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Achieving Law Reform Sometimes Requires a Strong Defense

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ACHIEVING LAW REFORM SOMETIMES REQUIRES A STRONG DEFENSE

William H. Henning[*]

ABSTRACT

In 2019, a joint drafting committee authorized by the Uniform Law Commission and the American Law Institute began work on a sweeping set of amendments to the official text of the Uniform Commercial Code (UCC) that address issues arising from emerging technologies. The amendments were approved by the sponsoring organizations at their 2022 annual meetings, and efforts are already underway to gain uniform nationwide enactment by state legislatures. The most significant changes to the UCC consist of a new Article 12 dealing with digital assets and amendments to Article 9 that facilitate the leveraging of these assets. Also in 2019, Wyoming adopted legislation to accomplish much the same thing. Although well-intended, the manner in which the legislation was drafted created serious problems for the functioning of that state's version of Article 9 and for lawyers planning financing transactions involving digital assets. Between 2019 and 2022, bills based on the Wyoming model were introduced in over 20 states. In response, the Uniform Law Commission launched an intense effort by a small team of its members to explain to these states the problems with the legislation and to encourage them to wait for the official amendments to be finalized. I was a member of the joint drafting committee and of the team that opposed Wyoming-like legislation. The Article is based on my first-hand observations and on documents maintained in my files.

INTRODUCTION

Achieving law reform through uniform state laws is a bit like surfing – to be successful, you have to catch the wave. Many projects come to the attention of the Uniform Law Commission (ULC) after states have begun to act, and if the ULC is able to produce a uniform law before too many states have acted, its chances of success are enhanced significantly. But the ULC is not fleet-footed. The normal procedure for a project that results in the promulgation of a uniform act consumes about three years, including first a study committee that considers whether a drafting project would conform to certain ULC criteria and then a drafting committee that must read drafts line-

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by-line at two annual meetings.[1] Many acts take longer, sometimes much longer,[2] to develop.

If too many states have enacted non-uniform laws by the time the ULC produces an act and gets it into the legislative pipeline, the wave will have passed the organization, and the project will not be a nationwide success. A prime example is the 1993 Uniform Health-Care Decisions Act, which has been adopted in only seven states, largely because most states had already acted by the time it was promulgated.[3] Another example is the 2013 Uniform Prevention of and Remedies for Human Trafficking Act, which has been adopted in 10 states but undoubtedly would have had many more enactments if the project had concluded sooner. Yet another example is unfolding now: The Drafting Committee on a Restrictive Covenants in Deeds Act[4] held its first reading at the ULC's 2022 Annual Meeting, but quite a number of states have introduced bills on the subject in just the last year.[5] If an effort is not made to halt the spread of non-uniform laws, this act may suffer the fate of the Health-Care Decisions and Human Trafficking acts.

While the ULC has generally been unable to expend legislative resources opposing non-uniform legislation,[6] the importance of the Uniform Commercial Code (UCC) led to an effort over the last two years that has been largely successful in tamping down non-uniform legislation in the digital-asset area developed by the ULC and American Law Institute (ALI) Joint Drafting Committee on the Uniform Commercial Code and Emerging

1. UNIF. L. COMM'N CONST. art. VIII, § 8.01(a)(2).

2. An extreme example is the project to amend Article 2 of the Uniform Commercial Code (UCC), which began in 1987 with the PEB's recommendation for a study and culminated in 2003 with the promulgation of a set of amendments to the article. For a description of this process, *see* William Henning, *Amended Article 2: What Went Wrong?*, 11 DUQ. BUS. L.J. 131 (2009).

3. A ULC drafting committee is currently revising the Uniform Health-Care Decisions Act and expects to complete its work in 2023. As stated in the Prefatory Note to the 2022 Annual Meeting Draft, the revision "modernizes the 1993 Act to reflect changes in how health care is delivered, increases in non-traditional familial relationships and living arrangements, the proliferation of electronic documents, the growing use of separate advance directives exclusively for mental health care, and other recent developments." UNIF. HEALTH-CARE DECISIONS ACT (UNIF. L. COMM'N, Draft June 22, 2022), *available at* https://www.uniformlaws.org/viewdocument/2022-annual-meeting-4?CommunityKey=5d7366a0-caa4-4b86-abe5-0a24f5860223&tab=librarydocuments.

