the vehicle to Stamper;
- (4) Stamper was a merchant who dealt in the business of used automobiles;
- (5) [*Gallas*] was a buyer in the ordinary course of business.

Id. at 593.

¹¹⁸ *Id.* at 596 (Wright, J. dissenting).

Justice Wright noted that, under Texas UCC section 2.401, once the seller physically completes delivery of the goods, ownership passes to the buyer regardless of the subsequent delivery of related documentation.¹¹⁹ Justice Wright then noted that Texas UCC section 2.403(a) provides that delivery of goods as part of a purchase transaction provides the purchaser power to transfer ownership to a good faith purchaser even when the goods are exchanged for a draft that is later dishonored.¹²⁰ Justice Wright concluded that a seller transfers ownership under section 2.403(b) when he or she intends to transfer all of the entruster's rights.¹²¹ Accordingly, if the Texas CT law provides a different outcome, then an apparent conflict exists between the UCC and the Texas CT law; therefore, according to the express language of the Texas CT law, the UCC controls because there is a conflict with the CT law.¹²²

Justice Wright then applied the law to the facts of *Gallas*.¹²³ The Texas CT law provides that the UCC controls in cases of conflict, and UCC sections 2.401, 2.403(a), and 2.403(b) indicate that vehicle sales in Texas are not controlled exclusively by the Texas CT law.¹²⁴ In applying section 2.403(b), Justice Wright determined that the basic issue to be decided in the case was the extent of Car Biz's rights under the UCC when Car Biz gave possession to Stamper.¹²⁵ Once Car Biz delivered the vehicle to Stamper, under Texas UCC section 2.401 the ownership passed to Stamper regardless of whether Car Biz delivered the CT at a later time.¹²⁶ Thus, Stamper could transfer that ownership to a good faith purchaser even if the bank dishonored his draft to Car Biz.¹²⁷ Stamper acquired the ownership and passed that ownership to Gallas regardless of Stamper's failure to receive or deliver the CT at the time of sale.¹²⁸

¹¹⁹ *Id.* at 596–97 (Wright, J., dissenting); see TEX. BUS. & COM. CODE ANN. § 2.401 (West Supp. 2007); see *supra* note 95 (full text of section 2.401(b) of the Texas UCC).

¹²⁰ *Gallas*, 914 S.W.2d at 596–97 (Wright, J., dissenting); see TEX. BUS. & COM. CODE ANN. § 2.403(a) (West 1994); see *supra* note 95 (full text of section 2.403(a) of the Texas UCC).

¹²¹ *Gallas*, 914 S.W.2d at 596–97 (Wright, J., dissenting); see TEX. BUS. & COM. CODE ANN. § 2.403(b) (West 1994); see *supra* note 109 (full text of section 2.403(b) of the Texas UCC).

¹²² See TEX. TRANSP. CODE ANN. § 501.005 (West 2007); *Gallas*, 914 S.W.2d at 596, 600 (Wright, J., dissenting) (“A statutory interpretation which attempts to harmonize these provisions necessarily admits there is a conflict between them.”).

¹²³ *Gallas*, 914 S.W.2d at 596–601.

¹²⁴ *Id.* at 598 (Wright, J., dissenting); see TEX. BUS. & COM. CODE ANN. § 2.401 (West Supp. 2007); *id.* § 2.403(a)-(b) (West 1994); TEX. TRANSP. CODE ANN. § 501.005 (West 2007).

¹²⁵ *Gallas*, 914 S.W.2d at 598 (Wright, J., dissenting); see TEX. BUS. & COM. CODE ANN. § 2.403(b) (West 1994); *supra* note 121 and accompanying text. Car Biz's rights are the rights that pass to Stamper. See *Gallas*, 914 S.W.2d at 598 (Wright, J., dissenting).

¹²⁶ TEX. BUS. & COM. CODE ANN. § 2.401 (West 2011); see also *Gallas*, 914 S.W.2d at 598 (Wright, J., dissenting). Despite what the majority says, this section is in direct conflict with the part of the Texas CT law purporting to require transfer of the CT for a sale. Compare TEX. TRANSP. CODE ANN. § 501.071 (West 2011) (providing that a sale requires a transfer of the CT), with TEX. BUS. & COM. CODE ANN. § 2.401 (West 2011) (providing that ownership passes with physical delivery of the goods).

¹²⁷ See TEX. BUS. & COM. CODE ANN. § 2.403(a) (West 2011); see also *Gallas*, 914 S.W.2d at 598 (Wright, J., dissenting).

¹²⁸ See discussion *supra* notes 116–19 and accompanying text.

In his dissent, Justice Wright distinguished the cases relied upon by the majority.¹²⁹ First, he noted that *Pfluger* is distinguishable on its facts.¹³⁰ While *Boswell* and *Morey* are nearly identical factually to *Gallas*, he observed that both cases similarly misapplied the law.¹³¹

The law clearly supports Justice Wright's position.¹³² *Gallas* relied heavily upon resolution of the conflict between the Texas CT law and the UCC as addressed in *Pfluger*, but the *Pfluger* court applied these laws incorrectly. The *Pfluger* majority relied on a principle of statutory construction which provided that the court had a duty "to interpret statutory language so as to harmonize apparently conflicting provisions and give effect to each in light of its purpose, if such an interpretation [was] reasonable."¹³³

However, the *Pfluger* court failed to properly complete the analysis for two reasons: First, the cases upon which the *Pfluger* court relied for the governing principle looked at whether the legislature intended, by its actions, to change the previous public policy of the state; yet, the *Pfluger* court never considered this in the context of the Texas CT law and its relation to the UCC.¹³⁴ Second, none of the statutes considered in support of the statutory principle applied by the *Pfluger* majority contained intra-state preemption clauses.¹³⁵ In this situation, the reverse-preemption clause in section 501.005 of the Texas CT law creates additional support for Justice Wright's position, because the majority, by harmonizing in an effort to honor the intent of both laws, contradicted the clear legislative intent, namely to give effect to the UCC, as expressed by the reverse-preemption clause in section 501.005 of the Texas CT law.¹³⁶

Additionally, the *Pfluger* court did not consider the legislature's purpose in placing the reverse-preemption clause in the CT law—the legislature precisely intended to change the public policy surrounding auto sales to reflect the principles of the UCC.¹³⁷ Because the *Pfluger* court did not consider these factors, that court's attempt to harmonize the laws did not

¹²⁹ *Gallas*, 914 S.W.2d at 598 (Wright, J., dissenting).

¹³⁰ *Id.*; see generally *Pfluger v. Colquitt*, 620 S.W.2d 739 (Tex. Civ. App.—Dallas 1981, no writ) (discussing the relationship between the Texas CT law and the UCC, but ultimately relying on the finding of a principal-agent relationship in finding the Texas CT law controlling).

¹³¹ *Gallas*, 914 S.W.2d at 599–600 (Wright, J., dissenting); see generally *Boswell v. Connell*, 556 S.W.2d 624 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.) (misapplying both the Texas CT law and *Pfluger*, because *Pfluger* merely discussed the Texas CT law and the UCC, then ultimately relied on the agency relationship for its holding); see also *Morey v. Page*, 802 S.W.2d 779 (Tex. App.—Dallas 1990, no writ) (misapplying *Pfluger*).

¹³² See discussion *supra* notes 116–30 and accompanying text.

¹³³ *Pfluger*, 620 S.W.2d at 741.

