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# How Successful Was the Revision of U.C.C. Article 9?: Reflections of the Reporters, (with C. Mooney, Jr.).

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HOW SUCCESSFUL WAS THE REVISION OF UCC  
ARTICLE 9?:  
REFLECTIONS OF THE REPORTERS

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INTRODUCTION

In our 1993 article, *The Article 9 Study Committee Report: Strong Signals and Hard Choices* (“*Hard Choices*”), we sought to “identify and explain, by way of examples, some important themes and patterns that emerge[d] from the [PEB Article 9 Study Committee] Report.”<sup>1</sup> As another of our goals, we sought “to offer some insight into the challenges that the Drafting Committee” for the revision of Uniform Commercial Code (“UCC”) Article 9 would face.<sup>2</sup> The Drafting Committee recently has completed its work. In 1998, the UCC’s sponsors officially promulgated Revised Article 9. Now the process of introducing Revised Article 9 in the legislatures is in full swing.<sup>3</sup> In this article we assess, again by way of examples, the degree

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As used in this article, “Revised Article 9” and “the revised Article” refer to the 1999 official text of Article 9. References to “Revised section 9-XXX” and “R. § 9-XXX” are to sections of Revised Article 9. “The Former Article” refers to the 1995 official text of Article 9. References to “Former section 9-XXX” and “U.C.C. § 9-XXX” are to sections of the Former Article.

1. Steven L. Harris & Charles W. Mooney, Jr., *The Article 9 Study Committee Report: Strong Signals and Hard Choices*, 29 IDAHO L. REV. 561, 562 (1993). The article addressed primarily the recommendations made in the report of the UCC Permanent Editorial Board’s Article 9 Study Committee, for which we served as reporters. See PEB STUDY GROUP, PERMANENT EDITORIAL BD. FOR THE UNIF. COMMERCIAL CODE, UNIFORM COMMERCIAL CODE ARTICLE 9 REPORT (Dec. 1, 1992) [hereinafter REPORT]. For background on the work of the Study Committee, including its organization and methodology, see *id.* at 1-16. The Committee’s chair and reporters also issued an interim report. See William M. Burke et al., *Interim Report on the Activities of the Article 9 Study Committee*, 46 BUS. LAW. 1883 (1991).

2. See Harris & Mooney, *supra* note 1, at 562.

3. For background on the drafting process, which began in 1993 and ended in early 1999 with the final touches on Revised Article 9 and its official comments, see R. § 9-101 cmt. 2.

of success with which the Drafting Committee met the challenges that *Hard Choices* identified. Our assessment necessarily is preliminary. The process of legislative enactment and the experience of transacting business and litigating under the revised Article undoubtedly will lead us to refine, and perhaps revise, our views.

We hasten to note at the outset that although we made known our thoughts on particular issues during the drafting process, we were not voting members of the Drafting Committee. On the other hand, we do not seek to escape our share of the responsibility should positions that we advanced turn out to be unwise, and we promise to be appropriately contrite should those against which we argued prove successful. Moreover, we must acknowledge responsibility for defects in drafting or organization, inasmuch as we bore considerable responsibility for those aspects of Revised Article 9. “Style” questions are quite another matter indeed.<sup>4</sup>

This article is organized generally along the lines of *Hard Choices*. Part I addresses Revised Article 9 in the context of bankruptcy policy, with a particular focus on the relationship between secured credit (and creditors) and unsecured credit (and creditors). Part II considers Revised Article 9’s modification—generally an expansion—of the scope of Article 9’s coverage. Part III explores how Revised Article 9 addresses three areas that have a substantial impact on secured financing but which cannot be addressed fully by the text of Article 9: filing systems, statutory liens on Article 9 collateral, and federal preemption of many aspects of intellectual property law. Part IV assesses various approaches to codification reflected by Revised Article 9, including the degree of balance between complexity and simplicity and between the promulgation of finely-crafted, detailed rules designed to give a definitive answer to a variety of questions and the establishment of “rough” principles intended to provide only general guidance to parties and the courts.

## I. STRIKING THE APPROPRIATE BALANCE BETWEEN UNSECURED AND SECURED CREDITORS

In *Hard Choices* we observed that “[t]he appropriate relationship

4. Under NCCUSL’s procedures, all drafts are reviewed by the Committee on Style, which “revises as to phraseology and style, but without altering the meaning or context, all Acts submitted to it by Drafting Committees and all Acts approved by the Conference.” NATIONAL CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, PROCEDURAL AND DRAFTING MANUAL 4 (1997).

between secured and unsecured creditors may present the single most important cluster of issues that the Drafting Committee will address.”<sup>5</sup> Reflecting on the process and its results, we believe that our observation has proved to be accurate. The potential effect of Article 9 revisions on the interests of unsecured creditors, including in a debtor’s bankruptcy, was the subject of discussion throughout the drafting process. The Drafting Committee received assistance on specific bankruptcy-related issues from a special task force on bankruptcy issues.<sup>6</sup> Consistent with the underlying approach and recommendations of the Report, Revised Article 9 embraces the goal of facilitating the extension of secured credit. The revised Article rejects the assumption, prevailing in some circles, that secured credit somehow primarily benefits secured creditors and is necessarily detrimental to unsecured creditors.<sup>7</sup> Instead, it reflects the increasing awareness that the principal beneficiaries of secured credit are the borrowers to whom credit is extended and others who have commercial or other relationships with those borrowers.<sup>8</sup> Assets claimed by secured creditors in an insolvency proceeding are not, of course, available for distribution to unsecured creditors. Indeed, the essence of a secured transaction is the resulting priority of a security interest over subsequent judicial lien creditors and the debtor’s

5. Harris & Mooney, *supra* note 1, at 569.

6. The task force, comprised largely of bankruptcy specialists, devoted particular attention to proposals by academics for restricting the effectiveness of security interests. *See, e.g.,* Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857, 913-29 (1996). Having received hardly any support among members of the task force and no support whatsoever from anyone who ever attended a meeting of the Drafting Committee, these proposals were rejected. The proposals were advocated also before the Council of the ALI and at a NCCUSL Annual Meeting, where they met with almost unanimous disapproval.

7. For a fuller description of this view, see Steven L. Harris & Charles W. Mooney, Jr., *A Property-Based Theory of Security Interests: Taking Debtors’ Choices Seriously*, 80 VA. L. REV. 2021, 2045-47 (1994).

8. *See, e.g.,* Heywood W. Fleisig et al., *Legal Restrictions on Security Interests Limit Access to Credit in Bolivia*, 31 INT’L LAW. 65, 66, 70-72, 98 (1997); Heywood W. Fleisig & Nuria de la Peña, *Peru: How Problems in the Framework for Secured Transactions Limit Access to Credit*, NAFTA: LAW & BUS. REV. AM., Spring 1997, at 33, 34-46; Steven L. Harris & Charles W. Mooney, Jr., *Measuring the Social Costs and Benefits and Identifying the Victims of Subordinating Security Interests in Bankruptcy*, 82 CORNELL L. REV. 1349, 1356-61 (1997); Harris & Mooney, *supra* note 7, at 2028-37; Anthony Saunders et al., *The Economic Implications of International Secured Transactions Law Reform: A Case Study*, 20 U. PA. J. INT’L ECON. L. 309 (1999); Steven L. Schwarcz, *The Easy Case for the Priority of Secured Claims in Bankruptcy*, 47 DUKE L.J. 425 (1997). We use the term “borrowers” to include sellers of rights to payment in transactions governed by Article 9, *see* U.C.C. § 9-102(1)(b) (Former Article 9 applies to sales of accounts and chattel paper); R. § 9-109(a)(3) (Revised Article 9 applies to sales of accounts, chattel paper, payment intangibles, and promissory notes), and “secured parties” or “secured creditors” to include buyers of these receivables, *see* U.C.C. § 9-105(1)(m) (defining “secured party”); R. § 9-102(a)(72) (same).

trustee in bankruptcy.<sup>9</sup> But that says nothing about the benefits that are conferred on borrowers and unsecured creditors *generally* by facilitating secured credit.<sup>10</sup>

The following discussion does not dwell on these more general benefits of secured credit. Instead, the discussion addresses primarily the extent to which Revised Article 9's enhanced facilitation of secured credit may be expected to provide materially greater recoveries for secured creditors in bankruptcy. Will these distributional effects of Revised Article 9 (i.e., enhanced recoveries for secured creditors) result in a substantial shift in the balance in favor of secured creditors? In general, our answer is an emphatic "no." Indeed, in many cases Revised Article 9 stops short of the recommendations made in the Report,<sup>11</sup> and in several respects it places burdens on secured creditors that are greater than those under Article 9.<sup>12</sup>

As we mentioned, Revised Article 9 generally facilitates the extension of secured credit, including transactions in which rights to payment (receivables) are sold outright. Many of its provisions make it easier and less expensive to create and perfect security interests and to achieve priority over competing claimants. Some specific examples may be useful.

Following a recommendation made in the Report,<sup>13</sup> Revised Article 9 provides that a security interest in instruments, both

9. As we observed in *Hard Choices*:

Making perfection easier and less costly to accomplish is likely to tilt the balance between secured and unsecured creditors: the number of unperfected security interests in bankruptcy can be expected to decline and the allocation of a debtor's property is likely to become more favorable to secured parties.

Harris & Mooney, *supra* note 1, at 565.

10. See *supra* note 8 and accompanying text.

11. Compare, e.g., Recommendation 7.C., REPORT, *supra* note 1, at 68-70 (recommending that the Drafting Committee give serious attention to the subcommittee report's recommendations, including perfection of security interests in deposit accounts as original collateral by filing) with R. § 9-312(b)(1) (security interest in a deposit account as original collateral may be perfected only by control).

12. Compare, e.g., R. § 9-313(c) (perfection by possession when collateral is in the possession of a person other than the debtor requires an acknowledgment by the other person that it holds the collateral for the secured party's benefit); *and id.* § 9-611(c) (secured party is required to give notification of disposition of collateral to secured parties or lienholders that have filed financing statements against the debtor covering the collateral) with U.C.C. § 9-305 (perfection by possession when collateral is in the possession of a bailee requires notification to, but not acknowledgment by, the bailee); *and id.* § 9-504(3) (secured party is required to give notification of disposition of collateral to a competing secured party only if the secured party has received written notification of the competing secured party's claim).

