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March 6, 2015

TESTIMONY IN OPPOSITION TO ADOPTION OF SB 462

Chairman Prozanski and members of the Senate Judiciary Committee:

I am Mark B. Comstock, an attorney at Garrett Hemann Robertson P.C. in Salem. I have practiced commercial and creditor's rights law for a little over 30 years and write in opposition to the adoption of the proposed SB 462 which seeks to amend the Oregon codification of the Uniform Commercial Code Secured Transactions Chapter, ORS Chapter 79, and specifically ORS 79.502 and 79.503, to adopt the alternate language referred to as Alternative A.

Not only have I practiced actively in this area for over 30 years, I am also a member of the Oregon Law Commission, which consciously made a decision to recommend that the Legislature adopt the Alternative B language based upon a broad Workgroup report. I also write from my own experience. This experience is not based on hypothetical situations, but is based in real-life, with real-life situations that matter to Oregonians. The adoption of Alternative B language for ORS 79.502 and 79.503 was based upon an allocation of risks, and who would be better able to bear the risk of an erroneous identification in a financing statement filed in Oregon seeking to perfect a security interest in designated collateral.

The importance of which alternative was adopted has crossed my desk and illustrates the impact of choosing Alternative B versus the more restrictive Alternative A for language of ORS 79.502 and 79.503.

A little over two years ago, a local Oregon farmer decided to sell one of his tractors to a person he knew as Richard Harris who farmed in both Oregon and California. The farmer knew enough to know that if he was to carry the contract for this purchase, he would have to document the transaction. He obtained a form Security Agreement from the local stationary store, and a form Financing Statement for both Oregon and California. He also obtained a Promissory Note form and used these forms for documentation of his transaction. He accurately described the John Deere tractor on both the Security Agreement and the Financing Statements and obtained Richard Harris' signature as necessary on the documents. He promptly filed the UCC Financing Statements with the Oregon Secretary of State's office and also filed the Financing Statement with the California Secretary of State's office seeking to perfect his security interest in the tractor.

After two quarterly payments, the purchaser defaulted in the payment of the Promissory Note. It is then that the farmer came to me. In searching for the Financing Statements and searching the records of both Oregon and California, including the Oregon corporation files and the various databases to identify the security interest, it became clear, that the only problem that this farmer had with his documentation of the transaction, was that the debtor's name, the purchaser of the tractor,

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was not accurately described. Instead of "Richard Harris", his name was actually "Leon Richard Harris", although he was known as "Richard Harris", in both Oregon and California. In performing searches in both Oregon and California databases for UCC Financing Statements, there were several that were for Leon R. Harris, and for L. Richard Harris, and for Richard Harris, all at the same address. Some of the filings had competing "blanket security interests" for all farm equipment. Thus, if there was to be a fight over the repossession the John Deere tractor, this farmer's Financing Statements and security interest could be challenged.

Under the Oregon current codification of UCC 5-502 and 5-503, the identification description of "Richard Harris" was sufficient to identify the debtor. Conversely, if Alternative A, as is now proposed in SB 462 was the law, then the identification of the debtor would be faulty, and the security interest would be subject to challenge. Most likely the farmer would have lost his security interest in the John Deere tractor that he sold to the debtor, as it would not be perfected. Fortunately, the debtor voluntarily allowed recovery of the John Deere tractor to allow my farmer client to get the tractor back and not be faced with a significant legal challenge and potential loss of his security for payment of the debt. If SB 462 were the law, the farmer's security interest would have been unperfected and the farmer would have lost his collateral.

I anticipate that the proponents of the bill will argue that the farmer should have asked for identification, and done a comprehensive UCC Financing Statement search. While I agree that the farmer's actions could have disclosed that the person he had known as "Richard Harris" for years, and that everyone knew in the community as "Richard Harris", was in fact "Leon Richard Harris" if he had asked for the driver's license. However, this level of inquiry is something that does not always occur, and it is usually the least sophisticated of the creditors that bears the loss.

The proponent of the bill, and its members, are certainly well able to perform comprehensive UCC searches and to protect their interests using alternatives of the identification based names, and the known-as names for the debtors. However, it should not be a function of the legislature to exclude those less sophisticated from the benefit of Oregon laws, by consciously providing a "gotcha" in the Uniform Commercial Code that benefits only those who know and practice the arcane rules of the Uniform Commercial Code.

I urge this committee to not adopt the proposed SB 462 language and change the provisions of ORS 79.502 and 79.503 to create a "gotcha" for unsuspecting creditors. It was a reasoned and conscious choice to use Alternative B language for the provisions of ORS 79.502 and 79.503 when it was proposed by the Oregon Law Commission. Those reasons and analysis are still applicable, and this legislation seeking to adopt arcane rules should be rejected by this body.

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