Drafting Contracts Under Revised UCC Article 9

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for their dealership’s assets to another dealership at a price below-market value, open-ended continuity was not satisfied because this was a one-time fraud and did not constitute defendants’ regular way of conducting business.

VI. Conclusion

Although RICO provides a powerful tool for use by plaintiffs’ class action attorneys against consumer financial services companies, it is not without its limitations. Current trends in the case law offer corporate defendants ample opportunity to challenge the adequacy of a plaintiff’s RICO pleadings at the motion to dismiss stage. This approach is desirable because the pleadings can be challenged without challenging the merits of the case and risking an unfavorable opinion on the merits at an early stage of the litigation.

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organizations, will not take effect until July 1, 2001 (and only then under the laws of the states that have enacted revised Article 9). Yet these revisions may already be having an effect on the documentation of secured transactions, as interested parties consider and react to the impact of these important changes.

The Reporters and Drafting Committee for the Article 9 revisions have provided extensive Official Comments to supplement and help explain each section of revised Article 9. The Official Comment to revised section 9-101 provides an excellent overview of the revisions, highlighting the major changes, and is recommended reading for anyone interested in secured transactions law. The purpose of this article is to follow the format of that Comment to briefly describe some practical and drafting implications of the noted changes.

II. Scope of Article 9

A. Summary of the Revisions

The Comment to section 9-101 notes that the scope of revised Article 9 is expanded to cover such things as security interests in commercial (but not consumer) deposit accounts, sales of payment instruments and promissory notes, health-care insurance receivables, nonpossessory statutory agricultural liens, true consignments, supporting obligations, and commercial tort claims among other things. For the first time, revised Article 9 also applies to security interests and other Article 9 transfers by state and local governments, except those specifically governed by other statutes.

Security interests in payment instruments, health-care insurance receivables, letter-of-credit rights, and general intangibles (such as contracts, permits, licenses and franchise rights) are permitted despite otherwise applicable contractual or statutory limitations (or prohibitions) on assignment.

B. Impact of the Scope Revisions

Obviously the expanded scope of Article 9 brings with it an expansion of the entire Article 9 world (as applicable) to new ranges of transactions. For example, parties drafting or executing commercial deposit agreements will need to contemplate the possibility that such agreements will now create a security interest as well as a deposit relationship. Sellers and buyers of promissory notes will need to contemplate the impact of Article 9 as such sales will generally be deemed to create a perfected security interest in the buyer (under section 9-309, perfection occurs upon attachment, which generally means upon execution of the security agreement).

Similarly, sellers and buyers of software license-threats, health-care insurance receivables (now treated as Article 9 “accounts”) and payment instruments will be covered by Article 9, as sales of accounts and chattel paper always have been. Agricultural liens will need to learn to comply with Article 9, in order to take advantage of the Article 9 perfection, priority and remedies provisions. Likewise, with exceptions, certain “true” consignments and baileys will be within Article 9, requiring some consignors and bailees to learn to comply with Article 9. Letter of credit transactions involving a “supporting obligation” may now involve Article 9, and a whole new field of lending on commercial tort claims may develop, with an impact on tort claimants and the plaintiffs’ bar. State and local governments will need to learn to comply with Article 9.

All of this is largely in the future, but that future is not far away. Prudent lawyers will begin to review their clients’ contracts now for provisions that may have new effects once (or even before) revised Article 9 is effective, and for needed contract changes to accommodate or respond to the expansionary aspects of revised Article 9.

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C. Distinguishing Accounts and Payment Intangibles

New terminology is part of any change of this magnitude. Illustrative of this is the new definition of "account," the new concept of "payment intangibles," and related issues for health-care-insurance receivables and general intangibles.

The definition of "account" at revised section 9-102(a)(2) is expanded to include monetary obligations (whether or not earned) for the sale, lease, license, assignment or other disposition of tangible or intangible personal property or services. This expands the definition to include such things as license fees for the use of software. Other types of contractual payment rights, such as health-care insurance receivables, are specifically included in the definition of "account." The result is a much broader definition of "account" in revised Article 9.

