The Practitioner's Guide to Uncertified Securities Under the Revisions to Article 8 in Georgia

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COMMENTS

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I. INTRODUCTION

The Corporate and Banking Law Section of the Georgia Uniform Commercial Code Committee has recommended to the Georgia General Assembly that the use of uncertificated securities be made available to Georgia companies by adoption of Article 8 of the Uniform Commercial Code ("U.C.C.") as revised in 1977.¹ The 1977 version of U.C.C. Article 8 provides for the issuance of uncertificated securities and governs the transfers, security interests, and rights of creditors involved with such securities.² Uncertificated securities are presented as a solution to the amount of paperwork and time expended with the use of certificates. By enabling participants in the securities industry to better use available technology, uncertificated securities provide a more efficient method of transacting business in the midst of the "Information Age."

The 1977 revision resulted from a series of steps involving the adoption of individual U.C.C. sections, modifications to other codes, and recom-

¹ On May 4, 1992, Zell Miller, Governor of Georgia, signed House Bill 762 making the 1977 Official Text of U.C.C. Article 8 the law in Georgia with only minor variations from the uniform version (to be codified as amended at O.C.G.A. §§ 11-8-101 to -408 (1992)). The sections appearing in House Bill 762 as adopted are the same sections appearing in the O.C.G.A. [hereinafter Revised Article 8].
² See infra text accompanying notes 31-112.
mendations in committee reports. The following is a brief historical account of the reforms leading up to the 1977 revision and its submission for adoption in Georgia. Also included in this Article is a description of the procedures to follow when dealing with uncertificated stock and some criticisms of those procedures.

II. THE HISTORICAL DEVELOPMENT OF UNCERTIFICATED SECURITIES

In 1977, the Permanent Editorial Board for the Uniform Commercial Code and the National Conference of Commissioners on Uniform State Laws revised Article 8 of the U.C.C. to provide for the issuance of uncertificated stock. These revisions were made in response to the "Paperwork Crunch" of the late 1960s in the securities market. Trading on the stock exchanges increased to such a level that it became impossible to transfer the stock certificates fast enough to reflect ongoing trading. There was also a significant increase in security thefts associated with the use of paper certificates. Many viewed the elimination of the stock certificate as the solution to these problems.

One step toward the elimination of certificated stock was the addition of section 8-320, which was adopted by more than forty states, including Georgia. This section validated the process by which clearing corporations maintain control of the certificates while making subsequent transfers of rights in the securities with entries on its books instead of actual physical delivery of the certificates. The addition of this section and the amendment to section 8-102(3), authorizing corporations registered as clearing agencies under federal securities law, led to the organization of clearing corporations that became host to a significant amount of transac-

3. See infra text accompanying notes 4-30 for a discussion of the steps that led up to the 1977 revision.
5. Reporter's Introductory Comments, supra note 4.
8. Coogan, supra note 6, at 1017.
tions between institutional investors. Although this reduced the use of certificates to some degree, "the benefits of the depository system generally are available only to brokers, banks and other institutional investors, or individuals somehow affiliated with a clearing corporation." Another step taken to resolve the paper crisis was the Securities Act Amendments of 1975. This legislation directed the Securities and Exchange Commission ("SEC") to initiate the formation of a national system for settlement of securities transactions and to report annually to Congress on the progress made in this direction. An important part of this legislation served to abolish the physical transfer of certificates as a means of transferring ownership of securities.

In 1971 the American Bar Association ("ABA") formed the Committee on Stock Certificates to propose legislation to significantly reduce or completely eliminate the use of stock certificates. The Committee released its report in 1975 recommending:

1) that the Model Business Corporation Act be amended in order to permit the issuance of corporate stock in uncertificated form and 2) that Article 8 of the Uniform Commercial Code (and related sections of other Articles) be revised to provide rules to regulate the rights, duties and obligations of the issuers of, and persons dealing with, uncertificated investment securities.

The ABA’s Committee on Corporate Law revised the Model Business Corporation Act to provide for uncertificated securities as proposed by the Committee on Stock Certificates. In keeping with this change in the Model Business Corporation Act, Georgia adopted a new Business Corporation Code. As a result, the Official Code of Georgia Annotated ("O.C.G.A.") section 14-2-625 states that shares do not have to be represented by certificates. The rights and obligations of shareholders are the same regardless of whether they are owners of certificated or uncertificated stock, unless otherwise provided in the code or by another statute.

