



**CLARKS' OIL AND GAS  
FINANCING UNDER  
THE UCC**

**BARKLEY CLARK  
BARBARA CLARK  
MATTHEW CLARK**

An A.S. Pratt™ Publication

# Clarks' Oil and Gas Financing Under the UCC

Barkley Clark

Barbara Clark

Matthew Clark

*An A.S. Pratt™ Publication*



## About the Authors

BARKLEY CLARK is well known as a national authority on commercial and financial services law, particularly secured transactions under the UCC. He is a partner in the law firm of Stinson Leonard Street LLP, located in the Washington, D.C. office. He advises financial institutions and businesses around the country on a variety of UCC and federal banking law issues. He has also practiced oil and gas law in Denver, and represented a major refiner in the recent *SemCrude* litigation. For many years, he has been listed in *Best Lawyers in America*. He is a graduate of Amherst College and Harvard Law School. During a teaching career spanning 45 years, he has taught commercial and banking law, including secured transactions, at the University of Kansas School of Law, Georgetown Law Center, George Washington University, and the University of Virginia. His publications are relied on by practicing attorneys and bankers throughout the financial services industry and are frequently cited by federal and state courts. Mr. Clark has served as a special advisor to the Federal Reserve Board, the Uniform Law Commission, and state legislatures around the country. In the 1990s, he served on the original Study Committee for the Revision of Article 9 of the UCC, which changed a number of the rules governing oil and gas finance. He has also served on the board of directors of a national bank. With Barbara Clark, he has co-authored two major treatises in the banking law area, *The Law of Secured Transactions under the UCC* and *The Law of Bank Deposits, Collections and Credit Cards*. With Barbara Clark, he also publishes a monthly newsletter, *Secured Transactions Monthly*, which reports on timely topics in secured lending, including oil and gas topics.

BARBARA CLARK is a former federal prosecutor and commercial litigator with over 35 years' experience. She is a partner in the Commercial Law Institute, Greenwood, Virginia. Ms. Clark is a graduate of Hamilton College and the University of Maryland School of Law. She has been a partner in private practice, specializing in commercial litigation and has represented financial institutions before federal and state regulators. One of Ms. Clark's areas of special interest is financial fraud and risk management. With Barkley Clark, she is a co-author of *The Law of Secured Transactions under the Uniform Commercial Code* and *The Law of Bank Deposits, Collections and Credit Cards*. With Barkley Clark and Mark Hargrave, she is co-author of *Compliance Guide to Payment Systems: Law and Regulation*. She also co-authors two monthly newsletters- one on secured transactions and the other on bank deposits and payments.

MATTHEW CLARK is a commercial litigator with the law firm of Faegre Baker Daniels LLP, where he handles a wide range of cases, including complex contract,

real estate, manufacturing, antitrust, intellectual property, and creditor-debtor disputes for clients in the banking, energy, and information technology industries. His practice frequently involves oil and gas issues, including representing clients in connection with the Exxon Valdez oil spill litigation and recently helping a fracking sands logistics provider in a trade secrets dispute. Mr. Clark works out of Faegre Baker Daniels' Colorado offices and lives in Boulder County, a hotbed in the fight over the rights of local communities to limit or ban fracking and other oil and gas projects in the face of state statutes and regulations authorizing oil and gas development. He is a graduate of the University of Chicago and the University of Arizona's James E. Rogers College of Law, where he served as the Editor-in-Chief of the *Arizona Law Review*. At the University of Arizona, Mr. Clark first became interested in tribal law issues, which are front and center in oil and gas development projects on Indian Country. Mr. Clark began his writing career in the early 1990s, writing a series of articles for *The Margin*, a magazine of applied economics. More recently, he has contributed to the monthly newsletter *Bank Deposits and Payments Monthly*.

Matthew thanks Michael Bolton, Leah Sixkiller, Anthony Broadman, and Colin Deihl, for sharing relevant insights about their practices and commenting on portions of this e-book. Matthew gives special thanks to Joe DiRago for being a frequent sounding board and providing his first-hand perspective on the *SemCrude* litigation.

# Table of Contents

Cover

Prefatory Material

Title Page

Copyright

Table of Contents

Preface

About the Authors

Oil and Gas Financing Under the UCC: Perfection and Enforcement of Security Interests

§ 1.01. Structure of Oil and Gas Finance

[1] Introduction

[2] Fractionalized Oil and Gas Interests

[3] Role of Article 9

§ 1.02. Interests in Unextracted Minerals: Personal Property or Real Estate?