4. The act will enable an owner of land for which a discriminatory restrictive covenant appears in the chain of title to have the covenant released or expunged from the record.

5. A. B. 1477, 2021-2022 (Cal. 2021); S. 1240, 66th Leg., 2d Reg. Sess. (Idaho 2022); H.B. 58, 102d Gen. Assemb. (Ill. 2021); H.B. 1058, Reg. Sess. (La. 2022); H.B. 1662, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022); and H. 551, Gen. Assemb., 2021-2022 Sess. (Vt. 2022). States considering legislation include Connecticut, Georgia, Massachusetts, Michigan, Nebraska, New York, South Carolina, and Texas.

6. There have been exceptions. In early 2015, the American Legislative Exchange Council (ALEC) distributed an alternative model act to the newly approved Uniform Fiduciary Access to Digital Assets Act (UFADAA) that had the support of a number of high-tech firms. ALEC's model act would effectively have prevented any meaningful fiduciary access, so the ULC mounted a campaign that resulted in a stalemate in the states. This led to a return to the drafting table and the Revised UFADAA, which was approved at the ULC's 2015 Annual Meeting, has now been enacted in forty-seven jurisdictions.

Technologies (Joint Committee).[7] The lessons learned in this effort may prove helpful in future efforts to stem the tide of non-uniform laws governing restrictive covenants in deeds and to enhance enactment prospects for future drafting projects faced with a similar problem.

The emerging technologies project came about slowly. It began with a proposal for a drafting project to create a framework for mortgage-backed electronic instruments that would be maintained in an electronic registry.[8] This project was ultimately unsuccessful, but the lessons learned were important factors in the subsequent recommendation of the Permanent Editorial Board for the Uniform Commercial Code (PEB)[9] that led to the formation of the Joint Committee in 2019.[10] The committee began its work as a study committee, but subsequently received permission from the sponsoring organizations to draft amendments to the UCC on a number of topics, most importantly for this Article on the topic of digital assets.

This Article describes Wyoming's legislation in Part I and the proliferation of proposed legislation based on the Wyoming model in Part II. Part III analyzes some of the problems with this legislation and how the official amendments to the UCC resolve the problems. Part IV details the results of the team effort, which were almost universally successful, but led to the enactment in some states of relatively benign alternative legislation. Lastly, the Conclusion opines on lessons the ULC has learned from the team effort and how those lessons might impact future projects.

I. WYOMING GOES ROGUE

The emergence of blockchain technology, and its perceived importance to economic development, led Wyoming to enact a spate of laws designed to create an attractive environment for businesses using the technology.[11] The goal was to diversify Wyoming's economy, which is heavily dependent on fossil fuels, by making the state "the Delaware of digital asset law."[12] Among

7. Each sponsoring organization gave final approval to the amendments at its 2022 annual meeting, and the ULC has formed an Enactment Committee, on which I serve, to seek adoption of the amendments in each state.

8. Project Proposal to ULC Comm. on Scope & Program submitted by Ad Hoc Subcomm. of the ULC Residential Mortg. Note Registry Working Group for a Drafting Comm. on Unif. State Elec. Residential Mortg. Note Registry (June 2015) (on file with author).

9. The PEB, which is composed of six members each from the ULC and the ALI, recommends study and drafting projects to the sponsoring organizations, monitors the activities of study and drafting committees, and prepares commentaries and reports on issues related to the UCC.

10. For the history of the project, *see* UNIF. COM. CODE & EMERGING TECHS (UNIF. L. COMM'N, Draft June 27, 2022) (prefatory note to 2022 annual meeting draft), *available at* https://www.uniformlaws.org/viewdocument/archive-committee-55?CommunityKey=1457c422-ddb7-40b0-8c76-39a1991651ac&tab=librarydocuments.

11. Caitlin Long, *What Do Wyoming's 13 New Blockchain Laws Mean?*, FORBES (Mar. 4, 2019, 7:29 AM), https://www.forbes.com/sites/caitlinlong/2019/03/04/what-do-wyomings-new-blockchain-laws-mean/?sh=7c8ff2655fde.

12. *Id.*

the laws passed by the state was an act relating to security interests in digital assets that became effective July 1, 2019,[13] just as the Joint Committee began its work. The act clearly implicates Articles 8 and 9 of Wyoming's UCC, which is in Title 34.1 of Wyoming Statutes Annotated, but does not directly amend them; instead, its provisions are separately located in Title 34. Discussion of the problems with some of the act's provisions is postponed until the discussion below of Wyoming-like bills that have spread across the country since 2019.