¹³⁴ *Id.* (citing *State v. Standard Oil Co.*, 107 S.W.2d 550, 559 (Tex. 1937); *County of Harris v. Tenn. Prods. Pipe Line Co.*, 332 S.W.2d 777, 781 (Tex. Civ. App.—Houston 1960, no writ)).

¹³⁵ *Id.* (citing *Standard Oil Co.*, 107 S.W.2d at 559; *Tenn. Prods. Pipe Line Co.*, 332 S.W.2d at 781). In fact, Texas CT law § 501.005 is somewhat unusual among state CT laws, although it merely restates what should already be the law. This should make these cases easy to decide in Texas, and it is instructive that (as described in this article) experience is to the contrary. Given these problems, even in the face of § 501.005, one can only wonder at the problems that await cases in other jurisdictions without an equivalent to § 501.005. UCOTA, of course, resolves these problems. See *infra* Part IV.

¹³⁶ See *Pfluger*, 620 S.W.2d at 741–42.

¹³⁷ See *id.*

eliminate the conflict between the laws.¹³⁸ The *Gallas* majority's adoption of this reasoning led it similarly astray.¹³⁹

In discussing Texas UCC section 2.401, Justice Wright noted that the legislature provided instructions in the event of a conflict between the UCC and the Texas CT law, and “[a] statutory interpretation which attempts to harmonize [them] necessarily admits there is a conflict . . . [and] is erroneous.”¹⁴⁰ The express language of the UCC provides that “title passes to the buyer when the seller completes . . . physical delivery.”¹⁴¹ There is no mention of other limits on the “rights of the seller” as the basis for a transfer of ownership under section 2.401; therefore, the Texas CT law does not limit the seller’s power to transfer ownership.¹⁴² Justice Wright properly concluded that the express language of the Texas UCC in section 2.401 should have entitled *Gallas* to recover when applied to the jury’s finding that Stamper sold and physically delivered the vehicle to *Gallas*.¹⁴³

Lastly, Justice Wright applied Texas UCC section 2.403(a) to *Gallas*.¹⁴⁴ In addition to section 2.401, he noted that the majority also ignored section 2.403(a).¹⁴⁵ The jury determined that Car Biz, Inc. delivered the vehicle to Stamper, who was a merchant purchasing the goods in a “transaction of purchase.”¹⁴⁶ Because the jury determined *Gallas* to be a BIOCOB, Stamper also transferred ownership to *Gallas* under section 2.403(a).¹⁴⁷ Ultimately, Justice Wright stated that the UCC controlled and entitled *Gallas* to recover “upon the application of the jury’s fact-findings to section 2.403(a).”¹⁴⁸

The Dallas court thus reflected two very different views in *Gallas*: (1) the framing of the view in favor of settling this conflict entirely under the Texas CT law;¹⁴⁹ and (2) the view of Justice Wright, recognizing application of the UCC, in the dissent.¹⁵⁰ Ultimately, the view Justice Wright expressed in the *Gallas* dissent became the majority in a later El Paso Court of Appeals (El Paso court) case.¹⁵¹ Justice McClure, writing for the majority of the El Paso court in *Vibbert v. PAR, Inc.*,¹⁵² applied reasoning very similar to that of Justice Wright’s dissent in

¹³⁸ *Id.*

¹³⁹ *Gallas v. Car Biz, Inc.*, 914 S.W.2d 592, 594–95 (Tex. App.—Dallas 1995, writ denied) (majority opinion).

¹⁴⁰ *Id.* at 600 (Wright, J., dissenting).

¹⁴¹ *Id.* (Wright, J., dissenting) (citing TEX. BUS. & COM. CODE ANN. § 2.401 (West 2011)).

¹⁴² *Id.* (Wright, J., dissenting) (citing TEX. BUS. & COM. CODE ANN. § 2.401 (West 2011)).

¹⁴³ *See Id.* (Wright, J., dissenting).

¹⁴⁴ *Id.* at 600–01 (Wright, J., dissenting).

¹⁴⁵ *Id.* at 600 (Wright, J., dissenting) (quoting TEX. BUS. & COM. CODE ANN. § 2.401 (West 2011) (stating that the validity of a draft does not impact the power of a person with voidable title to transfer good title to a good faith purchaser in a purchase transaction); TEX. BUS. & COM. CODE ANN. § 2.403(a) (West 2011)).

¹⁴⁶ *Id.* (Wright, J., dissenting) (quoting TEX. BUS. & COM. CODE ANN. § 2.403(a) (West 2011)).

¹⁴⁷ *Id.* (Wright, J., dissenting).

¹⁴⁸ *Id.* (Wright, J., dissenting).

¹⁴⁹ *Id.* at 594–95 (majority opinion).

¹⁵⁰ *Id.* at 595–601 (Wright, J. dissenting).

¹⁵¹ *See id.* (Wright, J. dissenting); *cf. Vibbert v. PAR, Inc.*, 224 S.W.3d 317 (Tex. App.—El Paso 2006, no pet.) (applying the *Gallas* dissent’s reasoning); *see discussion infra* notes 152–73 and accompanying text.

¹⁵² 224 S.W.3d 317, 317 (Tex. App.—El Paso 2006, no pet. h.).

Gallas. This analysis as applied in *Vibbert* serves as a good example of how various other Texas appellate courts have held that the buyer is protected under the UCC, rejecting the erroneous precedent set by the Dallas court.

B. Cases Holding the Buyer Protected Under the UCC

As noted, other Texas appellate courts using Justice Wright's reasoning have held that the reverse-preemption provision in the CT law applies and, as a result, the controlling statute is the UCC.¹⁵³ Thus, the El Paso court in *Vibbert* acknowledged the CT law, but found the UCC controlling.¹⁵⁴

In *Vibbert*, Sandra and Joseph Vibbert traded in their 1998 Nissan Altima to G.S. Motor Sports (G.S.) to supplement the purchase of a 1989 Mercedes Benz.¹⁵⁵ G.S. agreed to pay off the loan balance owed on the Altima.¹⁵⁶ G.S. sold the car a few days later to the Kuwamotos, who contacted Zoom Lot Funding (Zoom) to finance the purchase.¹⁵⁷ Approximately one month later, Wells Fargo Bank (Wells Fargo), the Vibberts' secured creditor for the Altima, contacted the Vibberts and notified them that it had received no payment for the secured debt owed on the Altima.¹⁵⁸ Sandra Vibbert contacted Gary Swenson, the owner of G.S., and obtained a copy of the payoff check.¹⁵⁹ Ms. Vibbert then discovered that the G.S. check had bounced and thus G.S. had never paid off the secured debt owed to Wells Fargo.¹⁶⁰ The vehicle was subsequently repossessed by PAR. The Vibberts then filed suit against PAR—a company specializing in repossessing vehicles for secured parties—to assert their superior interest in the vehicle and allege conversion.¹⁶¹

¹⁵³ See *id.* at 324; see also TEX. TRANSP. CODE ANN. § 501.005 (West 2011); First Nat'l Bank of El Campo, TX v. Buss, 143 S.W.3d 915, 915 (Tex. App.—Corpus Christi 2004, pet. denied); Hudson Buick, Pontiac, GMC Truck Co. v. Gooch, 7 S.W.3d 191, 191 (Tex. App.—Tyler 1999, pet. denied). Note that while this is the correct result, it is not the correct reasoning. At least in cases involving UCC Article 9, the law governing these scope issues is Article 9, not the CT law. See U.C.C. § 9-109 (2001) (Article 9 governs security interest issues); see also U.C.C. § 9-311(a) (limited exception for perfection under the CT law, but not for priority and related issues).

