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UCC Article 9 Revisions Move Toward Summer 1998 Approval

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UCC Article 9 Revisions Move Toward Summer 1998 Approval, Pt. I

By Alvin C. Harrell

Code (UCC) Article 9. The meeting was chaired by Drafting Committee Chair William M. Burke, in conjunction with Reporters Steven L. Harris and Charles W. Mooney, Jr. It was announced that the next (and expected final) meeting of the Drafting Committee was scheduled for March 20-22, 1998, in Philadelphia. This article describes the February, 1998 meeting. The views expressed are solely those of your author, and all issues noted were subject to subsequent reconsideration by the Drafting Committee.

Chairman Burke reported that the previous draft was presented to the ALI Council in December, 1997, and was unanimously approved, subject to a few remaining unresolved issues. Final presentation to the ALI membership was expected in May, 1998, with a final reading to the National Conference of Commissioners on Uniform State Laws (NCCUSL) in the summer of 1998. On July 30, 1998 NCCUSL approved the new uniform text, subject to final stylistic revisions expected out in October, 1998. The final draft should be consulted to determine the ultimate outcome of the issues discussed herein.

Professor Marion Benfield, Chair of the Drafting Committee Consumer Issues Subcommittee, reported early in the February meeting that the Consumer Issues Subcommittee had met with creditor and consumer representatives for two and a half days in an effort to resolve the remaining controversies over the proposed consumer provisions. He reported that issues were still unresolved, but that progress was being made, with further details to be provided later. It was reported that several compromise solutions had been offered by various parties. Later in the meeting, it was announced that a breakthrough had been achieved, in the form of a compromise between consumer and creditor representatives (see infra Pt. XVI.). Chairman Burke noted that these have been the most contentious issues confronted by the Drafting Committee, and again thanked Professor Benfield and the Consumer Issues Subcommittee for their efforts.

II. Investment Property

“Delivery” has been substituted for “possession” for purposes of perfection, under sections 9-203(b) and 9-311. Authority to repledge is inherent in the concept of “control” under section 9-207. On page 65 of the January, 1998 draft, there is a reference to the governing law choice by the parties (section 9-305; see also section 8-110). Conflicting control (section 9-324, pages 107–108) interests rank equally, as under previous section 9-324(3), but this draft moves toward a first-in-time rule, based on the time of obtaining control. This remained, however, an open issue and Professor Mooney suggested that further consideration be given the question.

The effect of the UCC Article 8 protections is dealt with at section 9-328(b), generally deferring to Article 8. A list of these protections (sections 8-115, 8-502, 8-503(e), 8-510, and 8-511) appears in Reporters’ Comment 4 at the top of page 114 of the January draft.

Section 9-611 (pages 194-95) deals with the required notice of disposition of collateral. This draft includes revisions to section 9-611(b), providing that the notice need not be given if the collateral is perishable or threatened with an immediate decline in value (section 9-611(c)). Other authenticated notices of disposition

1. References herein to Article 9 section numbers are citations to the January, 1998 draft unless otherwise noted.
2. All page numbers herein refer to the January, 1998 draft.
may be required, unless the collateral is consumer goods (section 9-611(b)).

An expanded comment on "enforceability" appears at page 236. "Control" is defined at section 8-102 (page 236–37 of the January draft). Recent changes to section 8-102(d) clarify the issues when a third party has "control" on behalf of the secured party. Comment 4 provides a number of specific examples:

Right of purchasers are governed by section 9-303 (page 245 of the draft). The "old transfer of "delivery" language does not comport with the new indirect holding system, so the concept of delivery has been deleted at several points. A new Example 6 at page 249 (Comment 3) il-

Illustrates the effect of adverse claims. Does "control" priority care into pro-
ceeds, or should Article 9 revert to a first-in-time rule in those circumstances? Sec-
tion 9-111(c) (pages 94–95) provides for controlpriority to carry forward into cash proceeds. See section 9-309(c)(1) (cash proceeds), which involves a division of proceeds in the form of chattel paper, negotiable documents, instruments, investment property or letters of credit rights. See section 9-109(c)(2). However, these proceeds claims would be junior to a claim against such property as original collateral, e.g., an instrument with "control" over such property would prevail. If security interest in such property is perfected by a means other than filing, conflicting security interests in the pro-
ceeds of such collateral would rank in priority according to the time of filing, under section 9-310(d) (page 90).

III. Perfection by Possession

Section 9-311 (top of page 79) is de-
signated to accommodate mortgage ware-
housing practices. This will allow perfection by possession when the collateral is delivered to the secured party. An authenti-
cation or agreement of the holder is not required in such circumstances. Cf. sec-
tions 9-311(c)(1), (2), (3) (otherwise requiring authentication or agreement unless the collateral was delivered by the secured party).

Regarding certificate of title goods, see section 9-311(b), providing for per-
fection by possession of certificate of title goods only as allowed under section 9-314(e), (i.e., where the security inter-
est is perfected under a certificate of title law at the time of repossession).

IV. Description of Consumer Collateral

Section 9-111(e)(1) (pages 34–35) provides that a description of collateral by "type alone" is insufficient with re-
gard to consumer goods (as well as vari-
ous types of investment property, i.e., se-
curity entitlements, securities accounts, and commodity accounts). Thus "consumer goods" would be inadequate as a description. Professor Michael Greenfield argued that even greater specifici-
ty would be required, so that, e.g., a collateral description as "jewelry" should not be sufficient. This would require an itemization of each specific item by in-
dividual description (e.g., gold Rolex watch, silver trim and band). It was noted that this would require a subjective analy-
sis by each loan officer to determine if each item of collateral was sufficiently described. It was also noted that the Drafting Committee had previously re-
jected Professor Greenfield's approach in favor of a middle ground that would al-
"low "all jewelry" descriptions as mean-
ingful language sufficient for the con-
sumer to understand what is being en-
cumbered. Professor Greenfield's ap-
proach would create additional lender un-
certainty that might encourage increased use of warehouse transactions and other possessor security interests (where collateral descriptions are not an issue). But consumer representatives expressed con-
cern that overly broad collateral descrip-
tions could full consumers into encum-
bering more property than they realize. The consumer issues are "compromised" (otherwise noted infra at XVII) calls for deletion of the proposed comment saying that an "all jewelry" description is sufficient; under the compromise the Re-
mark 9 Comments are to include no consumer examples. This will leave the

issue for further development by the courts.