12. Coogan, supra note 6, at 1018.
13. Sabbath & Conrad, supra note 7, at 31 (citing Article 8 Is Ready, supra note 4, at 892).
16. Sabbath & Conrad, supra note 7, at 32.
18. Reporter’s Introductory Comments, supra note 4.
19. Id.
22. Id. § 14-2-625 (1982).
23. Id.
O.C.G.A. section 14-2-626 authorizes the board of directors to issue some or all of the shares of any or all of its corporation's classes or series without certificates. 24

The drafters of Revised Article 8 wanted to promote the use of uncertificated securities. The idea was for participants in the security industry to feel comfortable about holding and dealing with uncertificated securities. To accomplish this the drafters sought to provide a framework of commercial law that would make the consequences of transactions involving uncertificated securities as predictable as those transactions involving certificated securities under existing law. 25 The end result was a set of parallel rules for certificated and uncertificated securities. 26 The Permanent Editorial Board for the Uniform Commercial Code and the National Conference of Commissioners on Uniform State Laws recommended Revised Article 8 in 1977 for adoption by the states. 27

Since 1977, forty-four states have adopted Revised Article 8, 28 most having done so with little or no variation. 29 After reviewing Revised Article 8 and the variations implemented in other states, Georgia's Uniform Commercial Code Committee proposed that the 1977 revision be adopted with only a few changes necessary for consistency with existing Georgia law or to clarify certain points. 30

III. THE 1977 REVISIONS TO ARTICLE 8

A. Uncertificated Securities Defined

Revised Article 8 section 102(1)(b)(i) defines Uncertificated Securities as "a share, participation, or other interest in property or an enterprise of the issuer or an obligation of the issuer which is [ ] [n]ot represented by an instrument and the transfer of which is registered upon books main-
tained for that purpose by or on behalf of the issuer.” In most instances an interest in a limited partnership does not fall within the definition of an uncertificated security according to section 8-102(b)(iv), “unless the partnership interest is listed on a national securities exchange[,] registered under the federal securities laws[,] or quoted in the automated quotation system of a national securities association registered under the federal securities laws.”

The uncertificated security exists only in registered form and, unlike the certificated security, is not represented by any paper. Although the purchaser receives an initial transaction statement ("ITS") from the issuer, this statement "speaks only as of the time of its issuance" while the representations contained in a certificated security are of "a continuing nature." A certificated security must be dealt in at exchanges or dealt in as a medium of investment, but there is no such requirement placed on uncertificated securities.

Revised Article 8 does not mandate the issuance of uncertificated securities by any issuer, nor does it even authorize the issuance of these securities. The Permanent Editorial Board left such authorization to state corporation law. As previously noted, O.C.G.A. section 14-2-626 provides for issuance of these securities at the discretion of each corporation's board of directors.

B. Transfer of Securities

The rules governing the transfer of securities under Revised Article 8 are set out exclusively in section 8-313(1). The transfer of a certificated security is carried out by actual physical delivery of the certificate or by

32. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-102(1)(b)(iv)). The Official Text of Revised Article 8 contains no such provision. Georgia's UCC Committee added this language to clarify that a partnership interest in a limited partnership is usually not an uncertificated security. Sabbath & Conrad, supra note 7, at 85.
35. Id.
36. ANDERSON, supra note 33, § 8-102:15.
37. Reporter's Introductory Comments, supra note 4.
38. Id.
40. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-313). "The transfer rules in this section are made exclusive by the inclusion of the word 'only' in the first sentence." Sabbath & Conrad, supra note 7, at 122.
some other method deemed to constitute delivery. Registration, instead of delivery, is required to transfer uncertificated securities since no instrument exists to deliver. In order to transfer interest in the security through registration, the registered owner, or other "appropriate person" under sections 8-308(7) and (8), must give an instruction to the issuer of the security. The issuer must then register the transfer on its books and within two business days send an initial transaction statement to the new registered owner and any registered pledgee. The ITS is a written statement describing the security that includes such information as the number of shares transferred; the name, address, and taxpayer identification number of the new registered owner and of any new registered pledgee; any liens and restrictions of the issuer; any adverse claims to which the security is or may be subject to at the time of the registration that the issuer is required to take notice of under section 8-403(4); and the date the transfer was registered.