13. See REPORT, *supra* note 1, at 152-54. We discuss this recommendation in *Hard Choices*. See Harris & Mooney, *supra* note 1, at 565-66.

negotiable and nonnegotiable, may be perfected either by filing or by taking possession.<sup>14</sup> Under the Former Article, only possession of an instrument would suffice for perfection.<sup>15</sup> Perfection by filing against instruments will provide substantial cost savings in many transactional settings.<sup>16</sup>

The revised Article also clarifies what constitutes an adequate description of collateral in a security agreement, which is a necessary condition for attachment of most nonpossessory security interests.<sup>17</sup> Similarly, it clarifies the requirements of an adequate identification of collateral in a financing statement. A financing statement that describes the collateral or indicates that it covers all assets or all personal property is sufficient.<sup>18</sup>

Revised Article 9 also facilitates secured credit by expanding its reach beyond that of the Former Article. This observation assumes, reasonably, that extending credit or buying receivables under Revised Article 9's coherent and rational system offers advantages over operating under common-law or other statutory rules that may be hard to find and, once found, unclear. Revised Article 9's coverage of security interests in deposit accounts as original collateral, commercial tort claims, and sales of many rights to payment not covered by Article 9 illustrates this expanded scope.<sup>19</sup>

Revised Article 9's treatment of proceeds of collateral provides another example of its facilitation of secured credit. The definition of "proceeds" has been expanded to cover property acquired by a debtor that is a functional substitute for original collateral; Former Article 9 covered only receipts from dispositions and collections and

14. See R. §§ 9-312(a), 9-313(a).

15. See U.C.C. § 9-304(1). *But see id.* §§ 9-304(4)-(5), 9-306(3) (providing for temporary perfection of a security interest in instruments in specified circumstances). *Cf.* R. §§ 9-312(e), (g), 9-315(d) (preserving these rules in revised form).

16. As explained in *Hard Choices*, a perfection-by-filing rule makes it unnecessary to determine whether a particular writing is an instrument or to make alternative assumptions, necessitating both filing and taking possession. See Harris & Mooney, *supra* note 1, at 565-66. Perfection by filing against instruments also avoids the costs and impracticalities of taking possession when the collateral consists of large numbers of instruments. See *id.* at 566; R. § 9-312 cmt. 2.

17. See R. §§ 9-108, 9-203(b)(3)(A).

18. See *id.* § 9-504.

19. Revised Article 9 covers sales of payment intangibles and promissory notes. See *id.* § 9-109(a)(3); see also *id.* § 9-102(a)(61) (defining "payment intangible"), (65) (defining "promissory note"). As did Former Article 9, Revised Article 9 applies to sales of accounts and chattel paper. See R. § 9-109(a)(3); U.C.C. § 9-102(1)(b). The definition of "account" also has been expanded to include most rights to payment that would be general intangibles under Article 9, sales of which were not covered by that article. See U.C.C. § 9-102(a). The expanded scope of Revised Article 9 is addressed in more detail below in Part II.

certain insurance proceeds.<sup>20</sup> The revised Article also provides that if a security interest in original collateral is perfected by any means, a security interest in identifiable cash proceeds of the collateral is perfected indefinitely.<sup>21</sup> Under Former Article 9, a security interest in cash proceeds continued to be perfected beyond ten days only if the security interest in the original collateral had been perfected by filing.<sup>22</sup> In addition, Revised Article 9 contains special priority rules that preserve for proceeds the priority in original collateral afforded by various nontemporal priority rules (some new, some derived from the Former Article).<sup>23</sup>

Revised Article 9 reflects substantial improvements in two other important respects—filing and enforcement.<sup>24</sup> As was the case under the Former Article, the filing system is the heart of Revised Article 9. The new filing rules, found in Part 5 of the revised Article, clarify various questions left unanswered by Former Article 9, resolve issues left in doubt or in conflict under the Former Article by the courts, and impose specific requirements on filing offices to increase efficiency, accuracy, and speed. The new filing system also is a “medium-neutral” regime that permits filing offices to adopt nonpaper, electronic means of filing and searching. Similarly, the enforcement provisions found in Part 6 of the revised Article draw on experience—good, bad, and indifferent—under Former Article 9 in fashioning solutions to various problems that arose under the Former Article. New Part 6 also adds needed flexibility. Although the revised enforcement provisions may be expected to be used in only a small minority of transactions,<sup>25</sup> we anticipate that the increased comfort provided *ex ante*, as in the other examples mentioned above, will help make more credit available at a lower cost. Revised Article 9’s approach to contractual and legal restrictions or prohibitions of

20. Compare R. § 9-102(a)(64) with U.C.C. § 9-306(1).

21. See R. § 9-315(c), (d)(2).

22. See U.C.C. § 9-306(3)(b).

23. See R. § 9-322(c)-(e). We discuss these rules below in Part IV.A.2.

24. For an overview and discussion of the highlights of filing and enforcement under Revised Article 9, see Steven L. Harris & Charles W. Mooney, Jr., *Filing and Enforcement Under Revised Article 9*, 54 BUS. LAW. 1965 (1999). For more detailed discussions, see Harry C. Sigman, *Twenty Questions About Filing Under Revised Article 9: The Rules of the Game Under New Part 5*, 74 CHI.-KENT L. REV. 861 (1999); and Donald J. Rapson, *Default and Enforcement of Security Interests Under Revised Article 9*, 74 CHI.-KENT L. REV. 893 (1999). We discuss the relationship between the statutory text of Revised Article 9 and the extra-textual characteristics of filing systems below in Part III.

25. See Ronald J. Mann, *Strategy and Force in the Liquidation of Secured Debt*, 96 MICH. L. REV. 159, 227 (1997) (“[N]ot a single one of my forty-four personal-property [commercial loan] profiles involved a repossession and sale of collateral.”).

assignments of intangibles provides a final example of its facilitation of secured credit. The revised Article overrides virtually all contractual and legal restrictions to the creation, attachment, and perfection of security interests in intangibles;<sup>26</sup> however, it recognizes and protects the interests of other parties to intangibles by insuring that these interests cannot be compromised by the enforcement of a security interest.<sup>27</sup> Although these new overrides may be expected to allow increased recoveries from collateral in bankruptcy, we expect the effects *outside* of bankruptcy—the facilitation of additional extensions of credit—will be more pronounced.<sup>28</sup>

These examples and many other provisions of Revised Article 9 reflect the Drafting Committee's effort to achieve more than merely "better," more "efficient," "equitable," or "reasonable" rules to govern secured transactions. An overarching goal of the revisions was to provide in the transactional context enhanced certainty and predictability from the inception of transactions. This certainty can facilitate transactions even though an understandable rule with predictable consequences may be normatively suboptimal.

One might conclude from the foregoing that the Drafting Committee pulled no punches in making security interests as easy to conclude, perfect, and enforce, and as impervious to the claims of third parties, as humanly possible. But that conclusion would be far off the mark. To the contrary, the Drafting Committee sought

26. See R. §§ 9-406 to 9-408.

27. Consider, for example, a license of intellectual property that prohibits the licensee from assigning the right to use the intellectual property. Revised section 9-408(a) renders this restriction ineffective to the extent it impairs the creation, attachment, or perfection of a security interest in the licensee's rights (a general intangible). Thus, the licensee may create an enforceable, perfected security interest in its rights under the license. However, Revised section 9-408(d) provides that, if the restriction on assignment would be effective under other law, the security interest is not enforceable against, and imposes no duty on, the account debtor (here, the licensor). A similar result would obtain if the restriction on assignment arose under other law. Of course, Revised Article 9 does not override conflicting federal law. See U.S. CONST. art. VI (Supremacy Clause).

28. As the Official Comments explain:

The principal effects of this section [R. § 9-408] will take place outside of bankruptcy. Compared to the relatively few debtors that enter bankruptcy, there are many more that do not. By making available previously unavailable property as collateral, this section should enable debtors to obtain additional credit. For purposes of determining whether to extend credit, under some circumstances a secured party may ascribe value to the collateral to which its security interest has attached, even if this section precludes the secured party from enforcing the security interest without the agreement of the account debtor or person obligated on the promissory note. This may be the case where the secured party sees a likelihood of obtaining that agreement in the future. This may also be the case where the secured party anticipates that the collateral will give rise to a type of proceeds as to which this section would not apply.

R. § 9-408 cmt. 8.



balance at every turn. If an efficient system of secured transactions is a good thing, it does not follow that pushing this generally beneficial regime to the extreme in every context must be even better. Indeed, the filing system itself may properly be viewed as an impediment to creating a perfected security interest. Article 9 extracts from the parties the price of public notice in exchange for the transactional benefits that it provides.

Examples abound of the revised Article's balance and the Drafting Committee's restraint; we mention only a few here. First, although the thrust of Revised Article 9 is the facilitation of secured credit, the revision process saw little interest in making changes that would materially disrupt the status quo concerning the avoidance of unperfected security interests in bankruptcy.<sup>29</sup> For example, a proposal to confer on an *unperfected* security interest priority over a judicial lien<sup>30</sup> gathered virtually no support among members of the Drafting Committee or the many advisors and observers.<sup>31</sup>

One of the most controversial aspects of the Report—at least if controversy is measured by the apparent level of dyspepsia that it generated during the drafting process—was the recommendation that Article 9 embrace deposit accounts as original collateral.<sup>32</sup> From the outset, it was clear that a substantial minority of the Drafting

29. One might quibble with the statement in the text. Revised Article 9 facilitates secured credit in part by enhancing certainty, including by making the requirements for perfection more certain. These requirements may result in fewer security interests that are inadvertently unperfected when the debtor enters bankruptcy. We do not believe that the consequent reduction in the number of unperfected security interests avoided in bankruptcy can be characterized fairly as a disruption of bankruptcy avoidance powers.

30. See James J. White, *Revising Article 9 to Reduce Wasteful Litigation*, 26 LOY. L.A. L. REV. 823, 823-26 (1993).

31. The absence of support may have reflected views on the merits, concerns about adverse political reactions that might jeopardize enactment, distributional bias, or some combination of these (or other) reasons. However, the absence of support most certainly did not result from the mistaken notion that adopting the proposal would, somehow, contradict principles embodied in the Bankruptcy Code or be outside the proper domain of Article 9. It could hardly be clearer that whether the bankruptcy trustee may exercise the power to avoid any given transfer under Bankruptcy Code section 544(a) depends exclusively on nonbankruptcy law. See 11 U.S.C. § 544(a) (1994). For personal property and fixtures, nonbankruptcy law normally is UCC Article 9.