V. Software Financing Transactions

These transactions involve an inter-
face between UCC Articles 2, 9 and 9. Typically they involve nonexclusive soft-
ware licenses subject to termination by the licensor under terms of the license (an Article 9 "payment obligation"). A threshold question is whether this payment obligation is "secured" by a termi-
nation right so as to be a security inter-
st. There is a consensus that the answer is no, and this allows several resulting issues to be resolved. Steven O. Weine had previously distributed a memo of January 12, 1998, reviewing these issues and identifying (and answering) four ba-
sic (and relatively uncontroversial) ques-
tions:

- Does revised Article 9 apply to the creation of such a payment obligation? (No)
- Does revised Article 9 apply to the sale of such a payment obli-
gation? (Yes) This would be a sale of an account or general in-
tangible.
- Can the holder of the payment obligation assert purchase money security interest (PMSI) priority? (Yes)
- Does the holder of the payment obligation need PMSI priority? (No)

These uncontroversial points were fol-
lowed by discussion of more difficult is-
sues, such as whether Article 9 should recognize these payment rights, under a nonexclusive license that contains a "ter-
mination on default" provision, as a varia-
tion of chattel paper. As noted, there is a consensus that a termination right alone does not constitute interest under Article 9 (this is a predicate to an-
swering the four basic questions as noted above). But treating such a right like chat-

tel paper would provide protection to cer-
tain transferees (including Article 9 se-
curred parties) as against prior claims. If a termination right is not a security interest, how does a lender to the licensor find out (efficiently) that its security inter-
est in the licensor's rights is subject to termination by the licensor? This must be regarded as a risk of doing business without requiring due diligence on the part of such a lender.

The primary issue is the treatment of a sale of the payment obligation and ter-
mination right by the licensor. This would be the sale of an account or general in-
tangible, and was proposed to be under Articles 9 and 9. Bob Zadek argued that the proposed approach was too broad and single Article 9 self-help remedy, not-
ning that there is no breach of the peace issue in this context. It was noted that the debtor hasample to the under-
current law for wrongful repossession (or termination). Bob Zadek also argued that just because Article 9 may make a sale in this regard, it is not reason for Article 9 to do so. A motion was made that Article 9 should follow the Article 2 model, to the extent a secured party is in a position like a licensor. The motion failed decisively.

VI. Electronic Chattel Paper

This issue includes definitional pros-
visions (sections 9-102(27), (33), (54)), perfection (sections 9-102A, 9-311, and 9-312), and priority (section 9-327). These provisions recognize the concept of intangible chattel paper and its "self-help." The purpose is to create a "control" concept for electronic chattel paper, equivalent to possession for traditional chattel paper. This reflects the approach made at the previous Drafting Com-
mittee meeting to focus on the economic function of the chattel paper rules, rather than being limited by a precise word use.

This casts rules for governing the new forms of electronic chattel paper, including all elements of traditional chattel paper except the paper document.

In this view, possession of the paper is a mere proxy for certain attributes that are now revealed in an electronic world in different form. The question thus is what additional chattel paper rules can be translated into the elec-
tronic environment.

Section 9-110A would recognize "control" by a secured party if all copies of the records or other evidence of the electronic chattel paper "permanently identify" the specific copy as the as-
signed. (Similar but more elaborate) rules apply where a single copy of the record exists, it indicates that it is the only copy for which it is used, and it is used exclusively by the secured party, and it cannot be dup-
licated without identifying the secured party as the assignee. This is an effort to create a functional equivalent of chattel paper, without interfering with traditional chattel paper transactions. The Report-
ers were widely complimented on the proposal, though Professor Mooney noted that it is another exception to the filing rules. There was also some concern that this approach (and permitting "permanently identify") could inhibit technological advances. The Reporter agreed to revise the language to permit maximum flexibility in this regard. Linda Hayman questioned whether these rules should be expanded to cover electronic accounts. Professor Harris agreed there are similarities but noted there is no pressing need to change the rules for accounts at this time.

VII. Agricultural Finance

This area of law involves new defini-
tions (sections 9-102a(3), (21) and 9-106); agricultural liens (governing law—section 9-302, proceeds—section 9-316), and time of default—section 9-606); Production Money Security In-
terest (PMSI) priority (sections 9-10A, 9-320A, livestock purchase money se-

5.

The purpose is to create a "control" concept for electronic chattel paper, equivalent to possession for traditional chattel paper. This reflects the approach made at the previous Drafting Commi-


te paper, and livestock are deemed to include aquatic goods (page 29 of the draft) (fish would be considered live-

stock, for example). Agricultural liens
QUARTERLY REPORT

VIII. Filing Issues

Section 9-523(b) (page 171) deals with the required response of the filing office to search requests. Alteratives A and B differ slightly but both would accommodate most current practices and emerging electronic filing issues. Alteratives C and D differ and are not acceptable by the bankruptcy bar. Alternatives B, C, and D differ slightly but both would accommodate most current practices and emerging electronic filing issues. Alteratives A and B differ slightly but both would accommodate most current practices and emerging electronic filing issues. Alt. C could not be accommodated by the bankruptcy bar. Alternative B was recommended by the Committee. Section 9-523(b) (page 171) deals with the required response of the filing office to search requests. Alteratives A and B differ slightly but both would accommodate most current practices and emerging electronic filing issues. Alteratives C and D differ and are not acceptable by the bankruptcy bar. Alternatives B, C, and D differ slightly but both would accommodate most current practices and emerging electronic filing issues. Alt. C could not be accommodated by the bankruptcy bar. Alternative B was recommended by the Committee.

The meeting next considered whether a final financing statement with a company's true and accurate address should be sufficient for perfection. Bob Zadek noted that some lenders are using multiple trade names on financing statements so as to keep others from using the UCC searches to obtain lists of the lender's customers. The Drafting Committee voted that an error in the secured party's address is not fatal to perfection (though it may prevent the lender from receiving notices sent to the erroneous address). There was a concern that a conflict of interest may arise with regard to errors in the secured party's address on the financing statement. Alternative A was approved by the Drafting Committee.

The meeting then discussed the effectiveness of a financing statement signed by an agent for lenders who may change over time. Does this enable later creditors to be added to the agent's perfection, so as to avoid lack of actual knowledge by others who would otherwise have a priority interest? It is possible, but the issue is whether it is customary to add a party to a financing statement without the consent of the named party. Bob Zadek noted that it is possible to add an agent to an existing statement in a timely manner. This is a practical solution. The proposed language is consistent with the Committee's recommendation that changes in the secured party's name or address should not affect prior filings or perfection by the creditor.

XI. Discharge of Real Property Mortgage Notes

Professor Fred H. Miller, Executive Director of NCCUSL, addressed the issue, noting that the Permanent Editorial Board of the UCC is split on this issue and has expanded the scope of the 1984 Drafting Committee to consider this issue even though the issue is governed by UCC Article 3 on section 3-902. The real estate bar apparently wants some changes to section 3-902 so that the ability to use a substitute mortgage note is not codified in the statute. The proposal was approved. Art. 9 Drafting Committee to consider this issue even though the issue is governed by UCC Article 3 on section 3-902. The real estate bar apparently wants some changes to section 3-902 so that the ability to use a substitute mortgage note is not codified in the statute. The proposal was approved. At page 153 (section 9-511) appears the duty to send a termination statement on request of the debtor, and authority for the debtor to do so if the creditor does not comply. In consumer transactions, there is a duty to terminate within one month of payoff or within ten days of a request for termination (section 9-511(b)). It is not clear in some cases the duty to terminate arises only on request of the debtor, and again the secured party must send a termination statement within ten days of the debtor's request. A debtor filed termination statement must identify itself as such, and under both provisions the system will not result in deletion of the financing statement. Thus a searcher will find both the financing statement and the debtor-filed termination statement and will need to inquire further to confirm the true status of both.