Although well-meaning, the drafters of Wyoming's act apparently had only a superficial understanding of Article 9. The act haphazardly, and apparently inadvertently in some instances, modifies or supplants many important Article 9 provisions, including some definitions of collateral types and some rules relevant to perfection and priority.[14] The changes simply do not fit within the framework of Article 9 and have the potential to create uncertainty in existing, well-established markets. Because of these problems, Wyoming's digital-asset industry will be well-served if the legislature repeals its existing law and enacts the Joint Committee's amendments.

II. THE WYOMING VIRUS SPREADS

The buzz surrounding Wyoming's self-designation as the Delaware of digital assets, amplified by individuals and organizations dedicated to the proliferation of blockchain technology, proved irresistible to many legislators in other states: digital-asset bills began to be introduced in states across the nation. There were some variations among the bills, but they were largely consistent with Wyoming's approach. It soon became apparent that they presented a serious threat to the ULC's goal of widespread enactment of the official amendments being prepared by the Joint Committee. If the ULC failed to act, it would miss the wave on one of its most important drafting projects.

Under the leadership of Ed Smith, Chair of the Joint Committee, and with exceptional assistance from Ben Orzeske, Chief Counsel of the ULC, a small team of ULC members began a campaign to defeat these bills. The first step was to develop a somewhat standard report to clearly articulate the problems with the bills and to inform readers of the Joint Committee's ongoing efforts. The message was, essentially, "don't enact that awful bill—help is on the way." Developing the report was challenging, but it was critical to the campaign's ultimate success. Members of the team did the actual drafting but called on many others to analyze provisions in the bills that fell within their particular areas of expertise.

13. Wyoming subsequently enacted HB 0043, effective July 1, 2021, which further defines "digital asset." Wyo. Stat. Ann. §§ 34-29-101–34-29-105 (WESTLAW through 2022 Budget Sess. of the Wyo. Legis.).

14. For an excellent and thorough analysis of the Wyoming act, *see* Matt Crockett, *Wyoming DIY Project Gets Western with the UCC*, 20 WYO. L. REV. 105 (2020).

Armed with this report, the team engaged with the legislative sponsors of the bills, other legislators with whom the ULC has developed a good working relationship, the local delegations of commissioners and, increasingly, representatives of the banking industry. Because of local politics the strategy inevitably differed from state to state, and Chief Counsel Orzeske was instrumental in organizing each state's resistance. At some point in the campaign so many acts were popping up that the members of the team analogized their efforts to the game of whack-a-mole, and emails within the team announcing the filing of a new bill began to be labeled "mole alerts."[15]

III. PROBLEMS WITH WYOMING-TYPE LEGISLATION

There are several problems with the Wyoming-like acts that have proliferated since 2019. The problems stem primarily from the drafters' apparent lack of familiarity with the structure of the UCC, particularly the substantive and choice-of-law rules of Article 9. The 2022 amendments avoid each of these problems by *inter alia* creating a new Article 12 that deals with digital assets and amending Article 9 to facilitate the leveraging of these assets. The amendments also contain carefully thought-out choice-of-law and transition rules – features entirely missing in the Wyoming and Wyoming-like acts. The discussion below focuses on some of the most significant of these problems.[16]

A. THE DEFINITION OF "DIGITAL ASSET."

Most Wyoming-like acts indirectly amend Article 9 of the UCC to include a "digital asset" as a type of property. The term is defined broadly to mean "a representation of economic, proprietary or access rights that are stored in a computer-readable format."

> The definition of "digital asset" in the bill is so broad that it includes any asset that happens to be contained in an electronic record. For example, the payment obligations of buyers and lessees of big-ticket items like automobiles are "chattel paper" under the UCC. There is a thriving industry built around the stream of income thrown off by chattel paper in electronic form. The stability of that industry depends on a secured party being able to obtain "control" of the electronic chattel paper, and thereby priority, under a very precise set of Article 9 rules. There have developed in the market

15. In 2021, the team dealt with bills in Arkansas, Nebraska, Nevada, South Carolina, South Dakota, and Texas. In 2022, the pace picked up with bills being introduced in Colorado, Connecticut, Hawaii, Idaho, Indiana, Kentucky, Missouri, Mississippi, New Hampshire, New Jersey, Ohio, Rhode Island, Utah, and West Virginia.