¹⁵⁴ See U.C.C. §§ 9-109, 9-311; see also *Vibbert*, 224 S.W.3d at 324.

¹⁵⁵ *Id.* at 318.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 318–19.

¹⁵⁸ *Id.* at 319.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* In another suit, Ms. Vibbert sued G.S. and owner Gary Swenson.

¹⁶¹ *Id.* at 319–20. Because G.S. never paid off the loan, the Vibberts were still indebted to Wells Fargo. If they could not claim ownership of the vehicle, they would lose the value of the vehicle and would have liability to Wells Fargo for the outstanding balance of the debt. *Id.* at 318–19. Potentially, the Vibberts could reclaim this amount in the suit filed against G.S.; however, if G.S. was insolvent the Vibberts would be near the back of the line in making claims in bankruptcy and would likely be left with little or no prospect of recovery. See 11 U.S.C. § 507 (2006) (priorities in bankruptcy); *Id.* at 319. Additionally, although not discussed in *Vibbert*, state law required G.S. to “obtain a \$25,000 surety bond from an approved surety to guarantee (1) its payment of all valid bank drafts drawn by it to buy motor vehicles . . .” Gramercy Ins. Co. v. Arcadia Fin. Ltd., 32 S.W.3d 402, 405 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Potentially, if this fund were not previously drained by parties closer to the front of the line, the Vibberts could seek recovery through this statute. See TEX. TRANSP. CODE ANN. § 503.033 (West 2011).

Roughly six months after the sale of the Altima to the Kuwamotos, Cygnet, the parent company of Zoom, had contacted PAR.¹⁶² PAR's CT department customarily acquires a duplicate CT, or repossession CT, for its customers, in order to effect a secured party's repossession.¹⁶³ In this instance, Cygnet provided PAR with the relevant documents regarding the sale of the Altima to the Kuwamotos and the security interest held by Zoom, preparatory to the repossession; nowhere in this documentation was there an indication that any interest in the vehicle was held by the Vibberts or Wells Fargo.¹⁶⁴ PAR then hired another company, C & M Title Services, to obtain a certified copy of the Altima's Texas CT, which showed Sandra Vibbert as the record owner and Wells Fargo as the secured party; however, this information was never shared with PAR.¹⁶⁵ C & M Title Services then filed an application to transfer the CT from the Vibberts to the Kuwamotos; the record was unclear exactly how this was done, and exactly who signed the names of Ms. Vibbert and her secured party to the CT application.¹⁶⁶

Each of these parties claimed the right of ownership and possession under different laws.¹⁶⁷ The Vibberts claimed that, under the Texas CT law, the sale from Sandra Vibbert to G.S. was void because Sandra Vibbert never transferred the CT; therefore, they claimed that possession of the Altima rightfully belonged with the Vibberts.¹⁶⁸ PAR argued that, pursuant to the UCC, ownership of the Altima passed upon Sandra's sale and physical delivery of the vehicle to the dealer, terminating Sandra's rights of ownership and possession.¹⁶⁹ The *Vibbert* court examined the nature and purposes of both laws, noting that the purpose of the CT law "is not to prevent sales and transfers of interests in motor vehicles."¹⁷⁰

After discussing the interplay between the purposes of these laws and their conflicts,

¹⁶² *Vibbert*, 224 S.W.3d at 319.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* The actual secured party indicated on the CT was Norwest Bank El Paso, but prior to the case the security interest was assigned to Wells Fargo Bank. *See id.* at 318–19. This may raise other issues. *See, e.g.,* Alvin C. Harrell, *Does a Secured Party's Assignment or Change of Name or Entity Require a New Certificate of Title?*, 63 CONSUMER FIN. L.Q. REP. 114 (2009).

¹⁶⁶ *Vibbert*, 224 S.W.3d at 319. The release of the security interest held by Wells Fargo "was purportedly signed by Brenda Bodkin, a PAR supervisor, as agent for [Wells Fargo]." *Id.* The company hired by PAR, C & M Title Services, denied that there was any forgery in the application. *Id.*

¹⁶⁷ *Id.* at 321. The trial court granted PAR's traditional and no evidence summary judgment motions without denoting the foundation for its ruling, leading to this appeal. *Id.* at 319–20.

¹⁶⁸ *Id.* at 321.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*; *see generally* discussion *supra* Part II B-C. (discussing the nature and purposes of the Texas CT law and UCC). In *Vibbert*, the El Paso court also noted a distinct conflict in the way a transfer of ownership relates to completion of a sale. *Id.* at 322. Under the UCC, "a 'sale' consists of the 'passing of title from the seller to the buyer for a price' (Section 2.401)." *Id.* (quoting TEX. BUS. & COM. CODE ANN. § 2.106(a) (West 2011)). The UCC also states that, regardless of any reservation of a security interest or the CT being delivered at another time or place, ownership passes to the buyer immediately upon the seller's completion of physical delivery of the goods. *Id.* (citing TEX. BUS. & COM. CODE ANN. § 2.401(b) (West 2011)). Under the CT law, however, a sale that violates Chapter 501 of the Texas Transportation Code "is void and title may not pass until the requirements of the chapter are satisfied." *Id.* (citing TEX. TRANSP. CODE ANN. § 501.073 (West 2011)).

Justice McClure discussed the Vibberts' reference, at the oral argument, to the *Gallas* case. In *Gallas*, as noted above, the Dallas court held that the Texas CT law controlled, but Justice McClure concluded in *Vibbert* that the proper interpretation was Justice Wright's dissent in *Gallas*.¹⁷¹ While the *Gallas* majority held that no conflict existed between the two laws because under the CT law no sale occurred. Justice Wright noted that this is contrary to the UCC, and "[a] statutory interpretation which attempts to harmonize these provisions necessarily admits there is a conflict between them."¹⁷²

The *Gallas* majority held that an interpretation harmonizing the CT law and the UCC, as the Dallas court purported to do in both *Pfluger* and *Morey*, "obviates the necessity to resort to section [501.005] of the [CT law] to resolve any apparent conflict."¹⁷³ However, in *Vibbert* the El Paso court agreed with Justice Wright that a conflict exists between the two laws. The decision in *Vibbert*, applying the reasoning of Justice Wright's dissent, ultimately favored PAR, affirming the trial court's grant of summary judgment and declaring that Sandra Vibbert transferred ownership when she delivered the Altima to G.S. as part of the purchase of her Mercedes Benz, and her failure to transfer the Altima's CT did not void the sale.¹⁷⁴ The El Paso court "conclude[d] that there is a conflict between . . . the [UCC] and . . . the [CT law]"; and that, by the Texas CT law's express language, the UCC has primacy when a conflict exists between the two.¹⁷⁵

Other courts of appeals in Texas, with the exception of the Dallas court, have reached the same conclusion as the El Paso court in *Vibbert*, in cases with related, though different, sets of facts.¹⁷⁶ The Corpus Christi Court of Appeals (Corpus Christi court), in *First Nat'l Bank of El Campo, Tex. v. Buss*,¹⁷⁷ held that "the [Texas CT law] and the [UCC] conflict with regard to when legal title passes under the circumstances presented . . . and . . . provisions of the [UCC] control to establish the relative rights of a floor-plan financier and a purchaser of a used vehicle from a dealer." Similarly, in *Gramercy Ins. Co. v. Arcadia Fin. Ltd.*,¹⁷⁸ the Houston

¹⁷¹ *Id.* at 321–24. The court also noted Justice Stephens's concurrence in *Pfluger*, which Justice Wright cited in his dissent in *Gallas*. *Id.* (citing *Pfluger v. Colquitt*, 620 S.W.2d 739, 747 (Tex. Civ. App.—Dallas 1990, no writ) (Stephens, J., concurring)); see also *Gallas v. Car Biz, Inc.*, 914 S.W.2d 592, 595 (Tex. App.—Dallas 1995, writ denied) (Wright, J., dissenting).

