UCC Article 9 Revisions Confront Issues Affecting Consumer Collateral

Alvin C. Harrell, Oklahoma City University School of Law
UCC Article 9 Revisions Confront Issues Affecting Consumer Collateral

By Alvin C. Harrell*

I. Introduction

The Uniform Commercial Code ("UCC") Article 9 Drafting Committee, meeting March 3-5, 1995 in Chicago, Illinois, to discuss the February 10, 1995 tentative draft of proposed revisions to Article 9. The Drafting Committee met again on June 9-11, 1995 in Washington, D.C., to discuss the May 1995 draft of proposals subsequently presented at the 1995 Annual Meeting of the National Conference of Commissioners on Uniform State Laws (NCCUSL).1 These fifth and sixth meetings of the Article 9 Drafting Committee continued to refine the proposed Article 9 revisions, with an important difference: The Drafting Committee considered specific consumer protection proposals dealing with secured transactions that had been discussed more generally prior to meetings, and had proved so divisive during such discussions.

As discussed previously in this journal,2 all discussions remain tentative.

Nonetheless, at the March and June, 1995 meetings of the Drafting Committee, the Reporters provided specific consumer protection proposals for discussion purposes, without prejudice to the ultimate decision as to whether such revisions should be included and, if so, whether such revisions should be integrated or segregated in Article 9.

Some of the proposed consumer protection provisions would significantly alter the enforcement of security interests in consumer collateral. These proposals are described infra. The discussions at these meetings highlighted both the difficulty and the importance of these issues. Interested parties should review these matters and make their views known without delay, as decisions are currently being made with regard to many of these issues.

II. Overview of Consumer Issues in Article 9

At the March 1995 meeting, Gail Hibberson of Consumers Union began the discussion of consumer issues by noting that consumer transactions are covered by Article 9, and arguing that the current Article 9 provisions need to work but that some don't work for consumer transactions. She contended that auto finance transactions are a major part of Article 9 problem, stating that there are an estimated 500,000 auto repossessions each year. Ms. Hibberson argued that consumers are, de facto, not able to pursue their legal rights, as they do not have a continuing relationship with a lawyer or significant bargaining power. She indicated that most consumer deficiencies are due to interruption of income, and reiterated the position that creditors do not seek to maximize the collateral resale price.

Edward J. Hieser responded on behalf of consumer lenders, arguing that consumer protection issues are better treated in consumer credit codes. He disputed the contention that consumers have difficulty obtaining legal representation, noting that consumer litigation is commercially viable and seems to be increasing. He noted that default due to interruption of income is still a default which impairs a consumer's recovery. He argued that additional consumer provisions in Article 9 would raise the cost of credit and reduce the underwriting standards.

Mr. Hieser suggested that four tests be met before any new consumer-oriented provisions are adopted as part of Article 9:

1. That there be a demonstrated need (not merely reports of isolated cases).
2. That it be clear the proposal will solve the problem.
3. That it be clear the benefits outweigh the disadvantages.
4. That it be clear that Article 9 is the place for a remedy.

At this point Don Rapson proposed that the Article 9 expressly recognize that the collateral resale price is a factor to be considered in determining whether the sale is commercially reasonable even if the sales procedure is otherwise satisfactory.

Harry Sigman then asked whether Article 9 should distinguish between consumer passenger vehicles and commercial vehicles. He contended that consumer bankruptcy is primarily into pickup and property, how to treat "new" and "used" uniform act as an alternative to revising and complicating Article 9. Ms. Hibberson responded that the problem extends beyond vehicles. Jack Burton commented that the Uniform Consumer Credit Code (UCC) is 21 years old and is now somewhat dated in its coverage of certain consumer issues. It was then asked whether the proposed consumer revisions would raise the cost of credit. The consumer advocates argued that the consumer group had in fact raised consumer awareness to provide evidence that any of the particular proposals up for discussion would increase the cost of credit, although those proposals had been under discussion in the consumer task force for a year or more. Others urged that such a result is not clearly evident.

