



## Campbell University School of Law

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# Nine Questions for the Article 9 Professor

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## NINE QUESTIONS FOR THE ARTICLE 9 PROFESSOR

TIMOTHY R. ZINNECKER\*

### INTRODUCTION

I know what you're thinking. How did an article on teaching Secured Transactions slip past those top-of-the-class law review editors and find its way into a journal issue devoted to teaching Property?<sup>1</sup> Property is a required course. Property is an integral part of the first-year experience. Property involves conveyances in land. Students love Property (and Property professors)!

Duly noted.

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\* Professor of Law, Campbell University School of Law. I extend my appreciation to the following friends who reviewed an earlier draft: Bobbi Jo Boyd, Christy C. Dunn, Michael B. Kent, and C. Scott Pryor.

1. Alternatively, you may be asking yourself, "Can I stop reading now and opt for a slow, painful root canal?"

Secured Transactions is not a required course at many law schools.<sup>2</sup> Secured Transactions is not part of the 1L curriculum.<sup>3</sup> Secured Transactions generally excludes real estate from its coverage.<sup>4</sup> Any student who takes a shine to UCC Article 9 risks being shunned and ostracized by classmates. And when was the last time a Secured Transactions professor received more than a sympathy vote or two for the “Professor of the Year” award?

Notwithstanding the foregoing, Secured Transactions is a course devoted to transfers of property (albeit personal, not real). The course devotes considerable time to the creation, enforcement, and priority of those property transfers, which typically arise in the context of securing the transferor’s financial obligations to the transferee.<sup>5</sup> The same concepts occur (using real estate as collateral), and

2. For example, only two of the six law schools in North Carolina require the course. *See Curriculum*, CAMPBELL UNIV., NORMAN ADRIAN WIGGINS SCH. OF LAW, <https://law.campbell.edu/learn/academic-program/curriculum/> [<https://perma.cc/6WG6-6RFT>] (yes); *JD Degree Requirements*, DUKE UNIV. SCH. OF LAW, <https://law.duke.edu/academics/jdrequirements/> [<https://perma.cc/X856-MBDM>] (no); *Required Courses*, ELON UNIV. SCH. OF LAW, <https://www.elon.edu/e/law/academics/curriculum/required-courses.html> [<https://perma.cc/L36K-98XQ>] (no); *Required Upper Level Courses*, N.C. CENT. UNIV. SCH. OF LAW, <http://law.nccu.edu/academics/curriculum-description/required-upper-level-courses/> [<https://perma.cc/V6CG-92-GA>] (yes); *Second and Third Year Curriculum*, UNIV. OF N.C. SCH. OF LAW, <https://law.unc.edu/academics/degree-programs/course-advising/core-courses/> [<https://perma.cc/7QC9-NJ4V>] (no); *JD Course Requirements*, WAKE FOREST UNIV. SCH. OF LAW, <https://jd.law.wfu.edu/academics/requirements/> [<https://perma.cc/WB9W-UF4H>] (no). Only one of the six law schools in Virginia requires the course. *See Chapter 4 Curriculum – Juris Doctor Program*, APPALACHIAN SCH. OF LAW, <http://asl.edu/wp-content/uploads/2015/08/Ch-4.-Curriculum-3.pdf> [<https://perma.cc/B3TN-5FLY>] (yes); *2012 and Later: JD Curriculum*, GEORGE MASON UNIV., ANTONIN SCALIA LAW SCH., [https://www.law.gmu.edu/assets/files/academics/jd\\_2012\\_and\\_later\\_required\\_courses.pdf](https://www.law.gmu.edu/assets/files/academics/jd_2012_and_later_required_courses.pdf) [<https://perma.cc/4BHD-S8DG>] (no); *Course Descriptions*, LIBERTY UNIV. SCH. OF LAW, <http://www.liberty.edu/law/curriculum/> [<https://perma.cc/5D9V-SWHE>] (no); *Curriculum*, UNIV. OF RICHMOND, T. C. WILLIAMS SCH. OF LAW, <https://law.richmond.edu/academics/curriculum/index.html> [<https://perma.cc/655Y-KLZQ>] (no); *J.D. Curriculum*, UNIV. OF VA. LAW SCH., <https://www.law.virginia.edu/policies/i-academic-policies-and-procedures-3#ie> [<https://perma.cc/PX2B-TC4F>] (no); *Curriculum Second and Third Year*, WASH. & LEE UNIV. SCH. OF LAW, <https://law.wlu.edu/academics/second-and-third-year> [<https://perma.cc/HE5V-82U9>] (no). And none of the four law schools in Missouri require the course. *See Curriculum Overview*, ST. LOUIS UNIV. SCH. OF LAW, <https://catalog.slu.edu/colleges-schools/law/juris-doctor/#requirementstext> [<https://perma.cc/VP7V-M5E4>] (no); *Degree Requirements*, UNIV. OF MO. SCH. OF LAW, <http://catalog.missouri.edu/professional/law/jurisdoctor/#requiredcourses> [<https://perma.cc/F7H3-T46N>] (no); *JD Requirements*, UNIV. OF MO.-KAN. CITY SCH. OF LAW, <https://law.umkc.edu/academics/degree-program/jd-degree/jd-requirements/> [<https://perma.cc/HH2H-RVFQ>] (no); *JD Requirements*, WASH. UNIV. IN ST. LOUIS SCH. OF LAW, <https://law.wustl.edu/academics/jd-requirements/> [<https://perma.cc/A98E-4W68>] (no). You get the picture.

3. And if it were, the size of the rising 2L class would plummet.

4. *See* U.C.C. § 9-109(d)(11) (excluding from the scope of Article 9’s coverage “the creation or transfer of an interest in or lien on real property,” except as noted).

5. *See* U.C.C. § 9-109(a)(1) (noting that Article 9 applies to “a transaction . . . that creates a security interest in personal property or fixtures by contract”); U.C.C. § 1-201(b)(35) (defining

similar issues of creation, enforcement, and priority arise, when a professor introduces principles of mortgage law in either the first-year property course or an upper-level real estate course. Because mortgage law and Article 9 have much in common, an article on teaching Secured Transactions has a legitimate place at the “property” table, and it may catch the attention of readers<sup>6</sup> who teach a “property” course (broadly defined).

Secured Transactions has always been part of my regular course package since joining a law school faculty in 1994. I’ve probably taught the course at least forty times.<sup>7</sup> I’ve taught at different law schools. I’ve used different books. I’ve taught the “former” version of Article 9 and the “revised” version of Article 9.<sup>8</sup> I’ve introduced Article 9 concepts when reading bedtime stories to my two daughters (“Then Winnie the Pooh bought a new honey pot on credit, using purchase-money financing provided by his good friend, Christopher Robin.”).<sup>9</sup> I love teaching Article 9!

What follows are nine questions to ponder, if you are anointed (or “requested”) to teach the course.<sup>10</sup> Most of my reflections are directed at less-experienced colleagues (the first or second timers). But I hope that some of my more experienced brothers and sisters in the Code find a morsel or two to chew on in the pages that follow.

#### I. QUESTION #1: WHAT IS THE NAME OF THE COURSE?

At first blush, this may seem like a silly question. But the answer will reveal how much UCC<sup>11</sup> terrain you are expected to cover.

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“security interest,” in part, as “an interest in personal property or fixtures which secures payment or performance of an obligation”).

6. Several well-meaning friends suggested that the plural was optimistic, and the singular might be more realistic!

7. You’re right: I do deserve (a) your sympathy, (b) a hefty pay raise, (c) a psychiatric evaluation, or (d) all of the above.

8. The revised version of Article 9 became effective in most states on July 1, 2001. *See* G. Ray Warner, *Non-uniform Effective Dates and the Transition to Revised Article 9*, AMERICAN BANKRUPTCY INSTITUTE (Nov. 9, 2019) <https://www.abi.org/abi-journal/non-uniform-effective-dates-and-the-transition-to-revised-article-9> [<https://perma.cc/V882-SFCU>].

9. OK. I’m making this part up. Truth be told, we all know that Mr. Milne’s most famous cuddly creature would be an un-BEAR-ably poor credit risk. (And for the preceding statement, I should be pun-ished.)

10. An entry-level faculty candidate who expresses a genuine interest in teaching Secured Transactions may be more marketable than a candidate who expresses interest in teaching more “popular” courses, such as constitutional law, civil procedure, evidence, constitutional law, criminal procedure, wills and trusts, constitutional law, family law, employment discrimination, and constitutional law.

11. Contrary to hallway talk, the acronym is not pronounced “Yuck,” nor does it stand for “Unsettling, Confounding, and Confusing.”

The answer probably falls into one of three camps:

- (1) Secured Transactions;<sup>12</sup>
- (2) Sales and Secured Transactions;<sup>13</sup> or
- (3) Commercial Transactions.<sup>14</sup>

If you are teaching a stand-alone Secured Transactions course, then Article 9 will be your daily traveling companion, with occasional visits to Article 1 (which includes a lengthy list of handy definitions<sup>15</sup>) and Article 8 (when discussing stocks, bonds, and mutual fund shares as “investment property” collateral).<sup>16</sup> You also might dip your toes into Article 2<sup>17</sup> and Article 3,<sup>18</sup> but only in passing.

12. See, e.g., *General Course Description*, UCLA SCH. OF LAW, <https://curriculum.law.ucla.edu/Guide/Course/44> [<https://perma.cc/WJU2-X9Q7>]; *Course Catalog*, MERCER UNIV., WALTER F. GEORGE SCH. OF LAW, <https://law.mercer.edu/academics/registrar/course-catalog/> [<https://perma.cc/R79U-TGYB>]; *Course Catalog*, UNIV. OF KY. COLL. OF LAW, <http://law.uky.edu/course-catalog> [<https://perma.cc/K8ZP-BAUF>].

13. See, e.g., *UCC Sales And Secured Transactions*, UNIV. OF N. KY., SALMON P. CHASE COLL. OF LAW, <https://chaselaw.nku.edu/current-students/resources/registrar/course-catalog/transactions.html> [<https://perma.cc/4BYL-7LXZ>]; *First Year Required Courses*, ATLANTA’S JOHN MARSHALL LAW SCH., [https://www.johnmarshall.edu/wp-content/uploads/Master-Course-List\\_Rev-04-25-19.pdf](https://www.johnmarshall.edu/wp-content/uploads/Master-Course-List_Rev-04-25-19.pdf) [<https://perma.cc/96A6-65QD>]; *Course List*, UNIV. OF MICH. LAW SCH., <http://www.law.umich.edu/CurrentStudents/Registration/ClassSchedule/Pages/CourseList.aspx> [<https://perma.cc/UY4N-RLNK>].

14. See, e.g., *Commercial Law*, SETON HALL UNIV. SCH. OF LAW, <https://law.shu.edu/students/curriculum/course/commercial-law.cfm> [<https://perma.cc/Z9HP-HVA2>]; *Upper Division/Second & Third Year Courses*, SYRACUSE UNIV. SCH. OF LAW, <http://law.syr.edu/academics/course-descriptions/second-third-year-courses/> [<https://perma.cc/V6RT-9NEC>].

15. See, e.g., U.C.C. § 1-201(b)(35) (defining “security interest,” perhaps the cornerstone of Article 9).

16. See, e.g., U.C.C. §§ 9-102(a)(49) (including within the definition of “investment property” such property as “a security, whether certificated or uncertificated, security entitlement, [and] securities account”), 9-102(b) (referring the reader to Article 8 for several definitions, including “certificated security,” “security,” “security certificate,” “security entitlement,” and “uncertificated security”), 9-314(a) (permitting a creditor to perfect a security interest in investment property by “control”), 9-106 (directing the reader to Article 8 to learn how to “control” a certificated security, an uncertificated security, or a security entitlement).

17. Many secured transactions involve an underlying contract for the sale of goods on credit (with the goods then serving as collateral for the credit extension), triggering application of Article 2. See U.C.C. § 2-102 (noting Article 2’s application to “transactions in goods”). Typically, though, professors teaching Secured Transactions need more than the “sale of goods, which serve as collateral” hook before exploring Article 2 provisions. One instance where Article 2 has some application is in the discussion of whether a debtor can grant a security interest in goods (i) in which the debtor holds mere voidable title or (ii) held by the debtor as a mere entruster. See generally U.C.C. § 2-403(1), (2).

18. Before introducing Article 3 to your Secured Transactions students, look in the mirror and convince yourself that you are a masochist (or have sufficient backbone to tolerate scathing evaluations). A debtor may offer an “instrument” as collateral in a secured transaction (think “debt”

If your course moniker is “Sales and Secured Transactions,” then you will be extending your stay in Article 2 and perhaps meandering through selected provisions of Article 2A (which covers lease transactions<sup>19</sup>) and Article 7 (relevant when the transaction involves a bill of lading, a warehouse receipt, or another document of title<sup>20</sup>).<sup>21</sup>

And if you are invited to teach a “Commercial Transactions” (or “Commercial Law” or “UCC”) course,<sup>22</sup> you will want to review the course description carefully. In addition to covering the “Sales” articles and the “Secured Transactions” articles, this expansive commercial law course may expand your kingdom<sup>23</sup> into the so-called “payments” articles: Article 3 (negotiable instruments,<sup>24</sup> including checks and notes), Article 4 (bank deposits and collections),<sup>25</sup> Article 4A (electronic fund transfers not involving consumer accounts),<sup>26</sup> and Article 5 (letters of credit<sup>27</sup>).<sup>28</sup> Wow! Like the rare baseball

instruments, not “musical” instruments). Article 9 includes within its definition of the term a “negotiable instrument,” a term which itself is defined in Article 3. *See* U.C.C. §§ 9-102(a)(47), 9-102(b), 3-104. I mention to students that Article 3 (through § 3-104) creates a multi-factor eligibility test, and then swiftly move on.

19. *See* U.C.C. § 2A-102 (noting that Article 2A “applies to any transaction ... that creates a lease”).

20. *See* U.C.C. §§ 7-101, 1-201(b)(16) (defining “document of title”).

21. Some law schools offer a stand-alone Sales course, a stand-alone Secured Transactions course, and a blended Sales and Secured Transactions course. Typically, in such a curriculum, a student who takes the blended course cannot receive academic credit for either of the stand-alone courses, and *vice versa*. *See, e.g., Courses*, WAKE FOREST UNIV. SCH. OF LAW, <http://courses.law.wfu.edu/> [<https://perma.cc/9NX7-E97T>] (course description for Law 442—“Sales and Secured Transactions”); *Course Schedules*, ST. MARY’S UNIV. SCH. OF LAW, <https://law.stmarytx.edu/academics/student-services/course-schedules/> [<https://perma.cc/LM7W-9FMN>] (course description for “Sales and Secured Transactions”).