16. Memorandum from the Unif. L. Comm'n Nat'l Conf. on Unif. State Ls., Selected Issues with Ohio's Proposed H.B. 585 and the Uniform Commercial Code (Mar. 1, 2022) (on file with author). The issues identified with respect to the Ohio bill are representative of the issues raised by the Wyoming-like bills introduced in other states. References to UCC provisions are to the UCC as amended in 2022.

> highly sophisticated "electronic vaults" designed to meet these rules. Great mischief will be caused by defining digital asset broadly enough to encompass electronic chattel paper, as is the case under the bill, thereby subjecting electronic chattel paper to the bill's very different control regime.[17]

As mentioned above, the 2022 amendments create a new Article 12 to cover digital assets, called "controllable electronic records" (CERs).[18] The definition of that term excludes a deposit account, an electronic copy of a record evidencing chattel paper, an electronic document of title, electronic money (a new type of Article 9 asset introduced by the amendments), investment property, and a transferable record.[19] Each of these asset types is adequately dealt with under the prior version of Article 9 or Article 9 as amended. CERs are integrated into amended Article 9 as a new subset of general intangibles.[20] Separating the definition of a CER from the definitions of other Article 9 property types in this manner avoids the overlapping definitions that are so problematic in the Wyoming-like acts.

B. THE TAKE-FREE RULE.

The Wyoming-like acts provide that a transferee of a digital asset that is perfected by filing "takes free" of a security interest if the transferee gives value and lacks actual notice of the security interest, but only after the passage of two years from the time of the transfer.

> The bill provides that a transferee of a digital asset perfected by a method other than control takes free of a security interest if the transferee gives value and lacks actual notice of the claim, but only after the passage of two years from the time of the transfer. The rule applies notwithstanding any other law, including Article 9, and thus appears to supersede many of the existing take free rules. The bill's "take free" rule appears to have been designed to protect transferees of virtual currency. However, as drafted, the rule applies to all digital assets. As explained above, this is a very broad category.[21]

The new Article 12 in the 2022 amendments contains a take-free rule that provides immediate protection from competing property claims, including security interests, for a "qualifying purchaser" of a CER.[22] This protection

17. *Id.*

18. U.C.C. § 12-102(a)(1) (AM. L. INST. & UNIF. L. COMM'N 2022) ("'Controllable electronic record' means a record stored in an electronic medium that can be subjected to control under Section 12-105").

19. *Id.*

20. U.C.C. § 9-102(a)(42) (AM. L. INST. & UNIF. L. COMM'N 2022).

21. Memorandum from the Unif. L. Comm'n Nat'l Conf. on Unif. State Ls., *supra* note 16.

22. U.C.C. § 12-104(e) (AM. L. INST. & UNIF. L. COMM'N 2022). A "qualifying purchaser" is a purchaser that obtains control of a CER for value, in good faith, and without notice of a property right in the CER. *Id.* at § 12-102(a)(2). As with negotiable instruments and investment property, the

for a qualifying purchaser is carried through into Article 9 as amended.[23] This approach leaves the Article 9 take-free rules for other types of assets in existence prior to the amendments unaffected by the new take-free rule for CERs.

C. CHOICE-OF-LAW.

The Wyoming-like acts provide that control is the equivalent of "possession" as that term is used in existing Article 9, that a secured party with control over a digital asset has a possessory security interest in the asset, and that a digital asset is deemed located in the enacting state if: i) the asset is held by a custodian authorized by the laws of the state, ii) the debtor or secured party is physically located in the state, or iii) the debtor or secured party is incorporated or organized in the state.

> The bill's choice-of-law rules conflict with those of the UCC. For example, the bill states that perfection by control constitutes possession for purposes of the UCC and that a digital asset is deemed located in Ohio under a broad range of circumstances, including the secured party being located in Ohio. The result is that the Ohio UCC choice-of-law rules may require the application of Ohio law to determine perfection by control and priority of a security interest in a digital asset, but courts outside of Ohio would apply the normal UCC choice-of-law rules that point to the law of a different state. The bill also seems to permit perfection of a security interest in a digital asset by filing with the Ohio Secretary of State even though, under the UCC's choice-of-law rules perfection by filing must occur under the law of the jurisdiction where the debtor, not the secured party, is located.[24]

Oil and gas producers relying on a special automatic perfection rule in Texas's version of Article 9 learned this lesson the hard way when they asserted secured claims in the bankruptcy proceeding of a Delaware limited liability company. The court correctly held that Delaware law governed perfection and that Texas's automatic perfection rule never came into play.[25]

The choice-of-law rules applicable to the Article 12 take-free rule and the Article 9 rules for perfection by control and priority of a security interest in a controllable electronic record are essentially the same, an approach which promotes consistency and predictability. The rules are based on the Article 8 and Article 9 choice-of-law rules for financial assets credited to a securities account maintained by a securities intermediary.