XI. Consumer Issues—Statutory Damages

Section 9-624(d) (pages 220-221) deals with any judgment damages for creditor violations. Section 9-624(d) provides that the statutory damages will be reduced by any award of actual damages. Section 9-624(d)(2) specifies that this reduction will only be done to the extent actual damages are actually recovered (as opposed to potential liability). Under section 9-607(c), a change in the secured party's address is also a non-event for perfection purposes.

Don Rapon urged that the "all assets" box be removed from the model form financing statement, on grounds it will involve "mindless" or routine checking of the box when it is not appropriate, thus requiring rule makers to make additional unnecessary exceptions. There was no objection to the "all assets" collateral description, merely a recommendation that this box not be included in the model forms. A representative from Bankers Systems noted that the box could and probably would be added by commercial forms. A member of the Committee noted that the proposed language is consistent with the Committee's recommendation that changes in the secured party's name or address should not affect prior filings or perfection by the creditor.

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Don Rapon argued that the proposed distinction between real-estate secured and other notes is unwieldy and would represent a fundamental shift in the approach to note holder in due course rule. Several commentators wondered whether the real estate bar fully understands the implications of the proposed change. Don Rapon Proposed a Drafting Committee Task Force to consider this issue further and report at future meetings. This was approved.

XI. Definitions

Changes to the definition of "governmental unit" at section 9-102(3) clarify that it includes state authorities which issue debt obligations exempt from federal income tax. "Public finance transaction" is defined to require issuance of bonds with a maturity of at least 20 years, by a governmental unit. The definition of "security" and the related changes are intended to clarify that banks are not governmental units. Generally speaking, under the revision, state governmental and proprietary public finance transactions will be subject to Article 9, providing legal clarity for such transactions.

XII. Enforcement

The "low price" dispositional rules is illustrated in a comment (section 9-614, Comment 6, page 206), and the Drafting Committee solicited advice on the proposed language for this comment. The test inherently uses ambiguous standards, and probably adds little to a judge's discretion under current law. Use of language such as "significantly below" is a "reasonable range of prices" seems impermissibly, even though the basic concept of the "low price" definition is a matter of concern that is in the eye of the beholder no matter how much it is explained in the commentary. Don Rapon outlined a list of nine relevant factors that should be considered by the court, for possible inclusion in the commentary.
A motion was made to include these transactions in Article 9, and treat them the same as payment intangibles. There would be some impact on Article 10, but its result would not become effective until the new article is approved. Current law on this issue is unclear and this proposal would resolve these issues, but some observers viewed it as an Article 3 problem and were hesitant to alter this intra-Code relationship without further consideration. The Drafting Committee referred the issue to the task force considering other Article 3-Ar-
ticle 9 issues (see supra Pt. X).

Attention was given to a new Comment A to section 9-328 (page 114), dealing with the impact of a junior secured party's general knowledge of a prior security interest (under current law this does not prevent the junior secured party from taking a check as holder in due course, even if the check represents proceeds from the prior security interest). Specific knowledge that the check is subject to the proceeds claim of a prior secured party would defeat holder in due course status. Revisions to "clean up" the language of this comment are being considered.

XIV. Consignments

Claims against proceeds of consigned or otherwise sold property are covered at section 9-603, Consign-
ment 6 (page 182) and section 9-614 (pages 204-05). Suppose there is a consignee who subordinates to a security interest, and the secured party forecloses and there is a surplus? The consignor (as owner) is entitled to the surplus, and claims junior to the consignor (the debtor consignee) cut off. Is the secured party required to seek out the consignor? The consignee is treated like any other junior party (page 203).

XV. Transition Rules

At page 232 the January 1998 draft provides a blank space for transition rules. A draft of proposed transition rules was included as an addendum to the Transition Task Force meeting. Various conflicting views are included in this draft. Transition rules for the 1962, 1978 and other revisions were appended to this report for comparison purposes. The changes regarding the place of filing are among the issues considered. Current filing under old law would continue to be effective until their scheduled lapse date, but any further continuation thereof would have to be filed according to revised Article 9 (e.g., for a security interest in goods, in the jurisdiction where the debtor is located, with certain exceptions for agricultural liens, goods covered by a certificate of title, and ore, coal, and gas collateral). The Drafting Committee then discussed an initial delayed effective date for revised Article 9 (e.g., January 1, 2001), so that various initial enactments by different states would have a consistent effective date. There was agreement that continuation statements timely filed before the new effective date would continue to be governed by old law. Subse-
quent continuation statements filed under the new law would relate back to the original filing (even if in a different state) for priority purposes. Several practical issues were raised and discussed, indicating that the transition period will provide some challenges for secured parties. However, these challenges do not appear to be undue burdensome.

One of the remaining difficult issues is the effect of a new-secured-property acquisition under existing Article 9. Should after-acquired property be subject to the new filing rule immediately upon the effective date? Harry Sigmund suggested a four month grace period as provided with regard to other concerns, and Bob Zackel spoke in favor of this. Should filing under old law remain effective with regard to after-acquired property until lapse under old law (as for other collateral)? Judge Hillman moved for adoption of the latter rule, and this was approved by the Drafting Committee. This has the advantage of not carving out separate rules for different collateral, and is easy to understand and implement. It also allows parties to do nothing until they would otherwise be required to file under old law, at which time they will hopefully be made aware of the new law.

Other transition rules involve collateral (e.g., commercial tort claims) or transactions (e.g., agricultural liens and sales of out-of-state equipment). Each is subject to Article 9, or transactions or collateral newly subject to perfection by filing. These would be subject to a one-year transition period. Brad Smith, Chair of the Transition Task Force, moved that in newly covered transactions (e.g., health care receiv-
ables), after-acquired property should also be subject to a one-year transition period before being subject to the new filing rules. This carried unanimously.

XVI. Consumer Issues

Bill Burke then announced the compromise on consumer issues, as docu-
mented in a Memorandum of Under-
standing distributed at the February, 1998 meeting (see appendix to this article). There had been previous efforts to base a compromise on a matrix of remedies designed to provide consumers with protections commensurate with the nature of the violation, but this did not find agreement. The consumer and creditor representa-
tives finally were able to reach a consensus at the February, 1998, meeting. To some extent this returns to the pattern of current Article 9 that has been successful in the Drafting Committee as a package. The Memorandum of Understanding issued at the February, 1998 meeting (see ap-
pendix to this article) provided the framework for the final Article 9 consumer is-

sue revisions. Both sides (consumer and creditor re-
presentatives) agreed to adopt a state-
tement to the effect that revised Article 9 is a fair and balanced package that should not be upset by nonuniform amendments. The auto finance companies were re-
ported to be willing to actively support the proposed revisions; the consumer rep-
resentatives agreed to support a state-
tement or lobby for nonuniform amend-
ments. All parties applauded the good faith and extensive efforts of Professor Beal's staff, in particular the com-
mittee and of the consumer and creditor re-

representatives. To reach this agreement, in view of how far apart these parties have been on most issues, was a very impres-
sive achievement that should pave the way for enactment of revised Article 9.