Ms. Hibberson pointed out that the Drafting Committee was presenting consumer issues in three distinct categories. The first category includes areas where consumer representatives are asking the Drafting Committee to preserve for consumers some existing rights not addressed by Article 9 or all debts which the revision contemplated eliminating for commercial borrowers. Second, the consumer advocates are arguing that new consumer-oriented changes to Article 9 proposed by the Study Group or Drafting Committee not be extended to consumer transactions where there has been no public demonstration need for them and there is a likelihood of harm to consumers. The third category is enhanced consumer protection to modify the effects of Article 9 in consumer secured transactions. Only the final and third category, Hibberson said, contains proposals for a significant change in Article 9.

The proposed differences between consumer and commercial interests in the first two categories become necessary, she argued, only because the Drafting Committee is affirmatively reducing debtor rights in certain situations where there is no justification to do so for consumer debtors.

III. Definitional Issues

Attention then turned to the February 10, 1995 Draft, Proposed section 9-105(a)(8), "debtor" would be defined to include a person who created the security interest or to whom the debtor transferred the collateral, if the secured party knows that the debtor has transferred the collateral.

Don Rapson expressed the belief that the definition of "consumer " would be better to provide a separate notice requirement rather than complex definitional provisions. The Reporters agreed, noting this is difficult to understand and that it is best to avoid making changes to other consumer rights and duties when they relate to numerous other sections. But the Reporters again agreed that the problem is already complex and that the proposed revisions would solve it.
Deficiency, due solely to the debtor’s wrongful conduct, is a separate issue. The purpose of the secured creditor’s statutory right of self-help is to prevent the innocent transferee who will lose his or her equity in the collateral if it is repossessed and sold, from being injured from beyond the fault of the debtor under the proposed absolute bar rule.

Other questions were also raised: Should the law protect only a transferee who gives notice to the secured party? Would sending payment to the lender cure a continuing default? Professor Michael Greenfield argued that the latter rule is necessary, as otherwise consumers would not know of the need to give notice.

Professor Mooney then suggested leaving the proposed section 9-105(16) definition the same, defining “transferor” in a consumer, and dealing with the issue of the notice of the secured party in section 9-507. The secured party taking payment from a transferee would “acquire” the collateral, and deal with the question of the notice of the debtor entitled to notice. This would represent a trap for the secured party who accepts payments without giving notice of the charge. Professor Jim Roggens suggested that these issues should not be resolved using the definition of debtor, because that term is used in so many places.

It was noted that any “knowledge” based fault is fraught with peril. Professor Mooney agreed, noting that these new efforts to protect transferees have created significant new drafting difficulties for the Reporters.

The definition of “consumer secured transaction” as proposed at section 9-105(16) would trigger any consumer receivable under the February 10, 1995 draft. Ed Haugen stated that the Drafting Committee should leave in the bracketed term “secured” to distinguish these from unsecured transactions and avoid any implication of broader coverage of unsecured debtor. Professor Greenfield countered that the transactions subject to the definition would be limited solely to secured transactions by reason of the scope of Article 9, so there is no need to insert “secured” in the definition. The purpose of the proposed section is to protect the innocent transferee who will lose his or her equity in the collateral if it is repossessed and sold; there was no concern over the possible impact on innocent secured parties without notice of the transfer. It was questioned whether failure to give notice to a transferee who has acquired the collateral from an innocent transferee who is borrowing from other than the secured party under the proposed absolute bar rule.

IV. Proposed Section 9-507

In the February 1995 draft, proposed section 9-507(b) would provide that where the secured party violates Article 9, the debtor can recover any surplus, except where a deficiency would be barred; e.g., only for violations of sections 9-502, 504, 505 (not, e.g., for a section 9-505 wrongful repossession). It was urged that merely defining the scope of “consumer secured transaction” alone would add great complexity. The deficiency issue is generally not much of an issue for defaulting debtors.