22. Which, on occasion, and like sausage, may be comprised of “parts” (*e.g.*, Part I and Part II).

23. And, hopefully, your job security!

24. *See* U.C.C. § 3-102(a) (noting that Article 3 “applies to negotiable instruments”).

25. *See* U.C.C. §§ 4-101 (noting that Article 4 “may be cited as Uniform Commercial Code—Bank Deposits and Collections”), 4-102 (“Applicability”) (referring to “items”), 4-104(a)(9) (defining “item” as “an instrument or a promise or order to pay money handled by a bank for collection or payment”).

26. *See* “Prefatory Note” to U.C.C. Article 4A, particularly “Description of transaction covered by Article 4A.”

27. *See* U.C.C. § 5-103(a) (noting that Article 5 “applies to letters of credit”).

28. Some law schools offer a stand-alone course devoted to these payment articles (often including relevant federal statutes and regulations). *See, e.g., Payment Systems*, WILLIAM & MARY LAW SCH., <https://law.wm.edu/academics/programs/jd/electives/courses/bypracticearea/commerciallaw/405-01/index.php> [<https://perma.cc/9UWL-258F>] (“Payment Systems”); *Payment Systems*, UNIV. OF ALA. SCH. OF LAW, <https://www.law.ua.edu/courseguide/courses/view/139> [<https://perma.cc/ZTW7-C6Q6>] (“Payment Systems”).

player, you could find yourself playing every “UCC position” in a single course!<sup>29</sup>

## II. QUESTION #2: HOW MANY CREDITS ACCOMPANY THE COURSE?

This question is important because the answer dictates the number of instructional classroom minutes you will have to teach Article 9 (and possibly the Sales articles, and possibly the Payment Systems articles). And knowing how much time you have to teach will shape the contours of your coverage.

The primary accrediting entity for each law school’s J.D. program is the Council of the American Bar Association Section of Legal Education and Admissions to the Bar (the “Council”).<sup>30</sup> The Council promulgates and enforces “standards” with which law schools are expected to comply. The American Bar Association provides a set of these standards at its website.<sup>31</sup>

Standard 310 addresses how a law school should determine the number of credits to assign to any particular course. In part, Standard 310 defines a credit hour as “an amount of work that reasonably approximates: (1) not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks, or the equivalent amount of work over a different amount of time[.]”<sup>32</sup> Under Standard 310, “fifty minutes suffices for one hour of classroom or direct faculty instruction.... The fifteen-week period may include one week for a final examination.”<sup>33</sup>

On the reasonable assumption that your commercial law course (regardless of title or scope of coverage) includes a final exam, the course generally will require you to provide a minimum of 700 minutes of classroom instruction for

29. Baseball players who have played all nine defensive positions during a single game include (in alphabetical order): Bert Campaneris (Oakland A’s; 1965); Shane Halter (Detroit Tigers; 2000); Andrew Romine (Detroit Tigers; 2017); Scott Sheldon (Texas Rangers; 2000); and Cesar Tovar (Minnesota Twins; 1968). See Mike Axisa, *Tigers’ Andrew Romine Fifth Player To Play All Nine Positions In One Game*, CBS SPORTS (Sep. 30, 2017, 10:13 PM), <https://www.cbssports.com/mlb/news/tigers-andrew-romine-fifth-player-to-play-all-nine-positions-in-one-game/> [<https://perma.cc/7YWB-65SH>].

The observant reader will note that I have not mentioned U.C.C. Article 6 (“Bulk Sales”). According to the Uniform Law Commission, “nearly every state” has repealed Article 6. See *Uniform Commercial Code*, UNIFORM LAW COMMISSION <https://www.uniformlaws.org/acts/ucc> [<https://perma.cc/FH35-ZDBG>].

30. See *American Bar Association Standards*, AM. BAR ASS’N, [https://www.americanbar.org/content/dam/aba/publications/misc/-legal\\_education/Standards/2018-2019ABAStandardsforApprovalOfLawSchools/2018-2019-aba-standards-preface.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/-legal_education/Standards/2018-2019ABAStandardsforApprovalOfLawSchools/2018-2019-aba-standards-preface.pdf) [<https://perma.cc/35UM-3GL2>].

31. See *American Bar Association Standards*, AM. BAR ASS’N, [https://www.americanbar.org/groups/legal\\_education/resources/standards/](https://www.americanbar.org/groups/legal_education/resources/standards/) [<https://perma.cc/LT45-K32Y>].

32. See ABA, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 21 (2019) (Standard 310(b)(1)).

33. *Id.* (Standard 310; Interpretation 310–1).

each credit hour awarded.<sup>34</sup> Typically, a stand-alone Secured Transactions course is a three-credit course, so you will have (at least) 2100 minutes in the classroom. These minutes are spread over the course of the semester, usually in increments of fifty minutes (forty-two class periods), fifty-five minutes (thirty-eight or thirty-nine class periods), sixty minutes (thirty-five class periods), seventy-five minutes (twenty-eight class periods), or ninety minutes (twenty-three or twenty-four class periods). Then the class periods are distributed over the semester, and you will find yourself teaching the course two, three, or four times each week.<sup>35</sup>

If you teach a two-credit Secured Transactions course, you may need to cut one-third of the material from the typical three-credit course. And the substantive cuts could be much deeper if you are teaching a three- or four-credit hybrid commercial law course that requires you to devote significant classroom instruction to UCC Articles 2, 2A, 3, 4, 4A, 5, or 7.<sup>36</sup>

As an aside, teaching a hybrid course may have an upside. You can bundle all of the Article 9 material you reluctantly cut<sup>37</sup> and repackage it in a one- or two-credit course proposal for “Advanced Secured Transactions”!<sup>38</sup>

### III. QUESTION #3: WHAT BOOK(S) SHOULD I ADOPT FOR THE COURSE?

Whether you are teaching a pure Secured Transactions course or a hybrid commercial law course, you should consider adopting both a statutory supplement and a textbook.

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34. Calculation: 50 (minutes) x 14 (weeks). U.C.C. citations, AND math! Wow! This paper offers something for everyone (to loathe)!

35. As agreed to by your academic dean (known as “The Dream Crusher” at many law schools).

36. What a professor needs to cover in a hybrid commercial law course may be dictated, at least in part, by the scope of Article 2 coverage in the first-year Contracts course, which may turn on the number of credit hours (four? five? six?) assigned to the Contracts course. Perhaps rephrased, a professor can cover more Article 9 material in a blended course if Article 2 is hit hard in a Contracts course. But the fewer credit hours assigned to a Contracts course leaves less time to cover Article 2, which then must be hit harder in a hybrid commercial course (at the expense of Article 9 coverage).

37. If you find yourself pondering what coverage cuts to make, contact an experienced Article 9 professor for guidance. My daughters often make requests couched in terms of “needs” (rather than “wants”). Some Article 9 topics are “needs” (*e.g.*, discussing default provisions related to collateral foreclosures and covering purchase-money superiority). Other topics, though, may merely be “wants” (*e.g.*, discussing accessions, commingled goods, and consignments, and resolving priority disputes between a secured creditor and the IRS under the Federal Tax Lien Statute).

38. Four suggestions: First, remind your academic dean to place a reasonable cap on what could be a student stampede to enroll. Second, request an easy-to-remember (but intriguing) course number, such as 666. Third, consider a more alluring course name (how about “CYA: Covering Your Ass(ets) With a Blanket (Lien)”?). Fourth, propose a schedule that avoids most class conflicts. Fridays—any time after 4:30 p.m.—should work. Prepare yourself to be POPULAR!



### A. *Statutory Supplement*

When adopting a statutory supplement, be sure that it includes all statutes relevant to your course. Some supplements can be used regardless of the scope of UCC coverage, while others are more course-specific. For example, I've always adopted the "Selected Commercial Statutes" book by West Academic Publishing, which includes the entire Uniform Commercial Code with official comments, the PEB Commentaries,<sup>39</sup> numerous federal laws that have some relevance to "sales,"<sup>40</sup> or "payment systems,"<sup>41</sup> or "secured transactions" courses,<sup>42</sup> and the bankruptcy code.<sup>43</sup> Students who acquire a comprehensive statutory supplement may be able to use it not only for Secured Transactions but also for other commercial law courses (a cost savings to students). But students may prefer a cheaper and less bulky course-specific supplement. At worst, that supplement may be of little use beyond that specific course (perhaps requiring a student to acquire a second statutory supplement for a different course taken later). At best, the course-specific supplement is adaptable to other courses, but only if accompanied by additional materials downloaded by the student (or provided by the professor).<sup>44</sup>

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39. PEB is a shorthand reference for "Permanent Editorial Board" for the Uniform Commercial Code. In 1987,

the Permanent Editorial Board resolved to issue from time to time supplementary commentary on the Uniform Commercial Code to be known as PEB Commentary. These PEB Commentaries seek to further the underlying policies of the Uniform Commercial Code by affording guidance in interpreting and resolving issues raised by the Uniform Commercial Code and/or the Official Comments.

*See Preface to PEB Commentary No. 20*, PERMANENT EDITORIAL BD. FOR THE UNIF. COMMERCIAL CODE (Jan. 24, 2019), [https://www.ali.org/media/filer\\_public/5e/f5/5ef5f671-9d70-4f56-b09b-b536743ffeaa/peb-commentary-no-20-01-2019.pdf](https://www.ali.org/media/filer_public/5e/f5/5ef5f671-9d70-4f56-b09b-b536743ffeaa/peb-commentary-no-20-01-2019.pdf) [<https://perma.cc/8YRG-NTWF>]. Consider assigning (i) PEB Commentary No. 3 when discussing U.C.C. §§ 9-315(a)(1) and 9-507 and (ii) PEB Commentary No. 8 when discussing U.C.C. § 9-330.

40. *See, e.g.*, Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, 15 U.S.C.A. §§ 2301 *et seq.* Professors teaching "sales" (whether standing alone, or as a component of a hybrid course) also may want a statutory supplement that includes the United Nations Convention on Contracts for the International Sale of Goods (often referred to as the "CISG").

41. *See, e.g.*, Regulation E (Electronic Fund Transfers), 12 C.F.R. § 1005; Regulation CC (Availability of Funds and Collection of Checks), 12 C.F.R. § 229; FTC Holder-in-Due-Course Regulations, 16 C.F.R. § 433.

42. *See, e.g.*, FTC Credit Practices Rule, 16 C.F.R. § 444; Federal Tax Lien Statute, 26 U.S.C. §§ 6321–6323.

43. 11 U.S.C.A. §§ 101 *et seq.*

44. Sometimes my Secured Transactions students have previously taken a sales course for which they purchased a subject-specific statutory supplement that did not include the bankruptcy code. They then wish to use that statutory supplement in my Secured Transactions course. Rather than require them to obtain a different statutory supplement, or a copy of the bankruptcy code, I have (in recent semesters) provided those students with a supplement of relevant bankruptcy provisions.

### B. Textbook

When choosing a textbook, consider (1) the scope of your UCC course coverage, (2) the duration of each class period, and (3) the availability of additional resources.

#### 1. Scope of UCC course coverage.

The answer to Question #1 should guide your textbook selection, at least in part. If you are teaching a stand-alone Secured Transactions course, you will have an array of “Secured Transactions” textbooks to evaluate.<sup>45</sup> If you are teaching a blended commercial law course (*e.g.*, Sales and Secured Transactions), you might consider the following three options. First, select a casebook for each commercial law topic. For example, you might adopt a Sales textbook *and* a separate Secured Transactions casebook. This will be an expensive option,<sup>46</sup> and one not favored or recommended. Second, you might start with the first option and, if both books are published by the same publisher, select particular chapters from each book and ask the publisher if it would bundle the chapters into a custom textbook just for you and your students at an affordable price. The third option is to find a “commercial law” textbook that covers not only Secured Transactions but also the other UCC/commercial law pieces of your blended course (*e.g.*, Sales, or Payment Systems). Those textbooks do indeed exist.<sup>47</sup>

#### 2. Duration of each class period.

As noted in the discussion of Question #2, a professor teaching a three-credit Secured Transaction course may have class periods as short as 50 minutes and as long as 90 minutes. As in other courses, Secured Transactions textbooks present the material in a discrete number of chapters.<sup>48</sup> One popular textbook takes an additional step and breaks the chapters into pre-packaged

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45. Contact publishing companies (or the representatives who visit your law school from time to time) and ask for a copy of the two or three most popular Secured Transactions textbooks.

46. Expensive for students, in terms of money. Expensive for you, in terms of student respect and appreciation.

47. *See, e.g.*, LYNN LOPUCKI, ET AL., COMMERCIAL TRANSACTIONS: A SYSTEMS APPROACH (6th ed. 2016); DOUGLAS J. WHALEY & STEPHEN M. MCJOHN, PROBLEMS AND MATERIALS ON COMMERCIAL LAW (11th ed. 2016); CANDACE ZIERDT, KRISTEN DAVID ADAMS & JULIET M. MORINGIELLO, ESSENTIAL UCC CONCEPTS: A SURVEY OF COMMERCIAL TRANSACTIONS (2018).

48. *See, e.g.*, STEPHEN L. SEPINUCK, PROBLEMS AND MATERIALS ON SECURED TRANSACTIONS (4th ed. 2018) (six chapters); DOUGLAS J. WHALEY & STEPHEN M. MCJOHN, PROBLEMS AND MATERIALS ON SECURED TRANSACTIONS (10th ed. 2017) (ten chapters); EDITH R. WARKENTINE & JEROME R. GROSSMAN, SECURED TRANSACTIONS: A CONTEXT AND PRACTICE CASEBOOK (2015) (twelve chapters); STEPHEN L. HARRIS & CHARLES W. MOONEY, JR., SECURITY INTERESTS IN PERSONAL PROPERTY: CASES, PROBLEMS AND MATERIALS (6th ed. 2016) (nine chapters); STEPHEN D. WALT & WILLIAM D. WARREN, SECURED TRANSACTIONS IN PERSONAL PROPERTY: CASES, PROBLEMS AND MATERIALS (10th ed. 2019) (ten chapters).

“assignments.”<sup>49</sup> The “chapters only” textbooks may give the professor greater flexibility in creating his or her personal schedule of assignments, regardless of minutes per class. The pre-packaged “assignments” textbook has the benefit of offering a professor clear start-and-stop points, but that approach might work better (presentation of the material may appear more seamless) when the number of class periods approximates the number of assignments.