In your author's view, this compromise will:

1. politically facilitate enactment in most states;

2. resolve issues that would other-

wise be resolved against the inter-

est of national consumer and creditor interests during the state enact-

ment process;

3. provide smaller lenders the same protection as large creditors (by eliminating certain proposed onerous rules coupled with class action protection that would have benefitted primarily large lenders);

4. largely preserve current law in most states (with some rela-

tively modest exceptions);

5. constitute an immense improve-

ment over some of the burden-

some and costly proposals that were previously seriously consid-

ered and even approved by the Drafting Committee;

6. leave resolution of many con-

sumer issues for further devel-

opment in the courts, pursuant to the common law model (where such issues belong if there is no consensus); and

7. constitute a major breakthrough that may be viewed as saving the Article 9 revision effort, and poss-

ibly Article 9 itself.

The proposed consumer issues com-

promise was unanimously approved by the Drafting Committee at the February, 1998, meeting, with one abstention. The compromise was, however, only a state-

ment of principles, which still had to be translated into legis-

lation. The technical and com-

promising efforts of the Drafting Committee and of the Congress will be required to complete this effort. Further consideration of such lan-

guage will remain important. But for those of us who feared that no compromise was possible in the multi-layered, ac-

tively contested, and contentious issues, the February, 1998 compromise ranks as an achievement of the highest order. Congratulations are due to all of those involved.

XVII. Trusts

At page 71 of the January, 1996 draft, paragraph (9) (section 9-308A) provides for automatic perfection for a security in a beneficiary interest in a trust. The Drafting Committee considered whether this should be deleted in favor of a filing requirement. The change was approved by the Drafting Committee.

XVIII. Certificates of Title

Section 9-314 (pages 84-86) has pro-

vided two alternatives regarding the ef-

fect of issuance of a second cert/ate of title in another jurisdiction. Alternative B was approved, providing that the sec-

urity interest in the prior state would be subordinate to a security interest per-

fectd on the new certificate, but would not become perfected.

Section 9-309A (pages 73-74) pro-

vides that even if certificated goods are used (as opposed to consumer goods) the security interest is to be per-

fected by certificates of title lien entry, with regard to a security interest for sale or lease or out on lease. The scenario

1. Representations of large creditors who vocally opposed consumer protection clauses with class action pro-

tection and nonuniform amendments. Several negative responses in the public comment already have been received. There appears to be no real support for Article 9.
discussed is where the owner/operator rents out his or her equipment as part of selling his or her services; concern was expressed that this might be viewed as requiring perfection by filing rather than certificate of title perfection; this is apparently intended, and it was agreed to specify this in a comment.

Section 9-30A(3) allows a repossessing secured party to retake the collateral in its name for purposes of resalable, without the retitling constituting an Article 9 disposition. There was a consensus that the language at sections 9-30A(3) should be clarified to provide that it applies only post-default, while section 9-30A(4) and (b) apply to pre-default perfection.

XIX. Conclusion

Many of these issues were the subject of further refinement during the March, 1998 meeting of the Drafting Committee, as discussed in the next article, and even later, as revised Article 9 was polished over the summer of 1998. But the February, 1998 meeting should always be remembered as the occasion when the consumer and creditor representatives reached agreement on the provisional compromise to pave the way for a new Article 9.

Appendix

Memorandum of Consumer and Creditor Understanding of Proposal on Consumer Issues (Subject to final language)

(Note: language in brackets is suggested by consumer representatives; language in [braces] is suggested by creditor representatives.)

1 Statutory damages as per current law (for all violations of Part 6 except the new notice of 9-61A-A)
2 Attorneys' fees as per current law.

3 Silent on class actions.
4 No bona fide error defense.
5 No partial strict foreclosure for consumer secured transactions.
6 Complete silence on absolute bar. (Rebuttable presumption language for commercial transactions only.) Comment a: [Under former Article 9 rule c(1)(c)(ii), the language at section 9-30A(c) should be clarified to provide that it applies only post-default, while section 9-30A(4) and (b) apply to pre-default perfection.]
7 Pre-sale notice as in the draft (with safe harbor form) but eliminate material fairness defense for minor errors not substantially misleading. For information included in the safe harbor notice but which is not required by Article 9, there would be a defense as to that information if it is not misleading as to Article 9 rights and remedies. This defense applies only to the effect of the non-required language under Article 9.
8 Post sale notice must still include calculation as below, but a minor error not seriously misleading defense is OK. Add post sale notice to list of nonwaivable sections.
9 Gross balance Plus proceeds of sale Net balance Known expenses (not itemized) Known rebates and credits (lumped together but types listed) Net balance Legend a: "Other rebates, credits, and expenses may affect this total. For complete information, call or write..."
10 Delete right to reinstatement altogether from the Article 9 draft.
11 Post sale waiver by consumers will be allowed by agreement, but only can waive right to receive notice of disposition and notice of right to redeem.
12 No codification of dual status or mixed collateral rule for consumer (keep current law).
13 Comment to convey the following concept: "A low price [may] suggest that a court more carefully scrutinizes all of the aspects of the sale, including the method, manner, time, place and terms to ensure that each aspect of the sale was commercially reasonable." (To appear instead of comments that say price is not a factor.) This comment applies to both commercial and consumer transactions.
14 Change drafting as per Consumer Task Force suggestion in 9-403 and 9-404 up to FTC holder rule is in effect even if the legend is not on the document, and so the FTC prevision regarding existence and amount of affirmative recoveries are preserved. (Per creditors' request, this would be clear that it applies only to transactions covered by the FTC rule applies.
15 Description of collateral: Repeal move comment that says "all jewelry" is OK. Comments to give no consumer examples.
16 BIOCOB. Either do not redefine in Article 9 or insert language in Article 2 draft (this may be 2-505 and 2-824).