Since a sale of (as well as a security interest interest in) accounts is covered by Article 9, this expands the scope of Article 9 to cover sales of such rights to payment, e.g., assignments of health-care insurance receivables and software license fees. Under old Article 9 such receivables would be within the definition of "general intangible" at old section 9-106, and a sale of general intangibles would not be covered under either version of Article 9. Thus, additional types of genuine sales transactions will be brought within revised Article 9.19

The expanded concept of "account" should be distinguished from the new concept in revised Article 9 of "payment intangible," defined at revised section 9-102(a)(6) essentially as a general intangible for the payment of money.20 Since "general intangible" is a residual category (covering only things not included elsewhere), and "payment intangible" is a type of "general intangible," the result is that "payment intangible" includes only monetary obligations not within the definition of "account" (i.e., not arising from a disposition of property or services) or some other Article 9 category. Thus, for example, a health-care insurance receivable is not a payment intangible because it is already within the definition of account.

The distinction between "account" and "payment intangible" is important because they are treated differently under revised Article 9. As noted, sales of accounts are covered; perfection is by filing. Sales of payment intangibles are also covered, but perfection is automatic.21 Sales of other general intangibles (general intangibles other than payment intangibles) remain outside of Article 9, and therefore are not subject to "perfection" by any means. But a security interest in a payment intangible or any other type of general intangible, or in accounts, is covered by either version of Article 9. Some of the implications of these issues are discussed infra at Pt. V.

III. Duties of Secured Party

A. Summary of Revisions

Revised Article 9 imposes a duty on secured parties with "control" of a deposit account, electronic chattel paper, investment property, or a letter of credit right, to release that control within ten days of notice from the debtor, when the secured obligation is satisfied.22 There is a similar duty to notify account debtors when an assignee's claim against the assignor is satisfied.23

Section 9-210 provides an expanded list of secured party duties in response to authenticated requests24 from the debtor for an accounting of the unpaid balance, a list of the collateral, or confirmation of a statement of account provided by the debtor. Generally, the secured party must respond within 14 days, except buyers of accounts, chattel paper, payment intangibles, or promissory notes, or a consignor.25 A debtor is entitled to one free response per six month period.26

Perhaps most importantly, revised Article 9 Part 6 (Default and Enforcement) provides new notice requirements for secured parties seeking to enforce security interests. There are new requirements for notice to the debtor prior to disposition of repossession collateral, including a "safe harbor" form of notice.27 There is a separate form for consumer-borrowers, who are entitled to more information.28

Consumers are also entitled to a post-disposition notice regarding calculation of any deficiency,29 and there is a statutory penalty of $500 for violations.30

B. Impact of Revisions

The revisions that impose new duties on secured parties, described briefly above, are among those provisions most likely to have an effect before revised Article 9 is effective or even enacted. There is some possibility that some of these revised standards will be reconsidered as "best practices" under current law, even though that clearly is not intended. From a secured party perspective, a positive aspect is that the new requirements clearly exceed current standards, so that compliance with revised Article 9 should be considered a safe harbor under current law. This may be a reason, for example, to begin using the statutory form for notice of disposition at this time.

In any event, prudent secured parties will want to begin now to plan the transition to the new requirements, so as to be fully prepared for compliance not later than the effective date of the changes.
The reasonable notice standard offers creditors some guidance, but it does not indicate any specific action that creditors may take to protect themselves from liability. Recognizing this shortcoming, the FRB is requesting comment on whether it is feasible or desirable to provide further guidance in this area. The FRB is particularly interested in determining whether Regulation B should address whether, and under what circumstances, a creditor must monitor the pricing or other credit terms when another creditor participates in the transaction. Additional guidance on these points may help resolve some of the uncertainties caused by the Long Beach settlement.

Although creditors may want additional guidance on this point, they clearly do not want to monitor the pricing and terms of credit offered by sellers, brokers or other creditors. Imposing such a duty on creditors would undoubtedly increase the cost of credit or reduce the amount of available credit. Even if the cost of monitoring sellers and brokers were not prohibitive, such oversight likely would be ineffective. Since any given creditor is reviewing only a small sample of the broker's or dealer's loans, it may be impossible to identify a discriminatory pattern or practice. Finally, creditors could not monitor race or national origin discrimination for non-mortgage loans, since the broker or dealer does not collect this information.

