The Relationship Between Revised Uniform Commercial Code Article 9 and the Bankruptcy Code: Points of Intersection and Conflict

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BANKRUPTCY AND THE UCC: POINTS OF INTERSECTION AND CONFLICT SYMPOSIUM

THE RELATIONSHIP BETWEEN REVISED UNIFORM COMMERCIAL CODE ARTICLE 9 AND THE BANKRUPTCY CODE: POINTS OF INTERSECTION AND CONFLICT

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I. INTRODUCTION

Initially, it should be noted that the Bankruptcy Code1 is an interstitial statute; overall it is intended to supplement, not displace, state contract, property, and lien laws such as the Uniform Commercial Code (UCC).2 Consequently, there is no inherent conflict between state and federal law in this context, at least in the traditional sense of a conflict between apparently competing and contradictory rules.3 Even as to "pure" bankruptcy issues, for example where the bankruptcy discharge provisions at Bankruptcy Code § 5244 obviously impact state debtor-

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2. U.C.C. § 9 (2000) (Article 9, or revised Article 9). See discussion below and infra Part II and note 10.

3. See, e.g., Alvin C. Harrell, Fred H. Miller, and William J. Woodward, Jr., Update on U.C.C.—Other Law Conflicts, 45 CONSUMER FIN. L. Q. REP. 335 (1991) (describing both some real conflicts and some false conflicts).

creditor laws, there is great deference in the Bankruptcy Code to state contract and property law and lien rights. Thus the Bankruptcy-UCC relation involves some preemption and some deference (and clearly some intersection), but no real “conflicts” in a traditional conflict-of-laws sense. This can be further illustrated by a review of a few of the Bankruptcy Code provisions affecting state law liens and security interests.

The Bankruptcy Code specifically as well as generally recognizes and protects security interests perfected pursuant to Article 9 of the UCC and other liens and property interests created under state law. Bankruptcy Code § 506(a) recognizes an “allowed claim of a creditor secured by a lien . . . to the extent of the value of such creditor’s interest . . . .” Bankruptcy Code § 101(37) defines “lien” broadly as any “charge against or interest in property to secure payment of a debt or performance of an obligation,” thereby including an Article 9 security interest. Among the other Bankruptcy Code sections recognizing and extensively deferring to state property and lien laws, including Article 9, are: § 362(b)(3) (recognizing Article 9 grace periods for purposes of the § 362(a) automatic stay); §§ 363 and 364 (generally protecting state law liens while addressing the liquidity and credit needs of bankruptcy debtors); § 506(d) (recognizing valid liens with a few narrow exceptions); § 541 (property of the estate, founded on state laws); § 546(b) (recognizing state law lien rights and priorities for purposes of Bankruptcy Code §§ 544, 545, and 549); § 547(e)(1)(A) and (B) (defining “transfer” and “perfection” by references to state law); § 552 (recognizing, subject to limits, the state law right of setoff); and of course Chapter 11 and 13 provisions like § § 1129 and 1322(b)(2) (broadly recognizing state law liens even while providing carefully crafted limitations and exceptions.)

These Bankruptcy Code provisions specifically reflect the traditional bankruptcy deference to state law liens, particularly with respect to Article 9 security interests. This deference is reflected consistently throughout the Bankruptcy Code. Except as noted below, there are no real exceptions. Indeed, it is this Bankruptcy Code deference to state lien

7. Id. § 101(37).
laws and the resulting consistency between the UCC and bankruptcy law that forms a basis for some of the bankruptcy-related criticisms of revised Article 9. As discussed below, because of this consistency and deference, improvements in Article 9 or other state laws may have an impact in bankruptcy cases, disappointing those who don't like the results. This does not mean there are no limits in bankruptcy on state property and lien rights; obviously, there are a number of exceptions that qualify the rights of secured parties in bankruptcy. These exceptions all

9. See, e.g., 11 U.S.C. §§ 363, 364, 506(d), 524, 1129, and 1322(b) (2000), all noted supra note this text; see also the bankruptcy “strong-arm” powers at id. at §§ 544-552 (discussed infra); Miller & Harrell, supra note 1, ch. 2. In United States Nat’l Bank in Johnstown v. Chase Nat’l Bank of New York City, 331 U.S. 28, 33-34 (1947), the Supreme Court illustrated some of these issues by summarizing the options of a secured party in bankruptcy as follows:

(1) [The creditor] may disregard the bankruptcy proceeding, decline to file any claim, and rely solely upon his security if that security is properly and solely in his possession. In re Cherokee Pub. Serv. Co., 94 F.2d 536 (8th Cir. 1938); Ward v. First Nat’l Bank of Ironton, 202 F. 609 (6th Cir. 1913).

(2) “[i]f the security is within the jurisdiction of the bankruptcy court and if [the creditor] wishes to retain his secured status,” he must file a secured claim because that court has exclusive jurisdiction over the liquidation of the security. Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734, 645 (1931).

(3) [The creditor] may surrender or waive his security and prove his entire claim as an unsecured one. Morrison v. Riemer, 249 F. 97 (7th Cir. 1917).


Referring to this list in the context of the old Bankruptcy Act, Professors Warren and Hogan noted,

The court’s statement relating to the second alternative open to the creditor “if the creditor wishes to retain his secured status, he must file a secured claim . . .” is misleading. Proof of a secured claim relates to the creditor’s desire to share in the general assets to the extent of the unsecured balance over and above the value of the security. If the creditor is fully secured, his claim would not even be allowed. Bankruptcy Act § 57e (11 U.S.C.A. § 93e). “Even if the security has passed into the hands of the trustee, a secured creditor need not prove his claim to retain his secured status. However, the secured creditor’s right to the security that has passed into the hands of the trustee may only be asserted in the bankruptcy court. Although the creditor may choose to assert this right in the form of a proof of secured claim, the better practice is to file an intervening petition.” In re Jack Kardow Plumbing Co., 451 F.2d 123, 134, and note 43 (5th Cir. 1971).

are directed, however, at narrowly-defined abusive practices or special and limited bankruptcy needs; none invalidate valid state law liens on a broad scale. Clearly the primary purpose of the Bankruptcy Code is to reconcile and (as appropriate) restructure claims and discharge debts, not to extinguish liens. Thus, while the relation between the Bankruptcy Code and Article 9 may not always be smooth, it is also not inherently contradictory. The purpose of this article is to consider this relationship, including the points of intersection and any potential conflicts, and to discuss arguments that revised Article 9 upsets the balance between bankruptcy law and secured credit.