### 3. Available additional resources.

Review the teacher’s manual that accompanies any textbook you are seriously considering. Experienced Article 9 professors may discount the importance of the teacher’s manual, but the professor teaching Secured Transactions for the first few times will lean heavily on it. Get comfortable that the manual will be a great traveling companion on your semester-long journey. If you conclude otherwise, consider a different textbook (or strongly consider putting the author(s) on speed-dial<sup>50</sup>).

Gone are the days when book selection started and stopped with the book itself (and, for the instructor, the teacher’s manual). Now when we adopt a book we should ask a host of questions. What other resources accompany the textbook? Are they available to students? If so, at what price? Does access and pricing depend on whether your students purchase a new or used textbook? Do the resources include popular forms of assessment, such as online problem-oriented exercises or multiple-choice questions? Have the authors created a coordinated webpage for the textbook, with informative videos and links to helpful resources? Will the publisher bundle the textbook with one of its popular study aids at a reduced price for students? These are some of the questions that merit some reflection during the textbook selection process.

## IV. QUESTION #4: IN WHAT ORDER SHOULD I PRESENT THE MATERIAL?

Five broad topics comprise the Secured Transactions course: (1) attachment (creating an enforceable property interest), (2) perfection (the step taken by the secured party to notify the world of its property interest), (3) priority (resolving competing property claims), (4) the secured party’s post-default enforcement rights against the collateral, and (5) bankruptcy provisions that impact the secured party.

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49. See, e.g., LYNN LOPUCKI, ELIZABETH WARREN, & ROBERT M. LAWLESS, SECURED TRANSACTIONS: A SYSTEMS APPROACH (8th ed. 2016) (nine chapters broken into forty assignments; some assignments offer the signpost “HALF ASSIGNMENT ENDS”). Cf. JAMES BROOK, PROBLEMS AND CASES ON SECURED TRANSACTIONS (3d ed. 2016) (34 chapters).

50. Most authors welcome (and timely acknowledge or reply to) questions, comments, and suggestions from those who adopt their casebooks. Inevitably, though, you’ll find yourself sending an email message (or placing a telephone call) too late to receive an answer before class begins.

Because perfection requires attachment,<sup>51</sup> and priority often is dictated by perfection (or the perfection step),<sup>52</sup> I suggest teaching attachment, perfection, and priority in that order. You will find widespread consensus among commercial law professors on this linear approach.

But when should you discuss the topics of default and bankruptcy? Before attachment? After attachment? After perfection? After priority? Bits and pieces here and there? There is far less agreement on this question, as evidenced by the order of presentation found in various textbooks:

- attachment, default, perfection, priority (bankruptcy throughout);<sup>53</sup>
- attachment, perfection, priority (default before and after attachment; bankruptcy throughout, including before attachment);<sup>54</sup>
- attachment, perfection, priority, bankruptcy, default;<sup>55</sup>
- attachment, default, perfection, priority, bankruptcy;<sup>56</sup> and
- attachment, perfection, priority, default, bankruptcy.<sup>57</sup>

Some observations follow.

#### A. *Default*

For me, the topic of default is best addressed as a singular topic, immediately after covering either attachment or priority. A secured party has enforcement rights upon the debtor's default.<sup>58</sup> Those enforcement rights (such as repossession,<sup>59</sup> foreclosure,<sup>60</sup> collection,<sup>61</sup> and retention<sup>62</sup>) are available, even if

51. See U.C.C. § 9-308(a) (noting that “a security interest is perfected if it has attached and . . .”).

52. See, e.g., U.C.C. §§ 9-317(a)(2)(A) (awarding priority to a lien creditor whose property interest arises before the secured party perfects its security interest), 9-317(b) (favoring buyers over unperfected secured parties), 9-322(a)(1) (resolving disputes among perfected secured parties in favor of the secured party who has the earliest filing or perfection date).

53. See STEPHEN L. SEPINUCK, PROBLEMS AND MATERIALS ON SECURED TRANSACTIONS xi–xx (4th ed. 2018) (“Table of Contents”).

54. See LYNN LOPUCKI, ELIZABETH WARREN & ROBERT M. LAWLESS, SECURED TRANSACTIONS: A SYSTEMS APPROACH xiii–xxv (8th ed. 2016) (“Contents”).

55. See DOUGLAS J. WHALEY & STEPHEN M. MCJOHN, PROBLEMS AND MATERIALS ON SECURED TRANSACTIONS xi–xv (10th ed. 2017) (“Contents”).

56. See EDITH R. WARKENTINE & JEROME R. GROSSMAN, SECURED TRANSACTIONS: A CONTEXT AND PRACTICE CASEBOOK ix–xiv (2015) (“Contents”).

57. See STEPHEN D. WALT & WILLIAM D. WARREN, SECURED TRANSACTIONS IN PERSONAL PROPERTY: CASES, PROBLEMS AND MATERIALS ix–xix (10th ed. 2019) (“Table of Contents”).

58. See U.C.C. § 9-601(a) (“After default, a secured party has the rights provided in this part . . .”).

59. See U.C.C. § 9-609(a).

60. See U.C.C. § 9-610(a).

61. See U.C.C. § 9-607(a).

62. See U.C.C. § 9-620(a).

the creditor is not perfected. As with attachment, the focus when addressing default is on the two parties to the transaction (the debtor and the secured party). Unless the collateral is subject to other security interests or encumbrances, which itself may constitute a default by the debtor, third-party concerns and priority are irrelevant matters.<sup>63</sup> Therefore, covering default after attachment (and before perfection and priority) has some appeal as a continued extension of the two-party relationship between the debtor and the secured party.<sup>64</sup>

There is at least one benefit to deferring the topic of default until after covering the topics of perfection and priority. Perhaps surprisingly, Article 9 does not define “default.” Instead, Article 9 “leaves to the agreement of the parties the circumstances giving rise to a default.”<sup>65</sup> Therefore, the security agreement or another loan paper should include a default clause, which may be “as long as the creditor’s arm and as broad as the counsel’s imagination.”<sup>66</sup> If default is covered immediately after attachment, students may have a myopic view of events that will trigger a default. Nonpayment? Sure. Bankruptcy? You bet.

But many students may not contemplate possibilities beyond these rather obvious examples.

On large commercial transactions, a default arises if (i) any representation by the debtor in any loan paper is materially incorrect and (ii) the debtor fails to comply with any covenant in any loan document. Some of these representations and covenants are dictated by provisions of Article 9. Consider the following two examples, each involving MidCorp, which will offer its inventory, equipment, accounts, and investment property as collateral for a \$2 million loan.

Example #1. Prior to two years ago, MidCorp’s legal name had been SmallCorp. Section 9-507(c) addresses the effect of a name change on the continued effectiveness of a financing statement. Paraphrasing, if the name

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63. Collateral encumbered by multiple security interests may impose a statutory duty on, and raise possible priority concerns for, the secured party that is asserting enforcement rights against the collateral. For example, the secured party must search the public records to discover these other creditors and then notify them of action that the secured party intends to take against the collateral. *See, e.g.*, U.C.C. §§ 9-611(c)(3), 9-621(a). Also, the foreclosing creditor may have a duty to remit foreclosure proceeds to these other creditors, depending on their respective priority. *See* § 9-615(a)(3), (g).

64. And if the collateral is subject to multiple security interests, raising some of the statutory concerns noted in the preceding footnote, the professor can easily work with those facts by stipulating the respective priorities (and then announcing in a booming voice, “*But do not assume that the final exam will provide you with any such stipulation regarding priority!*”).

65. U.C.C. § 9-601 cmt. 3.

66. 4 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 34-2, at 386 (4th ed. 1995).

change is seriously misleading,<sup>67</sup> the filing remains effective to perfect an interest in collateral acquired by the debtor before, and within four months after, the name change.<sup>68</sup> But the filing does not remain effective to perfect an interest in collateral acquired by the debtor more than four months after the name change.<sup>69</sup> As a result of this provision, Bank should require MidCorp to (i) represent its current name and all prior names; and (ii) covenant that it will not change its legal name without Bank's prior written consent.

Example #2. MidCorp's assets include some stocks, bonds, and mutual fund shares. Some of the investment property is in certificated form, and some of it is in a brokerage account. Bank can perfect its interest in the investment property by filing, taking delivery of any certificates, or obtaining control.<sup>70</sup> If Bank relies on a filing for perfection, its priority will be subordinate to third-party security interests (i) previously perfected, regardless of method,<sup>71</sup> and (ii) subsequently perfected by delivery or control.<sup>72</sup> As a result of these provisions, Bank should require MidCorp to (i) represent that no other party, including any securities intermediary,<sup>73</sup> has an enforceable security interest in, possession of, or control of any of its investment property; and (ii) covenant that it will not permit any third party, including any securities intermediary, to have an enforceable security interest in, possession of, or control of any of its investment property.

The preceding two paragraphs provide just a few of the possibly many examples of representations and covenants prompted by the perfection and priority rules of Article 9. If any representation is materially incorrect, or if the

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67. A financing statement is seriously misleading if a search (using the clerk's standard search logic) against the debtor's legal name fails to reveal the previously-recorded filing. *See* U.C.C. § 9-506(c).

68. *See* U.C.C. § 9-507(c)(1).

69. *See* U.C.C. § 9-507(c)(2). Therefore, a secured party that wishes to remain continuously perfected in collateral acquired by the debtor more than four months after the name change needs to file an amendment (reflecting the name change) before that four-month period runs its course. *Id.*

70. *See* U.C.C. §§ 9-312(a) (filing), 9-313(a) (taking delivery of any certificates), 9-314(a) (control). *See also* U.C.C. §§ 9-106(a) (noting that a secured party has "control of a certificated security, uncertificated security, or security entitlement as provided in Section 8-106"), 8-106(a)-(e) (providing "control" requirements that are sensitive to the type of investment property).

71. *See generally* U.C.C. § 9-322(a)(1) (awarding priority to the secured party who first files or perfects).

72. *See* U.C.C. §§ 9-328(1) (favoring creditors who are perfected by control over creditors who do not perfect by control (*e.g.*, filers), 9-328(3) (favoring securities intermediaries (*e.g.*, brokers) over other secured parties), 9-328(5) (favoring a secured party who takes delivery of a stock certificate, over a secured party who is perfected by another method (*e.g.*, filing)). In effect, Section 9-328 creates several "superpriority" rules that underscore the phrase, "second in time but first in line."

73. The term is defined in U.C.C. § 8-102(a)(14), incorporated by reference into Article 9 through U.C.C. § 9-102(b).

debtor fails to comply with any covenant, then a default should arise. Students may fail to appreciate these and other possible defaults until after the topics of perfection and priority are covered. This delayed appreciation justifies deferring the topic of default until later in the course.<sup>74</sup>

### B. *Bankruptcy*

Why teach *any* bankruptcy in a Secured Transactions course? If students want to learn about bankruptcy law, then let them register for a bankruptcy course! (And we shouldn't discuss property issues in a contracts course, criminal matters in a torts class, evidence concerns in any course except evidence, tax implications *EVER*,<sup>75</sup> etc.)

Many students who take Secured Transactions will not take a bankruptcy survey course.<sup>76</sup> But bankruptcy can have an adverse impact on a secured party, its contractual and Article 9 statutory rights, and the enforcement of its security interest. Bankruptcy can be the ultimate crucible for a secured transaction, the venue in which the rubber meets the road.<sup>77</sup> A student whose knowledge of a secured transaction is confined to UCC Article 9 (and selected provisions from other UCC Articles) will fail to appreciate the dangers lurking for a creditor in Title 11 of the U.S. Code.

Even so, adequate coverage of Article 9 does occupy most of the class time in Secured Transactions, and in a typical semester a professor may have three or fewer hours to devote to bankruptcy matters. Prioritizing topics then becomes quite important. A short list of essential bankruptcy topics to cover probably includes the following:

- the automatic stay, and its impact on what a secured party can and cannot do (including, without limitation, exercising its default remedies under Article 9);<sup>78</sup>

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74. A professor who prefers to cover default before perfection and priority could consider the following approach. When asking students to consider what events might trigger a default, the professor could suggest "any representation made by the debtor in the security agreement that is materially incorrect, as well as the debtor's failure to comply with any covenant in any loan paper." The professor then could suggest that the Article 9 rules on perfection and priority ("which we will soon be covering") may prompt the secured party to include particular representations and covenants. As the course moves ahead into the topics of perfection and priority, the professor can explore how those representations and covenants might be drafted and, in this manner, watch the list of possible "defaults" evolve over much of the semester.

75. Admit it: this last suggestion holds some attraction!

76. But 98.7% of all law students somehow know that student loans are not dischargeable (as a general rule). A much smaller percentage can cite the governing statute. *See* 11 U.S.C. § 523(a)(8).

77. Or, if you (y'all?) are from the South, "where your fork hits the grits." One reviewer suggested a spoon is the more appropriate eating utensil. And just like that, an idea for a future article is borne!

78. *See* 11 U.S.C. § 362(a).

- the limited post-petition reach of the after-acquired property clause;<sup>79</sup>
- the trustee's power, under the so-called "strong-arm clause," to set aside an enforceable, but unperfected, security interest (leaving the creditor with an unsecured claim);<sup>80</sup> and
- the trustee's power to recover debt payments from, or destroy a security interest claimed by, a secured party, in either case as a voidable preference.<sup>81</sup>

If you favor the notion of covering material in the order presented in the textbook, then the textbook will dictate when you cover bankruptcy (and whether you cover it as a stand-alone topic during consecutive class periods or in bits and pieces sprinkled throughout the course). Regardless of when your textbook introduces the material, you may prefer to cover the basic bankruptcy concerns at the end of the semester. You may be nearing the end of the semester with more material to cover than you have time remaining. If you must jettison some material, why not bankruptcy? Students interested in the topic can take another course in bankruptcy (during which the preceding short list of topics is likely to be addressed); but Secured Transactions affords students their lone opportunity to learn the basics of UCC Article 9.<sup>82</sup>

As noted already, though, the debtor's bankruptcy will play a critical role in the life of a secured party.<sup>83</sup> Therefore, the Secured Transactions professor should set aside at least three hours of class to address bankruptcy issues. If pressed for time, consider cutting some of the less important<sup>84</sup> Article 9 issues that you had planned to cover.<sup>85</sup> Perhaps you can cover more material by presenting additional recorded lectures that students can watch before class. Also, you might mitigate the effect of the end-of-semester time crunch<sup>86</sup> on

79. See 11 U.S.C. §§ 552(a) (limiting the reach), 552(b)(1) (extending the reach to post-petition proceeds of pre-petition collateral).