Professor Greenfield noted that the situation in New York is the same. This view was disputed by the Reporters, who noted that they would want to give consumers protection if they could actually be injured by the violation. The majority favored an absolute bar of deficiency judgments for transactions below a certain dollar amount. With regard to the definition of debtor, there was a consensus that the debtor should refer to the agreement of the credit; this would represent no change from present law. The consumer creditor argued for some creditors in the latter, consumer defaults as an excuse to repossession collateral. Jeff Turner then asked: Why would any creditor do this? David McGahan of West Virginia suggested that the Reporters had raised its face clients as known as “churning” or which the creditor sells a car, collects the new payments, processes, and resells the vehicle. It was proposed that there be an Article 9 definition to limit default limits to non-commercial and (2) material impairment of collateral. This was generally rejected as being likely to breed frivolous litigation.

Proposed Section 9-507

In the February 1995 draft, proposed section 9-507(b) would provide that the secured party or the creditor in Chapter 11, the debtor can recover any surplus, except where a deficiency would be barred, real, e.g., only for violations of sections 9-502, 504, 505 (not, e.g., for a section 9-505 wrongful repossession). It was argued that merely defining the scope of “consumer secured transaction” alone would add great complexity. The deficiency issue is generally not much of an issue for defaulting debtors.

Professor Greenfield noted that the situation in New York is the same. This view was disputed by the Reporters, who noted that they would want to give consumers protection if they could actually be injured by the violation. The majority favored an absolute bar of deficiency judgments for transactions below a certain dollar amount. With regard to the definition of debtor, there was a consensus that the debtor should refer to the agreement of the credit; this would represent no change from present law. The consumer creditor argued for some creditors in the latter, consumer defaults as an excuse to repossession collateral. Jeff Turner then asked: Why would any creditor do this? David McGahan of West Virginia suggested that the Reporters had raised its face clients as known as “churning” or which the creditor sells a car, collects the new payments, processes, and resells the vehicle. It was proposed that there be an Article 9 definition to limit default limits to non-commercial and (2) material impairment of collateral. This was generally rejected as being likely to breed frivolous litigation.

IV. Proposed Section 9-507

In the February 1995 draft, proposed section 9-507(b) would provide that where the secured party violates Article 9, the debtor can recover any surplus, except where a deficiency would be barred; e.g., only for violations of sections 9-502, 504, 505 (not, e.g., for a section 9-505 wrongful repossession). It was urged that merely defining the scope of “consumer secured transaction” alone would add great complexity. The deficiency issue is generally not much of an issue for defaulting debtors. The debtor could also recover statutory damages/surplus in addition to the bar of a deficiency. It was argued that section 9-503 be added to proposed section 9-507(b).

Under proposed section 9-507(c), the secured party has the burden of proving compliance; if the secured party fails, under section 507(c)(3)(c), the secured party’s claim to a deficiency judgment is barred. In other cases, the deficiency would be reduced by an amount of the loss caused by the violation.

The purpose would be to use the absolute bar rule as a proxy for damages if Part 5 is violated, in order to avoid litigation over actual damages, by using the bar as an exclusive Part 5 remedy in most consumer cases. An objection was raised. If the secured party commits an egregious violation, should the bar be the debtor’s only Article 9 remedy? This would, for example, exclude punitive damages. A vote of the Drafting Committee rejected Don Rapson’s suggestion that the dealer receive the advantage of the loss of deficiency against the consumer. Professor Mooney suggested that this should be resolved in the dealer’s contract. Rapson noted that the consumer not be the dealer’s only Article 9 remedy. This would, for example, exclude punitive damages. A vote of the Drafting Committee rejected Don Rapson’s suggestion that the dealer receive the advantage of the loss of deficiency against the consumer. Professor Mooney suggested that this should be resolved in the dealer’s contract. Rapson noted that the consumer not be the dealer’s only Article 9 remedy. This would, for example, exclude punitive damages. A vote of the Drafting Committee rejected Don Rapson’s suggestion that the dealer receive the advantage of the loss of deficiency against the consumer. Professor Mooney suggested that this should be resolved in the dealer’s contract.
purse other collateral under 9-507(3)(i)? The vote on the Drafting Committee was unanimous that this should not be allowed.