II. THE NATURE OF BANKRUPTCY—IS REVISED ARTICLE 9 AN ANTI-BANKRUPTCY ACT?

As noted here and elsewhere, the Bankruptcy Code largely defers to state law to determine property and lien rights, including distinctions and priorities as between secured and unsecured creditors. By any traditional measure, the Bankruptcy Code is largely concerned with maintaining an orderly resolution of unsecured claims in the context of debtor insolvency, rather than rearranging secured claims and property rights. Thus, changes in the underlying state law that affect secured claims and property rights, such as Article 9, will inevitably be felt in bankruptcy cases, and the Bankruptcy Code contemplates this. The Bankruptcy Code deference to state secured transactions law is a clear example. As an overlay statute, the Bankruptcy Code accommodates such changes without disruption.

This is not to say that the impact of changes in state law in bankruptcy cases is always clear and simple. Any time changes as important and extensive as the Article 9 revisions are grafted onto a body of law with the scope and consequences of the Bankruptcy Code, there will be dissenters and uncertainties. For one thing, in a broad sense anything that improves the law governing voluntary secured transactions

has a potential impact on unsecured creditors and non-reliance parties, as well as those who represent these interests. Those who prefer federal over state law solutions are also likely to be unenthusiastic about the success of revised Article 9, because federalization of Article 9 was a possible alternative. And those who view the proper role of bankruptcy law as redistributionist may disapprove of the increased clarity and predictability of the rules for voluntary transactions in revised Article 9. It may also be difficult for some bankruptcy practitioners to approve of changes that enhance the use of secured credit and therefore, arguably, reduce the flexibility of a bankruptcy court to adjust the debts of insolvent debtors.

Thus, revised Article 9 has been labeled an "anti-bankruptcy act," and in a broad sense, any changes that improve secured transactions law may be viewed as adversely affecting competing unsecured parties in and outside of bankruptcy, and reducing the utility of bankruptcy as a redistributionary forum. But the only way to avoid this would be to make secured transactions law worse, i.e., to reduce the utility and predictability of voluntary secured transactions. Because secured transactions are a significant engine of economic growth, and the goals of the uniform law process remain simplicity, clarity, modernization, and uniformity in the law, it seems unlikely that the uniform law process would intentionally make the law worse. Of course, if one views bankruptcy as an opportunity to affect social goals through the judicial restructuring of private bargains, then legal reforms that enhance private bargains will not be to your liking. Thus, the debate over revised Article 9 is partly an inescapable debate with respect to freedom of contract. It was probably not to be expected that revised Article 9 would escape this debate or that Article 9 would be popular among

11. For example, lawyers who represent unsecured claimants may perceive that the position of their clients would be enhanced if secured claims were diminished.


13. See UCC § 1-102(1), (2). The author is aware of academic arguments to the effect that secured transactions are not economically beneficial. These are quite interesting but, one suspects, less than compelling for the businesses and consumers that depend on secured credit to satisfy so many of their important needs.

14. "Bankruptcy is redistributinal and both can and should alter non-bankruptcy rights where necessary to achieve policies such as distributional fairness." Warner, supra note 12, at 5.

advocates of a redistributionist bankruptcy policy; but neither should the Article 9 revisions be blamed for the rift.

More specifically, however, it is possible for critics to argue that the Bankruptcy Code was drafted in the context of old Article 9, and therefore, that any significant change to Article 9, or other relevant state law, usurps the balances reflected in the federal law.\textsuperscript{16} Taken as a blanket proposition this obviously goes too far; it would bar almost any revision of state law. But it may raise legitimate issues in a narrower context: are there specific policy judgments articulated in the Bankruptcy Code, that are now at risk because of specific changes in revised Article 9? If so, the critics of revised Article 9 may have a point; otherwise, perhaps it is all just sour grapes. An analysis of this issue can logically begin by considering the impact of Article 9 on the bankruptcy "strong arm" powers.

III. IMPACT OF REVISED ARTICLE 9 ON THE BANKRUPTCY STRONG ARM POWERS

The "strong arm" powers of the trustee in bankruptcy\textsuperscript{17} are directed primarily at an orderly and ratable distribution of unencumbered assets to unsecured creditors, free of the disruptions caused when such creditors undertake hurried efforts to improve their positions, \textit{e.g.}, via last-minute liens. Thus these bankruptcy powers are directed at maintaining or restoring the immediate pre-filing status quo. While this may affect Article 9 secured parties, particularly when secured transactions occur in close proximity to (or straddle) the bankruptcy filing, ordinary Article 9 secured transactions are clearly not the intended target of these powers. Of course, an unsecured creditor could seek to use an Article 9 security interest to gain unfair advantage just prior to bankruptcy, just as that creditor could use a judicial lien or preferential transfer or fraudulent conveyance; in the proper circumstances, any of these mechanisms are potentially subject to a bankruptcy trustee's strong arm powers. But, ordinary Article 9 secured transactions are not the target for these powers, as shown by the Bankruptcy Code protections for purchase-

\textsuperscript{16} Warner, \textit{supra} note 12, at 6. For a contrary view by the Reporters for revised Article 9, see Harris & Mooney, \textit{supra} note 10.

\textsuperscript{17} 11 U.S.C. §§ 522, 544-548, and 552 (2000); MILLER & HARRELL, \textit{supra} note 1, at ch. 2.
money and contemporaneous transactions and other ordinary-course-of-business exceptions to the strong-arm powers.\textsuperscript{18}

It would be inappropriate for revised Article 9 to change this balance so as to enable Article 9 to be used in a fraudulent conveyance or preferential transfer or to obtain an improper post-petition lien. But of course revised Article 9 makes no such attempt, and has no such effect.\textsuperscript{19}

Revised Article 9 does distinguish between differing levels of perfection, and the trustee in bankruptcy occupies the status of a judicial line creditor, traditionally one of the lowest priority slots for secured claims.\textsuperscript{20} For example, a security interest perfected by certificate of title "lien entry" pursuant to revised Article 9 § 9-311(a)(3) will likely remain perfected indefinitely under revised § 9-316(d), as against lien creditors, even if the certificate of title is canceled in another state and the "lien entry" otherwise ceases to be effective. This provides some protection for the Article 9 secured party against the risk that the debtor will fraudulently procure a subsequent, "clean" certificate of title in a different state that does not reflect the lien entry. It will permit the original lien entry (\textit{i.e.}, a perfected Article 9 security interest) to be enforced in bankruptcy, despite such debtor fraud, thereby supporting the secured status of auto lenders in bankruptcy.