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filing of a financing statement is not, in and of itself, notice of a property claim to a CER. *Id.* at §§ 12-104(h), 9-331(c).

23. U.C.C. § 9-331(a) (AM. L. INST. & UNIF. L. COMM'N 2022) (stating that a qualifying purchaser with control takes free of an earlier security interest, even if perfected, to the extent provided in Article 12).

24. Memorandum from the Unif. L. Comm'n Nat'l Conf. on Unif. State Ls., *supra* note 16.

25. *See In re* First River Energy, LLC, 986 F.3d 914, 928 (5th Cir. 2021). The decision is consistent with *In re* SemCrude, L.P., 864 F.3d 280, 293 (3d Cir. 2017).

D. OTHER ISSUES.

Among many other issues arising from the Wyoming-like acts are:

a. They include all virtual currencies within the UCC's definition of "money" without differentiating between fiat and non-fiat virtual currencies.[26] Under the 2022 amendments, fiat virtual currencies are money and not within the scope of the new Article 12,[27] while non-fiat currencies are CERs governed by Article 12.[28]

b. They are blockchain-focused rather than technologically neutral. The 2022 amendments describe the rights that must accrue to a person having control,[29] which are analogous to those of a person possessing a tangible asset, but do not require that control be achieved through the use of a particular technology. The benefit of a technologically neutral approach is that the amendments will still be functional under technologies that may be developed in the future.

c. They provide that a security interest in a digital asset may be perfected by control through the use of a smart contract, but the language used to describe how this works is confusing.[30] This is another example of an ill-considered focus on a particular technology.

IV. THE RESULTS OF THE CAMPAIGN TO STOP THE SPREAD

The results of the campaign to stop Wyoming-type legislation from taking root in other states have been extremely positive. No state has adopted

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26. Fiat virtual currencies are sometimes referred to as central bank digital currencies, or CBDCs. For example, the Marshall Islands has adopted a blockchain-based virtual currency as its legal tender. Declaration and Issuance of the Sovereign Current Act, 17 MIRC § 302 (2018) (Marsh. Is.).

27. For purposes of Article 9, the collateral type "money" is subdivided into "tangible money" and "electronic money." U.C.C. §§ 9-102(a)(54A), (79A), (31A) (AM. L. INST. & UNIF. L. COMM'N 2022). A security interest in tangible money must be perfected by possession; a security interest in electronic money must be perfected by control. U.C.C. §§ 9-312(b)(3)-(4). A new take-free rule provides the same protection for transferees of electronic money as transferees of tangible money. U.C.C. § 9-332(b).

28. The amendments implement the policy that a virtual currency is not money if it has not been issued by a country's central bank or other government agency, even if it has been authorized or adopted as a medium of exchange by the government of that country. The policy is implemented by an amendment to the Article 1 definition of "money" that excludes from the term "an electronic record that is a medium of exchange recorded and transferable in a system that existed and operated for the medium of exchange before the medium of exchange was authorized or adopted by the government." U.C.C. § 1-201(b)(24). Under this policy, Bitcoin is not money even though El Salvador enacted legislation in 2021 recognizing Bitcoin as a medium of exchange in that country. Decreto N° 57 La Asamblea Legislativa De La República De El Salvador [Legislative Decree No. 57 of the Republic of El Salvador].

29. For a person to have control of a CER, the person must have i) the power to enjoy "substantially all the benefit" of the CER, ii) the exclusive power to prevent others from enjoying "substantially all the benefit" of the CER, and iii) the exclusive power to transfer control or to cause another person to obtain control of the CER. U.C.C. § 12-105(a).