¹⁷² *Vibbert*, 224 S.W.3d at 321–24 (quoting *Gallas*, 914 S.W.2d at 600 (Wright, J., dissenting)).

¹⁷³ *Gallas*, 914 S.W.2d at 595 (Wright, J., dissenting). The *Gallas* court referred to the conflict as "apparent," yet insisted that no conflict exists. See *id.* This was probably intended to suggest a "false" conflict, i.e., one that apparently exists but upon analysis is resolved by harmonization. But, as illustrated here, in this instance the conflict is real and to the extent it can be harmonized by using § 501.005, the Dallas court did so incorrectly.

¹⁷⁴ *Vibbert*, 224 S.W.3d at 324; see discussion *supra* notes 153–73.

¹⁷⁵ This is clearly the correct result. See *Vibbert*, 224 S.W.3d at 324. But see *supra* note 153.

¹⁷⁶ See discussion *infra* notes 178–82 and accompanying text.

¹⁷⁷ *First Nat'l Bank of El Campo, Tex. v. Buss*, 143 S.W.3d 915, 923–24 (Tex. App.—Corpus Christi 2004). The basic facts of *El Campo* are as follows: Over several separate transactions, the buyers purchased and took possession of the cars from the used car dealer, Dota, filled out the CT applications, and left them with Dota, who never completed the applications. *Id.* at 916–17. The dealer defaulted on its promissory note and the floor-plan lender made a demand to return the vehicles on both the dealership and the buyers. *Id.* The dealer, however, filed bankruptcy, and the buyers each filed suit to clarify the ownership. *Id.*

¹⁷⁸ *Gramercy Ins. Co. v. Arcadia Fin. Ltd.*, 32 S.W.3d 402, 408 (Tex. App.—Houston [14th Dist.] 2000) (quoting *Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Ins. Co.*, 465 S.W.2d 933, 937 (Tex. 1971) (overruled on

court stated: “[E]ven in the face of non-compliance [with the Texas CT law], the sale of a vehicle without the transfer of a title certificate [the CT] is valid ‘as between the parties, when the purposes of the Certificate of Title Act [CT law] are not defeated, although the Act [CT law] declares that the non-transfer of such certificates [CT] renders the sale void.’”¹⁷⁹ The Tyler Court of Appeals, in *Hudson Buick, Pontiac, GMC Truck Co. v. Gooch*,¹⁸⁰ noted the change in the law following the decision in *Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Ins.* when the court stated: “[T]he legislature amended the [Texas CT law] to include section 65 [now section 501.005,] which stated that the [UCC] controlled if there was a conflict with the [Texas CT law].”¹⁸¹

Thus, most but by no means all, Texas courts have held that a conflict exists between the Texas CT law and UCC on these issues, and that courts should apply the UCC to these situations, protecting the buyer over the rights of the seller’s security party.¹⁸² However, the analysis remains murky and unsettled, as illustrated by this Texas case law, even in the face of

other points of law by statute)). In *Gramercy*, the “[l]ender for an automobile dealership brought action against surety to recover on dealer’s bond after the lender obtained a default judgment against the dealer for failing to repurchase installment contracts.” *Id.* at 402. For a discussion of the purposes of the Texas CT law, see *supra* Part II A.

¹⁷⁹ *Gramercy*, 32 S.W.3d at 408 (quoting *Phillips Ford*, 465 S.W.2d at 937.).

¹⁸⁰ *Hudson Buick, Pontiac, GMC Truck Co. v. Gooch*, 7 S.W.3d 191, 198 (Tex. App.—Tyler 1999, pet. denied) (citing Act of May 10, 1971, 62nd Leg., R.S., ch. 123, reprinted in 1971 Tex. Gen. Laws 895, 896 (West 2007) (recodified as TEX. TRANSP. CODE ANN. § 501.005 (West 2011) by Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995)). In *Hudson*, Newton Hudson, the owner of the Hudson Buick, Pontiac, GMC Truck Company, agreed to sell four vehicles to Don Shirley, an automobile wholesaler who purchased the cars on behalf of Cars of Texas. *Hudson*, 7 S.W.3d at 193. Shirley only paid a portion of the amount owed to Hudson, but signed a contract to purchase all four vehicles and promised to bring the remainder of the money when the banks opened. *Id.* at 194. Shirley and three others took the vehicles from the Hudson lot to the Cars of Texas lot, where they left three of the vehicles. *Id.* Shirley used the fourth vehicle to transport the three other drivers and himself back to Henderson. *Id.* Once back in Henderson, the car was involved in an auto accident resulting in the death of another driver, Edelle Newton Irwin. *Id.* The injured parties and her estate filed suit against Hudson, asserting that it still owned the vehicle. *Id.*

¹⁸¹ *Id.*

¹⁸² See also *In re Bailey Pontiac*, 139 B.R. 629, 633 n.3 (Bankr. N.D. Tex. 1992) (rejecting the need to even consider the application of the Texas CT law given the adoption of § 501.005); *Tyler Car & Truck Center v. Empire Fire & Marine Ins. Co.*, 2 S.W.3d 482, 485 (Tex. App.—Tyler 1999) (“[A]n automobile [sale] which may not be in exact compliance with the [Texas CT law] may still be valid as between the buyer and seller.”).

Although, as illustrated by this discussion, Texas has its share of problems with its current CT law, these problems are not unique to Texas; many other states experience similar or greater problems with their CT laws. See discussion *infra* Part IV.; see generally John Krahmer, *Cars, Boats, and Security Interests: Certificates of Title and the Uniform Commercial Code*, 48 CONSUMER FIN. L.Q. REP. 149 (1994) (discussing the various CT laws in the United States). States use a variety of CT systems, which has led to confusion in and among the states regarding CT laws. See *id.* The existence of these systems flowed from the past promulgation of two uniform CT laws, each of which gained only partial support from the states. *Id.* Even further exacerbating the confusion, every state adopted the UCC, further altering the CT laws in many states and creating a new area for conflict. See TEX. BUS. & COM. CODE ANN. § 1, Table of Jurisdictions Wherein UCC Has Been Adopted (West 2011). This piecemeal adoption led to a disconnect between the principles of the UCC, which the states uniformly adopted, and many states’ CT laws. See, e.g., Krahmer, *supra*, at 149.