But this seems an unassailable point: would anyone argue that a secured party who has extended voluntary credit (perhaps funding purchase or repair of the vehicle) in reliance on this lien entry should be deprived of the security due to fraud by the debtor, or that this fraud should benefit the bankruptcy trustee? The only parties with an arguably higher claim are competing reliance parties who might be misled by the new "clean" certificate of title issued in the second state.\textsuperscript{21} These parties are protected under revised §§ 9-316(e) and 9-337. The trustee in bankruptcy has no similar reliance claim, and obviously the defrauded secured creditor is not the kind of claimant that is a target of the trustee's lien created under Bankruptcy Code § 544(a). So yes, there are gradations of perfection in revised Article 9; innocent purchasers and other reliance parties receive some protections that lien creditors and the trustee in bankruptcy do not. But most disinterested parties probably

\textsuperscript{18} See, \textit{e.g.}, MILLER & HARRELL, \textit{supra} note 1, at 33-42.

\textsuperscript{19} Id. at 72-74.

\textsuperscript{20} 11 U.S.C. § 544(a) (2000); U.C.C. § 9-102(a)(52); MILLER & HARRELL, \textit{supra} note 1, at 27-29.

\textsuperscript{21} See generally Alvin C. Harrell, A Roadmap to Certificate of Title Issues in Revised UCC Article 9, 53 CONSUMER FIN. L.Q. REP. 202 (1999).
would agree that such distinctions are traditional and appropriate, and do not interfere with any bankruptcy policy.

Among other things, revised Article 9 contains similar gradations of perfection and priority rules for investment property, chattel paper, deposit accounts, instruments, and payment intangibles. Typically, all forms of perfection are effective for priority against non-reliance parties (such as lien creditors, including the trustee in bankruptcy), while certain levels of perfection (such as "control" or holder in due course status) are given a higher priority. Again, these distinctions are compelling, based on the need to protect ordinary banking and securities transactions, holders in due course, etc. from security interests perfected by filing, while permitting the efficiencies of perfection by filing as against other filing and non-reliance parties such as lien creditors and the trustee in bankruptcy. An argument that this somehow interferes with national bankruptcy policy or that perfection by filing is inadequate notice to these competing security interests and non-reliance parties is misplaced. Moreover, the alternative is to abandon public notice systems and return to a system awarding priority to "secret" unrecorded liens. Improvements in the filing system seem clearly preferable.

IV. "RELAXED" ARTICLE 9 FILING STANDARDS

One purpose of revised Article 9 was to improve the filing system by reducing unnecessary and onerous burdens on secured parties who perfect by filing. As with the gradations in perfection and priorities discussed above, this is a natural example of improving the law and an obvious progression reflecting technological advances. An observer might be puzzled to learn that in some quarters this is regarded as an improper effort to undermine bankruptcy law.

Undoubtedly, a prime purpose of revised Article 9 is to improve the filing system and to clarify and simplify the filing requirements. For example, the requirements of a financing statement at revised § 9-502 are greatly simplified by the practical effects of unneeded former requirements like the debtor's signature deleted, although as discussed below the practical deletions of these benefits are reduced somewhat by

22. Revised U.C.C. §§ 9-312, 9-314, 9-328 – 9-331. A typical example would allow perfection by filing or "control," with the latter having a higher priority but the former good against lien creditors and competing security interests subsequently perfected by filing.

the more complex "safe harbor" rules at revised § 9-516 and the expansive model form at revised § 9-521.24 Here, the UCC goals of clarity, uniformity, and simplicity collided, and the result is not nearly so "relaxed" or creditor friendly as some critics maintain.25 But clearly, there was an intent to eliminate unneeded requirements in order to help "clean up" the filing system. This goal is not a basis for legitimate objection.

The associated complexity was directed at encouraging the use of a uniform "safe harbor" form of financing statement under §§ 9-516 and 9-521, containing all of the information needed for nationwide filings, that would not be subject to arbitrary rejection by local filing offices, while still allowing a lesser standard under § 502 for existing local filings where the extra information may not be needed.26 The resulting complexity is regrettable, though apparently necessary to accomplish these multiple purposes. But in any event that complexity cuts against an argument that Article 9 secured parties are being unduly favored—the resulting risk is largely theirs. Professor Ray Warner concludes that all of this is "targeted at the bankruptcy strong arm power."27 Maybe so, but one can read these provisions all day long without finding credible evidence of any purpose beyond a laudable rationalization of the filing system. Surely the states can undertake an effort to simplify and modernize the UCC filing system by eliminating obsolete requirements, providing an all-inclusive model form to suit a system of nationwide filings, and minimizing local filing office abuse, without being validly accused of an anti-bankruptcy crusade.28 Revised Article 9 is confusing to the uninitiated and contains traps for the unwary secured party. It also pursues sometimes contradictory goals. However, it would be quite a stretch to claim that these rules usurp national bankruptcy policy.

Additionally, the Article 9 "seriously misleading error" rule, carried forward from old § 9-402(8) to revised § 9-506, has been clarified to

24. The latter are viewed by some as creating a new set of minimum requirements, more complex than old Article 9, which in effect supersedes the requirements of § 9-502 for many practical purposes. See, e.g., Christopher S. Bose, A Trap for the Unwary: Revised UCC Article 9's Deceptive Technical Guillotine for Financing Statements, 55 Consumer Fin. L. Q. Rep. 152 (2001).
25. Id. Professor Warner calls these rules "unnaturally complex." Warner, supra note 12, at 35. As previously discussed, this complexity works against secured creditors in bankruptcy, and cuts against Professor Warner's argument that the Article 9 revisions are anti-bankruptcy.
27. Warner, supra note 12, at 3.
specify that an error in the debtor's name, which key to the Article 9 filing system, is seriously misleading. By negative implication, most other errors are not. A statutory test to determine whether an error is in the debtor's name, based on the capabilities of the filing office search logic and apparently inspired by a prior Texas non-uniform amendment, is provided at § 9-506(c). An error or unrecorded change in the secured party's name (a common occurrence as loans are bought and sold and creditors merge) cannot mislead searching parties as to the existence or perfection of the security interest, and thus is not seriously misleading as to perfection. However, if the incorrect information in the filed financing statement is prejudicial to the rights of an innocent party, the latter will take free of claims based on the filing. For example, searching parties are entitled to rely on the name of the secured party of record in giving required notices, and an error in that name may result in a failure of the correct secured party to receive important notices, to that party's detriment.

Again, this creates a seemingly balanced system to resolve common errors in the UCC filing system and protect those who rely on that system. It is not clear why this should be regarded as a threat to bankruptcy, beyond the basic notion that improvements in the law of secured transactions may adversely affect competing claims. The changes to the Article 9 rules on seriously misleading errors in the financing statement are obviously directed at resolving problems that arose under old Article 9 and some statutory ambiguities highlighted in a few well-known cases. These problems were obvious under prior state law statutory provisions, cases, and filing systems, and they cried out for state law reform. Is it a threat to bankruptcy law every time a blatant problem with state law is cured? As a non-reliance party, the trustee in bankruptcy seems in no position to complain when improvements in state law resolve ambiguities about the rights of parties who do rely on the filing system.