30. For example, it is unclear how a secured party can create a smart contract unilaterally and protect the debtor has against the secured party's unilateral action.

a full-blown Wyoming-type act and, now that the Joint Committee's amendments have been approved, it is unlikely that any state will do so. A side benefit of the campaign has been the opportunity to educate many commissioners, legislators, lenders, and others about the benefits of the amendments.

In most states, the team was able to stop bills in their tracks.[31] In a few states, however, the team had to settle for the adoption of an alternative act. These states followed four categories of approaches: (1) the Nebraska approach, which was followed by Indiana, New Hampshire, and Iowa; (2) the Texas approach, which was followed by Arkansas; and the *sui generis* (3) Idaho and (4) Utah approaches. None of these approaches are ideal, but the Nebraska and Texas approaches are essentially benign and even have some positive features.[32] The results in Utah are disappointing, but the bill that was adopted was stripped of almost all harmful Wyoming-like provisions. Idaho did not adopt the full-blown Wyoming-like bill that was initially introduced but what it adopted contains quite a number of pernicious provisions.

A. THE NEBRASKA APPROACH.

Largely through the efforts of Nebraska Commissioner Harvey Perlman and with drafting support from the Joint Committee's then-Reporter, Professor Steven Harris,[33] Nebraska enacted Legislative Bill 649 in 2021, to become effective on July 1, 2022. The bill consisted of the then-current Joint Committee draft of Article 12 and the corresponding changes to Article 9, and it was understood to be a placeholder for the final version of the Joint Committee's amendments. The effective date has since been moved back to July 1, 2023. In the best of all possible worlds, the act would never take effect.

Indiana, Iowa, and New Hampshire took roughly the same path in 2022. Indiana adopted SB 0351 and Iowa adopted HB 2445, both of which became effective on July 1, 2022. New Hampshire adopted HB 1503 with an effective date of January 1, 2023.[34] Each act contains what is essentially the ALI

31. Some of these states, seeking to appease supporters of the bills, have created working groups charged with preparing a report on the ways in which blockchain technology might benefit the state and its residents. For example, in 2021 Texas enacted HB 1576, which created a Working Group on Blockchain Matters charged with developing a master plan for the expansion of the blockchain industry in Texas. H.B. 1576, 87th Leg., Reg. Sess. (Tex. 2021). I was appointed by Governor Greg Abbott to serve on this group and am the co-chair of its Commercial Law and Contracts Subcommittee. The Working Group's highest legislative priority is for Texas to enact the amendments developed by the Joint Committee. The chair of the Working Group is Professor Carla Reyes, who has recently been appointed to serve as Assistant Research Director of the PEB along with Professor Andrea Tosato.

32. The team obtained permission from the leadership of the ULC for both the Nebraska and the Texas approaches.

33. Professor Harris is now deceased, and the responsibilities of the Reporter have been assumed by Professor Charles Mooney. Professor Harris's contributions to the work of the Joint Committee cannot be overstated, nor can his brilliance, skill, dedication, and graciousness. He is greatly missed.

34. Professor Mooney provided drafting support for the Indiana effort.

Council draft of Article 12 (denominated Article 14 in Iowa) and the corresponding changes to Article 9. The Nebraska, Indiana, and Iowa acts all lack the transition provisions that were adopted by the Joint Committee late in the drafting process, and each act has less-than-ideal choice-of-law provisions.

B. THE TEXAS APPROACH.

The approach taken by Texas was the most innovative. After concerns were raised about the Wyoming-type bill that he initially considered for introduction, Texas State Representative Tan Parker[35] pulled together a working group consisting of members of the Texas Blockchain Council, the Texas Bar Association's Committee on the UCC,[36] and representatives of the banking industry to discuss an alternative approach. During the group's discussions, it became apparent that the primary concern of the bill's supporters was the need for legislation facilitating the leveraging of virtual currency. This would allow owners to use their virtual currency to obtain capital at market interest rates instead of having to sell it and pay capital gains tax rates.

The solution was to follow the approach of the Joint Committee by creating a new UCC Article 12, limiting its scope to "virtual currency." While the Joint Committee uses the term "controllable electronic record" to describe all Article 12 digital assets, the term was too broad for an article limited to one type of digital asset. Instead, the group adopted the definition of "virtual currency" in the ULC's Uniform Regulation of Virtual Currency Businesses Act.[37] Like the Nebraska approach, the Texas act adopted the then-current Article 12 Joint Committee provisions dealing with control and the take-free rights of qualifying purchasers, as well as the corresponding amendments to Article 9, all of which were limited to virtual currency. This law took effect in Texas on September 1, 2021.