1. The Uniform Commercial Code (UCC) Article 9 Drafting Committee (Drafting Committee) met for the 14th time on March 22-23, 1998 in Philadelphia, pa, to consider the March, 1998 draft of proposed Article 9. This was the last regular meeting of the Drafting Committee prior to the National Conference of Commissioners on Uniform State Laws (NCCUSL) 1998 Annual Meeting, essentially concluding a process that began nearly a decade ago with the formation of the Permanent Editorial Board Article 9 Study Committee. Drafting Committee Chairman William M. Burke presided, and commenced the March, 1998 meeting by describing the final stages of the American Law Institute (ALI) and NCCUSL approval processes. As of March 20, 1998 it was expected that the latest draft of proposed Article 9 would be sent to the ALI on April 3, 1998 for submission to the ALI on May 13, 1998 during the Spring 1998 ALI meeting in Washington, D.C. Subsequent reports indicate that the draft was approved by the ALI at this meeting. On or about April 15, 1998 the draft was sent to the NCCUSL, Style Committee for consideration at its April 16-19, 1998 meeting. On or about May 15, 1998 the "final draft" was delivered to NCCUSL for consideration beginning on July 24, 1998 at the 1998 NCCUSL Annual Meeting. On or about July 30, 1998 NCCUSL approved the final draft of revised Article 9, subject only to final stylistic adjustments expected to be completed by October, 1998. The changes made subsequent to the May 1998 approval by the ALI considered and approved by the ALI Council in October, 1998. The result can then be introduced for enactment by the states in 1999. The final uniform text will also be submitted to the American Bar Association for consideration and possible approval (though such approval is not required) in 1999. The Official Comments are expected to be available this fall, and technical amendments may be made at any time prior to the ALI Council meeting in October.

Chairman Burke noted that the draft before the Philadelphia meeting (the March, 1998 draft) included proposed language to implement the consumer issues compromise reached at the February, 1998 meeting. The consumer and creditor representatives responsible to this proposed language and the Drafting Committee scheduled votes on these issues at the March, 1998 meeting.

II. Relation to Articles 2 and 2A

Section 9-116 specifically refers to the Article 2 and 2A sections affected (sections 2-505, 2-507, 2-711(3) and 2A-505(5)); rather than providing a more direct reference to security interests arising under these Articles. The general rule is that these Article 2 and 2A security interests have priority as long as the debtor does not have possession of the goods (thereby essentially being limited to the period of transferishment of the goods). The Article 2 and 2A security interests do not have to meet the Article 9 requirements on attachment (section 9-201(b)(3)) or perfection. The rights of the Article 2 or 2A secured party on default of the debtor are governed by Article 2 or 2A.1

It is recognized that this is a short term "fix," that is subsequent revisions to Articles 2 and 2A may obviate the entire issue by eliminating these security interest entirely.

If there is a conflict between the Article 2 or 2A security interest and a security interest not created by this debtor, (e.g., a conflict between the security interest of a buyer under section 2-711(3) and the security interest of a seller under Article 2 or 2A), the seller's security interest (if perfected) will prevail.2 Section 9-30A(3) (page 72 of the draft) provides for perfection upon attachment of a security interest arising solely under section 2-401, 2-505, 2-711(3) or 2A-505(5). Section 2-326 (page 238 of the draft) deals with consignments. It continues to distinguish between "sale on approval" and "sale or return" consignments. An important term is the definition of "consignment" at section 9-102(a)(13) (page 8 of the draft). This covers any transaction where goods are delivered to a merchant for the purpose of sale and: (1) the merchant deals in goods of that kind under a name other than the name of the person making delivery, is not an auctioneer, and is not generally known to be substantially engaged in selling the goods of...
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others; (2) the value of the goods is $1,010 or more; (3) the goods are not consumed immediately before delivery. If a security transaction does not create a security interest.

Section 9-313(e) (page 83 of the draft) deals with the entrenchment issue, providing that a security interest in collateral after sale, lease, license, exchange or other disposition, unless (among other exceptions) the security interest is continued by agreement under section 2-403(2). This is merely a clarification of current law.

Section 9-313(c) (page 237 of the draft) deals with assignments of accounts, allowing such despite an agreement to the contrary. There is a possible conflict with section 9-404, a revision to section 2-310 that provides that in such case section 9-404 prevails.

III. Investment Property

Section 9-313(c) (page 118 of the draft) provides that conflicting security interests (where both are perfected by control) should rank according to time, or equally. A preference was expressed for determining time using the time of obtaining control (the traditional "first-in-time" rule). This is subject to exceptions at sections 9-334(c) and (5) where securities interstices have claims which are generally given priority.

Section 9-312(c) (pages 81-82) provides that once control is obtained, that control continues until the secured party loses control and: (1) the debtor acquires possession of the collateral if it is a chattel article; or (2) the issuer registers the security interest in the name of the debtor as registered owner (if it is an uncertificated security). If (1) or (2) of the collateral is not itself a chattel article becomes the entitlement holder. Thus a secured party who has "achieved control" would retain that status unless and until one of the above affirmative tests (regarding possession or re-registration of the security or security entitlement) is met.

In effect, once a secured party is perfected by control, the secured party remains perfected even if control is lost, unless (1) the debtor acquires control; this once again by perfection by control is achieved, the secured party need not prove continued control unless control has been returned to the debtor.

Subsection 9-311(d) (and e) (page 37) provides rules governing descriptions of collateral in security agreements and similar collateral. Section 9-311(d) provides that a description in sufficient detail if it describes the collateral as a security entitlement, securities account, account or commodity account, or as investment property, or if it describes the underlying financial asset or commodity contract. Section 9-311(e) provides that a description of the collateral of type of collateral alone is not sufficient if the collateral is a commercial tort claim or if, in a consumer transaction, the collateral is consumer goods, a securities entitlement, a securities account, or a commodity account. This only applies to descriptions by type of collateral as defined in the UCC (otherwise permitted at section 9-111(b)(3)). This would still apply for a specific listing of the collateral or its "category," under section 9-111(b)(1) and (2). However, as noted infra at Part XIII, this issue was reconsidered later in the code in the context of consumer transactions.

Section 9-313(a)(c) (page 208 of the draft) provides that a secured party's disposition of collateral after default cuts off subordinate security interests. This protects purchasers at a repossession sale. Professor Moorey proposed that this rule be extended to cover co-equal security interests in investment property (along with a rule requiring equal sharing of the proceeds by all co-equal secured parties). This would allow a buyer to take free of subordinate and co-equal security interests in investment property at a repossession sale. This would, for example, protect the buyer where two secured parties with "control" have equal priority. Upon consideration by the Drafting Committee, this proposal was approved. Section 9-311 (page 120 of the draft) may provide some protection to the buyer.

The right of the secured party to repledge collateral is discussed in Reporter's Comment 5 to section 9-201 (page 56 of the draft). The comment states that perfection by control is achieved, the secured party need not prove continued control unless control has been returned to the debtor.

As noted infra at Part XIII, this issue was reconsidered later in the code in the context of consumer transactions.