E. Notification of Adverse Action to Business Applicants

The ECOA authorizes the FRB to exempt certain classes of transactions, or particular types of transactions within a class, from the Act's provisions. These transactions may be exempted only if the FRB determines that the application of the Act to such transactions would not further the Act's purpose. Currently, Regulation B exempts business credit from certain notification and record retention requirements if the business has gross revenues in excess of $1 million or the credit extended is trade credit. The FRB is soliciting comment on whether these particular exemptions are still appropriate.

VI. Conclusion

Although none of the final or proposed amendments will drastically alter the requirements or purpose of ECOA, some of the amendments should facilitate compliance with the Act and, at the same time, provide creditors with some additional protection against fair lending lawsuits. Many of these amendments represent an ongoing attempt by the FRB to clarify or modernize ECOA to reflect the recent changes to the lending process. The increased use of intermediaries, such as brokers and computers, has resulted in a number of the recent changes to the lending process. As the lending process further evolves, ECOA and Regulation B will undoubtedly undergo additional changes. These changes hopefully will facilitate future compliance by creditors.

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IV. Choice of Law

A. Summary of the Revisions

Choice of law is one of the more difficult analytical issues under old Article 9. In addition, practical problems, such as administrative delays in the filing systems in some states, create unnecessary risks for interested parties. Revised Article 9 addresses these issues by greatly simplifying the rules on where to file to perfect a security interest for most collateral. For most collateral, under revised Article 9 the place to file is the jurisdiction where the debtor is located. The effect of perfection or nonperfection (e.g., priority and enforcement issues) will continue to be governed by the law of the location of collateral in the form of negotiable documents, goods, instruments, money or tangible collateral paper, but the place to file will be where the debtor is located. Perfection by possession will continue to be governed by the law where the collateral is located, as will perfection by filing as to fixtures, timber and minerals. In contrast, under old Article 9, the place to file most often depended on the location of the collateral, which could easily change from one jurisdiction to another, creating choice of law problems.

Under revised Article 9, the location of the debtor (which changes less often than the location of tangible collateral) will be the place to file. The debtor is deemed to be located at its place of business, or chief executive office if there is more than one place of business. This follows the rules at old section 9-103; however, revised section 9-307 provides three important exceptions for determining the debtor's location: (1) a "registered organization" such as a corporation or LLC is located in the state where it is organized; (2) an individual debtor is located in the state of the debtor's domicile; and (3) a foreign branch is located in the state of the state in which the branch is located.

37. Section 9-301(1).
38. Section 9-301(2), (3)(c).
39. Section 9-301(2).
40. Section 9-301(3), (4).
41. See, e.g., Hewitt, supra note 36.
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The debtor or collateral may be located in or move to or from a jurisdiction with either the old or revised Article 9 will need to be considered.

Now is probably the time for each lender to begin to develop a transition plan to accommodate these changes and issues. Note that an understanding of the transition issues requires an initial understanding of the impact of the revisions on the subject transaction, so that some extended staff training probably is in order.

V. Perfection

A. Summary of the Revisions

There are new rules governing perfection as to specified classes of collateral: deposit accounts, letter of credit rights, electronic chattel paper, investment property, instruments, agricultural liens, tort claims, payment intangibles, promissory notes, and certificates of title goods.45

Generally, security interests in deposit accounts and letter of credit rights can be perfected only by the secured party taking “control” of the collateral.46 Electronic chattel paper and investment property are subject to either filing or control, though control is safer (and has a higher priority).47 Security interests in accounts, instruments and commercial tort claims, and agricultural liens, will be perfected by filing.48 The definition of “account” is expanded to include some receivables that old Article 9 would treat as general intangibles (e.g., health-care insurance receivables), thereby covering genuine sales of such receivables for the first time and possibly requiring perfection by filing to protect the buyer.49 However, these should be distinguished from “payment intangibles,” a new residual category defined at section 9-102(a)(61) to mean a general intangible representing an obligation for the payment of money not related to a disposition of property or services. Sales of payment intangibles are also covered by revised Article 9, but perfection is automatic (and therefore does not require a filing).50 Sales of promissory notes likewise are covered by revised Article 9, in contrast to old Article 9, and perfection is automatic.51 Security interests in all such property will be covered, with perfection by filing (except that perfection by possession will still be available as to instruments).52