Different authors were one cause of these problems: the early CT laws were drafted by different authors at different times, none of whom followed the UCC. *Id.* Individual state amendments increased the disparities among the states’ CT laws and worsened the lack of uniformity, causing confusion for both sophisticated and unsophisticated parties alike. See *id.*

clear scope provisions in UCC Article 9 and an unusual effort by the Texas Legislature to harmonize the conflict via section 501.005. Since this article's first publication in 2009, nothing has changed. The same courts identified in this article have not changed from their interpretation. One additional court, the First Court of Appeals in Houston, has noted that the conflict addressed by the El Paso, Corpus Christi, and Tyler Courts of Appeals exists.¹⁸³ Although the court did not find it applicable to the case it was deciding at the time, the First Court of Appeals in Houston acknowledged that the UCC controls in cases where the Texas CT law and UCC lead to different results.¹⁸⁴ The problem lies largely in the fact that the Texas CT law seems largely to have been written in a vacuum, without sufficient regard to other laws with which it must interact, such as the UCC. This is a foundational and pervasive flaw, which can only be fully resolved by comprehensive legal reform. Until that occurs, useless and needless litigation like that noted above will be inevitable.

IV. THE SOLUTION: THE UNIFORM CERTIFICATE OF TITLE ACT¹⁸⁵

A. Background

These cases clearly indicate that the time has come for enactment of a modern, uniform CT law.¹⁸⁶ Recognizing this, in 2002, amidst continuing case law problems and disparities, and weaknesses in the states' CT laws that present negligent and even devious persons with numerous opportunities to mislead innocent consumers, the NCCUSL formed a Drafting Committee to draft what would become UCOTA.¹⁸⁷ The UCOTA Drafting Committee aimed to address not just the internal disparities, loopholes, and weaknesses that are common in the states' CT laws, but also to address the conflicts within state CT laws, conflicts between these laws and other laws such as the UCC, and inconsistent and erroneous judicial interpretations (often resulting from a poorly-drafted CT law) that pose a risk to innocent buyers and/or secured parties.¹⁸⁸

NCCUSL created the UCOTA with the intention of responding "to several principal, though by no means exclusive, factors affecting transfers of interests in motor vehicles: diversity of state treatment; the increasing use of electronic records, including efforts to reduce and prevent title and other vehicle fraud, and contracting; evolving commercial practices and current legal issues; and the impact of revised Article 9 of the [UCC]."¹⁸⁹ The UCOTA

¹⁸³ NXCESS Motor Cars, Inc., v. JPMorgan Chase Bank, N.A., 317 S.W.3d 462, 469–70 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

¹⁸⁴ *Id.*

¹⁸⁵ At this writing, no states have adopted the UCOTA, and Oklahoma is the only state to have introduced it. See *The National Conference of Commissioners on Uniform State Laws*, <http://www.uniformlaws.org/> http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucota.asp (last visited Jan. 31, 2008). As noted *supra* note 64 (regarding enactment of the UCC), it is not unusual for the enactment period to be lengthy, no matter how compelling the need. This is clearly a weakness of the state legislative process, and risks a continuing erosion of state law.

¹⁸⁶ See Steven N. Leitess, *Lien On Me: Modernizing Certificate of Title Laws: Is it Time for a Uniform Certificate of Title Law?*, 21 AM. BANKR. INST. J. 24, 24 (2003).

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See UCOTA, *supra*, note 5.

Drafting Committee “determined that a uniform certificate of title law would benefit the business community and purchasers of property affected by such laws, and enhance commerce”¹⁹⁰ The discussion below focuses primarily on how the enactment of UCOTA would resolve the Texas appellate court split, focusing on the sections of UCOTA which protect a good faith purchaser or BIOCOB, but also noting some additional benefits that will accompany the adoption of UCOTA in Texas.¹⁹¹

B. Protecting Consumer Expectations

The adoption of UCOTA will bring with it a realistic view of the needs of parties and transactions involving CTs, and for the first time will fully reconcile the Texas CT law with the UCC.¹⁹² In drafting and approving UCOTA, the NCCUSL did not focus on combing through the CT laws of the various states for the details of registering ownership or perfecting security interests, but instead focused on the broad legal issues with the most practicality.¹⁹³ Thus, UCOTA does not seek to micromanage the operations of state CT offices, instead merely resolving legal issues that commonly arise in CT transactions.

For example, the vast majority of dealer sales, whether for new or used vehicles, involve a delay between the retail sale and the execution of (or application for) the CT.¹⁹⁴ In recognition of this consumer expectation and common business practice, UCOTA supports the majority of the case law and follows the UCC by allowing a BIOCOB to buy a vehicle from a dealer without first obtaining a CT.¹⁹⁵ This single measure will bring uniformity (based on the majority view and clearly the better view) to an issue that otherwise will generate continuing uncertainty, injustice and needless litigation.

In addition, section 18 of the UCOTA clarifies the customary protection (e.g., as provided in the UCC) for a good faith purchaser.¹⁹⁶ UCOTA section 18(a) recognizes the protections afforded a good faith purchaser for value under UCC section 2-403(1), and UCOTA section 18(b) recognizes the entrustment protections found in UCC section 2-403(2).¹⁹⁷ UCOTA section 19 recognizes UCC section 9-320, an exception to the general rule that a transferee takes ownership subject to prior security interests.¹⁹⁸ This exception, reflected in UCOTA section 19(c), recognizes the right of a buyer of a vehicle covered by a CT, in the ordinary course of business (a BIOCOB) “to take free of claims and security interests created by the

¹⁹⁰ See Leitess, *supra* note 186, at 24.

¹⁹¹ See Harrell, *supra*, note 7, at 18–19.

¹⁹² See *id.* at 9.

¹⁹³ See Leitess, *supra* note 186, at 24.

¹⁹⁴ See Harrell, *supra* note 7, at 9.

¹⁹⁵ See *id.*; see also UCOTA §§ 18-19.

¹⁹⁶ UCOTA § 18 cmt. 1.

¹⁹⁷ *Id.* at § 18 cmts. 1-2. UCC § 2-403(1)-(2) is the equivalent to Texas Business and Commerce Code § 2.403(a)-(b). See TEX. BUS. & COM. CODE ANN. § 2.403(a)-(b) (West 2011).

¹⁹⁸ UCOTA § 19(c); see also UCOTA § 19 cmt. 1. UCC § 9-320 is equivalent to Texas Business and Commerce Code § 9.320. Compare U.C.C. § 9-320, with TEX. BUS. & COM. CODE ANN. § 9.320 (West 2011). A relationship similar to that of UCC §§ 2.403(2) and 9.320(a) exists between UCOTA §§ 18(b) and 19(c). See U.C.C. §§ 2.403(2), 9.320(a); UCOTA § 19 cmt. 1.

seller.”¹⁹⁹

The UCC rules recognized in UCOTA make clear that “the primacy of a [BIOCOB] in merchant sales transactions [is] essential to the smooth functioning of retail markets.”²⁰⁰ This is already the law under the UCC, but, as illustrated by the cases noted in this article, weaknesses in state CT laws have led some courts to misconstrue the laws relating to this fundamental principle. Yet, any other alternative would require real estate sale-like investigations into vehicle ownership and liens prior to making such routine transactions as purchasing or borrowing money on a vehicle.²⁰¹

Because a vehicle’s CT is often not held by the dealer, but instead by the dealer’s floor-plan lender or a consignee located off-site, a retail buyer (especially a consumer) is likely to be assuaged by the dealer’s promises to take care of the CT later and is unlikely to press the issue further.²⁰² Expecting a buyer to conduct an extensive title examination in making such a routine purchase and not to yield to the promises of the dealer, a person whom the buyer is trusting with the funds needed to make a large purchase, is neither practical nor realistic.²⁰³

An additional problem would arise even if legislators expected buyers to conduct a title examination like that involved in a real estate transaction.²⁰⁴ At this time no comprehensive public recording system, like that for real estate titles, exists for personal property ownership and bailments; therefore, no realistic method exists for a buyer to protect against the risks created by CT law provisions like those relied on in *Gallas*.²⁰⁵ Moreover, in a bailment situation, understanding who is in the best position to prevent the harm helps illustrate why UCOTA sections 18 and 19 are important.²⁰⁶ As Professor Harrell has noted, “[t]he difficulty of protecting a BIOCOB from claims of a bailor, the relative ease with which a bailor can protect himself [or herself] . . . from the obvious risk of [an unwanted] sale by a merchant bailee, and the need to maintain a smooth-functioning and efficient retail system for sales of goods constitute strong public policy reasons in support of . . .” recognizing the basic rules of the UCC in UCOTA.²⁰⁷ The UCOTA, again recognizing common expectations and industry practice, specifies in section 19(c) that executing a CT is not required to obtain BIOCOB

¹⁹⁹ UCOTA § 19 cmt. 5. *See also* U.C.C. § 9-320.