It was noted that the absolute bar rule does not have any impact on the actual amount of the creditor’s liability unless this creditors’ interest is subordinated to another collateral interest. The Drafting Committee then rejected placing any limitation on a security creditor’s class action liability in Article 3.

Proposed section 9-507(3)(i) (attorney fees) would allow a prevailing consumer only to recover attorney fees. Ed Hesler said that attorney fees either should not be addressed or should apply equally to both parties. Harry Sigman noted a California statute that makes a unilateral attorney fee provision in a contract mutually applicable. Ed Hesler said this would be better than the current draft. A vote of the Drafting Committee favored leaving attorney fee provisions entirely. However, upon a subsequent vote there was very little support for keeping the statutory lien, as under current law.

Instead, there was considerable support for a rule that would allow a prevailing consumer to recover attorney fees unless the creditor couldn’t get them, in which case it would be optional with the courts. It might require more than the current 20% of GMAC or a dealership may have, e.g., selling repossessed collateral at retail. He argued that a sale in a bank parking lot, after reasonable advertisement efforts, may be the best option for a small bank and its customers. It was noted that allowing the courts to second guess the parties on this would generate lots of litigation. It was noted that under, under proposed section 9-504(c)(2), there would be no duty to apply non-cash proceeds until liquidated, but if the secured party wanted to give immediate notice, it would have to do so in a commercially reasonable manner.

Under proposed section 9-504(b)(3), there is a question regarding whether the seller/supplier could repossess if collateral is repossessed from a transferee. The original debtor or the new owner? Harry Sigman suggested an alternative that repossessed collateral would be treated as a “safe harbor” for the secured party who repossessed the collateral on the debtor to the secured creditor on the secured party’s credit card. Under proposed section 9-504(c), there would be a good faith purchase rule protecting third parties who receive cash proceeds in good faith and without notice.

Under proposed section 9-504(c), a debtor other than a consumer obligor may waive the right to prior notification of sale. A vote was noted to reject the 10 day safe harbor for consumer transactions. However, a series of votes to select between a 15 day safe harbor, a 21 day safe harbor, and to retain the 9-504(c) article 9 standard of reasonable time were inconclusive. This issue was not resolved.

The discussion then turned to proposed section 9-504(c)—a safe harbor “notice of disposition” form. It was questioned whether such a form is needed. The consumer representatives stated that they had not sought to add a safe harbor notice form, but that such a form would be added to the UCC. Two one which had been proposed in the draft was too sketchy for consumer transactions. Ed Hesler said the notice provided for in proposed section 9-504(c) for commercial cases is sufficient, there is too much potential for error in the proposed consumer form, creating a likelihood of technicalities that could lead to a bar of deficiency judgment and other remedies, resulting in unnecessary risks. He argued that a better approach would be to use the commercial form as proposed section 9-504(h) with the addition of a warning clause regarding the deficiency but excluding the more complex disclosures and calculations in proposed section 9-504(i). Michael Ferri supported the more extensive disclosure requirement, and said that a shorter, simpler form would be more likely to be read and understood by consumers. Ed Hesler suggested leaving out the loan data numbers and providing a phone number to call for more information. Frank Szariff suggested this would lead to more workflows and would encourage communication between the creditor and debtor, but some consumer advocates disagreed, arguing that their clients already experience difficulty in obtaining information by phone from creditors.

The discussion seemed to be moving toward a consensus that the notice should include specific calculations. Chairman Buttke asked the consumer and creditor groups to consult, but several consumer advocates argued that the notice should include specific amounts. Professor Miller then raised issues and exceptions regarding current requirements under other law and current industry practices.