80. See 11 U.S.C. § 544(a) (particularly, in a Secured Transactions course, subsection (1)). See also JEFFREY T. FERRIELL & EDWARD J. JANGER, UNDERSTANDING BANKRUPTCY § 14.02, at 530 (3d ed. 2013) ("Section 544(a), long known as the 'strong-arm clause,' is the trustee's most important avoiding power."); CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY § 6.3, at 336 (1997) ("One of the most important of the trustee's avoiding powers is the 'strong arm' clause, codified in § 544(a).").

81. See 11 U.S.C. § 547. Be sure to distribute and collect your evaluations before teaching this topic if you have any hope of not finishing in last place in the student balloting for your school's "Professor of the Year" award.

82. Actually, some students may have a second opportunity (if you catch my drift).

83. See *supra* text accompanying notes 76–77.

84. Why am I feeling pangs of blasphemy as I write this?

85. You may get a difference of opinion on possibilities. My list would include topics mentioned as "wants" in note 37, *supra*.

86. It is usually during the last two weeks of the semester when professors adopt the cadence and tempo of an auctioneer, and students discover they can type 95 words per minute.



bankruptcy coverage by introducing the material in pieces throughout the semester. For example:

- introduce the automatic stay when discussing the secured party's post-default statutory remedies under Part Six of Article 9;
- mention how bankruptcy can limit the post-petition reach of the after-acquired property clause after covering Section 9-204(a) (and possibly "proceeds");
- discuss the power of the bankruptcy trustee<sup>87</sup> to avoid unenforceable, but unperfected, security interests under the strong-arm clause when resolving priority disputes between the secured party and the lien creditor under Section 9-317;<sup>88</sup> and
- address the challenging topic of voidable preferences at the conclusion of your priority coverage.

In summary, *when* you cover bankruptcy issues in the Secured Transactions course is less important than *that* you cover bankruptcy issues. Draft a daily assignment schedule that devotes some time to bankruptcy topics and stay committed to that block of time.

#### V. QUESTION #5: HOW FAMILIAR ARE MY STUDENTS WITH AGENCY LAW AND DIFFERENT FORMS OF BUSINESS ENTITIES?

Most, if not all, law schools offer courses on agency law and different forms of business entities (*e.g.*, general partnerships, limited partnerships, limited liability partnerships [LLPs], limited liability companies [LLCs], and corporations), albeit in different ways. For example:

- Capital University offers (i) Business Associations I and (ii) Business Associations II;<sup>89</sup>
- Cleveland State University, Cleveland-Marshall College of Law offers (i) Agency, Partnership, and Limited Liability Associations and (ii) Corporations;<sup>90</sup>

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87. Sometimes referred to as "the Prince of Darkness."

88. By definition, the trustee is a "lien creditor" under Article 9. *See* U.C.C. § 9-102(a)(52)(C). Several years ago, I read advance sheets of an opinion that referenced "a lien creditor." But the space between the first two words had been dropped, giving me the temporary impression that priority disputes had gone intergalactic! Talk about an adrenaline rush!

89. *See Course Listings and Descriptions*, CAP. UNIV. LAW SCH., <https://law.capital.edu/CourseListingandDescriptions/> [<https://perma.cc/G873-KGX2>].

90. *See Course Descriptions*, CLEV. ST. UNIV. CLEV.-MARSHALL COLL. OF LAW, <https://www.law.csuohio.edu/academics/curriculum/coursedescriptions/> [<https://perma.cc/4JHU-SLVJ>].

- North Carolina Central University School of Law offers (i) Agency-Partnership, (ii) Business Associations, and (iii) Corporations;<sup>91</sup>
- Samford University, Cumberland School of Law offers Business Organizations;<sup>92</sup>
- South Texas College of Law Houston offers (i) Agency & Partnership and (ii) Corporations;<sup>93</sup>
- University of Kansas School of Law offers (i) Business Associations I, (ii) Business Associations II, and (iii) Business Organizations (a “one semester equivalent” of the other two courses);<sup>94</sup> and
- Vanderbilt University Law School offers (i) Corporations and (ii) Corporations and Business Entities.<sup>95</sup>

The students enrolled in your Secured Transactions course are likely to fall among the following groups: (i) they already have taken one or more of these courses; (ii) they are concurrently taking one or more of these courses; (iii) they will take one or more of these courses in a subsequent semester; and (iv) they will not take any of these courses.<sup>96</sup>

Through first-day polling, you may wish to know where your students fall. You may discover that a significant number of your students land in groups (iii) and (iv). This is unfortunate, as some rather important Article 9 provisions require a party to take action that assumes some basic understanding of agency principles<sup>97</sup> and the different forms of business entities. Knowing what courses your students have taken or are concurrently taking may allow you to better anticipate particular questions when you cover those Article 9 provisions.<sup>98</sup> It

91. See *Full Curriculum Listing*, N.C. CENT. UNIV. SCH. OF LAW, <http://law.nccu.edu/academics/curriculum-description/full-listing/> [<https://perma.cc/9NQ3-54DY>]. The first and third courses are offered only in the evening program; Business Associations is offered only in the day program. *Id.*

92. See *Courses*, SAMFORD UNIV. CUMBERLAND SCH. OF LAW, <https://www.samford.edu/cumberlandlaw/courses> [<https://perma.cc/XNG8-U5LF>].

93. See *Corporate Law Pathway*, S. TEX. COLL. OF LAW HOUS., <http://pathways.stcl.edu/business-corporate/corporate-pathway/> [<https://perma.cc/3QST-YSQT>].

94. See *Course Descriptions*, UNIV. OF KAN. SCH. OF LAW, <https://law.ku.edu/course-descriptions> [<https://perma.cc/B789-PSHE>].

95. See *Course Information*, VAND. UNIV. LAW. SCH., <https://law.vanderbilt.edu/courses/> [<https://perma.cc/2R9T-TDVW>].

96. Let’s hope that the students in this last group have *phenomenal* bar prep instructors in these subjects!

97. Agency principles supplement the UCC. See U.C.C. § 1-103(b).

98. Students may have been exposed to some agency principles in courses other than those (such as an agency course or a business organizations course) that devote significant time to the topic. For example, professors who teach courses on wills, trusts, or legal ethics may offer commentary on fiduciary principles. If you poll your students to determine their degree of knowledge of agency principles, consider response options that recognize these other courses.

may also prompt you to consider one or two brief “primer” lectures on these topics (delivered by yourself or by a colleague who teaches that subject matter).

Agency principles are relevant in at least two areas of Article 9: document authentication, and perfection by possession. Recognizing and appreciating the various forms of business entities is critical to knowing where to file a financing statement.

#### A. *Agency Principles*

##### 1. Document authentication.

In several of its provisions, Article 9 requires a party to authenticate<sup>99</sup> a document. This authentication requirement appears at least once in four of the major areas of course coverage: attachment, perfection, priority, and default.

*Attachment:* In most secured transactions, the parties memorialize their understanding in a written security agreement. To create an enforceable security interest, the debtor must authenticate that agreement.<sup>100</sup>

*Perfection:* A secured party can perfect its security interest in tangible collateral by taking possession of it.<sup>101</sup> The secured party can utilize the services of a bailee, but the bailee must authenticate a record indicating that it holds or will hold possession on behalf of the secured party.<sup>102</sup>

*Priority:* A secured party with a purchase-money security interest in inventory can claim superpriority over a previous filer if the purchase-money creditor satisfies certain requirements.<sup>103</sup> One requirement is that the purchase-money creditor must timely send an authenticated notice of its security interest to the earlier filer.<sup>104</sup>

*Default:* After the debtor defaults, the secured party may sell the collateral.<sup>105</sup> As a general rule, the secured party must send to the debtor (and perhaps other parties) an authenticated disposition notice.<sup>106</sup>

In many commercial transactions, the party that is authenticating the document is not a human. Rather, it is a financial institution, a corporation, or other legal entity. These entities carry out their day-to-day activities only

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99. Article 9 defines “authenticate” to mean “(A) to sign; or (B) with present intent to adopt or accept a record, to attach to or logically associate with the record an electronic sound, symbol, or process.” U.C.C. § 9-102(a)(7). *See also* U.C.C. §§ 9-102(a)(70) (defining “record” as “information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form”), 9-102 cmt. 9 (elaborating on “authenticate” and “record”).

100. *See* U.C.C. § 9-203(b)(3)(A).

101. *See* U.C.C. § 9-313(a).

102. *See* U.C.C. § 9-313(c).

103. *See* U.C.C. § 9-324(b), (c).

104. *See* U.C.C. § 9-324(b)(2).

105. *See* U.C.C. § 9-610(a).

106. *See* U.C.C. § 9-611(b)–(d).

through the words and acts of their employees, who serve as agents for the entity. But not all employees have the same scope of responsibility, or the authority to engage in behavior that binds the employer. For example, assume that a university wants to borrow money to build a new law school building. To bind the university, the employee (the university's agent) authenticating the relevant loan documents must have authority to do so; that person may be the chairperson of the board of trustees, or the university president or chancellor, or the university's chief financial officer or general counsel. But, it may not include the law school dean, and it will not include a law professor.<sup>107</sup> If a person signs a document without the authority to bind the entity, the document may have no legal effect. Under Article 9, this could leave the secured party unsecured, unperfected, subordinate, or in breach of a statutory duty.<sup>108</sup>

Even if the authenticating employee has authority to bind the entity, another signature-related issue may arise. The employee's signature should clearly indicate that the employee is signing as agent for and on behalf of the disclosed principal (the entity). Typically, this is addressed with a signature block that takes the following form:

[ENTITY NAME]

By: \_\_\_\_\_ [cursive signature of employee]

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_ [President, Chief Financial Officer, etc.]

A signatory that fails to reveal either the agency role, or the principal on whose behalf the person is signing, may raise issues regarding whether (i) the document (*e.g.*, the security agreement) can be enforced against the principal<sup>109</sup> and (ii) the signing party has incurred possible, but probably unintended, personal liability.<sup>110</sup>

Students who have some basic knowledge of agency law will have a better appreciation for these issues surrounding document authentication. Consider providing that knowledge yourself or with the assistance of a colleague.

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107. Even if tenured and teaching Secured Transactions.

108. Whether the person signing the security agreement had authority to bind the entity is an issue that pops up from time to time in the courtroom. *See, e.g.*, *Northwestern Bank v. First Virginia Bank of Damascus*, 585 F. Supp. 425 (W.D. Va. 1984); *Zaremba Group, LLC v. FDIC*, No. 10-11245, 2011 U.S. Dist. WL 4962259 (E.D. Mich. Oct. 19, 2011) (defendant's motion for reconsideration granted (2011), third-party defendant's motion granted in part and denied in part; plaintiff's motion to stay denied; plaintiff's motion to strike denied) *Zaremba Group, LLC v. FDIC* No. 10-11063, 2010 U.S. Dist. WL 3805190 (E.D. Mich. Sep. 23, 2010); *Tripp Village Joint Venture v. MBank Lincoln Centre, N.A.*, 774 S.W.2d 746 (Tex. App. Dallas 1989).

109. *See, e.g.*, *In re Great Basin Transport, Inc.*, 32 B.R. 365 (Bankr. W.D. Okla. 1983); *In re Mid-Atlantic Piping Products of Charlotte, Inc.*, 24 B.R. 314 (Bankr. W.D. N.C. 1982).

110. *See, e.g.*, *Arlington v. McClure*, No. 2-06-296-CV, 2008 WL 755072 (Tex. App. Fort Worth 2008); *Mundaca Investment Corp. v. Febba*, 143 N.H. 499, 727 A.2d 990 (N.H. 1999).

## 2. Perfection by possession.

Typically, the secured party will perfect its security interest by filing a financing statement.<sup>111</sup> But Article 9 does permit a secured party to perfect its interest in tangible collateral by taking possession of it.<sup>112</sup> This method is impractical if the collateral is cumbersome or bulky, or the debtor needs the collateral to generate the revenue necessary to repay the debt (*e.g.*, inventory and equipment). But possession may be an attractive option if the collateral is small and portable, the debtor can function without it, or the secured party is concerned that the debtor may dispose of it. Examples include stock certificates, jewelry, artwork, and collectibles.

Article 9 allows the secured party to take possession through an agent.<sup>113</sup> The Code also allows the secured party to take possession through a non-agent. The non-agent may have possession prior to the secured transaction, or the non-agent may take possession after the secured transaction arises. In either case, the secured party's interest will not be perfected unless and until the non-agent possessor "authenticates a record acknowledging that it holds [or will hold] possession" of the collateral for and on behalf of the secured party.<sup>114</sup>

A student who lacks basic knowledge of agency principles may not appreciate whether the non-debtor possessor is an agent of, or a non-agent for, the secured party—and the possible need for the possessor to provide the requisite acknowledgement. The result? A secured party relying on possession, rather than filing, may be unperfected.<sup>115</sup> Consider minimizing this risk by sharing knowledge of basic agency principles with your students.

### B. *Forms of Business Entities*

A prospective borrower, through one or more human agents, approaches a financial institution for a loan. Talks progress, and the parties execute the appropriate documents, including a security agreement. The secured party

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111. See U.C.C. §§ 9-310(a), 9-310(b), 9-310 cmt. 2, 9-310 cmt. 3.

112. See U.C.C. § 9-313(a). Although conceptually the same as taking possession, the UCC uses the phrase "taking delivery" with respect to certificated securities (*e.g.*, stock certificates). *Id.* Article 9 does not define "possession." U.C.C. § 9-313 cmt. 3. Article 8 provides guidance on taking "delivery" of a certificated security. See U.C.C. § 8-301(a).

113. See U.C.C. § 9-313 cmt. 3.

114. See U.C.C. § 9-313(c). The non-agent person in possession is not required to provide the acknowledgement. *Id.* at (f). In such a case, the secured party may wish to perfect its security interest in the item by filing, or use an agent to possess the item, or insist that the debtor move the item to a more compliant non-agent possessor.

115. Here is an opportunity to encourage students to practice the benefits of "belt and suspenders" law. Do not rely solely on possession as your method of perfection; instead also file a financing statement against the collateral. Taking both steps isn't necessarily a redundancy. The secured party can rely on filing for perfection, and it can take possession of the collateral for a different reason—to minimize or frustrate the debtor's opportunity to dispose of the collateral.

intends to perfect its security interest by filing a financing statement. The debtor and the collateral have connections to multiple states. In which state(s) should the secured party file its financing statement(s)?

Article 9 provides the following rule: file where the debtor is located.<sup>116</sup> Guidance on where a debtor is “located” is found in Section 9-307. An individual is located in the state where the individual has his or her principal residence.<sup>117</sup> A debtor that is not an individual is an “organization.”<sup>118</sup> An organization that does business in only one state is located in that state.<sup>119</sup> If it does business in more than one state, the organization is located in the state of its chief executive office.<sup>120</sup>

But wait! There’s more!