Under old Article 9, security interests in payment intangibles (as a form of general intangible)53 and most promissory notes (as instruments)54 are covered by Article 955 and are subject to perfection by filing (general intangibles) or possession (instruments).56 Revised Article 9 expands this coverage to include “sales” of payment intangibles and certain promissory notes, with perfection essentially automatic upon attachment; but sales of other general intangibles are still excluded.57 Revised Article 9 also provides new rules governing perfection as to collateral in the hands of a bailee. The security interest is perfected when the bailee acknowledges a new authenticated record that it holds the collateral for the benefit of the secured party.58

B. Impact of the Revisions

Here again, the expanded scope of revised Article 9 means that parties previously unaffected by Article 9 will need to be acquainted with the Article 9 perfection rules. For example, sales of promissory notes secured by real estate mortgages, sales of health-care insurance receivables, software license-fee receivables, and payment intangibles, sales of commercial tort claims, and those claiming agricultural liens will now be affected by (Continued on page 168)
accountant’s “Federal Tax Service,” purchased for business use in the accountant’s business practice. She alleged that the Act applied to a debt incurred by a sole proprietorship, citing Slays v. Hand.\(^{50}\) The plaintiff also alleged that she used the account for “personal educational purposes.”\(^{50}\)

The court held that the language in Slays to the effect that the FDCPA applies to a debt incurred by a sole proprietorship is merely erroneous dicta. It therefore granted summary judgment against the plaintiff, on grounds the debt was for business purposes.

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revised Article 9. Buyers may need to perfect under Article 9, in order to avoid "Octagon-like" problems.\(^{66}\)

Transactions already governed by Article 9 may also be affected. For example, nonbank secured lenders accustomed to tracing proceeds into deposit accounts may find that avaime blocked by the competing claim of a depository institution with "control" over the deposit account (and therefore priority). Automatic perfection as to sales of payment intangibles and promissory notes may surprise competing parties not familiar with revised Article 9.

Again, these possibilities suggest a need for careful and extended transition planning.

VI. Priority

A. Summary of the Revisions

The preceding discussion already has anticipated this issue to some extent. The expanded scope of revised Article 9 brings with it new perfection and priority issues. For each example of newly-recognized Article 9 collateral, there are new perfection, priority, transition and enforcement rules.\(^{65}\)

In addition, some old priority rules are clarified or changed. For example, section 9-103(b) clarifies the concept of a purchase money security interest (PMSI), specifying that a PMSI in inventory does not require a matching of each advance to each item of collateral. And section 9-103(b)(3) and (c) specify that a PMSI in goods integrated with software also covers the software. Sections 9-103(c) and (1) codify (except in consumer goods transactions) the dual-status rule in cases where a debtor seeks to recharacterize a PMSI as a non-PMSI, effectively recognizing the PMSI aspect of a mixed transaction. This rejects the "transformation rule," which otherwise could negate PMSI status on the basis that the PMSI was tainted by almost any non-PMSI aspect to the transaction. Section 9-103 also treats consignments as purchase money security interests.\(^{67}\)

Section 9-102(a)(75) defines "software" (as a computer program and any supporting information, but not including software programs embedded in goods), and provides that a PMSI in goods also includes the embedded software. These issues should be considered when drafting collateral descriptions.

There is a special PMSI priority rule for livestock,\(^{56}\) similar to the inventory rule,\(^{68}\) and a "baseline" first-in-time priority rule for agricultural liens, subject to priorities for agricultural liens provided under other law.\(^{72}\)

The priority rules for investment property at section 9-328 are similar to those at old section 9-115 (formulated as part of the 1994 revisions to Articles 8 and 9). Generally perfected by control has priority over perfection by other means, and competing security interests perfected by control rank according to the time of perfection.\(^{73}\) This is a change from old section 9-115, which provided for security interests perfected by control to rank equally.