In section 9-311(d) (and e) (page 37) provides rules governing descriptions of collateral in security agreements and similar collateral. Section 9-311(d) provides that a description in sufficient detail if it describes the collateral as a security entitlement, securities account, account or commodity account, or as investment property, or if it describes the underlying financial asset or commodity contract. Section 9-311(e) provides that a description of the collateral of type of collateral alone is not sufficient if the collateral is a commercial tort claim or if, in a consumer transaction, the collateral is consumer goods, a securities entitlement, a securities account, or a commodity account. This only applies to descriptions by type of collateral as defined in the UCC (otherwise permitted at section 9-111(b)(3)). This would still apply for a specific listing of the collateral or its "category," under section 9-111(b)(1) and (2). However, as noted infra at Part XIII, this issue was reconsidered later in the code in the context of consumer transactions.

A new definition of "Healthcare Receivables" replaces the old one in section 9-102(c) (page 22 of the March 1999 draft), as "a right to payment arising out of the furnishing of healthcare services or supplies to the extent covered by a perfect health care provider or insurance policy or other third-party payor." Such receivables are deemed to be within the definition of accounts. The purpose is to bring within Article 9 healthcare receivables that would otherwise be excluded under the insurance exclusion.

The language at section 9-112 (Scope) subsection (a)(3)(A) (page 39 of the draft) was revised to exclude from the insurance exclusion (hereby including in Article 9) any healthcare receivables of a provider of an interest in a healthcare insurance receivable, and any subsequent transfer of the right in payment.

As noted supra at section 9-111 (Scope) subsection (a)(6)(A) (page 39 of the draft) was added to provide for perfection upon att

VI. Possession Purchase Money Security Interests

Section 9-322 (page 102) covers the priority of a possessory money security interest (PMI). Thomas S. Heimendinger again raised (through a letter dated March 16, 1998) certain issues relating to the impact of these rules on forwarders, non-merchant common carriers, and customs brokers. Cross-collateral claims of freight forwarders may be at risk as a competing security interest perfected by filing. Possession purchase money security interests are priority. In order to provide for a healthcare organization, the National Association of Insurance Commissioners (NAIC) has recommended that the NAIC adopt a form of the Article 2 security interest as against the filed Article 9 PMI. Professor Moorey noted that this would extend loan of non-economic property, changing the current law (though current law is not clear). This is, however, consistent with current expectations that a merchant buyer's inventory is not perfected before delivery to the debtor, unless such claims are cut off under section 9-931(1) (which arguably requires intent).

The consensus was that the language in the March, 1998 draft is sufficient. Under this language a possession PMI and a PMI perfected by other means (e.g., filing) would have co-equal priority until possession is released to the chattel articles. PMI is defined as section 9-104 (23 of the March 1998 draft); this generally tracks current section 9-107 (except for deleting surplus language relating to "use of" the chattel articles). The Drafting Committee rejected this deletion and voted to retain the former language, to make clear that no substantive change is intended.

VII. Revised Article 9 Part 5 (Filing)

Section 9-501 (2) (page 138 of the March, 1998 draft) provides brackets to highlight legislative choices. Section 9-502(c) (page 140) incorporates brackets around "time to be cut", with regard to coverage by a real estate mortgage. The question is whether "time to be cut" should be treated as personal property (goods) and therefore not be subject to a real estate mortgage. The decision was to delete the bracketed language and leave time subject to a mortgage "until it is cut off." Regarding section 9-503 (name of debtor and secured party subsection (a)(4) (page 142)); Should this be changed to "auction or organization entity," to address problems created by common usage? "Organization" is defined in the draft Article 9. It may be used more broadly by filing officers. "Organization" was approved. Bracketed language "presence of" (at section 9-501(b)(1) (page 143) was removed pursuant to a vote.


7. See also ABA-ULSA Draft Article 9 Model Clause Commentary 22, 46, 72, 77 (1988).
Section 9-508 (page 144) was revised to provide that "minor errors or omissions" in the financing statement are not fatal. Steven W. Byers, the drafter of this section, believed "minor" in favor of other language but the March, 1998 language was retained. Should section 9-508 (minor errors are not fatal) be changed to be like section 9-506 (unnecessary, an error, or be applied to collateral descriptions (e.g., serial number errors)? For discussion purposes, Harry Sigman proposed an amendment that, among other things, would require to perfect security interest in the debtor's name, on at least one day after the debtor sent to the secured party an authenticated demand. The ten day deadline is in brackets in the March, 1998 draft, because of concern that ten days is inadequate in view of the change from a device for the trigger being an attachment (received by the secured party to the time notice is "sent by" the debtor). There was a consensus that in light of this change ten days is not adequate and the deadline should be increased. The drafting Committee voted to extend this to 20 days. There are analogous rules regarding release of "control," as shown in Section 9-206 (pages 56-57). Should the ten day rule at section 9-206(b) also be extended to 20 days? The Drafting Committee voted to leave this as ten days.

Section 9-511(b) (pages 150-152) on termination of financing statements is directly applied to certificate of title lien perfection. This is carried over from "Division Question" section 9-511 on page 152 of the March, 1998 draft. Ed Smith expressed concern that this might conflict with state certificate of title laws; he suggested the issue be covered in a comment, not in the statute. Professor Macer noted that section 9-511(b) only requires the creditor to do what is required of it to initiate the relief within the stated time period; the creditor cannot be sure the filing office will complete its work and actually terminate the security interest within the statutory deadline.

Bracketed language at section 9-516(b) (page 158) was deleted, as unnecessary. Nonetheless it is clear that a bankruptcy filing does not (for all period the filing office will complete its work and actually terminate the security interest within the statutory deadline.

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An A. The Article 3/9 Trade Law

A. An Article 3/9 Trade Law

An Article 3/9 Trade Law was previously formed to deal with the situation between Articles 3 and 9, particularly in the area of secured transactions on a non-holder of a negotiable instrument. The Trade Law (in a memo dated March 4, 1990) recommended the sale of articles of Bankruptcy (negotiable, non-nego-
intangible, and intangible) or electronically be covered by revised Article 9, that perfected position be able to receive payment in full and without knowledge that the article was taken over in default of the secured party, giving that purchase position over a competing security interest perfected by means other than possession or control. This would cover both sales and security transactions, but would not require that the purchase take over in the ordinary course of business for or "new value," but it would require that the purchase have prior knowledge that the purchase violates the rights of the secured party. Section 9-328(b) was amended to refer to section 9-328(d) to allow a fast-in-time purchaser to protect itself by "regarding" the instrument. Article 3 section 3-506 was amended to protect the "in-" under the 3-9 concept. There was considerable debate on the last issue of this section and Drafting Committee members expressed some discomfort at making these significant changes to Article 3 (and Article 9) at this stage of the Article 9 revision process. Some felt that inasmuch as the holder in due course rules are primarily Article 3 issues not suitable for the Article 9 revisions. It was noted that the issue can be resolved by a more general Article 9 revision. It was urged that the Article 9 Drafting Committee should address the issues with respect to real estate-guaranteed notes. Professor Mooney noted that the short time remaining before the final Article 9 revision must be interpreted to mean long fundamental changes at this late date in the process. It was proposed that the Article 9 Drafting Committee not act on the pay-
from this section) against a security interest claimed as proceeds of an inven-
tory security interest, if the purchaser gives value in good faith and takes
possession or control in the ordi-
cular course of business, and the chattel
paper does not have a legend indicating a
prior assignment.
IX. PMIS in Software
Should the PMIS rules for goods be extended to cover software? A March 10,
1990 memo from the Reporters reflects a proposal from Steve Weisz to extend the
PMIS rules at section 9-104 to the ordi-
cularly covered software, adding new sec-
tions 9-104(a)(3) and 9-322(g) to effec-
tively this expansion of the PMIS rules.13
This proposal was approved.
Ed Smith moved that the definition of chattel paper be expanded to include soft-
ware to the same extent tacitly included in the amended PMIS rules. This was approved.
X. Transition Rules
A memo of March 19, 1998 from the Reporters was distributed. This memo provides a proposed Article 9, covering transition matters.
The general rule is section 9-703 is that transactions strictly entered into under
current Article 9 will continue to be valid under revised Article 9 but can only be
terminated or enforced, etc. under revised Article 9.
Under section 9-704(a) a security in-
terest enforceable and with priority against a lien under old law, which would
qualify as a perfected security interest under
revised Article 9, will continue to be enforceable under revised Article 9 without further action. Under section 9-704(b)(a), if a consent statement is priori-
ty over a lien under old Article 9 but not under revised Article 9, it will continue to have priority if perfected under revised Article 9 in this order after the effective
date of revised Article 9. It will have