The new choice of law and location of debtor rules at revised §§ 9-301 through 9-307, clarifying where to file, have been attacked as

29. Revised U.C.C. § 9-506(b).
31. Revised § 9-506, cmt.; revised U.C.C. § 9-503(d), (e).
32. Id. § 9-338.
33. Id. § 9-511, 9-338.
34. See Bose, supra note 24, at 152; William E. Carroll & Alvin C. Harrell, Article 9 Filings: Russian Roulette—UCC Style, 52 CONSUMER FIN. L. Q. REP. 338 (1998).
altering the trustee’s strong arm analysis, again presumably because increased clarity in the law means that fewer secured parties will inadvertently forfeit their collateral and this improvement in the Article 9 filing system adversely affects competing interests. Changes at revised §§ 9-108 and 9-504, clarifying the requirements for a description of the collateral, reaffirming the long-standing public policy in favor of using UCC-defined categories (e.g., “accounts” or “general intangibles”), and authorizing super-generic descriptions (“all assets”) in the financing statement, are considered by some to be anti-bankruptcy because they facilitate private allocations of collateral. Reliance parties (who, after all, rely on the filing system) are provided additional remedies in revised Article 9 if they justifiably rely on erroneous information in the public record. Such remedies are inherently not available to non-reliance parties-including trustees in bankruptcy, who do not rely on the records in extending credit. But surely this is fundamentally fair and an essential aspect of a system built on public notice, rather than an unwarranted discrimination against the trustee in bankruptcy.

If one concedes that voluntary secured credit is a good and important thing, these Article 9 rules make eminent sense as an effort to protect those who give value in reliance on the public record. To others, the “complex web” of rules in revised Article 9 fails this test: being too broad in allowing even non-reliance parties to attack financing statements under § 9-502 and by allowing reliance parties too many remedies without a sufficiently strict “value” requirement; yet also, being too narrow by excluding non-reliance parties from the remedies at §§ 9-

35. Warner, supra note 12, at 36. Professor Warner concedes that companion revisions rejecting the use of debtor trade names (§ 9-503) and improving the quality of information in the financing statement (§§ 9-506 and 9-516) will make it easier to attack erroneous financing statements. Id.

36. Id. at 37. It should be noted that these issues were carefully considered by the Article 9 Drafting Committee, with the result that significant exceptions and limitations are also provided at §§ 9-108 and 9-504.

37. Not all will agree. Warner, supra note 12, at 37 (citing a comparison of revised U.C.C. §§ 9-502(a), 9-516(b), and 9-338).

38. And this is specified in revised Article 9. See revised U.C.C. § 9-338; Warner, supra note 12, at 37-38 (noting that the liberal requirement of “value” in §§ 9-338 and 1-201(44) qualifies nearly all security interests for protection under § 9-338, while excluding lien creditors).

39. Not all will agree. See, e.g., Warner, supra note 12, at 38. For others, the benefits of secured credit and a viable public record are self-evident. From the author’s perspective, forty years of experience in financing small business and consumer transactions strongly indicates that secured credit is essential to the availability of cost-effective financing for most people.
338 and 9-516(b). In the latter view, the only explanation for this "dysfunctional" approach (limiting a remedy for an erroneous public record to those who use the public record) is "an attempt to limit the bankruptcy strong arm power." But there is nothing dysfunctional about protecting those who use a public record from errors in the record.

There will always be disagreements over the precise, optimal mix of rules governing public notice systems. These debates will never end, as long as there are lawyers. There is no doubt that the mix in revised Article 9 is more complex than many would like, but it goes too far to claim that the resulting, carefully-crafted balances in Article 9 are "dysfunctional." Rather, they are an epitome of rational function. Moreover, it should also be conceded by the critics that any such complexity resulted from a bona fide effort to address and resolve complex issues. The Bankruptcy Code is quite the same, and it is ironic to see bankruptcy specialists complaining that Article 9 is too complex. It should also be conceded by the critics that this complexity creates pitfalls that are primarily a risk for Article 9 secured parties, and therefore an opportunity for competing parties and trustees in bankruptcy. To some extent this is a price that we pay for a complex society and for the needed specificity in commercial law; yet such pitfalls are, by nature, pro-bankruptcy.

Perhaps the system could have been made more simple, for example (as Professor Warner suggests) by continuing prior law. But prior law was clearly a failure in certain respects, as evidenced by some well-known case law, and to address these issues, greater specificity was appropriate and necessary, with the result being gradations of filing requirements and remedies, for example, at § 9-338 and in revised Article 9 Part 5, and other complexities, in order to assure greater national uniformity, and protection against rogue cases and filing offices. Certainty and uniformity is essential if credit is to be extended nationally in reliance on the filing system; in its absence, some of the critics were already calling for a federal solution. Some of us with years of experience in dealing with federal laws and regulations can be forgiven for doubting that a new federal system would be more clear, simple, and cost effective than revised Article 9.

40. Warner, supra note 12, at 38.
41. Id.
42. See, e.g., Harrell, supra note 21, at 202; Pomerantz, supra note 30, at 34; see, e.g., William E. Carroll and Alvin C. Harrell, Casenote: Reperfection of Security Interests and the Impact of Bankruptcy, 42 CONSUMER FIN. L. Q. REP. 169 (1988).
V. SIMPLIFIED ARTICLE 9 CHOICE OF LAW RULES

The new choice of law and location of debtor rules at revised §§ 9-301 through 9-307 are at the heart of the efforts to reform and simplify the Article 9 filing system. It was an ambitious effort. To make the state law systems work on a unified national basis. It has been done before, in the context of the bank collection system and UCC Article 4 (though not without inevitable criticism from those advocating a federal law solution). But the bank collection system largely predated federal commercial law and regulation, and even the existence of the Federal Reserve System. It is one thing to preserve a centuries-old bank collection system, quite another to create a new national filing system under state law in the twenty-first century.

The challenge was daunting, but the effort was spectacularly successful, with a 100% state enactment rate achieved before the uniform effective date of July 1, 2001.\(^{43}\) This ranks as one of the most noteworthy successes in the history of our federalist system. Even the most ardent supporters of revised Article 9 did not predict such dramatic success. While not without their teething problems, the new choice of law rules have been widely acclaimed and are an important part of this success.