However, a securities intermediary with control of a security entitlement will have priority over all others, even those with control.\(^{29}\)

Deposit accounts are subject to a similar system, under section 9-327. Generally perfected will trump perfection by any other means, competing security interests with control will rank according to the first-in-time rule, and the depository institution with control will prevail over all others.\(^{77}\) A depository institution’s right of set off is given priority over other claims to the account, including Article 9 claims to the account as proceeds of a security interest.\(^{76}\) However, there is an overriding priority rule in favor of the depository lender who obtains control by transferring the account to the name of the lender so that the lender becomes the account holder on the books of the depository institution.\(^{77}\) Security interests in letter of credit rights are subject to a priority system similar to those for investment property and deposit accounts.\(^{78}\)

One difficult problem for the Article 9 Drafting Committee was the need to accommodate sales of electronic chattel paper while preserving the priority and negotiability concepts of old section 9-330.\(^{29}\) This was accomplished by grafting onto the old section 9-308 the notion of control of electronic chattel paper\(^{40}\) as the equivalent of taking possession of written chattel paper.\(^{40}\) There is a continuation of the requirement that the purchase be in the ordinary course of business, and section 9-330 includes requirements regarding knowledge, good faith, and new value.\(^{50}\)

\(^{50}\) Section 9-327.


\(^{72}\) Sections 9-327(4), 9-104(a)(3), and 9-340(c).

\(^{73}\) Sections 9-328(a)(3), (4), and 9-104(a)(3).

\(^{51}\) See supra, Flood v. Wachovia Bank & Trust Co., 993 F.2d 948 (10th Cir. 1993), Thomas E. Plunk, When a Sale of Accounts is Not a Sale: A Critique of Octagon Gas, 48 Consumer Fin. L.J. Rep. 45 (1994). Revised §§ 9-330(2) and 9-318 address changes by permitting a security interest to attach only if the debtor has rights in the collateral, and removing explicit that a seller of accounts, chattel paper, payment intangibles or promissory notes no longer has the necessary rights in the property to hold. However, until the buyer perfected under Article 9, the seller can make an effective transfer to a third party. Moreover, this does not address the broader "Octagon problem" of a buyer who does not know he has an Article 9 transaction.

\(^{65}\) The revised Article 9 priority rules are at §§ 9-317 through 9-341.

\(^{66}\) Sections 9-103(c)(1), (d). Section 9-103(b) clarifies any intention to refer from the exclusion that a different rule is intended in consumer goods cases. The issue is simply left undecided; current law should continue to apply.

\(^{67}\) Section 9-103(d).

\(^{68}\) Section 9-103(b)(3), (5).

\(^{69}\) Section 9-324.

\(^{70}\) Section 9-103(b)(3). See brief description, supra this text.

\(^{71}\) Section 9-312(a)(1).

\(^{72}\) Section 9-328(c).

\(^{73}\) Section 9-328(d).

\(^{74}\) Section 9-329(d).

\(^{75}\) Section 9-329.

\(^{76}\) See text and supra note 11. For more detailed treatment of these issues, see James M. Stewart, Electronic Commerce and Issues in Buying Chattel Paper, 49 Consumer Fin. L.J. Rep. 9 (1991).

\(^{76}\) Section 9-105.

\(^{77}\) Section 9-331(a)(1).

\(^{78}\) See § 9-330(a)(1), (2) and Official Comment 3; §§ 9-102(a)(57).
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Section 9-322 classifies the priorities of proceeds claims, generally providing a first-in-time priority rule based on the time of filing or perfection as to the original collateral. However, for collateral subject to perfection by means other than filing (e.g., adopting a non-filing collateral," i.e., chattel paper, deposit accounts, negotiable documents, instruments, investment property and letter of credit rights), there are special proceeds rules: (1) the original priority in the non-filing collateral continues in the proceeds of that collateral if the security interest in the proceeds is perfected and the proceeds are cash proceeds or the same type of non-filing collateral; (2) perfection in the non-filing collateral by means other than filing (e.g., "control") does not provide continuing priority as to proceeds that are "filing collateral" (accounts, tort claims, general intangibles, goods, negotiable documents and payment intangibles); in the latter case priority is

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83. Section 9-322(b).
84. Section 9-322(c).
85. Section 9-322(c)(2), (c).