²⁰⁰ *See* Harrell, *supra* note 7, at 19.

²⁰¹ *See id.*

²⁰² *See id.* at 19 n. 14. In the purchase of a new vehicle, this promise is likely to be even more effective, as the CT normally has not been created at the time of the sale. In addition, as noted, the CT (or other title documentation) may be held by the dealer’s secured party, making delivery to the buyer at the time of sale literally impossible.

²⁰³ *Id.* at 19.

²⁰⁴ Consider, for example, the difficulties faced by the buyers in a case like *Vibbert v. Par, Inc.*, 224 S.W.3d 317 (Tex. App.—El Paso 2006), if required to conduct a pre-purchase title examination. *See supra* notes 152-170 and accompanying text.

²⁰⁵ *Id.* *See also* *Gallas v. Car Biz, Inc.*, 914 S.W.2d 592 (Tex. App.—Dallas 1995, writ denied); Harrell, *supra*, note 7, at 9; *supra* text accompanying notes 91-118. It is obviously unrealistic to expect or require a vehicle buyer to understand and resolve such issues before purchasing a vehicle. Given a proper interpretation of the UCC, and a rational CT law, the buyer does not need to do so. Nonetheless, note that UCOTA (by facilitating a comprehensive system of electronic CTs) makes possible the creation of a more useful public record for CT transactions.

²⁰⁶ *See* Harrell, *supra* note 7, at 9.

²⁰⁷ *See id.* at 19.

status.²⁰⁸ The ordinary consumer buying a vehicle from a dealer is thus protected from the claims of a secured party or bailor who entrusted the vehicle to the selling dealer. UCOTA thus recognizes a long-held truism: that those in the best position to avoid the loss should pay the most attention.²⁰⁹

C. Other Benefits of UCOTA

Sections 18 and 19 of the UCOTA will resolve the appellate court split in Texas, and those provisions are in good company because many other benefits to Texas CT law will follow from the enactment of UCOTA. For example, “priority rules consistent with the [UCC] . . . will improve efficiency, reduce costs and provide a national body of precedent,” while the uniform perfection methodology in UCOTA will reduce uncertainty within the state and choice of law conflicts between states.²¹⁰ These changes reflect modern business practices, as conducted all over the United States, and will facilitate both fairness and economic growth, while also providing increased clarity regarding legal outcomes in routine transactions, all of which will also provide for a reduction of costs.²¹¹

The UCOTA provisions mentioned here are just a few of the provisions that will allow the state to realize such benefits. For example, to facilitate future economic growth, UCOTA permits both written and electronic CTs, but does not require either, and allows for conversions between the two.²¹² Also, to facilitate financing transactions, UCOTA is consistent with the most modern perfection methods currently in effect in various states, and reconciles these with UCC Article 9.²¹³

An important purpose of “UCOTA is to provide rules that are consistent with other applicable law, such as the UCC, in order to avoid creating costly and troublesome conflicts of law.”²¹⁴ This is a glaring deficiency in many current CT laws, which too often seem to have been written in a legal vacuum, without regard to related laws. But another goal of UCOTA is to bring the CT law into conformity with common CT office practices and procedures. Today, there are often disparities between what the law says and what the CT office does. Ironically, in some instances, UCOTA is more consistent with CT office practices and procedures than is the current CT law.²¹⁵

Enactment of UCOTA may require small changes in the procedures of some state CT

²⁰⁸ See *id.* at 20.

²⁰⁹ See *id.* at 20 n.16. (“Consumers, particularly unsophisticated ones, do not always respond to public education on such matters and are likely to rely on contrary assurances by the dealer (who wants to sell the car). The prospect of massively changing this fundamental principle of retail transactions in order to save a few bailments gone wrong surely represents a public policy mismatch.”).

²¹⁰ See Leitess, *supra* note 186, at 42.

²¹¹ See *id.*

²¹² See, e.g., Edwin E. Smith, *The Effect of the Uniform Certificate of Title Act on Secured Transactions*, 60 CONSUMER FIN. L.Q. REP. 366, 384 (2005).

²¹³ *Id.* at 383; see also Harrell, *supra* note 7, at 6.

²¹⁴ See Harrell, *supra* note 7, at 8.

²¹⁵ See *id.* at 6.

offices, e.g., to facilitate uniformity on such issues as statutory terminology, “title holding” by secured parties, and record-keeping procedures or other similar matters.²¹⁶ But such changes will be minimal. The UCOTA’s purpose in this regard is to create a uniform CT law, based on current practices, that the states can apply without difficulty; thus, most states will have to make few changes, and will find that the bulk of the UCOTA is consistent with current state laws, practices, and procedures.²¹⁷

V. A TUNE-UP FOR TEXAS CT LEGISLATION

A. Need for a Broad Perspective

Uniform laws have proven themselves indispensable to modern commerce.²¹⁸ Given the national or regional scale on which many companies now do business, simpler and uniform interstate transactions law poses a significant opportunity to reduce costs and confusion, and to improve business conditions for the industry and consumers alike.²¹⁹ If the lessons learned from the history of uniform laws, including the nation-wide adoption of the 1999 revisions to UCC Article 9, are any indication, creditors, dealers, and borrowers alike will reap many benefits from the enactment of UCOTA.²²⁰

Laws, particularly those designed to apply to millions of people and ordinary transactions in inevitably varying situations, are rarely perfect.²²¹ However, the hope for a better law is not unrealistic, and is a stated goal of legislative sessions.²²² Roy L. Steinheimer, Jr., former Dean of Washington and Lee University School of Law, has noted that, when grouped together and considered as a whole, separately from the remaining corpus of the legislation, the flaws in an existing law may seem formidable.²²³ However, when considered in the context of the entire statute, the provisions of which resolve disputed matters or produce desirable outcomes, the admirable overall aspects of the law, as found in most provisions, and the seeming insignificance of most of the flaws—the shortcomings may shrink to a size which seem unlikely to significantly impair the statute’s usefulness.²²⁴ This makes reform of such a law, such as the Texas CT law, a formidable challenge, despite its obvious flaws. The flaws in such statutes have been described by Judge Brewster as “spots on the sun. It takes an expert to see them, and he must use glasses at that.”²²⁵ Nonetheless, the defects, as Dean Ames said, “must inevitably be followed, sooner or later, by additional legislation to remedy the evils which

²¹⁶ Smith, *supra* note 212, at 387–88.

²¹⁷ See Harrell, *supra* note 7, at 6–9.

²¹⁸ See Leitess, *supra* note 186, at 42.