Apparently, however, this notion of success has not been shared by some bankruptcy advocates. Conceding that revised Article 9 “greatly simplifies the filing rules,” and removes much previous uncertainty\(^{44}\) thereby reducing the potential for legal errors, Professor Warner nonetheless argues that the result is a less effective filing system because of the potential inconvenience of filing for small transactions in a distant forum and the danger that concentrating all filings for a debtor in a single office will cause an “overwhelming number” of filings to pile up.\(^{45}\) Moreover, there is said to be a risk that numerous “all assets” filings, by secured parties who are actually claiming less, will clutter the records with overbroad and therefore meaningless filings.\(^{46}\)

\(^{43}\) A few states deferred their effective dates, but a unified national Article 9 filing system has essentially been achieved.


\(^{46}\) There are related concerns shared by those who draft and file financing statements: secured parties who file “all assets” financing statements can probably expect to answer a lot of inquiries about the precise reach of their security interest (see revised §
Anything is possible, of course, but these concerns seem overstated. The advent of electronic filing and other modern means of communication have reduced the inconvenience of remote filings. And assuming that a national (as opposed to the former balkanized) choice of law filing rule is appropriate, dealing with a remote filing office for interstate debtors is inevitable. Again, experience with federal filing systems in Washington, D.C. (even at a much lower level of transactions) suggests that federal law is not a better alternative. The risk that an overwhelming number of filings would pile-up in a single federal office also seems greater than that risk under Article 9.\textsuperscript{47} And revised Article 9 retains the system of local filing offices for debtors incorporated (or individuals residing) in-state, which a single federal filing office probably would not. This will permit local filings for many small and intrastate transactions, and the probability that a debtor will have only one “all assets” filing (who would lend on top of that?) further reduces the risk of a pile-up of such filings.

Finally, the obvious point should be noted that an “all assets” filing merely makes a little easier what has always been lawful and feasible using other UCC terminology (e.g., by listing all seven of the Article 9 collateral categories named at old § 9-102(1)). Therefore, it seems unwarranted to conclude that the new choice of law rules under revised Article 9 will impair the effectiveness of the filing system; quite the opposite seems the greater probability.

\textsuperscript{47} Article 9 filings overall will be dispersed among the fifty states, depending on where the debtor is located, rather than being concentrated in a single office. And in a worst-case scenario, a debtor frustrated in its efforts to acquire financing due to a bogged-down filing office in one state could re-incorporate or otherwise move elsewhere to a more hospitable locale, an option that would be lacking in a federal system. This possibility creates incentives favoring state filing office competence.
VI. NOTICE TO UNSECURED CREDITORS

Nonetheless it is argued that revised Article 9 impairs the public notice system for unsecured creditors, who are said to be insufficiently aware of their increased risks as a result of the improved position of competing secured creditors, and who therefore have not adjusted their pricing to compensate for their new risks. It is argued that the "filing system's original function of providing public notice to unsecured creditors has been replaced by the dual function of providing inquiry notice to other secured creditors and of providing a simple means of determining the relative priority of competing security interests." 48

This is an interesting argument, implying as it does that the latter purposes are less deserving than the former (giving notice to unsecured creditors). Many observors might disagree on this point, concluding that even if Professor Warner is correct, the modern "dual function" quoted above is quite appropriate for a notice filing system. And clearly the same inquiry notice that is provided to competing secured parties is also available to unsecured creditors, if they want to use it. Many unsecured creditors apparently forego that use, choosing instead to rely on the debtor's general credit-worthiness, going concern viability, perhaps a credit report, which may reflect Article 9 filings, and the debtor's desire for a continuing business relationship, rather than a claim to residual assets in a potential liquidation. That is a business judgment that reflects the nature of unsecured credit in many instances, though it is also likely that in some cases consideration of the debtor's secured obligations will enter into an analysis of credit-worthiness by an unsecured creditor, particularly in large or important unsecured transactions. For those cases where the unsecured creditor cares enough to inquire, the Article 9 filing system is there and serves a useful notice purpose, whether consulted directly or through a third-party credit report. Of course, some non-Article 9 creditors are entirely non-reliance parties, e.g., judgment lien creditors (including trustees in bankruptcy 49) who do not rely at all on a credit analysis or the public record in extending value. These parties (and their lawyers) cannot be expected to favor any system that awards priority based on a public record. But similarly, they are in no position to complain about others who do rely on the public record or about efforts to improve the functioning of that public record. Their quarrel is

48. Warner, supra note 12, at 43.
with the concept of public notice, and they should address their comments accordingly, rather than objecting to improvements in the law.

VII. PLOWING THE CORNERS OF THE FIELD—DEPOSIT ACCOUNTS

Perhaps the most common criticism of revised Article 9, from bankruptcy advocates, is that the expanded scope of revised Article 9 means that secured creditors will absorb virtually all of a debtor's assets, leaving nothing to fund a bankruptcy case and no payout for unsecured creditors.  

Revised Article 9 does cover new categories of assets not previously subject to its reach, including commercial bank accounts and commercial tort claims. It also extends Article 9 to new types of transactions such as sales of payment intangibles, promissory notes, and health-care insurance receivables (the latter now being included in the definition of "accounts" at revised § 9-102(a)(2)), and it allows Article 9 perfection of certain agricultural liens. The inclusion of bank accounts seems particularly offensive to some bankruptcy advocates, on grounds it will deprive debtors' bankruptcy estates of the liquidity needed to fund the bankruptcy case.  

In response, revised Article 9 probably does not change the results in these cases. For one thing, to the extent that Article 9 now applies to deposit accounts, it largely clarifies what was already possible by other means. In addition, in a business transaction (the only type subject to the Article 9 deposit account rules under revised § 9-109), where the debtor's other assets are likely encumbered under Article 9, virtually all deposit accounts were already likely to constitute proceeds of other Article 9 collateral, and such proceeds always have been covered by Article 9. Third, the depository bank is a likely creditor in these cases,

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50. Warner, supra note 12, at 44 (the Article 9 revisions "Leave Nothing on the Table"). Sometimes this is referred to as "plowing the corners of the field."

51. See generally Alvin C. Harrell, Drafting Contracts Under Revised UCC Article 9, 53 CONSUMER FIN. L.Q. REP. 138, 146 (1999).

52. And to pay the debtor's attorney. There can be no doubt that "cash collateral" issues are among the first to be faced in many bankruptcy cases. See, e.g., Douglas Bacon, Real Estate Bankruptcies From the Secured Creditor's Standpoint, 43 CONSUMER FIN. L.Q. REP. 131 (1989). But, as noted previously, the results are not necessarily different under revised Article 9.

53. See generally Alvin C. Harrell, Security Interests in Deposit Accounts: A Unique Relationship Between the UCC and Other Law, 23 UCC L.J. 153 (1990) (discussing, for example, rights of setoff and the common law pledge).