32. Benefiting from two reports on the subject from an advisory group and drawing upon the experience of deposit account financing in three states, the Study Committee recommended that the Drafting Committee revise Article 9 to include deposit accounts as original collateral, see Recommendation 7.A., REPORT, *supra* note 1, at 68, and that the Drafting Committee seriously consider adopting the specific perfection, priority, choice-of-law, enforcement, and other rules recommended by the advisory group. See Recommendation 7.C., *id.*, at 68. When the Report was issued in December 1992, deposit accounts could serve as original collateral under Article 9 as enacted in four states—California, Hawaii, Illinois, and Louisiana. See *id.* at 68 n.2. However, Illinois had been in the group for less than a year. The group now includes Idaho as well.

Committee, including some members associated with the secured financing industry, had reservations about including deposit accounts as original collateral. The Drafting Committee disagreed over whether lenders actually would extend additional credit in reliance on a deposit account to which the debtor had access; it disagreed over whether obtaining a perfected security interest in all deposit accounts of a debtor would become the routine result in the vast run of secured transactions; it disagreed over the appropriate priority rule for resolving a conflict between a security interest in a deposit account as original collateral and a security interest in the deposit account claimed as proceeds of inventory, accounts, or other original collateral; it disagreed over the appropriate priority rule for resolving a conflict between a security interest in a deposit account and the bank's right of setoff; and it disagreed over whether the benefits of including deposit accounts as original collateral justified the many special provisions required to accomplish the task. The Federal Reserve Bank of New York expressed concern that security interests in deposit accounts would impede the free flow of funds through the payment system. Consumer-advocacy groups feared that individuals would inadvertently or unwisely encumber their bank accounts.

Ultimately, the Drafting Committee settled on an approach that appears to have satisfied (grudgingly, perhaps) all concerned. The basic principles of the approach are straightforward.<sup>33</sup> First, Revised Article 9 deals directly with the concerns of the New York Fed by providing that transferees of funds from a deposit account take free of a security interest in the deposit account, even if they actually know of the security interest and even if they give no value.<sup>34</sup> The only exception is for a transferee who acts in collusion with the debtor in violating the rights of the secured party.<sup>35</sup> Other than encountering some difficulties articulating the appropriate standard for the exception, the Drafting Committee had little difficulty settling on this rule.

The Drafting Committee had greater difficulty deciding what to do about consumer deposit accounts. Representatives of banks that extend consumer credit argued for including them as original

33. This approach is discussed somewhat more fully below in Part II.E. For a more complete and detailed discussion of the issues raised by including deposit accounts as original collateral under Revised Article 9, see Bruce A. Markell, *From Property to Contract and Back: An Examination of Deposit Accounts and Revised Article 9*, 74 CHI.-KENT L. REV. 963 (1999).

34. See R. § 9-332(b).

35. See *id.*

collateral. They claimed that the applicable common-law requirements for an effective “pledge” of a deposit account were uncertain and, to the extent certain, costly to implement. Representatives of consumer-advocacy groups did not dispute this claim. Rather, they objected to eliminating the uncertainty and cost, lest the use of deposit accounts as original collateral become more widespread. Perhaps because they made a political judgment that opposition to the proposed inclusion of deposit accounts in consumer transactions might have resulted in excluding deposit accounts as original collateral in commercial transactions as well, the Drafting Committee agreed to exclude from Revised Article 9 assignments of deposit accounts in consumer transactions.<sup>36</sup>

The third basic principle is that a security interest in a deposit account as original collateral may be perfected *only* by “control”; it may not be perfected by filing a financing statement.<sup>37</sup> “Control” of a deposit account is defined in much the same way as “control” of a security entitlement.<sup>38</sup> A secured party having control of a deposit account normally has the power (even if not always the right) to appropriate the funds on deposit. In the minds of some, control served as a proxy for the secured party’s having relied on the deposit account as collateral when deciding whether and to what extent to extend credit to the debtor. Perhaps more accurately, lack of control served as a proxy for lack of reliance. A secured party that does not even take the steps necessary to enable itself to reach the funds on the debtor’s default is unlikely to rely on the deposit account as original collateral in any meaningful way. Its unperfected security interest is junior to the rights of the debtor’s judicial lien creditors and trustee in bankruptcy. Revised Article 9’s control-only perfection rule is in part a response to those who argued that it should not be “too easy” to take a deposit account as original collateral. The rule actually makes it *more difficult* to perfect a security interest in a deposit account as original collateral than under the nonuniform versions of

36. *See id.* § 9-109(d)(13).

37. *See id.* §§ 9-312(b)(1), 9-314(a). A security interest in a deposit account that is proceeds of most other types of other collateral may be perfected by filing. *See id.* § 9-315(c), (d)(2).

38. *Compare id.* § 9-104(a) with U.C.C. § 8-106(d). A secured party has control of a deposit account if the secured party is the bank with which the deposit account is maintained; if the debtor, secured party, and bank with which the deposit account is maintained agree in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the account without further consent by the debtor; or if the secured party becomes the bank’s customer with respect to the account. *See R.* § 9-104(a).

Article 9 currently in force in some jurisdictions.<sup>39</sup>

Modification of the method of perfecting a security interest through the possession of collateral by a person other than the debtor or secured party is another example of the measured approach taken in Revised Article 9. Under Former Article 9, perfection by possession could be achieved by the bailee's receipt of notification of the security interest.<sup>40</sup> In a change analogous to the control-only perfection rule for deposit accounts, perfection in this setting under Revised Article 9 occurs only if a person other than the debtor or secured party "authenticates a record acknowledging that it holds [or will hold] possession of the collateral for the secured party's benefit."<sup>41</sup>

No one can prove or even predict with confidence whether and the extent to which unsecured creditors generally will fare better or worse under Revised Article 9.<sup>42</sup> Is the end result "perfect" in every respect? Of course not. But the Drafting Committee and, ultimately, the UCC's sponsors used their best efforts to modernize, improve, and refine the law of secured transactions with a view toward facilitating extensions of credit. The project was undertaken with care and patience. It was characterized by robust debate and the frank exchange of differing views. There was nothing particularly novel or odd about the exercise, except that the Drafting Committee received greater and more widespread input than in any earlier uniform law project that we know about.<sup>43</sup>

39. For example, California law provides that perfection is achieved merely by giving written notice of the security interest to the bank at which the deposit account is maintained. See CAL. COM. CODE § 9302(1)(g)(ii) (West 1990 & Supp. 1999).

40. See U.C.C. § 9-305. This approach left several questions unanswered and disputed, including whether the secured party, as opposed to the debtor, could give an effective notification and whether a bailee's receipt of notification imposed upon the bailee any duties.

41. R. § 9-313(c)(1).

42. See Harris & Mooney, *supra* note 8, at 1356-64.

43. Fortunately, very few of the many who followed the revision process appear to have been swayed by hyperbole painting it as a classic David and Goliath battle of good against evil. See, e.g., Kenneth N. Klee, *Barbarians at the Trough: Riposte in Defense of the Warren Carve-Out Proposal*, 82 CORNELL L. REV. 1466, 1468 (1997) (characterizing the revision process as a "secured creditors' grab" that reflects "hysterical efforts to entrench wealth in the hands of banks, insurance companies, and finance companies at the expense of tort creditors, tax creditors, environmental creditors, and, perhaps, employees and trade creditors"); see also Elizabeth Warren, *Making Policy with Imperfect Information: The Article 9 Full Priority Debates*, 82 CORNELL L. REV. 1373, 1374 (1997) (describing reform effort as a "headlong push to enlarge on every scintilla of priority for secured creditors").

## II. SCOPE OF ARTICLE 9

Including deposit accounts as original collateral is not the only way in which the revision enlarges the scope of Article 9. That scope already was very broad. The Former Article applied generally to “any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures,”<sup>44</sup> and to “security interests created by contract.”<sup>45</sup> Although Former section 9-104 excluded thirteen types of transactions, several of the exclusions followed directly from the limitations inherent in the scope provisions.<sup>46</sup>

Article 9 is a product of the 1950s, when personal property financing was concerned largely with goods and rights arising from transactions in goods, such as accounts (rights to payment for goods sold) and documents of title. Other types of intangible property have become important sources of wealth in the ensuing decades. Not surprisingly, many of the Report’s recommendations to expand the Article’s scope dealt with rights to payment (sales of general intangibles for money due, deposit accounts, rights under insurance policies, tort claims) and other intangible collateral (intellectual property).<sup>47</sup> The transactions that the recommendations would bring within the ambit of Revised Article 9 generally are possible under the common law.<sup>48</sup> However, Article 9 provides a legal framework that the Study Committee thought likely to reduce the costs and uncertainty attendant to common-law transactions.

In this part we examine the extent to which the revised Article follows the Study Committee’s recommendations concerning scope

44. U.C.C. § 9-102(1)(a).

45. *Id.* § 9-102(2).

46. *See, e.g., id.* § 9-104(c) (generally excluding liens given by statute or other rule of law for services and materials), (j) (generally excluding the creation or transfer of an interest in or lien on real estate).

47. Despite the breadth of Article 9’s coverage, Part III.A of the Report addressed seven scope-related topics. *See* REPORT, *supra* note 1, at 43-49 (sales of general intangibles and credit card receivables), 50-55 (intellectual property), 56-57 (rights under insurance policies), 58-59 (tort claims), 60-66 (fixtures and real estate-related collateral), 67 (oil, gas, and minerals-related collateral), 68-71 (deposit accounts). Other portions of the Report dealt with several other areas that raised issues of Article 9’s scope. *See id.* at 91-93 (non-UCC principles of law and equity), 106-34 (proceeds), 178-80 (nonassignable contracts, permits, and licenses), 181-84 (agricultural financing), 194-98 (financing buyers and nonlease bailments).

48. Although the common law permits the creation of a security interest in a deposit account, the common-law requirements may serve as a practical impediment to taking a security interest in a deposit account used for day-to-day operations. *See, e.g.,* Dwight L. Greene, *Deposit Accounts as Bank Loan Collateral Beyond Setoff to Perfection—The Common Law Is Alive and Well*, 39 DRAKE L. REV. 259 (1990).

and explain briefly how the Drafting Committee reached the results it did.

### *A. Sale of General Intangibles*

The Drafting Committee expended much time and energy considering issues related to sales of rights to payment.<sup>49</sup> Unlike the decision whether to include deposit accounts as original collateral, which was contentious, there was general agreement from the outset on the goals to be accomplished with respect to sales of receivables. The problems were primarily ones of implementation.