²¹⁹ See *id.*

²²⁰ See *id.*

²²¹ See Roy L. Steinheimer, Jr., *The Uniform Commercial Code Comes of Age*, 65 MICH. L. REV. 1275, 1278–79 (1967).

²²² See *id.* at 1278–80.

²²³ *Id.* at 1279 (quoting Charles L. McKeehan, *The Negotiable Instruments Law (A Review of the Ames-Brewster Controversy)*, 50 U. PA. L. REV. 437, 589–90 (1902)).

²²⁴ *Id.*

²²⁵ *Id.* at 1278 (quoting Lyman D. Brewster, *A Defense of the Negotiable Instruments Law*, 10 YALE L.J. 84, 97 (1901)). At the time Judge Brewster’s article was published, he was serving as the President of the NCCUSL.

they . . . introduce.”²²⁶ In the context of CT laws and transactions, such evils are increasingly apparent, and the curative legislation is UCOTA.

B. The Alternatives are Inadequate

By looking at other possibilities for addressing conflicts between a CT law and the UCC, and thereby understanding why those other possible solutions will not work, the necessity for the UCOTA becomes even more apparent. No other solution will solve the problems on a uniform, national basis consistent with our fundamental system of state law. The Texas Supreme Court could address each conflict and clarify the applicable law, but has refused to accept the few cases which were appealed from the appellate courts to clarify the proper law to be applied.²²⁷ Moreover, such a solution would be inherently piecemeal and interstitial, addressing isolated issues in narrow fashion without the benefit of an overarching perspective; this approach is likely to introduce new problems even as it solves old ones. While this illustrates the value of common law methodology as a solution to legislative failure, it also illustrates the immense value of the uniform law alternative.

Another possible solution could consist of a public awareness campaign, including mass notifications distributed throughout multiple forums and media, from newspapers and television to the internet, seeking to inform consumers as to the intricacies of CT law so they can suitably protect themselves in the current legal environment.²²⁸ Another, similar option is to use a medical-like informed consent document given to the consumer prior to the purchase of any automobile.²²⁹ These types of solutions present multiple problems, beyond the obvious probability that the information will not reach potential victims or that they might not understand it. Many consumers do not read directions, contracts, or warnings, and they are highly unlikely to change that behavior in such a common transaction.

Beyond the substantial cost, another problem is that such methods would require dealers and creditors to change their business practices, e.g., if the consumer education campaign succeeded in warning the buyer that he or she must leave the dealership with an executed CT to ensure protection of ownership rights. In many instances this simply is not possible, e.g., because the vehicle is new and no CT has been created yet or because the CT is being held by a consignor or the dealer’s inventory lender. If the state pursued this alternative, people would no longer be able to buy a car and drive it off the lot that day; to protect against losing the vehicle to a secured party, consignor, or other claimant, the BIOCOP would have to come back to pick up the vehicle and pay for it after the CT was executed and transferred. And, suppose the buyer traded in a vehicle, should he or she go without a car until the CT arrives? As a practical matter, a vehicle sale in which the transfers of possession are deferred will likely

²²⁶ Steinheimer, *supra* note 221, at 1278 (quoting James Barr Ames, *The Negotiable Instruments Law. A Word More*, 14 HARV. L. REV. 442, 449 (1901)). James Barr Ames was Dean of the Harvard Law School at the time Dean Steinheimer published this article.

²²⁷ See *First Nat’l Bank of El Campo, TX v. Buss*, 143 S.W.3d 915 (Tex. App.—Corpus Christi 2004, pet. denied); *Hudson Buick, Pontiac, GMC Truck Co. v. Gooch*, 7 S.W.3d 191 (Tex. App.—Tyler 1999, pet. denied); *Gallas v. Car Biz, Inc.*, 914 S.W.2d 592 (Tex. App.—Dallas 1995, writ ref’d).

²²⁸ This is an obviously inadequate solution. See, e.g., *supra* notes 203, 207.

²²⁹ See Harrell, *supra* note 189, at 20 n.16.

turn out to be no sale at all, with adverse consequences for all concerned. Thus, these alternatives to UCOTA come with a host of new problems, both legal and practical, and stray far from the legislature's apparent intent, an intent that will be furthered by enactment of UCOTA.

C. Properly Allocating the Risks

As noted, UCOTA properly places the consequences of an ownership transfer gone wrong on the party best able to avoid the loss.²³⁰ Often, the dealer is responsible—because of a failure to file or submit the required documents correctly, a financial failure, or both—for the failure to obtain a proper transfer of the CT.²³¹ The inventory lender's failure to monitor its debtor may be another factor, but the lender's ability to trace and claim the proceeds of the sale (under UCC section 9-315) may mitigate this loss. Because the dealer's inventory lender made an evaluation of the dealership's financial health before agreeing to fund the dealership, and is also in the best position to continually monitor the business and financial practices of the dealership, these consequences should lie with that lender.²³² The consignor is similarly responsible for gauging the financial stability of a dealer to whom the consignor entrusts the vehicle.

From the standpoint of balancing the risks and rewards, the dealer's inventory lender or consignor should accept the consequences when the dealership it financed (or entrusted the vehicle to) fails. The dealer's inventory lender or consignor is the party benefitting from its relationship with the dealer and has both the duty and a superior ability to continually evaluate the risk.²³³ The inventory lender or consignor profits from its relationship with the dealer and entered the relationship with its eyes open; by providing the resources to maintain the dealer in business, the inventory lender or consignor permits the dealer to make sales to the public. The lender or consignor can be expected to assess the dealer's financial position,²³⁴ whereas the retail buyer often goes to the dealer based largely on word of mouth, or based on prior purchasing experience with the dealer, advertising, or convenience, or because a particular vehicle is sitting on the dealer's lot. The buyer has no practical means to gauge the solvency or vehicle ownership status of the dealer. The buyer rarely, if ever, enters into a car-buying relationship with a dealer having the same knowledge of the dealer's ownership and financial status as does the inventory lender or consignor.²³⁵

²³⁰ See discussion *supra* Part IV. Of course, not in every situation should the burden rest with the dealer's secured party, but when the buyer is not responsible for the failure to transfer the CT that burden obviously should not be imposed on him or her.

²³¹ See cases cited *supra* note 11.

²³² See, e.g., Comptroller of the Currency Administration of National Banks. Floor Plan Loans: Comptroller's Handbook, at *1. <http://www.occ.treas.gov/handbook/floorplan1.pdf> (last visited Feb. 29, 2008) [hereinafter Comptroller].

²³³ See 8 OXFORD ENGLISH DICTIONARY, 822 (1989) (A lender is "one who makes a business of lending money at interest."); see also *supra* note 230 and accompanying text.

²³⁴ See Comptroller, *supra* note 232, at *5–7 (example of the procedure a lender goes through before determining whether or not to become the lender for that dealership).

²³⁵ See Alvin C. Harrell, *Can a Buyer and Secured Party Rely on a Certificate of Title? Part II*, 76 OKLA. B.J. 447, 450 (2005).