54. See old U.C.C. § 9-306; revised U.C.C. § 9-315. Revised Article 9 expands
and for something like 1,000 years such a creditor has been recognized to have a right of set-off, tantamount to a lien in bankruptcy, and recognized as such under Bankruptcy Code §§ 506 and 553. 55 Finally, the battle over funding of the bankruptcy case is likely to focus on the debtor’s desire to use cash collateral under Bankruptcy Code § 363, an analysis that already assumes the deposit account to be collateral under Article 9 or other law, 57 and this analysis is not affected by the Article 9 revisions. In other words, the debtor’s deposit accounts were just as likely to be someone’s cash collateral under old Article 9 (by means of a right to setoff, a common law pledge, or an Article 9 proceeds claim), and the real battle will continue to involve the use of that collateral under Bankruptcy Code § 363, not revised Article 9. In this respect, the Article 9 revisions do little more than simplify the law and minimize the likelihood of expensive litigation over obscure common law issues. 58

Thus, it seems clear that the expansion of revised Article 9 to allow direct security interests in deposit accounts in commercial transactions will not significantly reduce the liquid assets available to fund bankruptcy cases. But even if that proved to be the case, there is no apparent rationale for precluding it, i.e., preventing debtors from using liquid assets to secure credit outside of bankruptcy. The alternative is to bar a debtor’s use of its own liquid assets to secure credit that might be used to stave off bankruptcy. Nowhere does such a policy appear in the Bankruptcy Code or elsewhere in state or federal law, and it takes a true devotee of bankruptcy to argue that the debtor should be deprived of using its own excess cash outside of bankruptcy in order to assure that there is always funding for a bankruptcy case. Rather, the clear policy of the Bankruptcy Code is to assume that liquid assets, such as deposit accounts, are cash collateral and to provide procedures for resolving the resulting conflicts on a balanced and equitable basis if bankruptcy is necessary. 59 Revised Article 9 in no way interferes with this policy or result.

somewhat the definition of “proceeds.” See revised U.C.C. § 9-102(a)(64); see infra Pt. IX.

55. So most deposit accounts have long been covered by “liens” anyway, outside of Article 9.
57. Bacon, supra note 52, at 131.
58. The real impact of revised Article 9 in this area of law is to rearrange the priorities between competing secured claims based on “proceeds” and “control.” See revised U.C.C. §§ 9-322, 9-327. But this does not affect bankruptcy.
Professor Warner and others have argued that the liquid nature of deposit accounts make them largely useless as collateral, and therefore of no real benefit to either debtors or secured parties outside of bankruptcy.\textsuperscript{60} The "ephemeral" nature of such collateral does indeed limit its usefulness, and for that reason deposit accounts (as distinguished from, \textit{e.g.}, instruments—see revised Article 9 §§ 9-102(a)(29) and (47)) are usually claimed as an adjunct to other collateral rather than as the sole means of securing a loan. But this can be an important adjunct for a debtor who, for example, may be generating a large cash flow or otherwise passing large sums through a deposit account. Of course, such transactions may implicate preferential and fraudulent transfer issues,\textsuperscript{61} as well as proceeds claims and tracing issues. But none of this necessarily detracts from the potential value of a security interest in the debtor's deposit accounts either as an adjunct or a counterpoint to such other claims. Indeed, such a security interest may prove its mettle merely by saving the expense of proving a common law pledge or conducting a tracing-of-proceeds analysis.\textsuperscript{62} The author cannot agree that these benefits are so unimportant that they are not a proper factor in a lender's credit analysis.\textsuperscript{63} The Article 9 revisions simplify and clarify this entire area of law, with obvious benefits for both debtors and creditors, and without any conflict with established bankruptcy law or policy, at either a practical or theoretical level.

\textbf{VIII. FREE ASSIGNABILITY OF CONTRACT RIGHTS}

Revised Article 9 "incorporates a strong policy in favor of free assignability and overrides most [state law] restrictions on the assignment of intangible property interests."\textsuperscript{64} While this cannot override certain restrictions, \textit{e.g.}, federal law, even in these instances it operates outside the boundaries of the restriction to allow such things as

\begin{enumerate}
\item Warner, \textit{supra} note 12, at 48.
\item \textit{See Miller & Harrell, supra} note 1, ch. 2.
\item \textit{See} Warner, \textit{supra} note 12, at 48. Professor Warner also criticizes revised Article 9's careful efforts to permit perfection without interfering with the debtor's use of its deposit accounts. \textit{Id.} But clearly this is an important feature for both debtors and creditors.
\end{enumerate}
a proceeds claim under Article 9.65 The expanded scope of revised Article 9 carries with it a commensurate expansion of the effects of this Article 9 policy.66 One significant effect is to facilitate security interests in software licenses outside the confines of federal law.67

Professor Warner characterizes this as largely an anti-bankruptcy policy on grounds that such security interests have essentially no effect against the licensor outside of bankruptcy (under the terms of revised Article 9 and otherwise applicable law), and therefore, are of use only against a bankruptcy trustee's claim to proceeds upon sale of the collateral.68

Professor Warner asserts a cogent point, but it is not the full story. Of course, the revised Article 9 policy favoring assignability will be effectively limited to proceeds where federal law contradicts that policy, and in conjunction with the assignability provisions of the Bankruptcy Code this creates a potent package of remedies. In addition, he is absolutely correct that § 9-408 does not contemplate (or purport to allow) direct enforcement of a security interest in, as a license, against the licensor. It is undisputed that in these circumstances the security is essentially a proceeds claim. But proceeds claims are not limited to bankruptcy, and restrictions on assignability (and their override under Article 9) are not limited to bankruptcy or other federal law. Revised Article 9 will override many state law and contractual nonassignability provisions, and thus will have a significant impact entirely outside of bankruptcy.69 To the extent revised §§ 9-406 and 9-408 interact with Bankruptcy Code provisions allowing assignment of rights, they will

65. Warner, supra note 12, 1t 48-49.
66. Id.
68. See Warner, supra note 12, at 53 (noting that the Bankruptcy Code permits such sales where other law does not). See, e.g., 11 U.S.C. § 365 (2000). He also notes that Professors Harris and Mooney "strongly disagree with this charge . . . [asserting] that 'the principal effect of the new rule will be the facilitation of credit and, at the margin, keeping debtors out of bankruptcy.'" Warner, supra note 12, at n.22 (quoting Harris & Mooney, supra note 10).
69. See Ulman, supra note 64, at 161-163 (discussing the effects of revised §§ 9-406 and 9-408 without any reference to bankruptcy). Professor Warner contends that outside of bankruptcy these proceeds can be captured by the secured party as after-acquired property (see § 9-204), or as accounts, without the need for § 9-408 or a proceeds claim. That may be so, but it requires a successful predication as to the nature of the proceeds. Perhaps for that reason (and others), the proceeds claim is well-established as an alternative. It is late in the game to object to that now.
reinforce, not contradict, bankruptcy policy; and this will facilitate extensions of credit and greater utilization of debtors' assets outside of bankruptcy.