For those who complete the DMP "successfully" the study might consider:

- How long did they stay in the program?
- What are their demographics?
- Are they better off or worse off at the end of their involvement with the DMP?
- Do they file bankruptcy?

The study might look carefully at the people who are referred to an attorney to see if they in fact file for bankruptcy or not. One of the most difficult aspects of such a study will be the definition of "success." For example, to what extent does each of the following constitute a "successful" outcome for a person who visits a debt counseling agency?

1. Maximum money paid to the creditors;
2. No bankruptcy filed by the client;
3. The degree to which the client becomes a more informed user of credit;
4. Demonstration by the client of "better" choices with regard to the use of credit;

The study should compare the experience between the debtor and the debt counseling agency with the experience between the debtor and the bankruptcy attorney and bankruptcy court system in a number of respects including the following:

1. What was the financial cost?
   a. Fee paid by client to agency;
   b. Fee paid by client to bankruptcy attorney;
   c. Filing fee paid to bankruptcy court; and
   d. Dollars paid to creditors.

2. How long did it take?
3. What were the psychological costs?
4. What was the debtor's "balance sheet" after the end of the bankruptcy or debt counseling experience?

Systematic studies of the debt counseling industry need to get underway promptly. [Ed. note: Interested parties should contact the author.]
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detected by a new version of the familiar first-in-time-of-filing rule. 86

B. Impact of the Revisions

There are many details in the new priority rules which will affect financial services contracts and operations. For example, the new definitions of “accounts,” “software” 87 and “goods” 88 will affect collateral descriptions in security agreements and financing statements, as well as sales agreements. 89

As another example, buyers and sellers of chattel paper will need to consider the impact of the revisions on electronic chattel paper, and the impact of the new proceeds rules on all chattel paper transactions. The Article 9 revisions will make clear that chattel paper can exist in electronic form, and will specify a method of perfection (“control”) that will replicate the old section 9-308 concept of possession. This resolves the biggest problems under old Article 9. But it is not fully clear how control of electronic chattel paper can be achieved. So the revisions will move the analysis to a higher level, but may require new types of analysis as a prerequisite to electronic chattel paper transactions.

VII. Filing

A. Summary of the Revisions

The desire to improve the Article 9 filing system was a driving force behind the Article 9 revisions. One way to do this was to facilitate improvements in filing technology by removing statutory bars to electronic filing. The revised Article 9 is therefore “median neutral” and eliminates all paper requirements. 90

In addition, the revisions eliminate the old requirement that a financing statement be signed by the debtor. 91 The revisions largely eliminate the relevancy of who filed the financing statement, instead focusing on whether the filing was properly authorized. 92 New rules clarify issues relating to sufficiency of the debtor’s name 93 and the description of collateral. 94 Generally a super-generic col-

90. For example, the term “recent” is used throughout. With the term “recent,” this replaces the concept of a signed writing. See § 9-105(a)(b)(c)(d). 91. See § 9-521(a), (c). 92. Section 9-509. There are parallels for nonrecorded filings. See §§ 9-509, 9-525.
94. Section 9-504.
The Relation Between Article 9 and Real Property Law After the Hulsev Case—Karen L. Howick
50  4  443

Taking the Economic Costs of Priority Seriously—Jesse M. Fried
51  4  328

The Theoretical and Practical Underpinnings for Consumer Provisions in Revised Article 9 of the UCC—David B. McMahon
50  2  183

Tort Claims as Collateral: Impact on Consumer Finance—Harold R. Weinberg
49  2  155

UCC Article 9 Drafting Committee Considers October 1996 Draft—Alvin C. Harrell
51  1  54

UCC Article 9 Drafting Committee March 1996 Meeting Considers Consumer-Related Collateral—Alvin C. Harrell
50  1  95