Ed Hesler agreed that the notice should include notice of the right to re-claim before the notice of the risk of a deficiency, and Article 9 should not burden creditors with the cost of this new obligation in every case. Several consumer representatives argued that the notice for consumer debtors is one needed for small business debtors, and consumer lenders should be singled out for disparate treatment. The Drafting Committee voted in favor of the proposed notice requirement in consumer transactions. A notice provision should also be required for commercial lenders. A majority of the Drafting Committee voted to extend this notice requirement to commercial transactions.

Proposed section 9-504A would prohibit charging (as described previously at the meeting by David McMahen), where collateral is purchased by a party related to the secured party at an Article 9 sale for purposes of determining the deficiency, then would within a short period of time at a price much higher than the Article 9 sales price. This revision would allow that any surplus received in extinguishing the security interest is paid to the debtor. It was pointed out that if the target is collectable, it may be more important to pay the creditor in order to redeem, and if not paid to the debtor. It was pointed out that the target is collectable, it may be more important to pay the creditor in order to redeem, and if not paid to the debtor. It was pointed out that the target is collectable, it may be more important to pay the creditor in order to redeem, and if not paid to the debtor. It was pointed out that the target is collectable, it may be more important to pay the creditor in order to redeem, and if not paid to the debtor. It was pointed out that the target is collectable, it may be more important to pay the creditor in order to redeem, and if not paid to the debtor. It was pointed out that the target is collectable, it may be more important to pay the creditor in order to redeem, and if not paid to the debtor. It was pointed out that the target is collectable, it may be more important to pay the creditor in order to redeem, and if not paid to the debtor. It was pointed out that the target is collectable, it may be more important to pay the creditor in order to redeem, and if not paid to the debtor. It was pointed out that the target is collectable, it may be more important to pay the creditor in order to redeem, and if not paid to the debtor. It was pointed out that the target is collectable, it may be more important to pay the creditor in order to redeem, and if not paid to the debtor. It was pointed out that the target is collectable, it may be more important to pay the creditor in order to redeem, and if not paid to the debtor. It was pointed out that the target is collectable, it may be more important to pay the creditor in order to redeem, and if not paid to the debtor. It was pointed out that the target is collectable, it may be more important to pay the creditor in order to redeem, and if not paid to the debtor.
无情无可丁九月前叫，和这是一样新的效果。《草案报告》则把这种情况下的无保合同视为一个音量相同的音量。《草案报告》认为这可以验证这种情况下的无保合同。\n
《草案报告》则把这种情况下的无保合同视为一个音量相同的音量。《草案报告》认为这可以验证这种情况下的无保合同。
QUARTERLY REPORT

Professor Mooney then posed a question: Would the securities required certify title perfection as the exclusive approach for vehicles, since this is universal, then apply the proposed “dual” rule, allowing perfection by filing as a supplemental alternative, for other certificates of title for goods? A vote on the Drafting Committee was almost evenly split.

When “would” coverage of a state’s law end? Under proposed section 9-103(c)(4), coverage would end when the certificate is “surrendered” in an effort to get a new certificate, or under proposed section 9-103(c)(11) when the goods become “covered” by another certificate from another jurisdiction.

When “coverage ends,” the proposed section 9-103(c)(15) four-month rule would be triggered. Section 9-103 would no longer refer to “removal” of the collateral from the state because the goods may not be in the state that issued the certificate of title. A new four-month rule would apply for four months after the goods were removed when the collateral is moved out of the state. Frank Suarino noted that a lender in the first state would have no way to know the title was transferred (e.g., in cases of fraud). It was noted that Professor Mooney’s national filing rule would help address this problem, because a security interest perfected by a national filing system would continue to be perfected as against lien creditors in the second state. In addition, Professor Suarino proposed that the security interest perfected in the first state should be merely subordinated to an innocent purchaser in the second state (not being subrogated as against a lien creditor), rather than being completely unperfected as a result of the new choice of law in the second state (since lack of protection would unreasonably cause loss as against virtually everyone).