[1] Introduction

[2] Mineral Estate and Royalties

[3] Leasehold Estate

[4] Overriding Royalties and Production Payments

[5] Net Profits Interest

[6] The Point at Which Article 9 Kicks In

§ 1.03. Security Interests in Extracted Oil and Gas and Proceeds of Sale

[1] Extracted Oil and Gas

[a] In General

[b] Buyer for Value without Knowledge

[c] Sales to Buyers in the Ordinary Course of Business

[d] Commingled Oil and Gas

[2] Accounts Generated From Sale of the Oil and Gas

[a] In General

[b] The Fullop Case

[c] Division Orders

[3] Security Interests in Oil and Gas Arising after Extraction

[4] Security Interests in Oil and Gas Stored Underground

[5] Factoring Transactions Involving Oil and Gas

§ 1.04. Article 9 Security Interests in Oil and Gas Equipment and Fixtures

[1] Introduction

[2] General Filing Problems

[3] Fixtures

[4] Perfection via Certificate of Title Notation

[5] Enforcement

[a] General Principles

[b] Commercially Unreasonable Foreclosure Sales: A Paradigm Case

[c] Commercially Reasonable Foreclosure Sales: A Paradigm Case

[i] The Texas Case

[ii] The Foreclosure Sale

[iii] Choice of Law Governing Enforcement

- [iv] Neither Repossession Nor Collateral Clean-up Are Conditions of Foreclosure
- [v] Three Tests for Commercial Reasonableness
- [vi] Bank's Foreclosure Sale was Commercially Reasonable under New York Law
- [vii] Defining Commercial Reasonableness by Contract
- [d] An Enforcement Checklist
- § 1.05. Oil and Gas Pipelines as Transmitting Utilities
- § 1.06. Federal Oil and Gas Leases
- § 1.07. The Challenge of the Trustee in Bankruptcy
- § 1.08. The Challenge of the Federal Tax Lien
- § 1.09. The Challenge of the Statutory Lien
  - [1] Mineral Liens
    - [a] In General
    - [b] Persons Entitled to Assert Liens
    - [c] Property Subject to Mineral Liens
    - [d] Filing Requirements
    - [e] Priority and Relationship to Article 9 Security Interests
  - [2] Oil and Gas Owners' Lien Acts
  - [3] Unitization Act Liens
  - [4] State Land Royalty Liens
- § 1.10. Issues Related to Hydraulic Fracturing
  - [1] Introduction
  - [2] Fracing Technology and Environmental Concerns
  - [3] Current Regulatory Landscape
  - [4] Security Interests in Hydraulic Fracturing Collateral
  - [5] Threats to Interest Owners and Secured Lenders Related to Hydraulic Fracturing Operations
    - [a] In General
    - [b] The Threat of a Moratorium
    - [c] The Threat of Subsurface Trespass
- § 1.11. Oil and Gas Security Interests in Indian Country
  - [1] In General
  - [2] Indian Tribes and Nations and Indian Country
    - [a] Generally
    - [b] Tribal Sovereignty and Regulation
    - [c] Indian Country
  - [3] Oil and Gas Transactions in Indian Country
  - [4] Secured Transactions in Indian Country
    - [a] In General
    - [b] Implementing a Secured Transactions System
    - [c] Comparing the MTSTA to UCC Revised Article 9
    - [d] Perfecting Security Interests: Where to File
  - [5] The Intersection of the Nonintercourse Act and As-Extracted Collateral
- § 1.12. Summary of Filing and Perfection Requirements
- Appendix A: Glossary of Terms

# Preface

## **An Important Era for Oil and Gas Financing under the UCC**

Even though highly cyclical oil prices have plummeted in recent months, publication of this e-book coincides with an unprecedented surge in oil and gas development in the United States. New horizontal drilling technology and well stimulation processes have made it feasible for producers to extract hydrocarbons from vast formations that less than a decade ago were economically inaccessible. As a result of this domestic oil and gas renaissance, a massive market for financing oil and gas projects and related service industries has arisen. While working interest owners often rely on venture capital to finance drilling projects, commercial banks regularly make secured loans on the basis of proven reserves. Mineral estate owners, pipeline operators, and contractors in the oil and gas industry also frequently receive financing from a bank secured by oil and gas collateral or other personal property used in connection with oil and gas operations. As a result of the current boom, Article 9's oil and gas provisions have never been more important or relevant. To the extent that sudden declines in oil prices leave some producers over-leveraged, the perfection of lenders' security interests will be tested in the bankruptcy courts.