UCC Article 9 Revisions Confront Issues Affecting Consumer Collateral—Alvin C. Harrell
49  3  256

UCC Article 9 Revisions Move Toward Summer 1998 Approval, Pt. I—Alvin C. Harrell
52  2  219

UCC Article 9 Revisions Move Toward Summer 1998 Approval, Pt. II—Alvin C. Harrell
52  2  227

UCC Section 9-403 and the Continuing Saga of Continuation Statements—William E. Carroll and Alvin C. Harrell
48  1  88

Update on Consumer Issues in the UCC Article 9 Revision Project—Alvin C. Harrell
48  1  68

Updated 1995 Annual Meeting Draft Considered by UCC Article 9 Drafting Committee—Alvin C. Harrell
49  4  411

U.S. Supreme Court Hears Arguments on Relation Between State and Federal Purchase-Money Grace Periods—Alvin C. Harrell
51  4  345

Werhovsky v. Ford Motor Credit Co.—Consumer Lease Security Deposits Governed by UCC Section 9-207—Thomas B. Hudson
50  2  161

When a Sale of Accounts Is Not a Sale: A Critique of Octagon Gas—Professor Thomas E. Plank
48  1  45

Whither the States and Revised UCC Article 9—Fred H. Miller
52  3  335

Certificate of Title Issues—

Cars, Boats, and Security Interests: Certificates of Title and the Uniform Commercial Code—Professor John Krahmer
48  2  149

Certificate of Title Issues in the UCC Article 9 Revisions: A Brief Summary—Donald J. Rapson
51  4  355

Electronic Lien and Title—Troy R. Underwood
52  4  405

The PEB Study Group Report and Revised Article 9 with Respect to Certificate of Title Issues—Alvin C. Harrell
51  4  367

Possible Proposals for Improving the UCC Filing Systems and Motor Vehicle Certificate of Title Systems—Steven L. Harris and Charles W. Mooney, Jr.
49  4  407

A Proposal for Modernization of the Vehicle Certificate of Title System—Larry N. Miller
49  4  400

The Proposed UCC Article 9 Revisions: Perfection of Security Interests in Multiple State Transactions—Collateral Subject to Certificate of Title Statutes—Martin B. Schvam
51  4  358

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"All assets" is sufficient for commercial collateral in the financing statement but not the security agreement. Filing offices can reject a perfected filing only on certain enumerated grounds, and are directed to "link" all related filings for easy access. Filings can be deleted no earlier than one year after lapsing. This creates a "open-drawer" system which limits filing office discretion as to which records should be filed and/or retained. As a re-

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suit, everything filed is to be included and left in the record (at least until one year after lapse); it is then up to the file-searcher to follow up with confirmation and legal conclusions as to the effectiveness of each filing. There are means by which a debtor can file a notice that certain filed records are inaccurate or wrongly filed, and as noted there are penalties for wrongful filings. 109

B. Effects of the Revisions

In conjunction with advancing technology and enhanced state-government computer capabilities, the revisions will encourage many secured parties to convert from paper to electronic filing. The revisions should also reduce the number of incidents in which filing office staff inadvertently exercise inappropriate legal judgment as to which financing statements should be filed, rejected, terminated or deleted. Elimination of the signature and writing requirements should simplify the process without any loss of real safeguards, and will facilitate electronic processing.

The revised provisions at sections 9-503 and 9-506 probably do all that can be done to alleviate problems with debtors’ names and related filing and search issues, but a careful review of the revisions and thoughtful execution of financing statements and records searches remains essential. 110 Like death and taxes, problems with debtors’ names and related issues likely will remain with us always; just as some of the issues are resolved, others seem to develop. 111

VIII. Default and Enforcement

A. Summary of the Revisions

This was a major focus of the revisions, as consumer group representatives raised issues relating to alleged creditor abuses, and commercial creditor representatives sought to streamline and modernize the remedies structure of Article 9. To some extent these efforts collided, and the result was some additional separation of commercial and consumer transaction rules. 112 The default and remedies provisions are in revised Article 9 Part 6, which takes the place of old Part 5.