In order to give the former registered owner and the former registered pledgee notice of the relinquishment of their interest and notice of any fraudulent or unauthorized transfers, the issuer must send them a statement similar to the ITS within two days of the transfer of their interest. However, this statement does not include information regarding any liens, restrictions, or adverse claims. Additionally, sections 8-408(6) and (7) require the issuer of uncertificated securities to send to the registered owner and the registered pledgee an annual statement containing information similar to that required on the ITS. The purpose of these peri-

41. O.C.G.A. § 11-8-313(1) (1982) (amended, supra note 1). Revised Article 8 expands the coverage of this paragraph to include delivery when the purchaser's "financial intermediary acquires possession of a certificated security specially endorsed to or issued in the name of the purchaser." Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-313(1)(c)).
42. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-313(1)(b)); see also Reporter's Introductory Comments, supra note 4. Note that this is not the type of registration required by the 1937 Security Act.
43. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-308(7), (8)).
44. Id. § 11-8-308(5).
45. Id. § 11-8-408(1), (4).
46. Id. § 11-8-403(4). Section 8-403(4) states that an issuer has a duty regarding adverse claims only when given notice by legal process, by written notification from the registered pledgee, when such claims were previously noticed on the ITS issued to the present registered owner, or when the issuer has elected to require forms of assurance beyond that expressly authorized in section 8-402. Id.
47. Id. § 11-8-408(1). The ITS contains the same basic information that would ordinarily appear on the certificates issued with certificated shares. U.C.C. § 8-408 cmt. 1 (1977).
48. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-408(5)).
49. Id.
50. Id. § 11-8-408(6), (7).
odic statements is to advise owners and pledgees of their positions in a manner similar to the role fulfilled by a bank statement.51

Paragraph (f) of section 8-313(1) applies to a third person registered owner or pledgee of an uncertificated security who is not a financial intermediary.52 Under these circumstances a transfer is effected when the third person acknowledges that he is holding an interest in the security for the purchaser.53 No book entry is required to effectuate this transfer.54 When the controlling party is a clearing corporation, as defined in section 8-102(3),55 a transfer occurs when the book entry is made to the purchaser's account.56 There is no need for confirmation to the purchaser under paragraph (g) because clearing corporations control securities of voluntary participants and do not usually hold securities for themselves.57

C. Security Interests

Security Interests Under the Prior Code. Prior to adoption of Revised Article 8, Article 9, unless expressly excluded, "governs the creation and perfection of security interests in any personal property."58 Certificated securities are included within the scope of Article 9 because they fall within the definition of "instrument" under section 9-105(1)(i) and are not specifically excluded.59 For a security interest to attach and become enforceable there must be an agreement between the parties and the secured party must give value for the collateral in which the debtor has rights.60 The collateral must be in the possession of the secured party or the debtor must have signed a written agreement describing the collateral.61

Uncertificated securities were included under section 106 of Article 9 as "general intangibles."62 Since the uncertificated security cannot be pos-

52. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-313(1)(f)).
53. Id.
54. Acknowledgment by the third party is the only condition to transfer. U.C.C. § 11-8-313 cmt. 3 (1977).
55. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-102(3)).
56. Id. § 11-8-313(g).
58. Sabbath & Conrad, supra note 7, at 40.
59. Compare O.C.G.A. § 11-9-105(1)(i) (1982) with Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-7-105(1)(7)).
61. Id.
62. Id. § 11-9-106.
sessed, a security interest can be created only by written agreement and perfected by filing a financing statement in a public office. The problem with the public filing requirement of uncertificated securities was that the debtor could still transfer the security to a bona fide purchaser and defeat the secured party's rights, even when a secured party had filed. The transfer of uncertificated securities takes place when registered by the issuer. Unless the issuer searched public records he would have had no knowledge of a security interest perfected by filing and would be unable to provide notice to the transferee.

The security interest in an instrument can only be perfected under Article 9 upon the secured party taking possession of the instrument. The problem with this method of perfection is that the security is often not in the possession of its owner. Instead the security is either held in a brokerage account, held in custody by a bank, or is in the possession of a pledgee. In addition, the security owner has no security to deliver to the secured party when the security is held in a mutual fund or dividend reinvestment shares. In these situations the shareholder receives statements instead of certificates, although he can request a certificate from the issuer or transfer agent.