Professor Warner rejects this perspective, arguing that the Bankruptcy Code override of nonassignability provisions is intended for the exclusive benefit of unsecured creditors and should not be reallocated to secured creditors via Article 9. As noted, this is a reasoned view. However, it is not one articulated in the Bankruptcy Code, and in the absence of such articulation, it is unclear why the value thus represented should be limited to unsecured creditors (and administrative expenses) in bankruptcy, rather than also being available to the debtor outside of bankruptcy (in the form of enhanced collateral values) and secured parties. If Congress intends otherwise, it should say so. Regardless of this issue, it is quite clear that revised §§ 9-406 and 9-408 have significant roles to play outside of bankruptcy and are not merely "insolvency value reallocation rules." 70

IX. PROCEEDS

It stands to reason that if a person does not favor the concept of secured credit, that person will not like proceeds claims either. But Article 9 has long recognized the proceeds claim as an important part of secured credit, given the propensity of troubled debtors to damage or dispose of collateral without authorization. 71 This has been an important part of the movement from possessory perfection (which sharply reduces the utility of secured credit for the debtor) to perfection by filing (which establishes priority and greatly increases the utility of secured credit for the debtor, but without a proceeds claim would expose the secured party to an unwarranted risk of unauthorized disposition).

Proceeds claims under Article 9 are not, of course, a perfect solution or a sure thing, and often involve uncertain tracing and priorities analyses. 72 They often include a claim to deposit accounts or other liquid assets, which are easy to spend, hard to trace, and may involve

70. Warner, supra note 12, at 54.

71. See old U.C.C. § 9-306; revised U.C.C. §§ 9-102(a)(64), 9-315, 9-322; see also supra note 69 and accompanying text. Even before Article 9 and without specific statutory authorization, the courts recognized or even created legal doctrines to protect proceeds claims, often on equitable grounds. See, e.g., Dillon & Harrell, supra note 62, at 198.

72. Dillon & Harrell, supra note 62, at 198.
conflicting claims with a higher priority.\textsuperscript{73} This is not a perfect world for secured parties, but proceeds claims are an essential aspect of voluntary secured credit transactions, and the effort to improve and clarify this area of law in revised Article 9 is laudable.\textsuperscript{74}

Those who favor an expansion of bankruptcy law rather than Article 9 may see it differently, viewing efforts to clarify and expand the reach of the Article 9 proceeds rules as another effort to grab assets that could otherwise fund and justify a bankruptcy case. Thus, some of the criticisms again reflect a basic disagreement over the optimal roles of secured credit and bankruptcy or the appropriateness of proceeds claims generally, rather than disagreement over technical aspects of the Article 9 revisions. For example, Professor Warner argues that the proceeds rules allow surreptitious claims to after-acquired property (to the extent it is proceeds), and he criticizes the automatic coverage of proceeds as unneeded and an inappropriate usurpation of contract law.\textsuperscript{75} He criticizes the revised Article 9 clarifications relating to tracing, identification, commingling of proceeds, and the deletion of the horrendous rules at old § 9-306(4)(d)(ii).\textsuperscript{76} This author never thought he would see anyone defend the latter rule, or the useless litigation that it and the prior uncertainties generated,\textsuperscript{77} and it is surprising to see these needed clarifications and obvious improvements in the law criticized. It is not even clear that these changes will always enhance the secured party’s claim in bankruptcy; one of the salient features of old § 9-306(4)(d)(ii) was the prospect of a secured party windfall under the arbitrary allocation formulation provided by the statute (designed in part to relieve the secured party of any tracing burden).\textsuperscript{78} It would seem that this is one area where everyone could celebrate the Article 9 revisions.

Other clarifications in revised Article 9, for example, the definition of proceeds at revised § 9-102(a)(64), are more clearly an expansion of the definition at old § 9-306(1). Though, here too there is an element of

\textsuperscript{73} See, e.g., revised U.C.C. §§ 9-322, 9-327, and 9-332.


\textsuperscript{75} Warner, supra note 12, at 55. This latter seems minor, inasmuch as virtually all security agreements cover proceeds anyway. See also supra notes 69 and 72. As noted supra at note 67, this is not the time and place to fundamentally re-examine the concept of proceeds. That train has already left the station, and the only way to stop it now is to derail nonpossessory secured credit. While that may be an agenda item for some commentators, it is inappropriate to lay the blame on the Article 9 revisions.

\textsuperscript{76} See Dillon & Harrell, supra note 62, at 198.

\textsuperscript{77} Id.

\textsuperscript{78} Id.
essential clarification at work. The specific inclusion in revised § 9-102(a)(64) of license and lease proceeds, collections and distributions on collateral, rights arising out of collateral, damages claims, and insurance claims, is both logical in the context of modern business transactions\textsuperscript{79} and reflective of the case law. Would the critics have had the drafters of revised Article 9 ignore changes in technology and business practices and important case law developments? The revisions do not, and cannot, resolve every possible issue, but they make an effort to clarify the proceeds rules and bring them into the modern world. It seems unfair to describe this as largely an anti-bankruptcy program.

The revisions also seek to clarify the issues of perfection and priority with respect to proceeds. It has been argued that the new perfection rules at revised § 9-315(c) make it more likely that the proceeds claim will be continuously perfected.\textsuperscript{80} This probably overstates the matter. The requisites for continuing perfection at revised § 9-315(c)-(d) are virtually identical to those at old § 9-306(3),\textsuperscript{81} with a primary difference being the relatively modest extension of the old ten day grace period to twenty days (consistent with most other Article 9 and related Bankruptcy Code grace periods). Thus § 9-315(c)-(d) makes almost no change to prior law.\textsuperscript{82}

There is a fairly complex interplay between the priority rules governing “control” (“non-filing collateral”) and those governing perfection by filing (“filing collateral”) at revised § 9-322.\textsuperscript{83} This is designed to cover scenarios where proceeds move from the “filing” world into the “non-filing” world and vice versa. In effect, as proceeds are generated or transformed into the form of filing collateral, they become subject to priority rules based on perfection by filing; if they are

\textsuperscript{79} Which obviously increasingly include leases and licenses rather than sales, intellectual property and collection rights, and damages claims.