Two votes were taken and again Professor Mooney’s proposal was favored. After four months the security interest perfected under the four-month rule—only the first secured party would win if the security interest was perfected in no more than four months (the first secured party would have section 9-103(c)(6) return to current parameters to protect only non-dealer-buyers; and 3) a proposal that a “clean” certificate not be required but buyer to prevail. Upon a vote the second proposal was favored.

C. Proposed Electronic Search System

Professor Mooney then proposed development of model provisions, possibly outside of Article 9, to allow a national electronic search/renewal system to reform certificate of title systems. The consumer representatives noted that it is essential that this new system not eliminate notation of the security interest on the certificate of title, since that is the only notice consumers receive of the existence of a security interest. They suggested it was too inappropriate and expensive to expect a consumer to check with a private filing system for the existence of a lien before purchasing a car on a weekend or late in the evening. Smaller banks and other lenders may share this concern.

The American Bar Association UCC Committee Task Force on State Certificates of Title Laws was asked to report on this proposal. Your author is chair of this Task Force and solicits input from interested parties.

D. Miscellaneous Issues re Certificates of Title

1. Attachment of Security Interests


2. Section 9-302(a)(4)

Proposed section 9-302(a)(4) would clarify the relation between astatistic perfection for consumer goods and certificate of title goods. Also, filing for perfection would be distinguished from filing for perfection of other goods. This is a movement to make this an Official Comment.

3. Section 9-302(c)

Proposed section 9-302(c)(3) appears at pages 72-73 of the 1995 Annual Meeting Draft. Professor Harris noted that this provision should be unwound due to the choice of law rule in proposed section 9-103. Reference to other state’s laws is unwound here because the forum’s law will refer to substantive law from the other state. The consensus was to eliminate this provision.

4. Section 9-302(d)

Proposed section 9-302(d) (page 73 of the 1995 Annual Meeting Draft) provides that compliance with the requirements for certificate of title perfection is equivalent to perfection by filing for purposes of other Article 9 provisions. This is consistent with the functional test at current section 9-102. An explanation appears at page 89 of the 1995 Annual Meeting Draft (Comment 11 to proposed section 9-306).

5. “Gap” Issues

Since the law of the second state (“State B”) will apply upon application for a certificate of title, if State B laws say there is no perfection and a certificate of title is issued, there will be a gap between the choice of State B law and perfection under the laws of State A. During this gap period, the security interest would be perfected in State B by a certificate of title lien entry in the prior state (“State A”).

6. Name of Secure Party on Certificate of Title

Proposed section 9-408 (page 150 of the 1995 Annual Meeting Draft) deals with the name of the secured party on the certificate of title but not as a lien entry. E.g. the secured party appears as owner or “legal owner.” Proposed section 9-408 would supersede the state’s certificate of title law to allow perfection by the secured party’s name appearing anywhere on the certificate of title using any of the listed terms.

7. Assignments

Under proposed section 9-302(b) (page 72 of the 1995 Annual Meeting Draft) an assignee would not need to do anything to continue perfection. This would not override a contrary state law but would eliminate any Article 9 provisions that additional action is needed under Article 9. This would also apply where the record lien holder becomes an agent of the assignee.

The question was raised: Can a secured party with a filing or lien entry combine with or assign this to another lender with an unperfected interest so as to create retroactive perfection? The consensus was no. Proposed section 9-302(b) only permits assignment of a perfected security interest.

8. Short Term Leases

If the collateral is inventory while on the dealer’s lot, then becomes consumer goods while leased, the consensus was that the lender must perfect under both categories.

XII. The Federal-State Law Relation

A. Introduction

Professor Mooney began this discussion by noting the Code’s minimalist approach to many areas of concern involving intellectual property and the problem of unnecessary federal preemption—i.e., more federal preemption than is needed to serve the federal interest. One possible solution is, of course, reform of federal law. In the meantime, the proposed Article 9 revisions are directed at working with federal law of whatever kind, and are designed seek the maximum reach of Article 9 to the extent not preempted.