If the organization is a “registered organization,” then the debtor is located in the state in which it is organized.<sup>121</sup>

So, what is a *registered* organization? Article 9 defines a “registered organization” as “an organization formed or organized solely under the law of a single State . . . by the filing of a public organic record with [or] the issuance of a public organization record by . . . the State[.]”<sup>122</sup> A “public organic record” is (in relevant part) “the record initially filed with or issued by a State . . . to form or organize an organization[.]”<sup>123</sup>

Many students will not find these definitions very helpful and will seek specific examples. Their wish is granted!

Thank goodness for the official comments, which provide specific examples of registered organizations. General partnerships and limited liability

116. See U.C.C. § 9-301(1).

117. See U.C.C. § 9-307(b)(1).

118. See U.C.C. §§ 1-201(b)(25) (defining “organization”), (27) (defining “person”). To the uninformed, the line between individual and organization may blur if the individual is operating a business as a sole proprietorship (creating a genuine “where to file” concern if the debtor lives in one state but operates the proprietorship in an adjoining state). The standard form UCC financing statement promulgated by the International Association of Commercial Administrators states in the accompanying instructions: “A sole proprietorship is *not* an organization, even if the individual proprietor does business under a trade name.” *UCC Financing Statement, Form UCC1*, IACA <https://www.iaca.org/wp-content/uploads/UCC1FinancingStatement-2.pdf> [<https://perma.cc/4467-ZPP2>] (page two, instruction 1a. “Organization Debtor Name”) (emphasis in original).

119. See U.C.C. § 9-307(b)(2).

120. See U.C.C. § 9-307(b)(3). See also U.C.C. § 9-307 cmt. 2 (elaborating, in the fourth paragraph, on “chief executive office”).

121. See U.C.C. § 9-307(e). The baseline rules regarding “organizations” stated in Section 9-307(b) expressly defer to the specialized rule for “registered organizations” stated in Section 9-307(e). See U.C.C. § 9-307(b) (“Except as otherwise provided in this section . . .”).

122. See U.C.C. § 9-102(a)(71).

123. See U.C.C. § 9-102(a)(68)(A).

partnerships (LLPs)? No.<sup>124</sup> Limited partnerships, corporations, and limited liability companies (LLCs)? Ordinarily, yes.<sup>125</sup>

So, we return to the question originally posed: where is a debtor located? It depends on the organizational form.

And students who have not had a business organizations course may be unaware of the host of possible organizational forms and, as a result, fail to fully appreciate the critical role that the debtor's form plays in knowing where to file a financing statement (the step taken to perfect the security interest).<sup>126</sup> Therefore, consider inviting a colleague to offer a mini-primer on these various entity forms.<sup>127</sup>

## VI. QUESTION #6: WILL MY FINAL EXAM BE "OPEN CODE"?

Of the nine questions posed in this article, this one may be of most interest to your students!

Secured Transactions is a statutory course. UCC Article 9 is a semester-long traveling buddy. Students need to get to know their buddy! Read the statutes.<sup>128</sup> Read them again (and again). Is that word defined? Where? What does that phrase mean? What insights did the textbook, or the professor, offer on that phrase? Does this provision stand alone, or are other provisions pertinent to a complete understanding? If so, where are these other provisions?

Encourage your students to highlight, mark up, and annotate their statutory supplement with cross references, marginal notes, and classroom observations.<sup>129</sup> By the end of the 14-week journey, students should have a

124. See U.C.C. § 9-102 cmt. 11 (paragraph 5).

125. See *id.*; see also U.C.C. § 9-307 cmt. 4.

126. Every filer is also a searcher, so the form of entity also dictates in which state(s) the secured party should search for pre-existing filings. Failing to search in the correct state could result in some unpleasant surprises for the secured party.

127. During the semester, I suggest to students at least two other instances when they (as counsel to a secured party) might consider engaging the services of another lawyer to fill in particular gaps in their Article 9 knowledge. First, if the collateral consists of valuable patents, copyrights, trademarks, or similar assets, then the Article 9 lawyer may wish to retain the services of an intellectual property lawyer. Second, if the secured party wishes to take post-default action against collateral consisting of stocks, bonds, mutual fund shares, or other investment property, the Article 9 lawyer may wish to retain the services of a securities lawyer. (Article 9 mentions the pertinent concern on this latter point in Section 9-610 cmt. 8.)

128. Join me in singing every commercial law professor's refrain: "*And the official comments, too!*"

129. This begins for me on the first day of class. Before we dip our toes into Article 9 (allowing the anticipation to build!), we peruse selected provisions from Article 1, including Section 1-304, which states: "Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement." And I ask two questions. "What does 'good faith' mean?" and "Can the parties disclaim the obligation to behave in good faith?" Students are encouraged to highlight the term "good faith" and then drop a citation in the margin to Section 1-

supplement that captures more than just the pristine text they purchased.<sup>130</sup> The classroom should be a laboratory where we can teach and hone a skill—statutory analysis—that survives our limited time together and will serve students well throughout their career. Students should leave our classroom with a “living and breathing” document<sup>131</sup> that will become part of their professional library for years to come.<sup>132</sup>

Aspirational? Yes. Realistic? That may be debatable. Perhaps the answer turns on whether a student: (i) registers for Secured Transactions only to satisfy a degree requirement, (ii) is pursuing a career in commercial law, or (iii) hesitates to engage in new/uncomfortable/tedious behavior that, while bearing long-term fruit may not appear to yield short-term benefits. I can’t do much about the first (an institutional decision), and my opportunities to shape career interests primarily arise during infrequent in-office conversations. But I can offer students a short-term benefit arising from “marking up” their statutory supplements: they will have access to, and the benefit of, their memorialized observations during the final exam, which is “open Code.” I believe that students throughout the semester are more likely to be diligent in their reading, attentive in class, and consistent in annotating their statutory supplement if they know they can access it during the exam. Students also breathe a deep sigh of relief because they are not expected to memorize massive amounts of challenging textual material!<sup>133</sup>

A pessimist may be concerned that an “open Code” exam is an invitation to laziness. A student has little or no incentive to master the intricacies of Article 9 if he or she has access to it during the exam. But instilling a degree of fear (often associated with the need to memorize) can be a great motivator!

There are counterweights to this concern. First, your students probably will be given a limited amount of time (*e.g.*, three hours) during which to complete the exam. They will have little time to “learn” or “hunt for” or “ponder” while turning the pages of their statutory supplement. Second, semester-long laziness should become apparent to, and can be addressed by, the professor long before the exam period (so why address it with a class-wide exam procedure?). And third, although I have no empirical evidence to support this because I have long had an “open Code” exam policy, I am skeptical that adopting a “closed book”

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201, where the term is defined. They also are invited to add a marginal cross-reference to Section 1-302, which prohibits disclaimer.

130. Students wouldn’t buy a “used” statutory supplement, would they? Am I naïve?

131. I’m hoping this phrase will have the unintentional consequence of significantly expanding the number of “hits” on this article (certainly in response to searches posed by our friends who teach constitutional law!).

132. And keep me off their speed dial.

133. Professors also may perceive benefits to an “open Code” exam. Professors may expand the scope of questions (or particular topics) that are “fair game.” Also, professors may be more comfortable, when grading, in raising the bar on reasonable expectations.



policy would enhance overall student performance, either in the classroom or on the final exam.

In summary, give some serious thought to the question of whether you will give an “open Code” exam. Share your decision, in writing, very early in the semester (preferably by the first day of class).<sup>134</sup>

#### VII. QUESTION #7: WHAT DRAFTING EXERCISES MIGHT I CONSIDER AS A METHOD OF FORMATIVE ASSESSMENT?

Standard 314 states:

A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.<sup>135</sup>

One of the two accompanying “interpretations” offers this guidance:

Formative assessment methods are measurements at different points during a particular course or at different points over the span of a student’s education that provide meaningful feedback to improve student learning. Summative assessment methods are measurements at the culmination of a particular course or at the culmination of any part of a student’s legal education that measure the degree of student learning.<sup>136</sup>

Secured Transactions is a course that offers a host of drafting opportunities as possible formative assessments. Suggestions of an “attachment” exercise and a “default” exercise follow.

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134. My syllabus provides the following:

#### EXAM

The final exam will be “open Code.” You may NOT bring your notes, outlines, hardback text, calculator, etc. The ONLY outside source that you may consult during the exam is your personal copy of your softback statutes book. The inside covers and blank pages at the front and rear must remain blank (other than personal information, e.g., name and phone number). However, annotations, cross-references, and personal comments pertaining to our Secured Transactions course are acceptable if written on any page on which appears a statute (or accompanying official comments) that we discuss during the semester. You may tab your statutes book (*but the ONLY information on the tab can be a statutory citation [e.g., “9-109”] and/or statutory caption [e.g., “Scope”]*).

If you are concerned that students may violate the spirit of this policy by effectively turning their supplement into a course outline, consider the alternative of allowing students to access during the exam a fixed and limited number of pieces of paper (e.g., two pages, 8.5 x 11 inches each), on which any information can be written (on the front and back).

135. See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2018–19 (Standard 314).

136. *Id.* (Interpretation 314–1). The other “interpretation” states: “A law school need not apply multiple assessment methods in any particular course. Assessment methods are likely to be different from school to school. Law schools are not required by Standard 314 to use any particular assessment method.” *Id.* (Interpretation 314–2).

### A. Attachment Drafting Exercise

In most secured transactions, the parties will memorialize their understanding in a written agreement.<sup>137</sup> For the purpose of attachment (creating an enforceable security interest), the agreement must meet two express requirements: the agreement must be authenticated by the debtor, and the agreement must describe the collateral.<sup>138</sup> Coverage of attachment starts with Section 9-203, but it then extends to Section 9-108 (adequacy of description); 9-102(a) (definitions of various “types” of collateral, such as “accounts” and “chattel paper” and “inventory”); and 9-204 (the benefits of an after-acquired property clause and a future advances clause).

After covering attachment, consider using some form of the following as a drafting exercise and a method of formative assessment:

*Redbird Bank<sup>139</sup> has agreed to loan \$1 million to BizCorp. The loan will be secured by all of BizCorp’s assets. Draft an error-free, one-sentence security agreement (sufficient solely for the purpose of attachment), ready for signature.*

Based on your course coverage, students should respond with a sentence (perhaps rather long) that captures the debtor’s conveyance of an interest in all of its non-real estate collateral in which the debtor now or in the future has rights, all in order to secure payment of any debt that the debtor now or in the future owes to the secured party.

A model answer might look like this:

To secure payment of any debt now or hereafter owed by BizCorp to Redbird Bank, BizCorp grants to RedBird Bank a security interest in BizCorp’s rights in the following, in each case whether now owned or hereafter acquired or created: accounts, chattel paper, deposit accounts, documents, equipment, farm products, general intangibles, instruments, inventory, investment property, letter-of-credit rights, letters of credit, minerals before extraction, and money.

BIZCORP

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

The opening language (“To secure payment of any debt now or hereafter owed . . .”) mentions the payment obligation,<sup>140</sup> which may include future

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137. Article 9 defines a “security agreement” as “an agreement that creates or provides for a security interest.” U.C.C. § 9-102(a)(74).

138. See U.C.C. § 9-203(b)(3)(A).

139. In the interest of full disclosure, I am a die-hard St. Louis Cardinals baseball fan(atic)!

140. A security interest “secures payment or performance of an *obligation*.” U.C.C. § 1-201(b)(35) (emphasis added). Therefore, the agreement should refer to an obligation. For privacy and other reasons, the parties may wish to avoid mentioning a specific dollar amount.

indebtedness (a future advances clause). The middle language (“BizCorp grants . . . a security interest” . . .) unambiguously memorializes BizCorp’s conveyance of a property interest.<sup>141</sup> Subsequent language (“in each case whether now owned or hereafter acquired or created”) captures the idea of after-acquired property.<sup>142</sup> Language, after the colon, (“accounts, chattel paper, . . .”) reasonably identifies the collateral<sup>143</sup> (this observation merits additional remarks in the next paragraph). And, the model answer includes the requisite signature block, which, once completed by BizCorp’s authorized representative, will satisfy the requirement of debtor authentication.

The limited facts indicate that all of BizCorp’s assets will serve as collateral. Article 9 excludes real estate and some other property rights of the debtor from its collateral coverage.<sup>144</sup> The catch-all definition of Article 9 collateral is “general intangibles” (“any personal property other than . . .”).<sup>145</sup> So, an exhaustive description of Article 9 collateral should capture “general intangibles” and every other type of collateral mentioned in its definition. Noticeably absent from the model answer are “commercial tort claims” and “goods.” The former is excluded because a reference to “commercial tort claims” without more descriptive language is inadequate to describe that form of collateral.<sup>146</sup> “Goods” is omitted as a particular word, but its meaning is adequately captured by the text. “Goods” come in four flavors: consumer goods, equipment, farm products, and inventory.<sup>147</sup> The debtor is an entity, not an individual, so the collateral description should not refer (directly or indirectly) to “consumer goods.” But the collateral description should refer to the other three forms of goods in which a commercial entity (like BizCorp) might now (or

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141. Although no magical language is required, the “granting” clause may be the best evidence that the agreement “creates or provides for a security interest.” See U.C.C. § 9-102(a)(74) (defining “security agreement”).

142. Notice that the after-acquired property clause appears before a colon and before the numerous references to collateral by type. The temptation is to add the after-acquired property clause to the end of the collateral description. Resist this temptation! Compare “accounts, equipment, and inventory[,] whether now owned or hereafter acquired or created” with “the following, in each case whether now owned or hereafter acquired or created: accounts, equipment, and inventory.” The former raises concerns as to the reach of the after-acquired property clause. The latter eliminates those concerns. *Cf. Shelby County State Bank v. Van Diest Supply Co.*, 303 F.3d 832 (7<sup>th</sup> Cir. 2002) (construing ambiguity in qualifying language that appeared in collateral description).

143. See U.C.C. § 9-108(a) (requiring a description that “reasonably identifies” the collateral) and U.C.C. § 9-108(b)(3) (providing that, in most instances, a description by “type” will suffice).

144. See U.C.C. § 9-109(d).

145. See U.C.C. § 9-102(a)(42).

146. See U.C.C. § 9-108(e). See also U.C.C. § 9-204(b)(2) (noting exceptions to the reach of the after-acquired property clause, including commercial tort claims).

147. See U.C.C. § 9-102 cmt. 4(a).

in the future) claim a property interest. And the model answer does that, with its references to “equipment” and “farm products” and “inventory.”