priority after the end of that one year grace period only if it attaches and is per-
fected in accordance with revised Article 9 before the end of that one year period.
Under section 9-705, a security interest
is enforceable but subordinate to a lien creditor under old Article 9 will be per-
fected under revised Article 9, if the new requirements for attachment and perfec-
tion are met, or upon subsequent satis-
faction of those requirements. Under sec-
tions 9-706(a), any action taken under old
Article 9 (except filing a financing state-
ment), which resulted in perfection and
priority, remains sufficient for a security interest that attaches within one year
after the effective date of revised Article 9, but then becomes unperfected unless ac-
tion is taken under revised Article 9. Un-
der section 9-706(b), a filing under old
Article 9 is effective as to collateral ac-
quired under revised Article 9, but only to the extent the filing would be effec-
tive under revised Article 9.
Under section 9-706(c), a filing under
old Article 9 otherwise remains effec-
tive under revised Article 9 (even if a
filing in a place that would be included under revised Article 9 but cannot be trans-
ferred or enforced, etc. under revised
Article 9).
Under section 9-704(a) a security in-
terest enforceable and with priority against a lien under old law, which would
qualify as a perfected security interest under
revised Article 9, will continue to be enforceable under revised Article 9 without
further action. Under section 9-704(b)(a), if a consent statement is priori-
ty over a lien under old Article 9 but
not under revised Article 9, it will continue to have priority if perfected under
revised Article 9 in this order after the effective
date of revised Article 9. It will have

13. See notes at C. Thrall, DCC Article 9 & Economic Re-
12. See id.
11. See id.
10. For example, the February 1999 meeting of the Drafting Committee.
8. For example, the February 1999 meeting of the Drafting Committee.
7. The language of the current draft of the Committee to

an effort to resolve the details of the con-
Institute incorporate similar suggestions in the February, 1998 meeting of the Drafting
Committee. The result was a refined out-
line of the compromise, with certain is-
Sues remaining open for presentation to
the Drafting Committee for resolution. These issues were then submitted to the Drafting
Committee on Saturday, March 22, 1998. Chairman Burke noted that fi-
nal agreement on these issues is essen-
tial to enactment in many states.
A Memorandum of Understanding documenting the consumer issues com-
promise was approved (with one absti-
nation and one modification) at the Febru-
ary 1998 meeting of the Drafting Com-
mittee.15 The Reporters then drafted prop-
osed language, which was circulated to interested parties prior to the March, 1998
meeting. "The consensus and creditor re-
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nounced at the beginning of the deliber-
es, March 22, 1998 meeting that approxi-
mately 21 "open issues" remained unsatis-
15. The language of the current draft of the Committee to

14. See supra note 10 (Epstein).
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15. The language of the current draft of the Committee to

14. See supra note 10 (Epstein).
Known expenses (not itemized)  
Known rebates and credits (tied up together but types listed)  
Net balance  
Legend is a “Other rebates, credits, and expenses may equal or exceed net balance. For complete information, call or write...”  
There is some dispute over the date of the calculation of a re- buttal of unreanted interest. Creditors want to do this protest, outside the notice.  
Delete right to reinstatement altogether from the Article 9 draft. No drafting problem.  
Post sale waiver by consumers will be allowed by agreement, but only with right to receive notice of disposition and notice of right to redeem (not the right to redeem). No drafting problem.  
No codification of dual status or mixed collateral rule for consumers (keep current law). Consumers are satisfied; creditors want any current case law preserved but do not want it codified. Would be difficult but not impossible to do this. Same resolution as item 1: No presumption, and so no notice.  
Comment to convey the following concept: “A low price (may) suggest that a court more carefully scrutinize all of the aspects of the sale, including the method, manner, time, place and terms to en- sure that each aspect of the sale was commercially reason- able.” (To appear instead of comments that say price is not a term.) This comment applies to both commercial and consumer transactions. Consumers want nothing to say price is not a term, but will accept the current law. Creditors want identical rule for both consumer and creditor transactions.  
Change drafting as per Consumer Task Force suggestion in 9-403 and 9-404 so FTC holder rule is in effect even if consumer objects. (Some of the documents, and so the FTC provisions regarding existence and amount of affirmative recoveries are preserved. (Per creditors’ request, this would be clear that it applies only to transactions in which the FTC rule applies). Law was agreed upon to accomplish both results.  
Description of collateral: Remove comment that says “all jewelry” is OK. Comments to give no consumer examples. Creditors objected to the March 20, 1998, Drafting Committee decision to allow a description of consumer collateral by “type” rather than requiring each item to be specifically identified.  
BIOCOB (Buyer in the ordinary course of business). Either do not redefine in Article 9 or insert language in current Article 2 draft (this may be 2-585 and 2-424). No drafting problem. The Drafting Committee selected the second approach.  
Section 9-625(b). Consumers are opposed to the addition of a new section not in the draft at the time the consumer issues compromise was reached. Consumers want the same rule for both commercial and consumer transactions. The provision was not covered in the Febru- ary, 1998 Memorandum of Under- standing but the Committee agreed to consider this. Consumers want nothing to say price is not a term, but will accept