Former Article 9 applied to sales of certain types of payment streams—accounts and chattel paper. Sales of other rights to payment—general intangibles and promissory notes—continued to be governed by non-Article 9 law. Not very long after Article 9 became widely enacted, Homer Kripke observed that the exclusion of non-sales- and non-service-related rights to payment from the definition of “account” was an anomaly and did not reflect the intent of the drafters.<sup>50</sup> The reason for including outright sales of payment streams in a law governing secured transactions applies equally to virtually all rights to payment, regardless of the nature of the transaction under which the right arises.<sup>51</sup> Accordingly, the Study Committee recommended that Revised Article 9 include sales of general intangibles for money due.<sup>52</sup> In *Hard Choices* we observed that the Drafting Committee would face two challenges in giving effect to this recommendation. First, it would need to distinguish general intangibles for money due from other general intangibles (e.g., the franchisee’s rights under a franchise). Sales of the latter typically are not financing transactions and, therefore, not properly within the scope of Article 9. Second, the Drafting Committee would need to exclude sales of loan participations, including loan participations in chattel paper, from the scope of the revised Article.<sup>53</sup>

49. Sales of rights to payment are an important component of securitization transactions. For a discussion of the revised Article’s likely effects on securitization, see Steven L. Schwarcz, *The Impact on Securitization of Revised UCC Article 9*, 74 CHI.-KENT L. REV. 947 (1999).

50. See Homer Kripke, *Suggestions for Clarifying Article 9: Intangibles, Proceeds, and Priorities*, 41 N.Y.U. L. REV. 687, 690-93 (1966).

51. As the Official Comment to Former section 9-102 explained, “Commercial financing on the basis of accounts and chattel paper is often so conducted that the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered by [Article 9.]” U.C.C. § 9-102 cmt. 2.

52. See Recommendation 1.A., REPORT, *supra* note 1, at 43.

53. See Harris & Mooney, *supra* note 1, at 571-72.

The Drafting Committee made the first decision, to apply Revised Article 9 to sales of general intangibles for money due, early and easily. From the earliest drafts, the Drafting Committee was content to define these general intangibles by reference to the account debtor's "principal obligation."<sup>54</sup> The Drafting Committee apparently recognized the futility of striving for greater precision and made virtually no effort over the following years to distinguish what have come to be known as "payment intangibles," whose sale is subject to Revised Article 9, from other general intangibles, whose sale is not governed by the revised Article. Thus, Revised Article 9 defines "payment intangible" as "a general intangible under which the account debtor's principal obligation is a monetary obligation."<sup>55</sup> As an Official Comment observes:

Virtually any intangible right could give rise to a right to payment of money once one hypothesizes, for example, that the account debtor is in breach of its obligation. The term "payment intangible," however, embraces only those general intangibles "under which the account debtor's *principal* obligation is a monetary obligation."<sup>56</sup>

Undoubtedly, at some time, property will be sold as to which the nature of the account debtor's principal obligation (monetary or otherwise) is uncertain. In determining whether the collateral is a payment intangible, courts should consider the purpose for including sales of payment intangibles within Revised Article 9 and the consequences of doing so.<sup>57</sup>

Most of the Drafting Committee's time and energy on the issue of sales of general intangibles was spent confronting the second challenge, finding a way to exclude sales of loan participations from the scope of the Revised Article.<sup>58</sup> The Drafting Committee's efforts

54. The Drafting Committee decided to include within the scope of Revised Article 9 most sales of general intangibles for money due at its very first meeting. The first full draft to reflect this decision defined "general intangible for money due or to become due" to mean "a general intangible under which the account debtor's principal obligation is to pay money." U.C.C. § 9-106 (NCCUSL Annual Meeting Draft 1995).

55. R. § 9-102(a)(61). This section differs from the analogous 1995 provision cited in the preceding note in only two, relatively insignificant ways. First, the defined term has been changed to "payment intangible" from "general intangible for money due or to become due." Second, the definition eliminated the use of the defined term "money." Compare *id.* with U.C.C. § 9-106 (NCCUSL Annual Meeting Draft 1995). "Money" means a medium of exchange authorized or adopted by a domestic or foreign government." U.C.C. § 1-201(24).

56. R. § 9-102 cmt. 5d (quoting *id.* § 9-102(a)(61) (emphasis added)).

57. See U.C.C. § 1-102(1) (UCC "shall be liberally construed and applied to promote its underlying purposes and policies"), (2) (explaining underlying purposes and policies of UCC).

58. The Study Committee appreciated that Article 9 may be construed as covering some sales of participations in loans that are evidenced by chattel paper. It recommended that Article

to meet that challenge were complicated by the conflicting goals of financial institutions. Bringing payment intangibles into Article 9 proved to be popular with those departments of a financial institution which handle securitization and other financing transactions such as sales of credit card receivables. It would enable these transactions to proceed with greater certainty, less risk, and less cost. On the other hand, those who staffed loan participation desks feared that bringing sales of loan participations into Revised Article 9 would wreak havoc and adamantly opposed revising Article 9 along those lines.

With the assistance of the American Bar Association Task Force on Securitized Asset Financing, the Drafting Committee considered and rejected several statutory approaches to this problem. Ultimately people realized that the concern of the loan participation markets was less with the abstract question of inclusion or exclusion from Revised Article 9 than with the practical impediments that might arise from conditioning perfection on the filing of a financing statement.<sup>59</sup> The Drafting Committee's elegant solution to this problem was to provide that sales of loan participations be perfected automatically upon attachment.<sup>60</sup> To accomplish this result, the Drafting Committee still needed to distinguish sales of loan participations, which were perfected automatically, from sales of other rights to payment, which

9 be revised to provide that "loan participations and other loan sales by financial institutions (and, possibly, sales by other classes of professional lenders) do not constitute the sale of chattel paper that is within the scope of Article 9." Recommendation 21.C., REPORT, *supra* note 1, at 169. Perhaps because of its inability to distinguish between loan participations and other sales of rights to payment, the Drafting Committee took no action on this recommendation.

59. The Report suggests that Article 9's "filing requirements would be obstructive in the high volume, high velocity loan-participation market." *Id.* at 47. There is some question, however, as to the extent to which a participant in the loan-participation market would have reason to care about whether its interest is perfected. Perfection comes into play only as against competing creditors (or a receiver) of the seller or as against another buyer of the same participation interest. The first reflects the risk that the assignor will become insolvent. Assignees of loan participations take at least some of this risk today with respect to the creditworthiness of their assignors. Because Article 9 does not apply to the sale of loan participations, *see* U.C.C. § 9-102(1)-(2), the common law applies. Even if one is certain which state's common law governs, one is rarely completely certain what the governing law requires be done to take priority over a subsequent judicial lien creditor of the assignor. For example, if New York law applies, does *Benedict v. Ratner*, 268 U.S. 353 (1925), require the assignee to take dominion over the receivable? Do typical participation arrangements and practices satisfy the *Benedict* requirements? The second aspect of perfection implicates the risk that the assignor is engaging in fraud. Again, assignees take that risk today and rely on the honesty of their assignors and the assignors' ability and willingness to make good in the case of inadvertent multiple assignments. There is no title registry for loan participations, and the common law governing priority in the case of multiple assignments is often uncertain (even if one can determine which state's common law governs).

60. *See* R. § 9-309(3).



require some act to perfect.<sup>61</sup> It did so not by defining “loan participation” (a task that proved futile) but rather by defining as an “account” nearly every type of payment stream the Committee could think of, other than payment streams represented by chattel paper or instruments.<sup>62</sup> Treating these rights to payment as accounts had the effect of imposing a filing requirement for both outright sales and assignments that secure obligations. It also had the effect of leaving in the residual category of “payment intangibles” the right to repayment of a loan.<sup>63</sup>

But what about the integrity of the filing system and the need for public notice? Every potential buyer of a loan participation from a bank knows that the bank sells participations. The filing of a financing statement covering “general intangibles” or “loan” gives no information. Even a financing statement that describes a particular loan is unlikely to give sufficient information to justify the delay that might result if sales of participations routinely were preceded by a search of the files against the seller. Under the Former Article, a prospective buyer of a loan participation had no way to insure that it was buying something that had not been sold before. Participants took this risk and were forced to rely on the honesty of the seller (often the lead bank that made the loan to the borrower) to minimize it. Revised Article 9’s automatic-perfection rule applicable to sales of payment intangibles does not exacerbate the situation. On the other hand, by expanding the category of accounts, Revised Article 9 increases the sale transactions in which filing is required as a condition of perfection. In some cases, doubt may arise concerning whether the collateral is a payment intangible or account or, if the collateral is a payment intangible, whether the transaction is a sale or an assignment that secures an obligation.<sup>64</sup> The parties most likely to

61. A security interest arising from the sale of an account, chattel paper, or an instrument (other than a promissory note) may be perfected by filing. *See id.* §§ 9-309(4), 9-310(a), 9-312(a). A security interest arising from the sale of tangible chattel paper or an instrument (other than a promissory note) may also be perfected by taking possession of the collateral. *See id.* §§ 9-309(4), 9-313(a). A security interest arising from the sale of electronic chattel paper may be perfected by control. *See id.* § 9-314(a); *see also id.* §§ 9-312(e) (providing for temporary perfection of security interests in instruments), 9-312(g) (same), 9-315(d) (providing for temporary perfection of security interests in proceeds).

62. Tort claims reduced to contractual obligations constitute an exception that may have escaped the attention of the Drafting Committee. *See id.* § 9-109 cmt. 15.

63. A loan evidenced by chattel paper or an instrument is not a “payment intangible.” *See id.* § 9-102(a)(42) (defining “general intangible”). A loan made under a credit card is an “account.” *See id.* § 9-102(a)(2) (defining “account”).