Oil and gas collateral is a unique creature. Prior to extraction, oil and gas is realty subject to encumbrance under real property rules. Upon extraction, however, oil and gas become personalty, subject to Article 9 security interests. While Article 9 has always included special rules to deal with the dual realty-personalty nature of oil and gas collateral, the last five years have been a very dynamic time for the development of oil and gas secured transaction law. In particular, one of the country's largest bankruptcies in recent years concerned the SemGroup family of companies that were involved in the large-scale transportation, storage, and resale of oil and gas in a number of states. Lawsuits related to the bankruptcy resulted in a series of important decisions addressing the take-free rights granted to buyers for value without knowledge and buyers in the ordinary course of business. Court rulings also exposed flaws in a number of nonuniform amendments to Article 9 designed to secure mineral interest owners' rights to payment from companies who purchase oil and gas at the wellhead, which has led to new legislation designed to correct shortcomings in prior enactments.

## **Who Can Benefit from this e-book?**

This publication aims to help anyone who deals with security interests or liens in oil and gas collateral. This includes lenders, mineral estate owners, operators, contractors, and the attorneys who represent them in connection with oil and gas projects or litigation concerning oil and gas security interests or liens. This e-book also provides general analysis and practical advice concerning the fundamentals of oil and gas law, issues raised by fracking technology, the interrelation between Article 9 security interests and specialized statutory liens, the adoption of tribal commercial codes governing transactions in Indian Country, and the basics of a secured lender's rights on a borrower's default including the rules governing the conduct of UCC foreclosure sales.

## **How the e-book Is Organized**

This e-book is a reprint of Chapter 13 of *The Law of Secured Transactions Under the Uniform Commercial Code* (written by Barkley Clark and Barbara Clark), and it is divided into twelve subsections. It begins with an overview of oil and gas finance and an analysis of the array of fractional interests in unextracted oil and gas commonly encountered. It then discusses the core rules applicable to security interests in extracted oil and gas and proceeds from the sale of hydrocarbons such as accounts receivable. The fourth subsection considers security interests in equipment, fixtures, and vehicles used in connection with oil and gas operations, as well as enforcement of security interests by a creditor. Subsections five and six consider special rules applicable to pipeline companies and leases on federal lands.

The next three subsections address the threats to a creditor's security interests posed by the trustee in bankruptcy, federal tax liens, and specialized statutory lien acts designed to protect everyone from companies who provide services to oil and gas well operators to mineral rights owners to states that lease their lands for oil and gas development.

The e-book next considers the hot topic of fracking-the technology that has enabled the recent expansion of domestic production and promises enormous economic and even national security benefits but also presents a series of risks to the environment, property owners, and communities near fracking operations. Uncertainty regarding how these opposing interests will be balanced by legislators and regulators creates risk for secured lenders and those seeking financing alike.



Subsection eleven explores secured financing of oil and gas projects on Indian Country. Tribes collectively own one of the largest accumulations of mineral rights in the country; however, development of those resources can be complicated by everything from intricate government approval processes to a low rate of adoption of commercial codes by tribes.

The e-book concludes with a concise summary of the filing and perfection requirements applicable to personal property collateral used as security in oil and gas projects. Especially at a time of falling oil and gas prices, secured lenders need to audit their documentation under the UCC and other relevant statutes. This e-book also includes an appendix containing a glossary of specialized terms encountered in oil and gas secured transactions.

We hope you find this e-book useful.

Barkley Clark  
Barbara Clark  
Matthew Clark

December 2014

**QUESTIONS ABOUT THIS PUBLICATION?**

---

For questions about the **Editorial Content** appearing in this volume or reprint permission, please call:

Matthew T. Burke at ..... (908) 673-1542

Email: ..... Matthew.T.Burke@lexisnexis.com

For assistance with billing or other customer service matters, please call:

Customer Services Department at ..... (800) 833-9844

Outside the United States and Canada, please call ..... (518) 487-3000

Fax Number ..... (518) 487-3584

Customer Service Web site ..... <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or ..... (800) 223-1940

Outside the United States and Canada, please call ..... (518) 487-3000

---

ISBN: 978-1-6304-3974-3 (eBook)

**Cite this publication as:**

Clarks’ Oil and Gas Financing Under the UCC § [sec. no.] (LexisNexis A.S. Pratt)

**Example:**

Clarks’ Oil and Gas Financing Under the UCC § 1.01 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Sheshunoff is a trademark of Reed Elsevier Properties SA, used under license.

Copyright © 2015 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. All Rights Reserved.

No copyright is claimed by LexisNexis, Matthew Bender & Company, Inc., or Reed Elsevier Properties SA, in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

*An A.S. Pratt™ Publication*

Editorial Offices  
630 Central Ave., New Providence, NJ 07974 (908) 464-6800  
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200  
[www.lexisnexis.com](http://www.lexisnexis.com)

MATTHEW  BENDER