Revised section 9-102(a)(27) defines “debtor” as an owner of the collateral, a seller of accounts, chattel paper, payment intangibles or promissory notes, or a consignee. “Obligor” is defined at sections 9-102(a)(39) as one who owes an obligation or is otherwise accountable for payment of an Article 9 transaction. The distinction is important; for example, section 9-602 lists the sections providing rights of debtors and/or obligors that cannot be waived or varied by agreement. 113 Generally (except for the right of a “consumer obligor” to an explanation of a deficiency under section 9-616), an “obligor” is afforded Article 9 rights only if he or she is a “secondary obligor” (defined at section 9-102(a)(71) as a secondary obligor with recourse against the debtor or another obligor, e.g., a surety or accommodation party). 114 Section 9-628 relieves the secured party of liability to a debtor or obligor unless the secured party knows of that status. 115

Contrary to the equivalent rule under Article 3 for accommodation parties, 116 section 9-602 generally precludes waiver of a secondary obligor’s rights under Article 9 Part 6, except that section 9-624 permits: (1) waiver of the obligor’s right to notice of disposition of the collateral, and (2) in a nonconsumer transaction, waiver after default of the secondary obligor’s right to redeem.

Section 9-607 clarifies the right of a secured party to claim proceeds, to notify account debtors and other obligors to make payment, to otherwise enforce the obligations of account debtors and other obligors, and to enforce security interests in deposit accounts by setoff and other means. 117 It recognizes nondishonorable enforcement of mortgages, the duty to proceed in a commercially reasonable manner, and the right of the secured party to recover collection costs (including attorney fees). 118

Disposition of collateral has given rise to much of the Article 9 litigation, and received considerable attention under revised Article 9. Section 9-610 allows sale with or without commercially reasonable preparation, as a unit or in parcels, and at any time and place and on any terms, but all aspects must be commercially reasonable. 119 The secured party may purchase at a public sale, or at a private one if the collateral is subject to standard price quotations. 120

The disposition sale carries all warranties of title, possession, quiet enjoyment, etc., as would be applicable to any voluntary sale of similar property, 121 but such warranties are also subject to disclaimer by the usual means. 122

Section 9-611 provides new requirements for the secured party’s notice of disposition. The secured party must send a reasonable authenticated notification of disposition to the debtor, any secondary obligor, and certain other secured parties if the collateral is other than consumer goods. 123 This presale notice is unnecessary for perishable goods or goods threatening to decline rapidly in value or sold on a recognized market. 124 Most of this is similar to old Article 9. 125

Section 9-612(a) provides that whether the notice of disposition is sent within a reasonable time is a question of fact, but section 9-612(b) creates a new “safe harbor” rule. “In a transaction other than consumer transaction, a notice of disposition sent after default and 10 days or more before” the sale is timely. 126 This ten day rule is a safe harbor, not a minimum; 127 in some cases less than ten days’ notice may suffice. The exclusion of consumer transactions was part of the consumer issues compromise, in which there was agreement that some issues would not be addressed; 128 there is no inference that consumer transactions require more than ten days’ notice.

For the first time, at section 9-613 the revised Article 9 provides specific criteria for a notification of disposition of collateral (for transactions other than consumer goods transactions), and a sample form:


Except in a consumer-goods transaction, the following rules apply:

(1) The contents of a notification of disposition are sufficient if the notification:

(A) describes the debtor and the secured party;

109. Section 9-503, 9-518, 9-626. A debtor’s first claim does not itself impair the effectiveness of a valid filing. Id.

110. id.


112. Section 9-610(b). (c), (f). See also UCC §§ 2-312 through 2-317 (sales of goods).

113. See, e.g., UCC §§ 2-316 and 2-317, 2-718 and 2-719.

114. Section 9-611(a)(o). See also § 9-611(c) (secured party request for information on other secured parties).

115. Section 9-611(d).

116. See old § 9-504. But § 9-611(e) is new.

117. Section 9-613. Cf. old § 9-504(3), requiring only reasonable notification.

118. Section 9-617, Official Comment 3.