64. The UCC does not give guidance for distinguishing an outright sale of a receivable from an assignment for collateral purposes. *See id.* § 9-109 cmt. 4.

engage in the assignment of rights to payment are likely to be sophisticated and to file in doubtful cases. By doing so, for very little cost they can protect against the possibility that the collateral is an account or that the transaction is the assignment of a payment intangible to secure an obligation.<sup>65</sup>

### *B. Sale of Promissory Notes*

The Study Committee also gave some consideration to expanding the scope of Article 9 to include outright sales of instruments.<sup>66</sup> After questioning whether buyers of instruments should be exempted from Article 9's filing requirements while buyers of other rights to payment are not, the Report concluded:

Notwithstanding the possible logic of imposing Article 9 filing requirements on non-possessory buyers of instruments, the Committee is reluctant to propose that change without the benefit of substantial additional investigation. Moreover, it seems unlikely that such a revision would garner widespread support. It also probably would necessitate considerably broader transactional exclusions from Article 9 (or its perfection requirements) for sales of instruments.<sup>67</sup>

The Drafting Committee gave little thought to sales of instruments until the very end of the revision process. At its last full-scale meeting, in March 1998, the Drafting Committee decided to include sales of promissory notes, which embody promises to pay, but not checks and other drafts, which order a person to pay. Once the decision was made to include sales of promissory notes, the decision

65. Also to protect the expectations of participants in the loan-participation market, contractual restrictions on assignment of the lender's rights under a loan agreement were singled out for special treatment. Like restrictions on the assignment of other receivables, restrictions on these rights are completely ineffective to prevent the creation, attachment, perfection, or enforcement of a security interest in the receivable which secures the lender's obligation to a secured party. *See id.* § 9-406(d). But Revised Article 9 does not displace other law that gives effect to restrictions on the outright sale of the lender's rights. *See id.* §§ 9-406(d), 9-408(a)-(b).

66. The Report observed, "If it decides to extend Article 9 to sales of general intangibles, the Drafting Committee also may wish to consider a further expansion to cover sales of other rights to payment that often are the subject of financings—instruments." REPORT, *supra* note 1, at 47. Under Former Article 9, "instrument" meant a negotiable instrument, as defined in UCC section 3-104, or any other writing that evidences a right to the payment of money, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment. *See* U.C.C. § 9-105(1)(i). The definition in Revised Article 9 is substantially the same. *See* R. § 9-102(a)(47).

67. REPORT, *supra* note 1, at 48 (footnote omitted). In the omitted footnote, the Report observes: "Even in the absence of a filing requirement for sales of instruments, the seller's retention of possession could, in appropriate circumstances, provide evidence leading to avoidance of the buyer's interest as a fraudulent transfer." *Id.* at 48 n.16.

to make sales perfected upon attachment<sup>68</sup> followed almost immediately. The draft then was revised to treat sales of promissory notes the same as sales of payment intangibles in other respects. For example, certain sales were excluded from the scope of Revised Article 9 because they are not likely to be financing transactions,<sup>69</sup> and legal and contractual restraints on alienation were made ineffective.<sup>70</sup>

Having taken up sales of instruments at the eleventh hour, the Drafting Committee did not spend much time considering the ramifications of its decision. Whether otherwise avoidable problems will arise as a consequence remains to be seen.

### *C. Insurance*

Former Article 9 excluded transfers of “an interest in or claim in or under any policy of insurance,” except as proceeds of other collateral.<sup>71</sup> Consistent with the Report’s recommendation,<sup>72</sup> early drafts of Revised Article 9 narrowed the exclusion substantially.<sup>73</sup> Certain sectors of the insurance industry, most notably the life insurance industry, objected to the potential inclusion of insurance as original collateral. We met with representatives of the life insurance industry to discuss their concerns, nearly all of which related to the insurer’s status as an obligor. In essence, the insurers wanted to be able to determine with certainty whom to pay to discharge their obligations under their policies, and they wanted to continue making that determination in accordance with existing procedures.<sup>74</sup> The Drafting Committee agreed with us that some of these concerns were unwarranted (e.g., the concern that an insurer would need to consult

68. See R. § 9-309(4). This rule was chosen for the same reason that sales of payment intangibles are automatically perfected, so as not to interfere with the loan-participation market.

69. See *id.* § 9-109(d)(4)-(5), (7).

70. See *id.* § 9-408.

71. See U.C.C. § 9-104(g).

72. See Recommendation 3, REPORT, *supra* note 1, at 56 (recommending that the Drafting Committee give serious consideration to expanding the scope of Article 9 to include security interests in “most forms of business insurance policies and at least some forms of ‘personal’ (e.g., life, health, and disability) insurance”).

73. See, e.g., U.C.C. § 9-104(g) (NCCUSL Annual Meeting Draft 1995) (covering security interests in insurance policies other than those covering healthcare costs, an injury to or disability of an individual, the loss of employment or income by an individual, or funeral or burial costs).

74. The insurance-premium-finance industry was concerned that inclusion in Revised Article 9 would impose upon financiers a filing requirement not contained in the non-Article 9 law of most jurisdictions.

the UCC filings before deciding whom to pay) and that others (e.g., the concern that the insurer would be obligated to pay the secured party upon receipt of a notification of assignment) could be addressed with special rules that would not require insurers to change their way of doing business. At its meeting in June 1996, the Drafting Committee voted five to three in favor of including insurance within the scope of Revised Article 9.<sup>75</sup>

Immediately following the vote, we asked for guidance on the substance of some of the special rules that might be needed. These preliminary discussions highlighted the complexity that might be necessary to bring insurance-related collateral into Revised Article 9 without upsetting current practices and prompted the Drafting Committee to reconsider its decision. On reconsideration, apparently motivated by the substantial thought required to address this complex subject properly and the limited time in which to do so, the Drafting Committee unanimously opposed including insurance policies within the scope of Revised Article 9. We were asked, however, to consider any special scope or other provisions that might be necessary to facilitate the financing of what Revised Article 9 now calls “health-care-insurance receivables,” i.e., rights to payment for health-care goods or services which arise under an insurance policy.<sup>76</sup>

From the perspective of the health-care provider, these receivables are the equivalent of traditional accounts—rights to payment for goods sold or services rendered.<sup>77</sup> Revised Article 9 classifies them as such.<sup>78</sup> Accordingly, the assignment (whether an outright sale or an assignment to secure an obligation) of health-care-insurance receivables by a provider to a financier is a secured transaction governed by Revised Article 9. A financing statement must be filed to perfect the financier’s security interest. However, because the account debtor on a health-care-insurance receivable is an insurer, and because the Drafting Committee did not wish to upset established practices concerning the insurer’s obligation to pay, some

75. The Drafting Committee’s vote did not address the inclusion of consumer insurance policies as original collateral in Revised Article 9. Representatives of consumer-advocacy groups opposed the inclusion, particularly of life insurance policies. They preferred instead to maintain the status quo, under which security interests in rights under life insurance policies are governed by non-Article 9 law in most jurisdictions. Regulating security interests under non-Article 9 law, they argued, has the practical effect of making credit secured by insurance policies much less available than it would be under an Article 9 regime. We agreed, but thought this to be a cogent reason for bringing these transactions into Revised Article 9.

76. See R. § 9-102(a)(46) (defining “health-care-insurance receivable”).

77. See U.C.C. § 9-106 (defining “account”).

78. See R. § 9-102(a)(2).

of the rules ordinarily applicable to account debtors on traditional accounts, such as trade receivables, were thought to be inappropriate to account debtors on health-care-insurance receivables. In particular, Revised Article 9 generally invalidates both contractual and legal restrictions on assignments of accounts.<sup>79</sup> It provides that, notwithstanding an agreement or law to the contrary, an account debtor that has been properly notified that the account has been assigned may discharge its obligation by paying the assignee but not by paying the assignor.<sup>80</sup> But although Revised Article 9 overrides contractual and legal restrictions on assignment with respect to the creation, attachment, and perfection of a security interest in health-care-insurance receivables, it does not override these restrictions with respect to the rights and duties of the account debtor.<sup>81</sup> Thus, other law, and not Revised Article 9, determines whom an account debtor on a health-care-insurance receivable must pay to discharge its obligation under an insurance policy.<sup>82</sup>

The term “health-care-insurance receivable” is not limited to rights enjoyed by providers. The patient’s right to payment under its health-care insurance policy is also a health-care-insurance receivable.<sup>83</sup> It, too, is classified as an “account,” even though the patient’s right to payment is not of a type that is included even in the broader definition of the term in Revised Article 9.<sup>84</sup> Thus, Revised Article 9 governs the patient’s assignment (both outright and for collateral purposes) of insurance benefits to his health-care provider. Such an assignment creates a security interest in an account. To facilitate the continuation of established practices, however, the security interest is perfected when it attaches; no filing against the patient is required.<sup>85</sup> If the provider assigns the right to payment to its financier, however, the normal filing rules apply.

#### *D. Tort Claims*

The Study Committee recommended that the scope of Article 9 be expanded to include security interests in claims (other than claims

79. *See id.* § 9-406(d) (contractual restrictions), (f) (legal restrictions).

80. *See id.* § 9-406(a).

81. *See id.* § 9-408.

82. *See id.* § 9-406(i) (making Revised section 9-406 inapplicable to the assignment of a health-care-insurance receivable).

83. *See id.* § 9-102(a)(46).

84. *See id.* § 9-102(a)(2) (defining “account”).

85. *See id.* § 9-309(5).

for personal injury) arising out of tort, to the extent that the claims are assignable under applicable non-UCC law.<sup>86</sup> With relatively little difficulty, the Drafting Committee decided to follow that recommendation.<sup>87</sup> Revised Article 9 governs security interests in an otherwise assignable “commercial tort claim” as original collateral.<sup>88</sup> All tort claims of organizations are commercial tort claims.<sup>89</sup> As for tort claims of individuals, only those that arise in the course of the claimant’s business or profession and do not include damages arising out of personal injury to or the death of the claimant are commercial tort claims.<sup>90</sup>

Revised Article 9 includes very few special rules governing commercial tort claims. One set reflects that tortfeasors are not typical of those who owe money. Unlike most unreified rights to payment, a “commercial tort claim” is neither an account nor a general intangible;<sup>91</sup> it is a separate type of collateral. Because the tortfeasor is not an “account debtor,”<sup>92</sup> notification of an assignment does not affect the tortfeasor’s obligation to pay unless other law so provides.<sup>93</sup> Moreover, Revised Article 9’s free-assignability provisions, which generally override any contract or non-Article 9 law restricting assignment of a right to payment, do not extend to assignments of commercial tort claims.<sup>94</sup>

Another set of special rules for commercial tort claims was designed to reduce the likelihood that a debtor inadvertently will encumber a tort claim. Unlike most collateral, which may be described in a security agreement by type (e.g., “all general intangibles”), a commercial tort claim must be described with greater specificity (e.g., “all tort claims arising out of the explosion at my

86. See Recommendation 4.A., REPORT, *supra* note 1, at 58.

87. The Drafting Committee benefited from the generous cooperation of Hugh E. Reynolds, liaison to the Drafting Committee from the Tort and Insurance Practice Section of the American Bar Association.

88. See R. §§ 9-109(d)(12) (excluding assignments of a claim arising in tort, other than a commercial tort claim), 9-401(a) (providing that law other than Revised Article 9 determines whether a debtor’s rights in collateral may be transferred).