When a third party (bailee) holds the instrument, the "secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest." The problem is that there is no mention in section 9-305 of who must give notice and what form the notice must take. There is also no indication of whether the bailee owes any duty to the secured party. It is often difficult to identify the bailee who is to receive the notice. For example, it is not clear whether a bank or broker who includes the borrower's certificate with the shares owned by other customers is considered a bailee of the borrower's security for Article 9 purposes. A prudent lender may be cautious about relying on perfection by notification to a bailee because of these uncertainties. Instead, the

63. *Id.* § 11-9-203(1)(a) (amended, *supra* note 1, to be codified at O.C.G.A. § 11-9-203(1)).
64. *Id.* § 11-9-302(1) (amended, *supra* note 1, to be codified at O.C.G.A. § 11-9-302(1)).
66. *Id.*
67. *Id.* at 42-43.
68. O.C.G.A. § 11-9-304 (1982) (amended, *supra* note 1, to be codified at O.C.G.A. § 11-9-304). There are a few exceptions to this; however, the perfection is only temporary in nature.
lender may require a certificate that creates unnecessary paperwork, thereby increasing the time and money expended on such transactions.\textsuperscript{71}

Revised Article 8 calls for the pre-emption of the provisions in Article 9 that govern the creation of a security interest and its perfection in securities, and those provisions requiring as a condition of perfection that public notice be given of a debtor's conveyance of an interest in intangible collateral.\textsuperscript{72} Other provisions of Article 9 not pre-empted by Revised Article 8 are still applicable to security interests in investment securities.\textsuperscript{73}

Creation of Security Interests under the Revised Code. A security interest in certificated stock is normally created by physical delivery of the certificate, duly endorsed, to the secured party (pledgee) and is indistinguishable from an outright transfer of the stock.\textsuperscript{74} The pledgee may "leave the security registered in the name of the debtor or [] cause the registration of transfer to himself or his nominee."\textsuperscript{75}

Under Revised Article 8 there are two methods by which a security interest may be created in uncertificated securities. One is by registration of transfer to the secured party, which places the secured party in essentially the same position as the pledgee of a certificated security who obtains registration of transfer to himself. To register a transfer of interest to the secured party the same process for an outright transfer of an uncertificated security is used.\textsuperscript{76} An additional method for evidencing a security interest in an uncertificated security is the registration of a pledge. In this situation the secured party is the counterpart to the pledgee of a certificated security who leaves the security registered in the debtor's name. Once the pledge is registered, the pledgee has the exclusive right to order transfer of the security to a new owner free of or subject to his pledge or may transfer his security to another secured party.\textsuperscript{77}

After a pledge is registered, the registered owner continues to enjoy all the rights of ownership such as dividends, voting rights, and notices.\textsuperscript{78} The pledgee, however, has the exclusive right to order a transfer of the security and may do so by using the methods provided in section 8-

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71. Sabbath & Conrad, supra note 7, at 40-41.
72. Coogan, supra note 6, at 1016. The proposed revision excludes security interests in securities from the coverage of sections 9-203(1) and 9-302.
73. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-321(3)). An example of when provisions of Article 9 are still applicable is in the disposition of collateral upon default. See O.C.G.A. § 11-9-504 (1982).
74. Reporter's Introductory Comments, supra note 4.
75. Id.
76. Id.; see also supra text accompanying notes 40-57.
77. Reporter's Introductory Comments, supra note 4.
78. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-207(2)).
\end{flushright}
This is basically the situation that exists when a certificated security is pledged. By possessing the duly endorsed certificate, the pledgee deprives the debtor, still recognized as the registered owner by the issuer, of the power to transfer and confers that power on himself. However, when a certificated security is held by a pledgee without registration of transfer, additional securities issued with respect to the original security (for example, stock dividends or splits) and securities or money distributed or paid in exchange for a pledge will necessarily be delivered to the registered owner since the issuer is unaware of the pledgee's interest. With uncertificated securities pledges must be registered so the additional money and securities remain in the control of the registered pledgee as mandated in section 8-207(6). This is one advantage of using uncertificated stock that is impractical under the certificated system.