B. Proposed Article 9-104(a)

Proposed section 9-104(a) (page 27 of the 1995 Annual Meeting Draft) alternates A would delete current proposed subsection (a) because a state cannot affect the extent of federal preemption, and to
but as an inference of any greater Article 9 concession; proposed alternative B would restate the current list of excluded transactions as a more comprehensive tool without conceding any new preemption (emphasizing deference to federal law only "to the extent ..." of preemption).

This was favored by the Drafting Committee. There is a basic desire not to extend the deference of state to federal law beyond the extent of federal preemption, i.e., to have Article 9 apply to the greatest extent possible. The consensus favored alternative B as revised by the addition of Harry Sigman's language.

C. Filing Exceptions

Proposed section 9-302(c)(2)(E) page 72 of the 1995 Annual Meeting Draft recognizes the exceptions to perfection by filing of a financing statement only applies where the federal filing is the exclusive means of perfection under federal law.

D. Title Clearing Provisions

The October 1994 draft included a proposed section 9-504(e) ("title clearing" rule), contemplating a means to clear the title to collateral through the title registration and certification system. The secured party could get legal title in order to transfer title to a buyer, without the secured party's title being an Article 9 "disposition." This was inadvertently removed from the 1995 Annual Meeting Draft bar there was wide support for includibility because the ability to transfer title at the disposition sale or auction will increase marketability and the sale price.

XIII. Review of Selected 1994-1995 Issues at the 1995 Meeting

A. Introductory Issues

1. Proposed Section 9-105(a)(3) "Affected Obligor"

"Affected obligor" would be defined essentially as a secondary obligor. There is no recourse against such a debtor. Proposed section 9-105(a)(2)(D) defines "obligor" as a person who owes an obligation or is otherwise accountable for the obligation. Proposed section 9-105(a)(10) defines "debtor" as a person with a property interest in a security interest collateral, whether or not the obligor, and would include the seller of accounts, chattel paper or general intangibles.

2. Exculpatory Provisions

Under the 1995 Annual Meeting Draft a secured party owes no Article 9 duty to the debtor or an affected obligor if the secured party knows the identity and how to communicate with such party. The secured party would not be liable under proposed section 9-307 to a party unless the exculpatory provision is not effective as collateral acquired by the new debtor before and within four months after the new debtor becomes so bound, and (b) if a financing statement is not seriously misleading as regards the new debtor: (1) the financing statement is effective only as collateral acquired by the new debtor before and within four months after the new debtor becomes so bound; and (2) the financing statement is not effective as collateral acquired by the new debtor after four months unless an amendment to the financing statement renders the financing statement not seriously misleading and is filed before the end of the four months. Alternative B provides a more specific subsection with a four-month grace period.

C. Section 9-308A—Transfers of Funds from Deposit Accounts

If the transferee of funds does not know at the time of the transfer the transferee is as a secured party, the transferee would not be liable to any person on any legal or equitable theory and takes the funds free of prior security interests. Some propose limiting this rule on the basis of knowledge, while others urge an exclusion from liability for collecting banks.

D. Section 9-104(g) (Insurance) and Section 9-104(k) (Tort Claims)

Under proposed section 9-104(g), Article 9 would not apply to a direct interest or claim in an insurance policy covering healthcare costs, injury or disability of an individual, loss of income or employment, or burial or funeral costs. This would bar only a direct Article 9 security interest in insurance, though a proceeds claim could still be taken into insurance proceeds.

Proposed section 9-104(k) provides that Article 9 does not apply to a transfer by an individual of any tort claim for damages from injury to an individual. However, proceeds of a tort claim for damages to the collateral would be specifically treated as proceeds of the security interest. At this writing these issues remain open and subject to discussion, though there appears to be some tendency to expand the scope of the reform processes in these controversial areas.