89. See *id.* § 9-102(a)(13)(A); see also U.C.C. § 1-201(28) (defining “organization”).

90. See R. § 9-102(a)(13)(B). The Study Committee also recommended that the Drafting Committee consider seriously whether to expand the scope of Article 9 to include security interests in claims for personal injury arising out of tort. See Recommendation 4.B., REPORT, *supra* note 1, at 58. The Drafting Committee decided against this expansion.

91. See R. § 9-102(a)(2) (defining “account”), (a)(42) (defining “general intangible”).

92. See *id.* § 9-102(a)(3) (defining “account debtor”).

93. Cf. *id.* § 9-406(a) (providing that after notification of an assignment, an account debtor may discharge its obligation by paying the assignee but not by paying the assignor).

94. See *id.* §§ 9-401, 9-406(d), (f), 9-407 to 9-409.

factory on May 5 of the present year").<sup>95</sup> Consistent with this approach, a security interest does not attach to after-acquired tort claims.<sup>96</sup>

Finally, the comments reflect the Study Committee's recommendation that Article 9 or the official comments "be revised to make clear that Article 9 applies to security interests in rights to payment that derive from claims arising out of tort (e.g., rights to payment under a settlement agreement or a promissory note given to evidence liability in tort)."<sup>97</sup>

### *E. Deposit Accounts*

As we discussed above in Part II, Revised Article 9 generally follows the Study Committee's recommendation that debtors be free to use deposit accounts as original collateral under the Article. The Study Committee recognized that including deposit accounts as original collateral "undoubtedly would raise a host of other difficult legal issues."<sup>98</sup> In addition to the exclusion for consumer transactions and the perfection and "take free" rules described above, the inclusion of deposit accounts as original collateral required the promulgation of special rules governing choice of law,<sup>99</sup> priority,<sup>100</sup> the rights of the bank at which the deposit account is maintained,<sup>101</sup> and enforcement.<sup>102</sup> It also contributed to the very complicated rules governing priority in proceeds.<sup>103</sup> Nevertheless, we would like to believe that "these complexities do indeed fit together, and snugly."<sup>104</sup>

### *F. Fixtures and Other Real Property*

Article 9 applies primarily to personal property. However, it also implicates interests in real property. For example, it applies to security interests in fixtures and to security interests in notes secured by mortgages of real property. Of the many recommendations

95. *See id.* § 9-108(b)(3), (e)(1).

96. *See id.* § 9-204(b)(2).

97. Recommendation 4.C., REPORT, *supra* note 1, at 58; *see* R. § 9-109 cmt. 15.

98. REPORT, *supra* note 1, at 69.

99. *See* R. § 9-304.

100. *See id.* § 9-327.

101. *See id.* §§ 9-340 to 9-342.

102. *See id.* § 9-607(a)(4)-(5).

103. *See id.* § 9-322(c)-(e). These rules are discussed below in Part IV.A.3 and in Markell, *supra* note 33, at 989-91.

104. Markell, *supra* note 33, at 1027.

concerning the interplay between Article 9 and the law of real property which arose from the Study Committee process, the most controversial surely was the recommendation that Article 9 provide that perfection in a note or other obligation secured by real property be achieved by perfection as to the obligation under Article 9 in the same manner as if the obligation were not secured by the real property.<sup>105</sup> The controversy was enhanced when, very early in the process, the Drafting Committee decided that filing would become a method of perfecting security interests in a mortgage note or other instrument.<sup>106</sup>

From the outset, we considered the Study Committee's recommendation to be wholly unremarkable. The prevailing non-UCC law long has been that a mortgage is incident to any note it secures; rights in the mortgage follow ownership of the note.<sup>107</sup> It follows that if an assignee acquires rights in the note that are senior to those of the assignor's other creditors, the rights in the mortgage likewise are senior. Unfortunately, Former Article 9 did not address the point directly, and the official comment to Former section 9-102 led to substantial confusion and uncertainty. The Study Committee's recommendation was simply that Revised Article 9 eliminate the confusion that had developed under the Former Article. We were quite surprised by the vehemence of the objections raised to codification of what we thought to be a relatively simple and virtually undisputed principle.

Through discussions with the organized real-property bar, including representatives of the American Bar Association Section of Real Property, Probate, and Trust and the American College of Real Estate Lawyers, we discovered that a host of other issues had become entangled with the one implicated by the recommendation. Chief among these was the same "whom do I pay" issue that the Drafting Committee grappled with in a variety of other right-to-payment contexts, such as deposit accounts, letters of credit, and health-care-insurance receivables. The principal concern was for mortgagors who would not know whom to pay in order to discharge their obligations on the note. If perfection of a security interest in a mortgage note could be achieved by filing, and if an assignee need not record an

105. See Recommendation 5.B., REPORT, *supra* note 1, at 61.

106. See *supra* text accompanying notes 13-16.

107. See, e.g., *Carpenter v. Longan*, 83 U.S. (16 Wall.) 271, 275 (1872) ("An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."); David G. Epstein, *Security Transfers by Secured Parties*, 4 GA. L. REV. 527, 534 (1970).



assignment of the mortgage in the real property records in order to ensure perfection, we were asked repeatedly, how would a homeowner or other mortgagor know whom to pay? The proposed revision of Article 9, we were told, would exacerbate the risk of a mortgagor having to pay the mortgage debt twice.

Of course, nothing could be further from the truth. The law of obligations determines whom an obligor must pay to discharge the obligation. Revised section 9-406, which applies to obligations that are not evidenced by an "instrument," is part of the law of obligations. It contains the "notification" rule that the real-property bar advocated: The account debtor can discharge its obligation by paying the original obligee until but not after the account debtor receives notification that the right to payment has been assigned; after notification, payment to the assignee will discharge the obligation, but payment to the assignor will not.<sup>108</sup> Neither the filing of a financing statement nor the recording of an assignment of mortgage affects this rule.<sup>109</sup>

If the obligation is embodied in an instrument, law other than Article 9 governs. If the instrument is not negotiable, that law is the common law. According to the Restatement of Mortgages, most reported decisions "giv[e] the mortgagor no credit for payments innocently made to the mortgagee" after the mortgage note has been transferred.<sup>110</sup> Nevertheless, the Restatement rejects that view as "completely impractical" and as having "the potential for great injustice to mortgagors."<sup>111</sup> It adopts a "notification" rule instead.<sup>112</sup> As with the notification rule under Revised Article 9, neither the filing of a financing statement nor the recording of an assignment of mortgage affects the mortgagor's obligation to pay.<sup>113</sup> If the instrument is negotiable, the "merger" principle will apply. Under

108. See R. § 9-406(a).

109. This discussion assumes the absence of legislation overriding Revised Article 9 and creating a different rule for discharging obligations on mortgage notes.

110. See RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.5 cmt. a, at 391 (1997).

111. *Id.*

112. "Except as otherwise provided by the Uniform Commercial Code, after transfer of an obligation secured by a mortgage, performance of the obligation to the transferor is effective against the transferee if rendered before the obligor receives notice of the transfer." *Id.* § 5.5, at 390.

113. See R. § 9-406(a) (account debtor may discharge his obligation by paying the assignor "until, but not after, the account debtor receives a notification" of assignment); U.C.C. § 1-201(26) (person "receives" a notification when it comes to his attention or is duly delivered); RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.5 cmt. c, at 395. However, a comment to the Restatement suggests that recordation of an assignment of mortgage imparts notice to a grantee who buys the mortgaged land after recordation. See *id.*

this principle, the obligation is bound up in and transferred with the paper on which it is written; notification is irrelevant. UCC Article 3 follows the merger principle. It provides that the makers' obligation on a negotiable note may be discharged by paying a person entitled to enforce the instrument ("PETE").<sup>114</sup> To qualify as a PETE, a person normally must be in possession of the instrument.<sup>115</sup> Thus, if the mortgagee assigns the mortgage note but the assignee does not take possession, the note can be discharged by paying the mortgagee as if no assignment had been made. Payment to the assignee will not discharge the obligation. As under the Restatement and Article 9, neither the filing of a financing statement nor the recording of an assignment of mortgage affects this rule.

In short, Revised Article 9 leaves the law of obligations, and the obligations of a mortgagor, exactly where they were. In the end, the real-property bar acknowledged this and turned their attention to repeal of the merger rule in Article 3. Although the leadership of NCCUSL added this issue to the agenda of the Article 9 Drafting Committee, it did so very near the end of the drafting process. In conjunction with its consideration of expanding the scope of Article 9 to include sales of promissory notes, at its last full meeting the Drafting Committee considered the "whom to pay" issue. Although there appeared to be general support for the notification rule, the Drafting Committee was reluctant to recommend overturning a fundamental principle of negotiable instruments law without sufficient time to consider all the ramifications of the change. In particular, it was unable to reach consensus on how broadly the merger principle should be supplanted (e.g., should the notification rule apply to all notes secured by real property? all secured notes? all installment notes?) or on the statutory mechanism for making the change. The issue, which continues to draw great interest from the real-property bar, remains on NCCUSL's agenda. It has been assigned to the Drafting Committee to Revise UCC Article 1.<sup>116</sup>

The Drafting Committee also decided not to limit to real-property collateral its codification of the principle that the collateral follows the debt. Revised Article 9 is intended to make clear that this

114. See U.C.C. § 3-412. The obligation also runs to an indorser who paid the instrument after dishonor. *See id.*

115. *See id.* § 3-301 (defining "person entitled to enforce").

116. For a detailed chronology of the efforts to ensure that the notification rule applies to all mortgage notes, both negotiable and nonnegotiable, see Dale A. Whitman, *Reforming the Law: The Payment Rule as a Paradigm*, 1998 BYU L. REV. 1169.

principle applies to attachment and perfection of security interests in all secured obligations, whether secured by personal property or real property.<sup>117</sup> Only time will tell whether it ultimately will succeed in doing so. There is a risk to codifying this basic common-law principle. A court may assume that because “everyone knows” that the collateral follows the debt, the new statutory provisions must mean something at least a little different.<sup>118</sup> That something different may be inconsistent with Revised Article 9.