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Section 9-620(b) (agreement not to assert defenses): There was a compromise, adopting alternative C with certain changes. Section 9-404 (pages 131–132). The creditors argued for certain changes. The consumer representatives argued against this change. Brad Smith argued that the current language is more clear. The Drafting Committee voted against the pro- posed changes by a narrow margin. Section 9-620(b) (pages 183). Creditors’ comments revealed some uncer- tainty under this language. The Report- ers’ Comments noted this. Section 9-610, Reporters’ Comments (page 192) (disposal of collateral in low-price sale): Should a low price alone permit a sale to hold consumers to an unfair bargain?” The Memorandum of Under- standing called for the Reporters not to close the door on this issue, but this indication that low price alone is not a factor in com- mercial reasonableness, The Reporters agreed that this was not a definition that cannot describe the law. Gary Sigman noted that the Memorandum of Under- standing was modified at the last meet- ing when the Drafting Committee voted to specify in a contract that price alone is not a factor. The Reporters followed this direction in drafting Comment in their Reporters’ Comments (pages 192). See also Reporters’ Comment to section 9-614 (“Low Price” Dispositions), page 205 of the draft. The consumer representa- tives also objected to this language. Gary Sigman noted again that this had been carefully considered by the Drafting Committee. He suggested, however, use of “extremely low” rather than “un- reasonably low,” to make clear that price is not a term to be considered for pur- poses of comparison with the com- mercial reasonableness requirements, and made a motion to that effect. Gary Hilberbrand argued that this is a major point for consumer representatives, which could disrupt the compromise. Neil Cohen then offered “suffer” language to substitute for Gary Sigman’s proposal: (line 13, delete up to “how- ever,” and substitute: “While not itself establishing a violation of this sec- tion.”) This was approved.

Section 9-621(b) (page 194) was re- vised to read: “Except in consumer [goods] transactions...” Section 9-612(b) was revised to read: “Except as provided in subsection (a)...” The effect is to prevent section 9-612(b) (from overriding 9-621) from applying to consumer contracts. Section 9-621(b) was changed to “ten days or more” and modified so that ten days might be always sufficient. Gary Hilberbrand objected and argued for ten day safe harbor in consumer transactions. Creditors argued that the term “useful” is not defined, and creates a negative implication that ten days is not sufficient. Professor Moore noted
that this was a purpose of section 9-612(c), excluding consumer transactions entirely from section 9-612. The proposal above carried. Gail Hillebrand argued the role should cover all consumer transactions (not just goods). This carried.

XII. Conclusion

Attending the Article 9 Drafting Committee meetings has always been a fascinating experience for all concerned—freely enlightening and also frustrating, but always enjoyable. Observing the exchange of ideas among experts in the field (including the Advocates, as well as the Reporters and members of the Drafting Committee) was always interesting, no matter what the outcome. At times it seemed as though it would be purely in academic exercise, as hopes for compromise seemed dim, but even as such it would be a useful exercise.

Since the fall of 1997, however, as hopes were raised for a possible consumer issue compromise, the process took on a heightened importance. Observing the development of a historic compromise between advocates of consumer creditors and Article 9 provided a glimpse of the uniform law process at its best. No process, and no statute, is or ever can be perfect. But, in your author's view, this process and product is as good as it gets. There is simply no equivalent to this process at the federal level, no matter how many requests for comments are put out by the federal agencies, and it shows in the results achieved in the NCCUSL process (in comparison, for example, to HUD's Regulation X). Anyone who cares about the preservation of our common law traditions and the basic foundations of our system of commercial, consumer, property, and contract law, should actively support revised Article 9.

Thought it certainly is not perfect, it is as close as we are likely to get, and may well offer the last, best hope for maintaining a comprehensive and modernized system of state law governing secured transactions.

Your author would like to express appreciation to Gail Hillebrand and David McMahon for their thoughtful comments on earlier drafts of this article. However, the views expressed herein are solely those of the author, and your author is responsible for any errors or inaccuracies.

Appendix

MEMORANDUM

TO: Commissioners on Uniform State Laws
FROM: Steven L. Harris and Charles W. Moore,

Jr., Reporters

DATE: June 3, 1998

RE: Uniform Commercial Code Article 9—Statement of Policy Issues

Following is a list of policy issues resolved by the 1998 Annual Meeting draft of Revised Article 9. The list includes the issues that we believe are most significant. We have not included in the list any issues that our staff has determined are not appropriate for consideration in the Annual Meeting draft. The list that follows is not intended as a complete list of all issues that may be relevant to the treatment of these issues as well as many others. Because there may be a wide range of opinion as to which policy issues are more or less, significant, we encourage you to review that Comment.

1. Scope. The draft expands the scope of Article 9 to cover:

a. Nonpossessionary, statutory agricultural liens (it also includes relevant special priority rules), but not other statutory liens;

b. Sales of payment intangibles and promissory notes (it also includes relevant special priority rules);

c. Security interests created by governmental debtors, to the extent not governed by special statutes regulating governmental secured transactions;

d. Sales of health-care-insurance receivables (a type of account);

e. Consignments of goods (it also includes relevant special priority rules);

f. Commercial tort claims;

g. Liens on property (including real property) to the extent they secure a right to payment served as a collateral (e.g., mortgage note);

h. Deposit accounts as original collateral (including special perfection and priority rules); and

i. Supporting obligations (such as guarantees) that support collateral that is a right to payment.

2. Consumer Transactions. The draft includes a carefully balanced set of provisions concerning consumer transactions. In several instances, the draft addresses issues as they affect non-consumer transactions while maintaining silence with respect to consumer transactions.


a. The baseline rule for applicable law for nonpossessionary security interests in most types of collateral is the location of the debtor. Debtors that are registered organizations (e.g., corporations) are located in their jurisdiction of organization (e.g., jurisdiction of incorporation).

b. The location of collateral continues to determine applicable law for possessionary security interests.

c. The draft provides special choice-of-law for agricultural liens, goods covered by a certificate of title, deposit accounts, investment property, and letter-of-credit rights.

4. Filing.

a. The draft adopts a mediamneutral approach that accommodates modern information technology. This approach is particularly significant for the filing rules.

b. In general, the draft does not address the identity of the person that files a record with a filing office. Instead, it focuses on whose authority is necessary for the filing to be effective.

c. The draft provides a mechanism for a debtor to file a termination statement for a financing statement when a secured party wrongfully fails to do so.

d. The draft embraces a policy under which all records that are filed and associated with a particular financing statement remain available for searches in the filing office records until at least one year after the financing statement lapses. They are not removed "purged" upon the filing of a termination statement. This policy also accommodates the debtor's substantial reduction of the permissible disbursement that a filing office may exercise in accepting and rejecting records submitted for filing.

e. The draft provides for central filing for all financing statements, except that fixture filings and certain retail-

The Science Behind Credit Card Offers (Continued on page 185)

5. Default and Enforcement. The draft contains substantial additional provisions concerning default and enforcement.

a. For transactions other than consumer transactions, in the case of a secured party's failure to comply with Article 9, the draft adopts the "rebateable presumption" rule and rejects the "absolution" rule.

b. For transactions other than consumer transactions, the draft permits a secured party to accept collateral in partial satisfaction of its obligations that it secures, subject to safeguards for debtors and competing claimants.

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