\textsuperscript{80} Warner, \textit{supra} note 12, at 58-59.

\textsuperscript{81} Professor Warner notes this. \textit{Id}.

\textsuperscript{82} Professor Warner correctly notes that these rules provide for continuing perfection as to proceeds of a type subject to perfection by a filing in the same office where the secured party’s financing statement was filed. Revised U.C.C. § 9-315(d)(1)(B). While this rule is unchanged, the “location of the debtor” choice of law rule of revised § 9-301(2) makes it marginally more likely that the “same office” test will be met. Thus the interplay between §§ 9-301 and 9-315 may favor proceeds claims to some marginal extent. Well, OK, but the “same office” rule was already very proceeds-friendly, consistent with the public policy favoring proceeds claims. The only difference in revised Article 9 is that the correct filing office may be easier to identify for all purposes. This is hardly evidence of an anti-bankruptcy motive.

\textsuperscript{83} See revised U.C.C.§ 9-322(c)-(e), cmts. 7-9.
generated or transformed into the form of non-filing collateral, they become subject to the non-filing priority rules. Thus, priority as between these two legal “worlds” is based on the form of the proceeds rather than its origin, as is necessary to resolve conflicts between the filing and non-filing rules with respect to proceeds that may come from one of those worlds but exist in the other.

It is, perhaps, unfortunate that this complexity was necessary, but it is a narrow issue and on a careful reading the rules are quite sensible and possibly unavoidable. It is hard to see how they could be viewed as anti-bankruptcy, as the obvious target was priority disputes between secured parties from these different Article 9 worlds, unless, once again, the very act of clarifying secured transactions law is an affront to bankruptcy. The revisions at § 9-322 will of course award priority as to deposit accounts to the secured party with “control” over competing secured parties claiming the deposit account as proceeds of other collateral, but only so long as the proceeds remain in the deposit account. This will in many cases award priority to the depository bank over a competing Article 9 claim to proceeds from other collateral that have been deposited into a deposit account. But in turn, this will be cut off under §§ 9-322 and 9-332 when the funds are withdrawn from the deposit account. So the effects will cut both ways. Any adverse impact will fall primarily on the proceeds claims of inventory lenders or other Article 9 secured parties, rather than the trustee in bankruptcy. Moreover, the alternative (and former Article 9 rule) is to award priority to the competing Article 9 proceeds claim, not the trustee in bankruptcy or other unsecured or lien creditors. The impact on the change in bankruptcy seems minimal.

Professor Warner notes that filing a single “all assets” financing statement in the state of the debtor’s location will now be sufficient to perfect a security interest in most types of collateral and its proceeds, including identifiable cash proceeds. Revised Article 9’s embrace of equitable tracing techniques at § 9-315(b) facilitates such identification (though it was a common practice under prior law). As previously noted, Professor Warner correctly asserts that the simplified filing and choice of law rules at revised §§ 9-301 through 9-307 will sometimes

84. *Id.*
85. Revised U.C.C. §§ 9-322(c), (d), and (e), 9-327, and 9-332.
86. Revised U.C.C. § 9-327.
87. Warner, *supra* note 12, at 59; primary exceptions being deposit accounts as original collateral and real estate-related collateral.
88. Thus allowing a perfected claim to deposit accounts as cash proceeds. *Id.*
translate into simpler requirements for perfecting as to proceeds, as well as for the original collateral. 90 But then again, it would be extraordinary if they did not because the rules are inherently the same for both. Reducing the complexity of these rules for one purpose also does so for other purposes; it would be hard to do otherwise. And what would be the purpose of such an effort?

It all comes down to the basic question: Is increased simplicity and clarity in the law of secured transactions a bad thing? For better or worse, increased clarity is a goal of the UCC and the uniform law process, and therefore was a goal of the Article 9 revisions. 91 This may enhance the position of some secured parties in bankruptcy, 92 though generally the revisions only make a little easier what was already possible under prior law. If the critics are troubled that fewer parties will inadvertently impair their positions and fail to protect their expected bargains, thereby producing fewer windfalls for nonreliance parties, it is an odd criticism. In the end, such criticisms depend on a purely results-oriented argument: Revised Article 9 may reduce the funds available to pay for bankruptcy administration and distribution by better protecting private bargains, and this distributional effect violates a national policy favoring bankruptcy. It is an argument not articulated in the Bankruptcy Code or any significant case law and depends on generalized (and perhaps narrowly-shared) conclusions about the intended purposes of commercial law and bankruptcy, rather than direct examples of circumstances where the Article 9 revisions contradict specific bankruptcy policies or rules.

X. CONCLUSION

In the end, the common criticisms of revised Article 9 from bankruptcy advocates come down to one thing: the drafters of revised Article 9 did too good a job. By improving, simplifying, and clarifying the law of secured transactions, revised Article 9 makes it too easy to effectuate private agreements that will be recognized in bankruptcy, thereby allowing more debtors and creditors to voluntarily structure their claims and priorities outside bankruptcy.

Perhaps advocates of Article 9 would plead guilty to this accusation (while hopefully denying that it is a bad thing.) But the focus on this

90. Warner, supra note 12, at 59-60; supra note 82.
91. See UCC § 1-102(2).
92. But see Harris & Mooney, supra note 10, at 85.
argument reveals the nature of the dispute—the critics cannot point to specific Article 9 revisions that improperly target bankruptcy rules or issues, because there are none. Every significant Article 9 revision has a significant nonbankruptcy driving purpose. Every revision is true to some combination of the guiding principles of the UCC: clarity, simplicity, and uniformity. There are no insolvency-only priority rules, no unreasonable protections for reliance parties, no preferring of some non-reliance parties over others, no efforts to deflect bankruptcy strong-arm powers from their intended roles, no statutory liens, no rules furthering fraudulent or preferential transfers, and no conflicts or interference with the Bankruptcy Code. In effect, the critics are reduced to arguing that revised Article 9 makes it too easy for the parties to do what they want to do and what they generally could have done under prior law at some greater effort. This is not exactly a stinging criticism.

Under the most extreme version of this view, almost any revision of state law, particularly if it enhances the utility or enforcement of private agreements, usurps a national policy in favor of using bankruptcy as a redistributionist forum. This is a test that any revision of Article 9 (or at least any competent revision) would (and should) fail, as would any other effective revision of state commercial or consumer laws. This bankruptcy test is too much to ask of state law. If secured credit is to be curtailed through an expanded use of bankruptcy as a redistributional forum, it should be done openly through federal legislation, not by demanding the stagnation and decline of state commercial law. To do otherwise would convert the Bankruptcy Code into The Anti-Commercial Code.