### III. ARTICLE 9 FILING SYSTEMS AND THE INTERACTION OF ARTICLE 9 WITH NON-UCC LAW

In *Hard Choices* we spoke approvingly of the Study Committee’s willingness to address matters that are outside the UCC but affect secured transactions. We praised “the reluctance of the current group of UCC law reformers to shy away from goals that are more ambitious than revisions to statutory text.”<sup>119</sup> In this connection, we referred to the Study Committee’s recommendations that the sponsors of the UCC “encourage and support the ongoing efforts to improve and make more uniform the various state systems for filing . . . and conducting searches[;]”<sup>120</sup> that the perfection, priority, and enforcement provisions of Article 9 be extended to statutory agricultural liens;<sup>121</sup> and that federal law governing copyrights, patents, and other intellectual property be revised, and federal recording systems for interests in intellectual property be reformed, to facilitate secured transactions.<sup>122</sup>

#### *A. Improving the Filing System*

To a considerable extent, the sponsors and Drafting Committee had the ability to implement the first two of these recommendations in the statute itself, and they rose to the occasion. Revised Article 9 contains several provisions that promote efficiency and uniformity in the operations of filing offices. For example, Revised sections 9-516

117. See R. §§ 9-203(g), 9-308(e).

118. Leaving to the common law the articulation of fundamental principles underlying commercial law also poses a risk. See Steven L. Harris, *Using Fundamental Principles of Commercial Law to Decide UCC Cases*, 26 LOY. L.A. L. REV. 637 (1993).

119. Harris & Mooney, *supra* note 1, at 575.

120. Recommendation 11.A., REPORT, *supra* note 1, at 88.

121. See Recommendation 24.A., *id.*, at 181.

122. See Recommendations 2.A.-F., *id.*, at 50-51.

and 9-520 underscore that filing offices serve a ministerial, rather than regulatory, function. Taken together, they contain an exclusive list of grounds for rejecting a financing statement or other record that is communicated to a filing office<sup>123</sup> and require a filing office that rejects a record to promptly inform the filer of the fact of and reason for the rejection.<sup>124</sup> To further insure that filers of written financing statements are not burdened by idiosyncratic requirements imposed by individual filing offices, Revised section 9-521 contains forms for initial financing statements and amendments which each filing office must accept (assuming it accepts written records). Revised section 9-519(f) facilitates searches of the public records by requiring a filing office to be capable of retrieving an initial financing statement and all amendments and other filed records relating to it either by the debtor's name or by the file number assigned to the initial financing statement.<sup>125</sup> Revised section 9-523 increases the utility of responses to search requests by requiring a filing office to respond to requests promptly and with current and complete information.<sup>126</sup>

The Drafting Committee realized that dictating the minimum services a filing office must provide and setting the minimum performance standards for providing those services are appropriate subjects for legislation, but specifying the details of day-to-day filing-office operations is not. Detailed procedures specified in statutes cannot be changed easily enough to enable filing offices to adjust to changes in filing load, personnel, and technology. Particularly given the substantial differences among Article 9 filing offices (in their current operations, in the quantity of filings processed, and in the number of employees who do the processing), imposing absolute uniformity of practices and procedures would be both unnecessary and unwise. Yet, because filers and searchers often deal with many filing offices, great value would come from having filing-office practices and procedures be harmonious with one another. Revised section 9-526 is a useful step toward realizing that value. This section

123. See R. §§ 9-520(a), 9-516(b).

124. See *id.* § 9-520(b) (requiring filing office to act not later than two business days after it receives the record).

125. A filing office must assign a unique number to each filed record. See *id.* § 9-519(a)(1). The "file number" is the number assigned to an initial financing statement. See *id.* § 9-102(a)(36) (defining "file number").

126. See *id.* § 9-523(c)(1) (requiring filing office to communicate, upon request, the information provided in financing statements on file as of a date no earlier than three business days before filing office receives the request), (e) (requiring filing office to act not later than two business days after it receives the request).

requires the adoption and publication of filing-office rules after consultation with other filing offices and after consideration of the rules and practices of, and technology used by, other Article 9 filing offices. Revised section 9-526 requires the rule-adopting official or agency also to consult the Model Rules promulgated by the International Association of Corporate Administrators (“IACA”), an organization of administrators responsible for statewide corporate and UCC filings.<sup>127</sup>

The process leading to the promulgation of the Model Rules demonstrates the value of the sponsors’ working with other interested groups towards improving matters that cannot be addressed usefully by statute. Links between Article 9’s sponsors and IACA began to form as early as 1991, when Harry C. Sigman, a member of the Study Committee, addressed an IACA annual meeting about efforts to revise Article 9. Funding provided by the Article 9 Filing Project<sup>128</sup> enabled Mr. Sigman and other experts in Article 9 to meet regularly with IACA members and assist them in fashioning the Model Rules during the succeeding years. Input from filing officers was not limited to formulation of the Model Rules. After the filing provisions of Revised Article 9 took shape, we met with a small group of filing officers to discuss the provisions in detail, and we engaged in many e-mail exchanges with filing officers throughout the revision process.

The beneficial effects of the filing officers’ participation in the process are likely to extend well beyond Revised Article 9 and the Model Rules. Filing officers not only became better educated about the needs of those who use the system but also, for the first time, systematically shared with one another their ideas about, and experiences with, a wide range of software and hardware products. The information and insights gained from IACA-related discussions already has enabled several filing offices to modernize and improve their operations. Perhaps most important, the filing officers appear to have come away from the revision project with an appreciation that they are engaged in a common enterprise under a uniform law. This constructive attitude bodes well for improved filing-office operations under Revised Article 9.

Other efforts stimulated by the revision also are likely to contribute to progress toward making the Article 9 filing systems

127. The final version of the Model Rules is expected to be promulgated by the end of 1999.

128. NCCUSL established the Article 9 Filing Project at the University of Minnesota to study and address problems with the filing system and to promote nonstatutory solutions, such as the promulgation of filing-office rules.

uniform. Of particular note are the standards for UCC electronic filing promulgated by the American National Standards Institute (“ANSI”).<sup>129</sup> These standards, along with an Implementation Guide,<sup>130</sup> will assist filing offices in implementing an electronic filing system under Article 9. A version of the Implementation Guide suitable for use with Revised Article 9 is expected to appear shortly. This version will facilitate a quick transition to Revised Article 9 and, for those filing offices that have not yet gone on line by Revised Article 9’s effective date of July 1, 2001,<sup>131</sup> to electronic filing.

### *B. Agricultural Financing*

The sponsors were successful in reaching outside their own organizations also when fashioning the treatment of statutory agricultural liens. As we noted in *Hard Choices*, two American Bar Association task forces invested much time and thought into proposals for improving Article 9’s treatment of agricultural finance and regularizing the treatment of statutory agricultural liens.<sup>132</sup> Revised Article 9 adopts many of the recommendations of those task forces. Several of its provisions clarify or otherwise improve the law applicable to security interests in agricultural collateral.<sup>133</sup>

Despite years of work, and despite what appeared to be a widely shared view that Former section 9-312(2) was unworkable,<sup>134</sup> neither the Drafting Committee nor the ABA task forces succeeded in forging a consensus among themselves or among the interested groups on one important question relating to agricultural finance: to what extent, if any, should Revised Article 9 afford priority to security interests in crops that secure new value (e.g., seed or

129. Transaction Set 154 of ANSI X12 relates to electronic UCC filings.

130. An Implementation Guide for use with the Former Article was approved by the Secured Transactions Section of IACA in 1999.

131. See R. § 9-701. For a discussion of the rules governing the transition to the revised Article, see Bradley Y. Smith, *New Article 9 Transition Rules*, 74 CHI.-KENT L. REV. 1339 (1999).

132. See Harris & Mooney, *supra* note 1, at 576.

133. Compare U.C.C. § 9-109(3) (definition of “farm products”) with R. § 9-102(a)(34) (revised definition of “farm products”). See R. § 9-324(d) (new priority for purchase-money security interests in livestock). Compare U.C.C. §§ 9-203(1)(a); and 9-402(1) (requiring security agreement and financing statement covering crops to describe the real property concerned) with R. §§ 9-203(b)(3)(A); and 9-502(a)-(b) (containing no such requirements). Compare U.C.C. § 9-401(1) (second and third alternatives) (requiring local filing to perfect a security interest in crops) with R. § 9-501(a) (requiring filing in central filing office).

134. Former section 9-312(2) afforded special priority to those who provide secured credit that enables a debtor to produce crops.

fertilizer) that is used in the production of the crops? Apparently recognizing that the fifty state legislatures were no more likely than other groups to agree about the desirability of a special priority for “production-money security interests” (“PrMSIs”), the Drafting Committee decided that the provisions for PrMSI priority should be presented to the states as optional. This proposal was met with a campaign orchestrated by the American Bankers Association against the provisions in fall 1997. Despite its intensity,<sup>135</sup> the campaign was of limited effect. The draft preceding the hubbub presented the PrMSI provisions in bracketed sections, each accompanied by a Legislative Note indicating that “This section is optional.”<sup>136</sup> Ultimately, the brackets surrounding the provisions were removed, and the provisions were relocated to Appendix II, which refers to them as “model provisions.”

Perhaps the most significant aspect of Revised Article 9 as it relates to agricultural financing concerns the scope of the revised Article. Many of the provisions relating to perfection by filing, priority, and enforcement apply not only to consensual security interests but also to the vast array of “agricultural liens” created by statute in each state.<sup>137</sup> These provisions afford a clear, easy, and uniform way for a holder of any one of these diverse agricultural liens to obtain priority over the debtor’s judicial lien creditors and bankruptcy trustee,<sup>138</sup> to ascertain the agricultural lien’s priority as

135. Along with the members of the Drafting Committee, we were subjected to a barrage of more than a thousand “form” letters arguing against the inclusion of any PrMSI rules in Revised Article 9. It was not uncommon for a single bank to have sent several pieces of mail, the contents of which were identical save for the name and signature of the individual bank officer or employee. The quantity was so great that the postal service reportedly refused to continue delivering mail to one Drafting Committee member, who was asked to pick up the mail at the post office instead.

136. U.C.C. §§ 9-105, 9-321 (Reporters’ Interim Draft Aug. 7, 1997).

137. “Agricultural lien” means an interest, other than a security interest, in farm products:

(A) which secures payment or performance of an obligation for:

(i) goods or services furnished in connection with a debtor’s farming operation;  
or

(ii) rent on real property leased by a debtor in connection with its farming operation;

(B) which is created by statute in favor of a person that:

(i) in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor’s farming operation; or

(ii) leased real property to a debtor in connection with the debtor’s farming operation; and

(C) whose effectiveness does not depend on the person’s possession of the personal property.