The model answer also does not mention “proceeds” or “products” or “fixtures” or “additions” or “substitutions” or “replacements” or “accessions” or other terms. Any Article 9 collateral that falls within the intended meaning of any such term should, by definition, already be captured through the combination of (i) the exhaustive list of types of collateral and (ii) the after-acquired property clause. Therefore, why use those terms?<sup>148</sup>

Also note that the model answer includes a signature block, a useful reminder that the debtor must authenticate the agreement to create an enforceable security interest.<sup>149</sup>

Your feedback form should include the model answer, accompanied by many of the foregoing reflections. If you wish to award a “score” to each student, your feedback form might provide a 10-point checklist similar to the following:

|   | Yes   | No    |
|---|-------|-------|
| Future advances clause  | _____ | _____ |
| Granting/conveyancing language  | _____ | _____ |
| After-acquired property clause (present)                              | _____ | _____ |
| After-acquired property clause (placement)                            | _____ | _____ |
| Excluded “commercial tort claims”                                     | _____ | _____ |
| Excluded “consumer goods”   | _____ | _____ |
| Replaced “goods” with “equipment” and “farm products” and “inventory” | _____ | _____ |
| Otherwise exhaustive (but streamlined) collateral description         | _____ | _____ |
| Signature block   | _____ | _____ |
| No spelling or grammatical errors                                     | _____ | _____ |

Given the important role that the written security agreement plays in the typical secured transaction, consider what corrective or follow-up action you may wish to require from students who commit particular errors or fail to achieve a minimal score.<sup>150</sup>

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148. Including a “proceeds” reference could be important if the debtor seeks bankruptcy protection. *See* 11 U.S.C. § 552(b) (2005) (allowing a pre-petition security interest to encumber post-petition proceeds “to the extent provided by [the] security agreement”).

149. *See* U.C.C. § 9-203(b)(3)(A).

150. You can anticipate that at least one student will describe the collateral as “all of BizCorp’s assets” or “all of BizCorp’s personal property.” Article 9 condemns these supergeneric collateral descriptions. *See* U.C.C. § 9-108(c). I consider giving those students a “zero” on the assignment and suggest that they have committed malpractice by leaving their client unsecured.

### B. *Default Drafting Exercise*

Article 9 permits the secured party to sell the collateral if the debtor defaults.<sup>151</sup> As a general rule, the secured party must authenticate and timely send a disposition notice to the debtor.<sup>152</sup> The secured party can find a safe-harbor form of notice in Sections 9-613 and 9-614.

After covering the statutory remedy of nonjudicial foreclosure (post-default, collateral dispositions), consider implementing some form of the following as a drafting exercise and a method of formative assessment:

*Six months ago, Ima Kardzfann (3117 Gibson Street, St. Louis, Missouri 63103<sup>153</sup>) borrowed \$25,000 from Redbird Bank (3630 Musial Boulevard, St. Louis, Missouri 63101<sup>154</sup>). Ima used the loan proceeds to jumpstart her catering business. To secure repayment of the loan, Ima granted an enforceable security interest in her 2018 Ford Explorer, which she has (at all relevant times) consistently used primarily for personal use. Redbird Bank has perfected its security interest in the vehicle.*

*Ima is in default. The Bank, without breaching the peace, has taken possession of the vehicle and intends to sell it at a public disposition.*

*Draft an error-free disposition notice, ready for signature.*

*Assume that today's date is [Monday, March 3, 2020].*

Students must decide which safe-harbor form to use as the template. Section 9-614 offers a form for consumer-goods transactions; Section 9-613 offers a

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151. See U.C.C. § 9-610(a).

152. See U.C.C. § 9-611(b), (c)(1). Notice is excused “if the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market.” U.C.C. § 9-611(d). The debtor also may effectively waive notice. See U.C.C. § 9-624(a) (requiring the debtor to authenticate the waiver after default).

153. Bob Gibson (in whose honor I have named the imaginary street) was the ace of the Cardinals pitching staff in the 1960's and early 1970's. He was one of baseball's most dominating, and intimidating, pitchers ever, and he accomplished the rare feat of winning both the league Cy Young award and the league MVP award in the same year (1968). He entered the Hall of Fame in 1981 and was named to baseball's “All-Century Team” in 1999. And the street number of “3117”? That represents the number of Gibson's career strikeouts. See generally *Bob Gibson*, NAT'L BASEBALL HALL OF FAME, <https://baseballhall.org/hall-of-famers/gibson-bob> [https://perma.cc/H5WR-LMUW].

154. Perhaps no other Cardinal is more beloved than Stan Musial (in whose honor I have named the imaginary street), regarded by fans far and wide as one of baseball's true icons. In February 2011, President Barack Obama awarded “Stan the Man” our nation's highest civilian honor, the Medal of Freedom. See Marybeth Johnson, *February 15, 2011 – Stan Musial Awarded the Presidential Medal of Freedom*, CARDINALS MAGAZINE (Feb. 15, 2011), <https://cardinals.mlblogs.com/february-15-2011-stan-musial-awarded-the-presidential-medal-of-freedom-b7abe2e09afa> [https://perma.cc/5XGQ-JDTS]. And the street number of “3630”? That's the number of Musial's career hits. Believe it or not, Musial hit exactly half (1815) at home, and half (1815) on the road! See *Stan Musial*, NAT'L BASEBALL HALL OF FAME, <https://baseballhall.org/hall-of-famers/musial-stan> [https://perma.cc/4VJK-9QYK].

form for all other transactions. Some students will be seduced by the facts that scream “CONSUMER GOOD” and conclude that the parties have engaged in a consumer-goods transaction. They then will use the form offered by 9-614 as the template.

Alas, those students need to pay more attention to defined terms. Yes, Ima is using the vehicle as a consumer good.<sup>155</sup> Yes, a consumer-goods transaction requires a security interest in a consumer good.<sup>156</sup> But, the definition of “consumer-goods transaction” also requires the individual debtor to incur the debt “primarily for personal, family, or household purposes.”<sup>157</sup> Ima borrowed the money to jumpstart her catering business, not for personal, family, or household reasons. Therefore, notwithstanding the presence of an individual debtor and a consumer good, the transaction was not a consumer-goods transaction. As a result, students should not use the safe-harbor form in Section 9-614.

Instead, students should use the safe-harbor form in Section 9-613(5) as the template.<sup>158</sup> As followed, the model response might look something like this:

TO: *Ima Kardzfann*  
*3117 Gibson Street*  
*St. Louis, Missouri 63103*

FROM: *Redbird Bank*  
*3630 Musial Boulevard*  
*St. Louis, Missouri 63101*  
*[student to provide telephone number]*

*We will sell your 2018 Ford Explorer to the highest qualified bidder in public as follows:*

*Day and Date: [student to provide]*  
*Time: [student to provide]*  
*Place: [student to provide]*

*You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell, for a charge of [student to provide, range of \$0 - \$50]. You may request an accounting by calling us at [student to provide telephone number].*

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155. See U.C.C. § 9-102(a)(23) (defining “consumer goods”).

156. See U.C.C. § 9-102(a)(24)(B).

157. See U.C.C. § 9-102(a)(24)(A).

158. The preamble to Section 9-613(5) states that the form therein, “and the form appearing in Section 9-614(3), when completed, each provides sufficient information” (emphasis added). Therefore, a student has statutory authority for choosing the form in Section 9-614(3) as the template (and, therefore, you may wish to be a bit flexible on this point). But the forms in Sections 9-613(5) and 9-614(3) are different, suggesting (to me) that the drafters preferred that the secured party adopt the form in 9-613(5) when the transaction is not a consumer-goods transaction. Otherwise, the drafters would have provided a singular all-purpose form for all transactions.

## REDBIRD BANK

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Keep in mind the following reflections. First, some students may draft the notice in a more formal letter format, with the secured party's name and address at the top (as if on letterhead), and the debtor's name and address a few lines lower, and flush to the left margin. Great! Second, because the secured party intends to dispose of the collateral at a public disposition, the student needs to provide the day (seven choices), the calendar date (be sure that the stated calendar date is consistent with the choice of day<sup>159</sup>), the time (including A.M. or P.M.), and place (street address at a minimum; consider adding a floor or office number). Third, the date of disposition must be "commercially reasonable" in light of "today's" date.<sup>160</sup> For example, if today's date is Monday, March 1, then it might not be commercially reasonable to schedule the public disposition on Friday, March 5, but it would be commercially reasonable to hold the sale on Friday, March 19.<sup>161</sup> Fourth, the secured party must authenticate the notice,<sup>162</sup> so the student should add a signature block to the letter.

Consider sharing these reflections, along with a model form of notice, in your feedback form. If you wish to award a score to each student, your feedback form might provide a multi-point checklist similar to the following:

|  | Yes   | No    |
|--|-------|-------|
| Correct safe-harbor form                   | _____ | _____ |
| Description of collateral                  | _____ | _____ |
| Choice of public, not private, disposition | _____ | _____ |
| Day  | _____ | _____ |
| Date                                       | _____ | _____ |
| Reasonableness of date (lead time)         | _____ | _____ |
| Time (including A.M. or P.M.)              | _____ | _____ |
| Place (appropriate specificity)            | _____ | _____ |

159. See *In re Inofin*, 455 B.R. 19, 31 (Bankr. D. Mass. 2011) ("The foreclosure notice, dated January 5, 2011, contained a scrivener's error. It provided that the foreclosure sale was to take place on Tuesday, January 20, 2011, although January 20, 2011 was a Thursday.").

160. See U.C.C. § 9-612(a) cmt. 2.

161. The business nature of the secured debt prevents the transaction from being a "consumer transaction." See U.C.C. § 9-102(a)(24). Because the transaction is not a consumer transaction, Article 9 provides a 10-day safe harbor (but not a minimum requirement). See U.C.C. § 9-612(b) cmt. 3. Under the facts of the problem, today's date is Monday, March 3. To avoid timing concerns, the notice should provide a disposition date no earlier than March 13.

162. See U.C.C. § 9-611(b).

|  |       |       |
|--|-------|-------|
| Accounting charge, if any                        | _____ | _____ |
| Other contents, including telephone number       | _____ | _____ |
| Signature block                                  | _____ | _____ |
| No spelling or grammatical errors <sup>163</sup> | _____ | _____ |

Also consider what corrective or follow-up action you may wish to require from students who commit particular errors or fail to achieve a minimal score.

#### VIII. QUESTION #8: WHAT “PRACTICAL SKILLS” EXERCISES MIGHT I CONSIDER AS A METHOD OF FORMATIVE ASSESSMENT?

Secured Transactions affords the professor multiple opportunities to assess a student’s practical skills. I have used two exercises in recent semesters. In the first, students complete an online UCC search and provide a written response to a particular question. In the second, students draft an error-free financing statement. Commentary on each exercise follows.

##### A. *Online Search Exercise*

The primary goal of the online search exercise is to assess whether a student can respond correctly to a particular search inquiry. The professor’s task is to provide the search inquiry. This will require some “reverse engineering” by the professor. Consider the following steps.

First, locate the UCC website in your state and follow the directions for conducting a search against an organization.

Second, look for filings against debtor organizations by searching against common first words of the debtor’s name. Consider using words that are either (i) a common surname (*e.g.*, Davis, Johnson, Wallace) or (ii) a locality in your state (*e.g.*, Columbia, Hickory, Warrenton).

Third, narrow your search results to debtors against which you find between two and five filings.

Fourth, consider as optimal those search results which reveal at least one filing that describes collateral with specificity (*e.g.*, “CDS Medonic Series Open Vial Analyzer”) and at least one other filing that describes the collateral by Article 9 type that will capture the specific collateral mentioned in the other filing (*e.g.*, “equipment”).

Fifth, draft the search inquiry to which your students will respond.

Consider generating at least four particular search inquiries for your class. This may discourage students from sharing the work, as not every student is given the same search inquiry. It also provides you with additional inquiries that you can pose to students who fail the exercise and are asked to “try again.”

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163. Be prepared to observe that notices submitted by some students will refer to “Musical” and not “Musial.” Oh, the perils of overreliance on spellcheck programs!



Here is an example (slightly edited for this article) of one of my recent online search exercises:<sup>164</sup>

*DO YOUR OWN WORK; DO NOT DISCUSS YOUR PARTICULAR SEARCH INQUIRY WITH ANYONE ELSE. ASK FOR NO ASSISTANCE FROM ANYONE ELSE (INCLUDING PROFESSOR ZINNECKER).*

Doing online searches in North Carolina.

Visit: <https://www.sosnc.gov/>. Click on the “Divisions” link near the top of the page. Then click on “Search For A UCC” under the “Uniform Commercial Code” topic. Then you should be able to conduct a “search” by inputting your organization name (see facts below) and then clicking on the “Search” button.

Your question is:

Has anyone filed a financing statement against a Caterpillar Dozer owned by Turner Dairy LLC? If so, what is (or are) the file number(s)? *List all, but only, the UCC-1 filing numbers (not UCC-3 filing numbers) for which no termination statement has been filed. Perhaps rephrased, limit your answer to those UCC-1 filings which remain active today.*

[space for response]

---

Student Name

Deadline for submission: Monday, February 18, at 2:45 p.m. (local time).

After reviewing the responses, consider what feedback you will offer. I provide each student with written feedback, using a form that can easily be tweaked for each search inquiry. Here is the feedback form (slightly edited for this article) for the search inquiry posed above:

NAME: \_\_\_\_\_

RESULT:                      Pass                      Fail

QUESTION:

Has anyone filed a financing statement against a Caterpillar Dozer owned by Turner Dairy LLC? If so, what is (or are) the file number(s)? *List all, but only, the UCC-1 filing numbers (not UCC-3 filing numbers) for which no termination statement has been filed. Perhaps rephrased, limit your answer to those UCC-1 filings which remain active today.*

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164. I distribute a written copy (single page) of the exercise to students soon after we begin covering perfection by filing. I make the appropriate number of copies of each of my search inquiries (typically dividing class enrollment by the aggregate number of inquiries I have prepared), shuffle the different copies, and then distribute the copies (by row) at the beginning of a particular class period.

## Remarks:

A search against the named debtor will reveal five filings, four of which should be mentioned.

*Your review of these filings should have revealed FS #20180086716M against the debtor and a "1980 Caterpillar Dozer D7G Unit D57 S/N: 92V8764." The filing was recorded on 8/21/18.*

None of the other filings specifically reference a Caterpillar Dozer. But in the hands of this debtor, a dozer is almost certainly a piece of "equipment." Therefore ...