E. Sales of General Intangibles

The 1995 Annual Meeting Draft brings sales of general intangibles into Article 9 but allows the parties to "opt out." There was concern that selective opt out at various stages might create an inconsistent pattern of inclusion and exclusion. As a result this area remains subject to review.

The draft current provides a unitary rule for chattel paper at proposed section 9-308, as opposed to the current bifurcated rule. Priority would depend on purchase in the ordinary course of business, without knowledge, for value, and taking possession. Compare the rules with other secured interests (revised section 9-115(e)(6) of the 1994 uniform text) (possessory security in rent prevails over perfection by filing).

D. Definitions

The definition of "organization of reorganization" is defined at proposed section 9-105(2) as the organization under whose law the entity is organized.
Incorrec information would not affect perfection except as against innocent purchasers who rely on the information.

K. Sales of Collateral

A letter from George Washington University School of Law's Latin Law student Lalea E. Zabrow was considered, summarizing her recent law review article on sales of collateral. Among other things Professor Zabrow argued that (1) secured parties should be deemed to have a fiduciary duty to their debtors when disposing of collateral; and (2) secured parties could be allowed an additional fee, based on any enhancement in the sales price, as an incentive to maximize that price. The censoring on the Drafting Committee was that such a fee would not be helpful and that fiduciary concepts should not be introduced into the debtor-creditor relationship.

XIV. Perfection by Possession

Perfection by possession has been criticized, and this was noted, but there was acuteness that this form of perfection has been recognized and sanctioned and should be retained. Professor Harris queried whether a definition of "possessions" was needed, and Steven Weiss argued that such a definition was necessary. In the event of the efficient Collateral Concept, Bob Zadok noted that the concept of possession may have different purposes in Article 9. To that a single, simplified definition is not suitable. Brad Smith noted that the baillee issue is the one needing the most attention.

Two issues were the focus of the discussion: "control" and public notice. Possession by the secured party may serve to achieve both of these ends, but may also achieve one without the other. For example, notice may be given by a public sign coupled with security arrangements that are apparently effective but can be subverted by the debtor. The notice may not be sufficient to the world to constitute perfection but would not provide effective or exclusive control. Similarly, effective, strict control could be maintained by a secured party without the public notice needed to constitute perfection.

Some of the conclusion in the cases derive from a failure of the courts to distinguish between the "control" and "notice" aspects of possession by secured parties. The essential purpose of perfection is giving notice to the world to perfect the obligation of the party that is the debtor under the control of the security agreement. Most of these matters remain unsolved.

Two important issues are whether perfection by possession is effective as to certificate of title goods, and whether the party in the ordinary course of business as to collateral in the hands of the secured party. Proposed section 9-205(2) specifies that certificate of title goods are subject to perfection only where perfection by possession is allowed under the law of the state of the applicable law. Therefore, the notice of perfection by the secured party.

Proposed section 9-205(2) specifies that certificate of title goods are subject to perfection only where perfection by possession is allowed under the law of the state of the applicable law. Therefore, the notice of perfection by the secured party is effective only where perfection by possession is allowed under the law of the state of the applicable law. The notice of perfection by the securing party is effective only where perfection by possession is allowed under the law of the state of the applicable law. The notice of perfection by the securing party is effective only where perfection by possession is allowed under the law of the state of the applicable law.

The main example is the perfecting of possession for personal property under Article 9-205(2) (certificates of title for personal property under Articles 9-205(2)

25. See W. Willams, supra note 25, at 521.

26. See 22 CMC, supra note 26, at 22.

27. The most common example is the perfection for personal property under Article 9-205(2) (certificates of title for personal property under Articles 9-205(2)

28. See supra note 25, at 521.

29. See generally W. Williams, supra 25, at 521.

30. See generally 22 CMC, supra note 26, at 22.

The most common example is the perfection for personal property under Article 9-205(2) (certificates of title for personal property under Articles 9-205(2).