Given reasonable due diligence, the inventory lender or consignor may be able to protect itself against these problems.²³⁶ With the inventory lender's knowledge of the dealership's practices and the industry as a whole, its inherent incentive for minimizing risk, and the ability to trace proceeds and require a collateral "cushion," the inventory lender stands a greater chance of effecting decisions by the dealership.²³⁷ The consignor is in much the same position. An average Joe may be able to impact the customer service aspect through customer complaints, but stands little chance of altering the inventory ownership and financial position of the dealership.²³⁸

The inventory lender's knowledge of the dealership, its ability to limit and diversify its risk, and its financial leverage make the risk of loss more appropriately placed with the inventory lender than the buyer.²³⁹ Again, the consignor is in a similar position to the secured party. Adoption of the UCOTA will assure that this risk is placed in the hands of the proper party.²⁴⁰

D. Eliminating Conflicts

In addition, by the enactment of UCOTA, the legislature can insure that any residual or future conflicts between the CT law and the UCC will disappear. UCOTA follows closely the ultimate goals of the UCC, and since the Texas Legislature adopted the UCC almost unchanged, it stands to reason that the legislature should support adoption of the UCOTA.²⁴¹ But as noted, in Texas, beyond this general benefit, there is a specific benefit to follow from the adoption of UCOTA: the resolution of a nonsensical and confusing conflict between these important state statutes, and the resolution of divergent lines of cases.²⁴²

Adoption of UCOTA will remedy this split, and clarify the law so as to conform to the common and reasonable expectations of consumers, dealers, and creditors, protecting legitimate expectations in these commercial contexts. But UCOTA also provides a number of other benefits, such as a legal structure to accommodate electronic titling, and consistency with other laws governing electronic transactions.²⁴³ One of the purposes of law in general, and of the UCC specifically, is to allow people to easily and accurately predict the outcome of a

²³⁶ See Comptroller, *supra* note 232, at *20–21 (example of the procedure a lender undertakes before recommending corrective actions for noted deficiencies).

²³⁷ See Comptroller, *supra* note 232, at *1–2 (listing warning signs that may warrant a reconsideration of the credit arrangement). The lender, given this relationship with the dealership, may be in a position to help the dealer get back on its feet by arranging additional loans, or restructuring the current agreement.

²³⁸ Dealer bankruptcy is also a significant risk. The lender and consigner have the ability to protect themselves by asserting secured claims, the buyer does not. See, e.g., 11 U.S.C. § 506.

²³⁹ See generally Comptroller, *supra* note 232 (containing an introduction to the lending relationship and a detailed description of the procedures).

²⁴⁰ See *supra* notes 231–37 and accompanying text.

²⁴¹ See *supra* notes 216–30 and accompanying text; see also discussion *supra* Part IV.

²⁴² See discussion *supra* Parts III–IV.

²⁴³ See also Harrell, *supra* note 7 for a broader discussion of the UCOTA's general benefits. See also Harrell, *supra* note 165, for another specific example. The other benefits that UCOTA would bring to Texas are extensive but a further discussion of these other benefits is beyond the scope of this article.

particular course of action.²⁴⁴ This principle is essential in a business or commercial law context, where the willingness of consumers and commercial entities to spend significant amounts of money depends on their ability to predict the outcome of a transaction and to insulate themselves from unforeseen losses. The American economy is resilient, and can easily adapt to a new law, if it is not too onerous; however, it is not a fortune-teller—predictable legal results are a fundamental necessity for the conduct of business and consumer transactions. Today, and absent enactment of UCOTA, many dangerous uncertainties lurk beneath the surface of our CT laws.

E. Stalled Legislative Movement

As of March 2013, no state has adopted UCOTA. Oklahoma has been the only state to consider legislation to adopt UCOTA. Oklahoma considered such legislation in 2007, 2008, 2009, 2010, and is set to do the same in 2013.²⁴⁵ Although, Oklahoma remains the only state where legislation has been proposed, several states have studied the benefits that UCOTA could provide to the states' CT and related processes.²⁴⁶ Some criticism of UCOTA has come from the American Association of Motor Vehicle Administrators ("AAMVA"). While the AAMVA believes that UCOTA provides a useful framework for electronic titling procedures, the AAMVA has expressed some concerns over the language of the proposed law, but cites the two primary concerns: (1) lack of available funds for states to implement the UCOTA-dictated changes; and (2) higher priority issues facing state motor vehicle administrators.²⁴⁷ The AAMVA's two concerns are intertwined because, in the AAMVA's view, the cost for UCOTA implementation will be significant in most states while most states will face multiple demands for not just funding, but also staff, information technology resources, and time.²⁴⁸ This reality is even more prominent as states face implementing federally-mandated programs, such as the Real ID Act, that likely take priority over optional changes like UCOTA.²⁴⁹ As issues regarding conflicts between state CT laws and the UCC, and conflicts between the various CT laws of the states continue to create problems that demand a solution, interest in implementation will hopefully outweigh the obstacles to its enactment.

VI. CONCLUSION

Adoption of UCOTA will serve the best interests of the state and its citizenry, including

²⁴⁴ See 10 HAWKLAND U.C.C. SERIES § 10-101:01 (2007) (recognizing fairness as a legal principle in Anglo-American law).

²⁴⁵ See Barry A. Graynor, Teresa Davidson, Edwin Huddleson, III, and Stephan T. Whelan, *Survey—Uniform Commercial Code: Uniform Commercial Code Survey: Leases*, 63 BUS. LAW. 1301, 1301 n.1 (2008); see also UNIFORM LAW COMMISSION, (last visited February 25, 2013) <http://www.uniformlaws.org/Legislation.aspx> (search "Certificate of Title Act" in "Act Title or Keywords" and select "Last 10 Years" in "Bill Date").

²⁴⁶ See, e.g., CTC & Assocs. LLC, *Vehicle Titling Issues Peer Exchange: UCOTA and Other Approaches* (Oct. 16-17, 2007), http://ntl.bts.gov/lib/34000/34700/34794/Vehicle_Titling_Issues_PE_-_Final_Report.pdf.

²⁴⁷ See *id.* at apps. B1, B2. But see *id.* at app. B3 (NCCUSL's Response to AAMVA Regarding UCOTA).

²⁴⁸ *Id.* at app. B1.

²⁴⁹ *Id.* To illustrate the challenges, it's worth noting that Real ID Act implementation has been delayed in several states and the federal government has granted extensions to states that have not met the standards. See NATIONAL CONFERENCE OF STATE LEGISLATURES, *Count Down to REAL ID*, (December 21, 2012) <http://www.ncsl.org/issues-research/transport/count-down-to-real-id.aspx>.

the CT office, the business community, and consumers. UCOTA clarifies the law and places the burden in priority conflicts with the proper party, e.g., the dealer's secured party, but also reinforces the reasonable expectations of the secured party or consignor, allowing lenders and consignors to conduct their transactions more efficiently. Other options available to address these issues not only do not solve the problems, but would create additional, unnecessary problems; moreover, the UCOTA fixes the Texas appellate court split and provides other benefits which will serve the interests of the state and its citizens for many years to come. With the domestic auto industry increasingly focused on the federal government, and its dealer systems in disarray,²⁵⁰ these traditional sources of support for state commercial law reform may be missing in action. It is time for the states to step up, and recognize the need for this reform and their own interest in creating a clear and uniform system of state CT laws.

²⁵⁰ See, e.g., Mike Spector & Josh Mitchell, *U.S. Turns Focus to Health of Auto Suppliers*, WALL ST. J., July 14, 2009, at B1 (noting the increased role of the federal government in auto industry matters); Associated Press, *Chrysler's lineup sees dip in sales*, OKLAHOMAN, July 3, 2009, at B3; Associated Press, *GM, Chrysler executives defend decision to close dealerships*, OKLAHOMAN, June 13, 2009, at B3.