*Your review of these filings should have revealed FS #20090018285G against the debtor and all "equipment" (among other assets). The filing was recorded on 3/11/09 (and continued on 3/10/14).*

*Your review of these filings should have revealed FS #20120031734E against the debtor and all "equipment" (among other assets). The filing was recorded on 4/6/12 (and continued on 3/29/17) (with amendment to debtor info filed on 3/29/17).*

*Your review of these filings should have revealed FS #20149118485F against the debtor and all "equipment" (among other assets). The filing was recorded on 12/23/14.*

ANOTHER SEARCH REQUIRED?      Yes; see attached sheet.

No

If you adopt some form of this online search exercise (and you pose a search inquiry that should reveal both specific and generic filings), anticipate that the most common mistake likely will be a student's failure to mention each filing that covers specific collateral through broad language ("equipment"), rather than specific language ("Caterpillar Dozer"). Perhaps rephrased, most students will mention a filing that refers to a "Caterpillar Dozer," but fewer of those students will also mention any and all filings that refer to "equipment."

Also, consider your responses to the following questions. What is the penalty for submitting no form, or a late form? How many opportunities will a student be given to pass the exercise? What is the penalty for failing the exercise? How will you respond if the student provides you with a UCC-3 filing number, instead of the corresponding, but different, UCC-1 filing number? How will you respond if the student provides you with a UCC-1 number for a filing that has been terminated but not yet expunged from the filing system?<sup>165</sup>

If you enjoy success with this exercise and wish to repeat it, review the filing records again in each future semester to confirm the continued accuracy of any feedback you intend to offer for particular search inquiries previously posed.

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165. See U.C.C. § 9-522(a) (requiring clerks to maintain a record of a lapsed financing statement for at least one year).

### B. *Financing Statement Exercise*

As a general rule, a secured party must file a financing statement in order to perfect its security interest.<sup>166</sup> It makes sense, then, to consider using as a method of assessment an exercise that invites students to prepare an error-free financing statement. The exercise requires the professor to provide students with little information: a link to an online form, the names and addresses of the two parties, and a collateral description. The exercise requires minimal preparation by the professor and minimal effort by the student.

But the exercise can become a bit more challenging if the professor provides unusual, atypical, or hard-to-spell data. And by doing so, the professor can assess not only a student's ability to complete a form, but also a student's attention to detail and proficiency in proofreading, critical skills that transcend any single course in the law school curriculum.

When using this exercise, I provide students with a single piece of paper. On one side of the paper are the following instructions (slightly edited for this article):

*Assignment:  
prepare a UCC-1 financing statement*

Use the online form here:

[https://www.sosnc.gov/documents/forms/uniform\\_commercial\\_code/ucc\\_1\\_financing\\_statement.pdf](https://www.sosnc.gov/documents/forms/uniform_commercial_code/ucc_1_financing_statement.pdf).

Or visit:

<https://www.sosnc.gov/> (click on "Divisions" and then click on "Download Forms" in the "Uniform Commercial Code" column [top row; far right]; after clicking on "Download Forms" then click on "Financing Statement" – you may then need to "open" the form using Adobe Acrobat).

Prepare the form, using the attached security agreement (see reverse side). Include your name in the upper left box (anywhere is fine). Print your completed (*and typed, not handwritten*) form and deliver a copy to me by the deadline below, *accompanied by a copy of your security agreement*. My standard of discretionary review is "complete information; no errors" (which is different from the Code's "seriously misleading" standard).

Please assume that the debtor will aggressively challenge the propriety of any financing statement which describes the collateral as "all of debtor's assets," "all of debtor's personal property," etc.

Please assume that there are no typos in the security agreement.

Do your own work, and do not discuss your particular project with any other student.

This project should take no more than twenty minutes.

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166. See U.C.C. § 9-310(a) and (b), and cmts. 2 and 3.

*Deadline for submission:*

On the reverse side, students will find a simple security agreement that provides them with all of the information necessary to draft the financing statement.

#### SECURITY AGREEMENT

This Security Agreement is executed as of February 20, 2020, between \_\_\_\_\_ (“Secured Party”), and \_\_\_\_\_ (“Debtor”).

To secure payment of indebtedness now or hereafter owed by Debtor to Secured Party, together with all reasonable expenses (including attorney fees) incurred by Secured Party in enforcing its rights and remedies against Debtor or any collateral, Debtor grants to Secured Party a security interest in all rights held by Debtor in the following:

\_\_\_\_\_

The parties agree that the laws of North Carolina shall govern their respective rights and duties and the validity, construction, enforcement, and interpretation of this contract.

*SECURED PARTY*

*DEBTOR*

13557 Leprechaun Lane  
Raleigh, NC 27607

65433 Kaleidoscope Circle  
Raleigh, NC 27609

BY: *Diana L. Walton*  
Name: Diana L. Walton,  
Title: Executive Vice President  
and General Counsel

I have a list of debtor names, secured party names, and collateral descriptions that I mix and match, so fewer than 20% of the students in the class have identical paperwork (at least initially). This may discourage students from sharing the work, as not every student has the same security agreement. It also provides me with additional inquiries that I can pose to students who fail the exercise and are asked to “try again.”

The filing clerk indexes a filing by the debtor’s name,<sup>167</sup> making this field the most important to be free from any error. Therefore, consider creating debtor names that are challenging. Four names that I have used are: (i) Deiter P. Bonnheofferr, (ii) Churubusco P. Galmidge, (iii) Dorrington P. Samulles, and (iv) Winnifred P. Stamfordd.

Secured party names might include a word that is hard to spell, a symbol, an intentional variation of a popular nearby locality, or an unexpected combination of letters. Four names that I have used are: (i) Allegheny Savings & Loan, (ii)

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167. See U.C.C. § 9-519(c)(1).

Frederickburg State Bank, (iii) Chattanooga Finance Company, and (iv) Culpeper Credit Union.

Collateral descriptions provide the professor with an opportunity to be creative, and perhaps to engage a personal passion or hobby. If the debtor is an individual (not an entity), the collateral could (among other objects) include a motor vehicle, a musical instrument, or a collectible. Four descriptions that I have used are: (i) Schimmel Piano Model C130 Serial Number 377139862662626543, (ii) book: *Thus Spoke Zarathustra* autographed by author Friedrich Nietzsche, (iii) musical score for *Carousel* autographed by composer Richard Rodgers and librettist Oscar Hammerstein II,<sup>168</sup> and (iv) baseball autographed by Red Schoendienst and Carl Yastrzemski.<sup>169</sup>

Depending on the data you provide in the security agreement, you may anticipate that a significant percentage of your students will make at least one mistake in preparing the financing statement. Errors to anticipate include:

- the individual debtor's name appears in the "organization" box;
- the individual debtor's first name and surname are reversed on the form;
- the street number is incorrect (*e.g.*, 13577 instead of 13557);
- the zip code is incorrect (*e.g.*, the same zip code appears for both parties);
- a word is dropped from the collateral description as it appears in the security agreement;
- the collateral description includes words or phrases not in the security agreement (*e.g.*, "consumer goods, including the following:", "replacements," "substitutions," "and all cash and noncash proceeds," etc.); and
- spelling errors of all kinds (in the collateral description, and elsewhere).<sup>170</sup>

Consider what feedback you will offer. I provide each student with written feedback (including the financing statement with particular fields circled). Here is the feedback form (slightly edited for this article) that I use:

168. Can readers anticipate the error most likely to occur? (I'll provide the answer in a later footnote.)

169. Baseball fans of a certain age may recall the 1967 World Series, in which the St. Louis Cardinals, managed by Red Schoendienst, beat the Boston Red Sox, led by Triple-Crown winner Carl Yastrzemski, in a seven-game thriller. See *1967 World Series*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/ws/yr1967ws.shtml> [<https://perma.cc/6MT8-QM97>]. Perhaps less noteworthy is the observation that my initials—TRZ—appear in "Yastrzemski."

170. A student may commit a non-clerical error. For example, the student may fail to follow instructions and forget to submit the security agreement with the financing statement (frustrating, in part, your ability to offer comments on the financing statement). Also, a student may prepare the financing statement and email it to you; for some technological reason, the data may fail to transmit, leaving you with a financing statement bereft of contents.

*UCC-1 Feedback Form*

NAME: \_\_\_\_\_

Circle One:                      Pass                      Fail\*

Another UCC-1 required? No                      Yes\*\*

\* You failed because your UCC-1 includes at least one typographical error. While your error(s) may not frustrate the notice function of the filing, your lack of attention to detail is a warning that you need to be much more careful in preparing a UCC-1.

\* Your collateral description is different from the collateral description in the security agreement, which may invite debtor objections, litigation, or both.

\*\* See the attached paperwork [a different security agreement].

If you adopt a variation of this exercise, consider your responses to these familiar questions: What is the penalty for submitting no form or a late form? How many opportunities will a student be given to pass the exercise? What is the penalty for failing the exercise?

IX. QUESTION #9: WHY DO SO MANY STUDENTS FIND THIS  
COURSE SO DIFFICULT?

Secured Transactions is a challenging course. But most law school courses are challenging. So why does the Article 9 course, more so than others, have a tendency to invoke fear, loathing, tremors, twitches, dizziness, shakes, emotional distress, skin rashes, cramps, sleepiness, anxiety, loss of appetite, nausea, uncontrollable weeping, and hair loss?

The possibilities are many. I offer five: (i) absence of cases, (ii) terminology, (iii) burying clues in the official comments, (iv) pitfalls of literalism, and (v) exceptions, exceptions, and more exceptions.

*A. Where Are The Cases?*

Property colleagues have *Pierson v. Post*<sup>171</sup> and *Village of Euclid v. Ambler Realty Co.*<sup>172</sup>

Torts professors have *Palsgraf v. Long Island Railroad Co.*<sup>173</sup> and *New York Times Co. v. Sullivan*.<sup>174</sup>

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171. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

172. 272 U.S. 365 (1926).

173. 248 N.Y. 339 (N.Y. App. 1928).

174. 376 U.S. 254 (1964).

Those who teach Contracts have *Hawkins v. McGee*<sup>175</sup> and *Hamer v. Sidway*.<sup>176</sup>

Civil Procedure colleagues have *Pennoyer v. Neff*<sup>177</sup> and *International Shoe v. Washington*.<sup>178</sup>

Constitutional Law professors have *Marbury v. Madison*<sup>179</sup> and *Roe v. Wade*.<sup>180</sup>

In so many courses, students learn the law and hone their analytical skills by reading cases. The cases provide the facts, state the issues addressed, articulate the legal reasoning, and reach a conclusion. Significant preparation, and subsequent class time, is devoted to assigned cases.

Secured Transactions is a course built on the statutory framework of Article 9. Students are expected to master the material by working problems, not by reading an abundance of cases.<sup>181</sup> And unlike cases, the problems do not provide

175. 84 N.H. 114 (N.H. 1929). Also known as the “hairy hand” case, it played a noteworthy role in the opening scene of the 1973 movie, *The Paper Chase*, for which John Houseman won an Academy Award (Best Supporting Actor) for his portrayal of Professor Charles Kingsfield. Fans of the movie may recall that the future “Bionic Woman” (Lindsay Wagner) played Professor Kingsfield’s daughter (and girlfriend of the film’s protagonist, law student James Hart [Timothy Bottoms], who was not quite prepared to engage in a Socratic dialogue on the first day of class when Professor Kingsfield called on him to recite the facts of *Hawkins*). *THE PAPER CHASE* (Thompson-Paul Productions & Twentieth Century Fox 1973).

176. 124 N.Y. 538 (N.Y. App. 1891).

177. 95 U.S. 714 (1878). Soon after finishing his opening remarks on the first day of class, my Civil Procedure professor turned to the audience and said, “Mindful of the scriptural admonition that the last shall be first (“Uh oh,” I’m thinking!), will Mr. Zinnecker please recite the facts in *Pennoyer*?” Alas, no one else in class shared my surname. How unfortunate (for me). I have great empathy for Mr. Hart.

178. 326 U.S. 310 (1945).

179. 5 U.S. 137 (1803).

180. 410 U.S. 113 (1973).

181. I use a textbook that includes major excerpts from only six cases. *See* STEPHEN L. SEPINUCK, *PROBLEMS AND MATERIALS ON SECURED TRANSACTIONS* xxi-xxxvi (4th ed. 2018) (“Table of Cases”; noting the six principal cases in bold typeface). I omit two of those cases from my assigned readings, but I do assign two additional cases, including one for “shock value”: *In re Motors Liquidation Co.*, 777 F.3d 100 (2d Cir. 2015) (addressing, in the General Motors bankruptcy case, the unintended consequences of terminating a financing statement filed in connection with debt in excess of \$1 billion). For a fascinating article on the incident, see Sally McDonald Henry, *The General Motors Recalls at the Dangerous Intersection of Chapter 11, Article 9 and TARP*, 85 CIN. L. REV. 131 (2017).

The number of principal cases appearing in other Secured Transactions textbooks varies. *See, e.g.*, EDITH R. WARKENTINE & JEROME R. GROSSMAN, *SECURED TRANSACTIONS: A CONTEXT AND PRACTICE CASEBOOK* xv (2015) (“Table of Principal Cases”; six cases listed); STEPHEN L. HARRIS & CHARLES W. MOONEY, JR., *SECURITY INTERESTS IN PERSONAL PROPERTY: CASES, PROBLEMS AND MATERIALS* xxi-xxv (6th ed. 2016) (“Table of Cases”; 21 principal cases); DOUGLAS J. WHALEY & STEPHEN M. MCJOHN, *PROBLEMS AND MATERIALS ON SECURED TRANSACTIONS* 397-400 (10th ed. 2017) (“Table of Cases”; 43 cases highlighted in italics); STEPHEN D. WALT & WILLIAM D. WARREN, *SECURED TRANSACTIONS IN PERSONAL PROPERTY*:

the students with a narrative explanation of the result to be reached. Instead, students must look to themselves and the statutes as the founts from which the legal analysis will flow.

Students get sprinkled with statutes in some of the first-year courses (e.g., UCC Article 2 in Contracts; the Federal Rules of Civil Procedure in Civil Procedure; selected state or model statutes in Criminal Law), but they get statutorily soaked in Secured Transactions. Students learn by doing (problems), not so much by reading (cases). This approach is new and different, and some students will find it challenging and uncomfortable, making it a factor that contributes to the course's reputation.

### B. Terminology

I recall a conversation I had with a colleague a few years ago. I was expressing interest in visiting Charleston. My colleague made some remarks about Charleston that gave me pause. It finally dawned on me that we were not talking about the same city. I came to the conversation with a pre-conceived notion that "Charleston" had a singular meaning. I was wrong.<sup>182</sup>

Students in the Secured Transactions course are introduced to terms they have never uttered (and may never use again in polite conversation). *Chattel paper. Entitlement holder. Payment intangible*. The same could be said for many other courses, though, which include a lexicon of course-specific words or phrases (e.g., "proximate cause" in Torts, "*in rem* jurisdiction" in Civil Procedure, "*mens rea*" in Criminal Law, and the dreaded "Rule Against Perpetuities" in Property<sup>183</sup>).