The Arkansas legislature adopted the language used in the Texas bill in HB 1926, which became effective on July 28, 2021, before the Texas law took effect.

C. THE IDAHO APPROACH.

The Idaho approach resulted in legislation that might best be described as Wyoming-lite. Although the team was able to stop the bill that was initially introduced, it was unable to engage legislators in a constructive conversation that might have led to a more acceptable outcome.

35. Representative Parker represents House District 63.

36. I serve on the Texas Bar Association's Committee on the UCC and was actively involved in developing the Texas approach.

37. UNIF. REGUL. OF VIRTUAL-CURRENCY BUS. ACT § 102(24) (UNIF. L. COMM'N 2017).

HB 583, effective on July 1, 2022, contains definitions similar to those adopted in Wyoming but that differ in quirky ways. For example, the definition of "digital asset" largely tracks the Wyoming definition but adds at the end "or any other controllable electronic record."[38] The act does not define the term, nor does it define "controllable," "electronic," or "record."

On the positive side, there is a take-free rule that protects a "qualified purchaser" of a digital asset from adverse claims and that defines such a person as a purchaser "that obtains the digital asset for value, in good faith, and without notice of a claim of a property right in the digital asset."[39] This is essentially the same as the take-free rule protecting a "qualifying purchaser" developed by the Joint Committee. On the negative side, the act contains a brief section on perfection and priority that manages, in a few lines, to import many of the evils described above in the full-blown Wyoming-like legislation.[40] Idaho represents the team's greatest setback.

D. THE UTAH APPROACH.

Utah's SB 182, effective on May 4, 2022, is puzzling. The act contains definitions modeled on Wyoming's,[41] but the definitions are largely unused in the substantive provisions. The only definition related to the UCC used in a substantive provision is "digital security," which means a digital asset that is a security under Article 8.[42] The only substantive provision related to the UCC states that digital securities are to be treated as securities under Article 8 and as investment property under Article 9.[43] There are no substantive provisions directly related to the perfection or priority of a security interest in a digital asset, but the definition of "control" provides that a secured party has control of a digital security (for purposes of Articles 8 and 9) if it "has created a smart contract which gives the secured party exclusive legal authority to conduct a transaction relating to" the digital security.[44]

It's almost as if the Utah legislature concluded that it had to enact something and, even though it was unwilling to adopt either the Nebraska or Texas approach, it absorbed the team's admonitions about the harm that could be caused if it followed the Wyoming model.

CONCLUSION

The effort to protect a prospective uniform act by blocking legislation on the same topic was an experiment for the ULC. There was never any grand design or policy framework for the effort; a bill would come along, and an

38. IDAHO CODE § 28-5303(3) (2022).
39. *Id.*
40. IDAHO CODE § 28-5306 (2022).
41. UTAH CODE ANN. § 13-62-101 (LexisNexis 2022).
42. *Id.* at (4).
43. UTAH CODE ANN. § 13-62-102(1) (LexisNexis 2022).
44. *Id.* at (2)(b).

ad hoc effort would be made to stop it. And then another bill would come along. Over time, members of the team had performed certain roles so often that they naturally fell into those roles each time a new bill came along.

Ed Smith was the captain, and Ben Orzeske ran what was, in effect, a central clearinghouse and communications hub. Another team member assumed responsibility for adopting the analytic report as each new bill emerged,[45] yet another team member used widespread connections developed in the practice of commercial law to mobilize state banking associations and sometimes individual banks, and all team members were available to advise commissioners and legislators, including appearing at legislative hearings by Zoom and providing testimony. The effort has significantly enhanced the prospects for uniform nationwide enactment of the Joint Committee's amendments.

There is a lesson here for the ULC, and perhaps it will be used in the near future. Rather than hoping to catch up with a wave already racing away, perhaps a drafting committee can delay the formation of the wave and thereby increase the chances of catching it and riding it forward. At the outset of this Article, there was a reference to bills being introduced in several states on the subject matter under consideration by the Drafting Committee on a Restrictive Covenants in Deeds Act. For bills that have not already been enacted and those that may be introduced during the final year of the committee's deliberations, an effort along the lines described in this Article might prove beneficial.

45. This was my primary role on the team.