In order to limit the burden on the issuer of uncertificated securities and insulate it from problems such as conflicting priorities, the issuer is required to register only one pledge of an uncertificated security at any one time. If a party wishes to perfect a junior security interest in an uncertificated security, methods other than registration must be used. The senior lender must receive notice under section 8-313(1)(h)(iv), but there are no provisions to ensure that the junior debtor will automatically be registered as a pledgee once the senior debtor is paid. This is one criticism of Revised Article 8.

Section 8-313(1) contains provisions for the creation of security interests in securities controlled by third persons. All security interests in securities controlled by third parties may be created without a written agreement signed by the debtor. According to paragraph (f), for a security interest to be effectively created in an uncertificated security the registered owner or pledgee must acknowledge that the security is held for the transferee.

79. Id. § 11-8-107(3). Section 8-207(4) provides that the pledgee can transfer by ordering the transfer of the security to a new owner free of or subject to his pledge, or transferring his security interest to another secured party. Id. § 11-8-207(4).
80. Reporter's Introductory Comments, supra note 4.
81. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-207(6)).
82. Id. § 11-8-108.
84. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-313(1)(h)(iv)).
85. See infra text accompanying notes 124-35.
86. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-313(1)).
87. Sabbath & Conrad, supra note 7, at 55.
88. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-313(1)(f)).
Paragraph (d) of section 8-313(1) deals with security interests in securities held by financial intermediaries that are not clearing corporations. A security interest held by such a financial intermediary is created by an entry in its books and a confirmation of the purchase sent to the secured party. When the security is controlled by a clearing corporation, a security interest is created under paragraph (g) at the time of the book entry to the account of the pledgee, with no confirmation necessary.

An alternative method for the creation of a security interest is set forth in section 8-313(1)(h). A written notification describing the collateral and signed by the debtor that is given to the person in control of the security can create a security interest. This method may be used "when a clearing corporation refuses to mark its books under section 8-313(1)(g), when another financial intermediary refuses to mark its books and confirm under section 8-313(1)(d), or when another third party refuses to acknowledge under section 8-313(e) or 8-313(f)." The person in control may be a financial intermediary on whose books the pledger's interest appears, as well as a third person, not a financial intermediary, in possession of a certificated security, or the registered owner or pledgee of an uncertificated security.

The creation of a security interest simply by executing a written agreement containing a description of the security and the giving of new value by the secured party is provided for in section 8-313(1)(i). However, unless the requirements of one of the other paragraphs of section 8-313(1) are satisfied, the security interest becomes unperfected.

When the financial intermediary serves as both a secured creditor and a depository for the debtor, such that the collateral has previously been transferred to the intermediary, paragraph (j) is controlling. Security interests in this case are created by written agreement and the giving of value.

Perfection of Security Interests under the Revised Code. Under Revised Article 8, a security interest that is effectively

89. Id. § 11-8-313(1)(d).
90. Id.
91. Id. § 11-8-313(1)(g).
92. Id. § 11-8-313(1)(h).
93. Id.
94. Coogan, supra note 6, at 1027.
95. Id. at 1028 n.65.
96. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-313(1)(i)).
98. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-313(1)(j)).
99. Id.
created is also perfected. Section 8-321(1) mandates that a section 8-313(1) transfer must take place before a security interest can attach and be enforced. According to section 8-321(2), when the debtor has rights in the collateral and the secured party has given value, a security interest transferred pursuant to agreement is perfected upon compliance with the provisions of section 8-313(1) under which public notice is not required. However, a security interest created by transfer under section 8-313(1)(i) becomes unperfected unless the requirements for transfer under another provision of section 8-313(1) are satisfied within twenty-one days.

D. Rights of Creditors

For an attachment or levy to be effective as to certificated securities, the security must actually be seized. This current procedure will continue under Revised Article 8. Article 8 has been expanded, however, to enable creditors to reach those certificated securities not within the debtor's control. Process upon the issuer, as provided by section 317(2) of Revised Article 8, is the only method by which a creditor may reach an uncertificated security registered in the debtor's name. Under subsection (3) a secured party who is not a financial intermediary can make an effective levy by legal process on a secured party in possession of a certificated security or in whose name an uncertificated security is registered. Subsection (4) of 8-317 provides for process on the financial intermediary on whose books the interest of the debtor appears. This is a means of reaching the interest of a debtor in an uncertificated security registered in the name of a financial intermediary. When a third party controls a debtor's interest in securities, subject to a judicial lien, subsection (5) permits the transfer of the securities for new value, free of the creditor's lien. Unless applicable law provides otherwise, the lien attaches to the proceeds of a third party to the transfer.