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CASES, PROBLEMS AND MATERIALS xxi-xxvi (10th ed. 2019) ("TABLE OF CASES"; noting 51 principal cases in bold typeface); LYNN LOPUCKI, ELIZABETH WARREN & ROBERT M. LAWLESS, SECURED TRANSACTIONS: A SYSTEMS APPROACH 695-699 (8th ed. 2016) ("Table of Cases"; noting over 100 principal cases in italics) (see also xxxvii—"We have heavily edited the cases in the book.").

182. Readers who teach Contracts may call to mind two of the more famous cases on contract interpretation that turned on words with multiple meanings. See *Frugaliment Importing Co. v. B. N. S. Intern. Sales Corp.*, 190 F.Supp. 116 (S.D.N.Y. 1960) (demonstrating the multiple meanings of the word "chicken"); See also *Raffles v. Wichelhaus*, (1864) 159 Eng. Rep. 375 (Exch.) (confronting a situation involving two ships each named *Peerless*).

183. First-year Property professors may be quick to point out that the Rule Against Perpetuities has, from time to time, made its way into a mainstream Hollywood film. See, e.g., Michael Asimow, *Estate Planning and Body Heat*, Cap Press (1998), <https://cap-press.com/sites/pj/articles/BodyHeat.htm> [<https://perma.cc/QRJ9-3T4M>] (referring to the neo-noir film *Body Heat*'s (MGM 1981) application of the rule against perpetuities to invalidate a will); Deborah L. Jacobs, FORBES (Feb. 23, 2012, 2:37PM), <https://www.forbes.com/sites/deborahljacobs/2012/02/23/the-descendants-buries-estate-planning-lessons-in-george-clooney-drama/#5af57f702c77> [<https://perma.cc/H5MP-LQB8>] (referring to the film *The Descendants*; (Fox Searchlight 2011) (mentioning the rules against perpetuities)).



Students may be surprised, however, to learn that Article 9 takes ordinary, conversational terms and defines them in a manner that upsets pre-conceived expectations. Three examples will illustrate this point.

First, Meredith borrows \$5,000 from Bank. Most of us use “borrower” and “debtor” interchangeably. But as defined by Article 9, Meredith may not be a “debtor.” In the typical secured transaction, the “debtor” is the party that is offering a security interest in one or more of its assets.<sup>184</sup> Without more facts, Meredith may not be a “debtor.” The loan may be unsecured. Or perhaps Meredith’s sister, Grace, offers as collateral for the loan a security interest in her (Grace’s) French Horn. Grace becomes the “debtor.” Meredith is the borrower, but she is not a “debtor.”<sup>185</sup>

Second, Consulting Firm borrows \$15,000 from Bank. Bank insists on collateral. What can Consulting Firm offer? Equipment? Sure. Accounts? You bet. Inventory? Hmm. Consulting Firm provides services to its clients; it does not sell or lease goods to its customers. Therefore, to suggest that Consulting Firm can grant a security interest in inventory seems nonsensical. But as defined by Article 9, Consulting Firm does indeed have “inventory”—note pads, paper clips, stationery, pens and pencils, etc.—because the term includes goods which “consist of . . . materials used or consumed in a business.”<sup>186</sup>

Third, Dealer sells a photocopier on credit to Customer, retaining a security interest in the photocopier to secure payment of the unpaid purchase price. What term or terms might we ascribe to Dealer? Seller. Merchant. Creditor. Secured party. But would you believe that Dealer is also a “purchaser?” It’s true!<sup>187</sup>

Students reasonably assume each course will introduce new terms to master. But students may be taken aback when they discover that Article 9 also borrows everyday terms and redefines them in a different and unconventional manner. Asking students to master a vocabulary that occasionally requires them to substitute or amend their own traditional definitions with unexpected variances can pose a challenge that contributes to the course’s difficulty.<sup>188</sup>

### C. “Read the Official Comments!”

Regardless of the UCC Article, professors quickly learn to appreciate the value of the accompanying official comments. Although they do not carry the

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184. See U.C.C. § 9-102(a)(28)(A).

185. See U.C.C. § 9-102 cmt. 2(a). (Example 3).

186. See U.C.C. § 9-102(a)(48)(D).

187. See U.C.C. §§ 1-201(b)(30) (defining “purchaser” as “a person that takes by purchase”), 1-201(b)(29) (defining “purchase” as “taking by . . . security interest . . . or any other voluntary transaction creating an interest in property”).

188. I have written on this observation elsewhere. See Timothy R. Zinnecker, *Socrates, Syllogisms, and Sadistic Transactions: Challenges to Mastering U.C.C. Article 9 Through Deductive Reasoning*, 13 CHAPMAN L. REV. 97, 102–08 (2009).

force of law,<sup>189</sup> the comments: illuminate a statute's intended purpose and application; emphasize particular statutory concerns; elaborate on intended meanings of words and phrases; signal other relevant provisions; and offer insightful illustrations.

For these and other reasons, professors repeatedly remind students to “read the comments.” But as in the parable of the sower, these words often fail to take root on good soil for the duration of the semester.<sup>190</sup> The student who fails to read the comments consistently may overlook priceless pearls of wisdom. Three illustrations follow.

First, Section 9-301(1) states, as a general rule, that a secured party must file its financing statement where the debtor is located.<sup>191</sup> The statute itself offers no guidance on where a debtor is located. But the comments direct the student to Section 9-307 for that critical determination.<sup>192</sup>

Second, Section 9-502 informs the reader that a financing statement is “sufficient” only if it provides the name of the debtor, the name of the secured party (or its representative), and an adequate collateral description.<sup>193</sup> So the preparer's omission of any other information—such as an address of either or both parties—leads to no adverse consequences, right? Wrong! As noted in the comments, Section 9-516 (several provisions later, no less) tells the reader that the filing officer “must reject a financing statement lacking certain other information . . . (e.g., an address for the debtor or secured party).”<sup>194</sup>

Third, Section 9-610 authorizes the secured party to sell the collateral after the debtor defaults.<sup>195</sup> The statute permits the secured party to purchase the collateral at a public disposition.<sup>196</sup> The secured party can purchase the collateral at a private disposition only in two situations, one of which requires the collateral to be “of a kind that is customarily sold on a recognized market.”<sup>197</sup> The reader may naturally ask: “Where can I find guidance on the intended meaning of ‘public disposition,’ ‘private disposition,’ and ‘recognized market’?” Section 9-102? No. Section 1-201? Sorry, try again. How about the relevant authority, Section 9-610? Not in the statute. But there is a place where the reader can find

189. See SEPINUCK, *supra* note 48, at 46 (“Each section of the UCC is also accompanied by official comments . . . . Even though the comments are not enacted into law, to fully understand any section, one must also thoroughly read and study the official comments.”).

190. The parable of the sower appears in three of the four gospels. See *Matthew* 13:1–13:23 (King James); *Mark* 4:1–4:20 (King James); *Luke* 8:4–8:15 (King James).

191. See U.C.C. § 9-301(1).

192. *Id.* at § 9-301(1) cmt. 4 (“. . . the law of the jurisdiction of the debtor's location, as determined under Section 9-307”).

193. See U.C.C. § 9-502(a).

194. *Id.* at § 9-502 cmt. 4. I have written on this observation elsewhere. See Zinnecker, *supra* note 188, at 108–11.

195. See U.C.C. § 9-610(a).

196. See U.C.C. § 9-610(c)(1).

197. See U.C.C. § 9-610(c)(2).

direction on the intended meaning of each of these three material terms: THE OFFICIAL COMMENTS!<sup>198</sup>

Students who fail to read the comments may, from time to time, find themselves with inadequate knowledge, leading them to draw an incorrect or incomplete conclusion, or no conclusion at all. Looking beyond the statutory text, and diligently reading the accompanying comments, takes discipline and brings rewards. A student who lacks this discipline is likely to find the course more challenging and difficult than it needs to be.

#### D. *The Perils of Being a Literalist*

One commercial law professor has described Article 9 as “the crowning achievement of the UCC project, and perhaps the entire uniform law enterprise.”<sup>199</sup> With well-deserved praise like that, students might reasonably assume that they can read Article 9 literally. And if they can’t, trouble may lie ahead.

Warning: trouble lies ahead for the literalist.<sup>200</sup> Here are two examples.

First, Section 9-317 awards superpriority to a purchase-money creditor over particular parties, if the secured party “files a financing statement” on a timely basis.<sup>201</sup> Assume that the collateral is a motor vehicle being used by the debtor as a consumer good or a piece of equipment. Filing a financing statement is an ineffective method of perfecting a security interest in the motor vehicle; instead, a secured party must comply with the applicable certificate-of-title law.<sup>202</sup> Therefore, in such a transaction a literalist would rationally conclude that the cited provision (which refers to perfection by filing, and no other method) does not apply. The literalist would reach an incorrect conclusion because compliance with the certificate-of-title statute “is equivalent to the filing of a financing statement[.]”<sup>203</sup>

Second, Bank has a perfected security interest in Consumer’s car. Consumer defaults, and Bank then obtains possession of the car without breaching the peace. The windshield has two small chips. One taillight is burned out. A tire

198. See U.C.C. § 9-610 cmt. 7 (commenting on public and private dispositions) and cmt. 9 (elaborating on “recognized market.”).

199. See Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 571 (1998); Cf. Robert K. Rasmussen, *The Uneasy Case Against the Uniform Commercial Code*, 62 LA. L. REV. 1097, 1144 (2002) (“While one can find fault with any statute, it is fair to say that revised Article 9 is a better-drafted statute than almost any statute produced at the federal level.”).

200. I have written on this observation elsewhere. See Zinnecker, *supra* note 188, at 111–16.

201. See U.C.C. § 9-317(e).

202. See U.C.C. § 9-311(a)(2) (general rule), (e) (inventory exception if the debtor “is in the business of selling goods of that kind”).

203. See U.C.C. § 9-311(b) cmt. 6. A student who reads the official comments will be reminded of the relationship between these two statutes; see U.C.C. § 9-317 cmt. 8 (last paragraph).

looks somewhat flat. And it's obvious from a quick glance at the back seat that someone in Consumer's family loves Lucky Charms.<sup>204</sup> Bank intends to sell the vehicle at a public sale, but it takes no action to address these minor issues. "No worries," says the literalist. Section 9-610 authorizes Bank to sell the car "*in its present condition or following any commercially reasonable preparation or processing.*"<sup>205</sup> "Or" means exactly that: Bank has a choice, an alternative. Bank can elect the permissible option that precedes the "or," or it can choose the permissible option that follows the "or." Bank has opted to pursue the former, not the latter. Alas (for the literalist), the "or" does not provide Bank with a pure option. Instead, the option to sell the car "in its present condition" must be viewed through the lens of "commercial reasonableness."<sup>206</sup>

Exhaustive statutory analysis requires students to measure each word or phrase against the facts as presented. That, in itself, can be challenging. Literalists may find the challenge a bit more daunting than reasonably expected because particular Article 9 provisions do not necessarily mean what they appear to say.

#### *E. There's An Exception (or Two, or Three, or More) to That Rule!*

In a Secured Transactions course, students will learn numerous rules. Among these rules, students will learn that: (i) a secured party can perfect its security interest by filing a financing statement;<sup>207</sup> (ii) a secured party who files first has priority over other secured parties;<sup>208</sup> and (iii) a secured party who wishes to dispose of the collateral after the debtor defaults must timely send notice of its intent to the debtor.<sup>209</sup>

And they will learn that each of these rules is subject to one or more exceptions.<sup>210</sup> Would you be surprised to learn that some variation of the phrase "*except as otherwise provided*" appears more than 100 times in Article 9?<sup>211</sup>

Learning more than a handful of statutory rules will pose some difficulty, but most students anticipate some degree of difficulty in each course, and they learn how to manage the difficulty. However, many of the Article 9 rules are

204. Some readers (who are over a certain age) may be as shocked (SHOCKED!) as I was to learn that General Mills has, over the years, greatly expanded the number of "magically delicious" marshmallow shapes, which now include unicorns. UNICORNS! LUCKY CHARMS, <https://www.luckycharms.com/original/> [<https://perma.cc/9HWP-H4AL>].

205. See U.C.C. § 9-610(a) (emphasis added).

206. See U.C.C. § 9-610(b) and cmt. 4.

207. See U.C.C. § 9-310(a).

208. See U.C.C. § 9-322(a)(1).

209. See U.C.C. § 9-611(c)(1).

210. See, e.g., U.C.C. §§ 9-312(b)(1) (requiring perfection of a security interest in a deposit account, taken as original collateral, only by control), 9-324(a) (awarding superpriority to particular purchase-money creditors), 9-624(a) (permitting the debtor to waive the right to notice).

211. I have written on this observation elsewhere. See Zinnecker, *supra* note 188, at 133 n.158.

accompanied by the real possibility that one or more “exceptions” are lurking in the shadows, sometimes clearly marked, sometimes not so.<sup>212</sup> The importance of being ever vigilant for these exceptions will catch some students by surprise and leave others floundering.<sup>213</sup>

#### X. CONCLUSION

We who teach Secured Transactions are the few, the proud, the anointed ones. If you are new to our group, I hope this article anticipates and responds to many of your questions. For the more experienced of us, I hope the article provides you with at least one takeaway: some fresh ideas on assessment and feedback.

I love teaching Secured Transactions! I love dispelling the notion (held by many students) that the course would be better labeled “Sadistic Transactions.” I love observing the numerous “ah hah!” moments in the classroom as we assemble the big-picture puzzle with the individual statutory pieces. I love teaching statutory analysis, a life-long skill that transcends the course. I love the linear approach to much of the material (attachment as a predicate to perfection, which is often a predicate to priority). I love encouraging students to learn primarily by doing (problems) rather than reading (cases). I love working with a collection of well-drafted, cohesive, and elegant provisions (notwithstanding any minor foibles I have raised) that offer bright-line, yes-or-no, clear-cut answers. I love inviting students to learn the material from a planning or transactional perspective, rather than primarily through the lens of the litigator. I love teaching Secured Transactions!

And I hope you will (or do), too!<sup>214</sup>

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212. See, e.g., U.C.C. § 9-611(b) (reminding the reader to consult “subsection (d)” but not referring the reader to Section § 9-624(a)).

213. I have written on this observation elsewhere. See Zinnecker, *supra* note 188, at 132–36.

214. Here’s the answer to the question posed *supra* in note 168: students often drop the “d” from Richard’s surname.