100. Id. § 11-8-321(2).
101. Id. § 11-8-321(1).
102. Id. § 11-8-321(2).
103. Id.
105. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-317(1)).
106. Sabbath & Conrad, supra note 7, at 58.
107. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-317(2)).
108. Id. § 11-8-317(3).
109. Id. § 11-8-317(4).
110. Id.
111. Id. § 11-8-317(5).
112. Id. This code section is similar to U.C.C. § 9-207 for other personal property.
IV. Criticisms of Uncertificated Securities and Revised Article 8

A. The Initial Transaction Statement

One criticism of uncertificated securities under Revised Article 8 is that the initial transaction statement ("ITS") received from the issuer provides less protection to the purchaser than a certificate. When buying certificated securities, a purchaser may normally assume that the holder of the certificate is the owner and entitled to transfer it.\(^{113}\) To a certain extent the ITS associated with uncertificated securities serves as a substitute certificate,\(^{114}\) but its function as such is limited because it is a record of the rights of the registered owner or pledgee as known to the issuer solely at the time the ITS is issued.\(^{115}\) Since the time the ITS was issued, the security might have been transferred or pledged.\(^{116}\) These later transfers would not appear on the ITS; therefore, the ITS does not provide any insurance that its holder is the current owner of the uncertificated security and entitled to effectuate its transfer.\(^{117}\) The only real assurance will come from the purchaser’s own ITS received from the issuer after the sale takes place.\(^{118}\) If the purchaser chooses not to rely on the seller’s representations or those of a third party guarantor, the purchaser could require that the seller obtain a current ITS from the issuer. The owner has the right to request an ITS from the issuer at any time.\(^{119}\) The requested ITS would reflect the current status of the issuer’s right to a lien,\(^{120}\) terms of the security,\(^{121}\) restrictions on transfer,\(^{122}\) and any adverse claims.\(^{123}\)

B. One Pledge Rule

Section 8-108 limits the number of registered, and therefore perfected, pledges to only one at any given time.\(^{124}\) Professor Peter F. Coogan was a member of The Permanent Editorial Board when the Board approved and recommended for adoption the amendments to Revised Article 8.\(^{125}\)

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113. Reporter's Introductory Comments, supra note 4.
114. According to section 8-105(2) statements sent by an issuer of uncertificated securities are not negotiable and are not a substitute for a certificated security.
115. Coogan, supra note 6, at 1024.
117. Id.
118. Id.
119. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-408(6)).
120. Id. § 11-8-103(b).
121. Id. § 11-8-202(1).
122. Id. § 11-8-204(b).
123. Id. § 11-8-304(2). For a general discussion of the limitation of the ITS, see Coogan, supra note 6, at 1024-26.
124. Revised Article 8, supra note 1 (to be codified at O.C.G.A. § 11-8-108).
125. Coogan, supra note 6, at 1013.
He is critical of this "one-pledge rule" because the rule makes it impossible to adequately perfect a junior security interest in uncertificated securities.\textsuperscript{126} To perfect a junior security interest in an uncertificated security already subject to a pledge, the senior lender must receive notification under section 8-313(1)(h)(iv).\textsuperscript{127} According to Professor Coogan, the junior lender will not want to rely on the receipt by the senior lender of notification of a new security agreement to create a junior interest in the senior lender's collateral.\textsuperscript{128} No protection is provided to the junior lender when the debtor pays the senior debt. Once the senior lender's security interest is terminated, the debtor is able to cause the issuer to register the debtor as the owner with no registered pledgee.\textsuperscript{129}

The principal drafters of Revised Article 8, Martin J. Aronstein, Robert Haydock, Jr., and Donald A. Scott ("the drafters") have answered these criticisms of the one-pledge rule.\textsuperscript{130} The drafters contend that what Professor Coogan foresees as undesirable consequences of allowing only a single pledge are not a significant consideration in the real world.\textsuperscript{131} The drafters argue that allowing multiple pledges of uncertificated securities would place such a heavy administrative burden on the issuer registering those pledges that it could deter an issuer from adopting an uncertificated system altogether.\textsuperscript{132} The one-pledge rule of Revised Article 8 does not create a new problem. Under existing law, only a single security interest can be perfected by possession of certificated securities.\textsuperscript{133} Therefore, the creation and perfection of a nonpossessory junior security interest is accomplished through notice to the person holding the certificate. The only change made regarding uncertificated securities is that the notice is directed to the person in control of the power to transfer the uncertificated security, instead of the person in possession of the certificated security.\textsuperscript{134}

An alternative to the one-pledge rule would be to allow two registered pledgees. This would only minimally increase the issuer's burden while allowing for the documentation of junior security interests. However, perfection of only one pledge at a time appears to present no real barrier in practice, since none of the forty-four states that have adopted their...
own version of Revised Article 8 have expanded the number of registered pledgees in the fifteen years Revised Article 8 has been in existence.135

C. Lack of Public Notice and the Possibility of Two Bona Fide Purchasers

Another criticism articulated by Professor Coogan is that Revised Article 8 does not address the lack of public notice of a pledgee's interest in uncertificated securities.136 No filing records for investment securities exist under Article 8. The possession of the securities cannot be used as evidence of the debtor's interest in the securities, because there is no instrument with uncertificated securities.137 Therefore, it is possible for two bona fide purchasers to exist.

One possible scenario in which there would be two bona fide purchasers is an owner of securities who makes himself the registered pledgee of his shares, registers a clearing corporation as the owner, and then obtains a loan equal to the full value of the shares. The security interest in the shares would be perfected under section 8-313(1)(g) by the clearing corporation marking its books to indicate that it holds for the lender. This lender would have the status of a bona fide purchaser under section 8-302(1)(c). The owner could then fraudulently sell his shares in a section 8-313(1)(b) registered transaction to a purchaser who would also be considered a bona fide purchaser. The issuer would send the purchaser a clean ITS due to lack of knowledge of the owner's transaction with the lender. As a result, the former owner would then be able to benefit from both the loan proceeds and the sale of the securities.138

The drafters, in addressing Professor Coogan's criticism, admit that this is a possible scenario, but one that is highly remote. If it were ever to occur, the drafters believe a court would determine that the lender would bear the loss but could recover against the clearing corporation and that the purchaser in the scenario who looked to the issuer to establish his interest should be entitled to the shares.139 The drafters see this conclusion as a simple one given that the clearing corporation allowed the owner of securities to register the shares and then for some unknown reason allowed the owner to become the registered pledgee. They view this as

136. Coogan, supra note 6, at 1036.
137. Id. at 1037.
138. Id. at 1041-42.
139. Article 8 Is Ready, supra note 4, at 910.
analogous to placing certificated securities with a clearing corporation and then receiving the certificates back endorsed for transfer.\(^{140}\)

D. Shifting the Expense to the Issuer

Another area of concern with uncertificated securities is that although using uncertificated securities decreases the paperwork and increases the efficiency of dealing with securities for brokers; buyers, sellers, and others, it does so at the issuer's expense. With certificated stock, the transfer and creation of a security interest can be executed by the actual physical delivery of the certificate and no real involvement of the issuer.\(^{141}\) Under Revised Article 8, the transfer of uncertificated securities and the creation and perfection of security interests in uncertificated securities primarily occur through notification to the issuer, who must send an ITS to the parties involved. While the uncertificated security benefits other participants in the industry by allowing for the completion of transactions at a much faster rate, a more active role is required by the issuer. The real expense to the issuer, however, is questionable, since it appears that the ITS could be produced by way of a form letter on a computer and would be of minimal cost once the ITS becomes a matter of institutionalized routine.

IV. Conclusion

Although Revised Article 8 may not hold all the answers to the difficulties faced by the security industry, the revision to include uncertificated securities is a major step in eliminating many of the problems. By using uncertificated stock, participants in the security industry will be able to eliminate the paper trail and the time involved with certificates, and better use today's technology. Now that uncertificated securities are available to Georgia corporations they can exercise the same options for the issuance of securities enjoyed by companies in other states. Georgia's adoption of Revised Article 8 has been long overdue.

SHAWN M. STORY

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140. *Id.* at 909.
141. Revised Article 8, *supra* note 1 (to be codified at O.C.G.A. § 11-8-313(1)(a)).