R. § 9-102(a)(5).

138. See *id.* §§ 9-310(a) (financing statement must be filed to perfect agricultural lien),

against conflicting security interests and agricultural liens in the same collateral,<sup>139</sup> and to enforce the agricultural lien.<sup>140</sup> At the same time, by subjecting agricultural liens to Article 9's filing requirements, Revised Article 9 enables potential secured lenders to ascertain with ease and at low cost, by searching the Article 9 filing records, whether farm products previously have been encumbered with an agricultural lien.<sup>141</sup> This statutory approach proved so popular that some people questioned why it should be limited to agricultural liens on farm products. They urged the Drafting Committee to extend the perfection and priority provisions of Revised Article 9 to cover all nonpossessory statutory liens on all kinds of collateral.<sup>142</sup> The potential advantages of such an expansion of Article 9's scope were evident. However, the world of nonagricultural, nonpossessory statutory liens is vast and, at least to some extent, unknown. Lacking a practical way of determining all the types of liens that would be implicated by expanding Revised Article 9 to cover all these liens, the Drafting Committee understandably declined to proceed.

### *C. Federal Regulation of Intellectual Property*

The Study Committee's recommendation that the law governing security interests in copyrights, patents, and other intellectual property be revised necessarily implicates federal law, which generally speaking lies outside the bailiwick of the UCC's sponsors. While the Drafting Committee was revising Article 9 to deal expressly with software financing and other issues relating to intellectual property collateral,<sup>143</sup> efforts at making federal intellectual-property law more conducive to contemporary patterns of commercial finance continued. These efforts, which have yet to bear

9-317(a)(1) (unperfected agricultural lien is subordinate to rights of a lien creditor), 9-102(a)(52) (defining "lien creditor").

139. *See id.* § 9-322(a), (g).

140. The holder of an agricultural lien may enforce the agricultural lien under Revised Article 9 by repossessing and disposing of the collateral or by accepting the collateral in satisfaction of the obligation it secures. *See id.* § 9-601(a).

141. *See id.* § 9-322(a) (affording priority to the first to file or perfect). *But see id.* § 9-322(g) (affording priority to later-filed agricultural lien if the statute creating the agricultural lien so provides).

142. An American Bar Association subcommittee sought more modest change. It recommended that Revised Article 9 govern only the priority between a nonagricultural statutory lien and an Article 9 security interest. *See* REPORT AND RECOMMENDATIONS OF THE SUBCOMMITTEE ON RELATION TO OTHER LAW OF THE ABA BUSINESS LAW SECTION UNIFORM COMMERCIAL CODE COMMITTEE (Oct. 1996).

143. For a discussion of these issues, see Steven O. Weise, *The Financing of Intellectual Property Under Revised UCC Article 9*, 74 CHI.-KENT L. REV. 1077 (1999).



fruit, have proceeded under the auspices of the American Bar Association and, more recently, the Commercial Finance Association.<sup>144</sup> We are uncertain whether the involvement of the UCC's sponsors (assuming it would have been welcome) would have been a wise allocation of their resources or would have led to enactment of improved federal legislation.<sup>145</sup> Regardless, we are disappointed that interested parties have not yet succeeded in spurring Congress into action.

#### IV. APPROACHES TO CODIFICATION: FINE LINES, ROUGH JUSTICE, COMPLEXITY, AND SIMPLICITY IN REVISED ARTICLE 9

The ultimate success of Revised Article 9 will depend not only on the quality of substantive rules it adopts but also on its appropriate application by lawyers and judges. Its appropriate application, in turn, will depend in large part on the way in which the substantive rules are articulated and organized.

As we noted in *Hard Choices*:

One of the virtues of Article 9 is that most of its provisions are readily accessible to lawyers who are familiar with its general outlines. In revising Article 9, the Drafting Committee will be expected not only to determine questions of Article 9's policy and scope but also to embody its choices in statutory language that preserves its accessibility.<sup>146</sup>

We were mindful of this challenge throughout the drafting process. And we were not alone. In several contexts the statutory approach that was taken (or rejected) generated more controversy than the substance of the rule it articulated. Moreover, we received a good deal of assistance in making sure that terminology and style were consistent throughout the revised Article.<sup>147</sup> This consistency

144. The American Bar Association's Joint Task Force on Security Interests in Intellectual Property, composed of lawyers from the Sections of Business Law and Intellectual Property Law, is preparing the Federal Intellectual Property Security Act. This Act would govern security interests in all federally regulated intellectual property, including copyrights and patents. The Commercial Finance Association, a trade organization of asset-based lenders, is supporting the enactment of the Security Interests in Copyrights Financing Protection Act, which, as the name implies, is a more modest reform effort.

145. Some participants in the Article 9 revision process have participated actively in these federal law-reform efforts, as well. Although the Study Committee took a somewhat more active role with respect to reform of federal law than did the Drafting Committee, *see* Harris & Mooney, *supra* note 1, at 575, the Drafting Committee had more than enough challenges without concerning itself with reforming federal law.

146. *Id.* at 587.

147. For a discussion of the Drafting Committee's efforts in this regard and those of its simplification task force, *see* Louis F. Del Duca et al., *Simplification in Drafting—The Uniform*

serves to render an already accessible statute even more accessible.

Of course, accessibility requires not only that each individual sentence be comprehensible but also that users of the statute are able to find all the relevant provisions and understand how the provisions relate to one another. Despite widespread satisfaction with much of the Former Article, Revised Article 9 contains myriad changes. As one of us quipped during the drafting process, "Everyone agrees that Article 9 works fairly well and only needs a handful of material revisions. The problem is that everyone has a different handful." Even if the inclusion of any single complex provision or set of rules does not give rise to a serious problem, the sheer number of complex and detailed rules in the aggregate may.

When taken in the aggregate and in the abstract, the revised Article may appear forbidding. But articles of the UCC are not novels, to be read through from beginning to end. Approached in a given transactional context, Revised Article 9 should prove to be readily navigable. It has been substantially reorganized with the new user in mind. That the reorganization was wholeheartedly supported by experts whose familiarity with (and investment in) the organization of Former Article 9 vastly exceeds that of the average user gives us reason to believe that the revised Article's organization will accomplish its intended purpose.

In *Hard Choices* we addressed the dichotomy between two differing paradigms. One would create finely crafted, individualized statutory lines that seek to work nearly perfect justice over a detailed taxonomy of circumstances. The other would offer rougher and blunter, albeit simpler, bright-line rules that, while normatively suboptimal in some circumstances, would yield the desired result in the mine run of cases. Of course, the fine lines versus rough justice dichotomy discussed in *Hard Choices* is but one of several classes of drafting choices along a broad spectrum. As one might expect, the revision includes examples of clear lines, enormous complexity, purposefully incomplete treatment of issues, general standards for courts to develop and apply as the circumstances require, and mere silence, leaving courts to interpolate both standards and results.

In the discussion that follows we provide a few examples of issues whose complexity tested our ability and that of the Drafting Committee to maintain the Article's accessibility by avoiding unnecessary complexity. We also speculate briefly on the likely causes

*Commercial Code Article 9 Experience*, 74 CHI.-KENT L. REV. 1309 (1999).

of the complexity. We conclude by noting some instances in which the Drafting Committee chose to address issues with considerably less—in some cases, perhaps too little—detail.

### A. (Possibly) Unnecessary Complexity

#### 1. Changes in Business Structure

In *Hard Choices* we examined the Study Committee's recommendations concerning the effect of certain changes in business structure on security agreements that contain after-acquired property provisions. We focused on two paradigmatic examples. The first was the transfer by an individual owner-operator of a sole proprietorship (*A*) of all of the business assets to a newly-formed corporation (*B*) owned by the individual. The second was a merger of a corporation (*A*) into another (surviving) corporation (*B*). Each case assumed that *B*, the transferee, continues to carry on the business of *A*, the transferor. Each case also assumed that *A* had entered into a security agreement in favor of SP-A covering all existing and after-acquired collateral (e.g., accounts and inventory) and that SP-A had filed a financing statement against *A*. The principal controversy arose with respect to collateral acquired by *B* following the transfer.<sup>148</sup> First, to what extent should the security agreement originally entered into by *A* be sufficient to create a security interest in collateral acquired by *B*? Second, if the security agreement is so effective, to what extent should the financing statement filed against *A* be sufficient to perfect the security interest in collateral acquired by *B*? Third, if the security interest is so perfected, what priority rule should govern a contest between SP-A's security interest and that of SP-B, in whose favor *B* entered into a security agreement?

The Report recommended that the official comments be revised to indicate that other (i.e., non-Article 9) law governs the answer to the first question—whether and to what extent the security agreement

148. Related questions concern the effect of the transfer on SP-A's security interest in the *transferred* collateral and the effect of a "pure" change of name, i.e., when *A*'s name changes to *B* but no new entity is involved. While not completely free from controversy, the resolution of these issues under Revised Article 9 is similar to that under its predecessor. SP-A's security interest normally continues in, and a financing statement filed against *A* continues to be effective with respect to, the transferred collateral, even if SP-A does not file against *B*. Compare R. §§ 9-315(a), 9-507(a) with U.C.C. §§ 9-306(2), 9-402(7) (third sentence). In the case of a name change, a financing statement filed against *A* continues to be effective as to collateral acquired by *B* within the four-month period after the name change and thereafter only if an appropriate amendment to the financing statement is filed. Compare R. § 9-507(c) with U.C.C. § 9-402(7) (second sentence).

originally entered into by *A* is effective to create a security interest in property acquired by *B*.<sup>149</sup> Revised Article 9, however, goes further. Consistent with the Report's recommendation, the revised Article provides that a person "becomes bound" as debtor under another person's security agreement when that result would occur by operation of other law or by contract.<sup>150</sup> Revised Article 9 adds to this trigger its own, additional, formula for when a person so "becomes bound" by another person's security agreement. Under Revised section 9-203, a person (here, *B*) "becomes bound" if "the person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person."<sup>151</sup>

Revised Article 9 follows the Report somewhat more closely with respect to the second and third questions.<sup>152</sup> As to the second question, under Revised section 9-508 SP-A's financing statement filed against *A* would remain effective to perfect its security interest in collateral acquired by *B* during the four-month period after *B* became bound by *A*'s security agreement. The financing statement would remain effective to perfect the security interest in collateral acquired by *B* thereafter only if, during the four-month period, SP-A files a new initial financing statement against *B*.<sup>153</sup>

As recognized in the Report, maintaining SP-A's perfected security interest in collateral acquired by *B* necessitates new priority rules in order to answer the third question. Basing priority on the timing of financing statements filed by SP-A and SP-B against *different debtors* would make no sense.<sup>154</sup> Revised section 9-326 contains the new rules applicable to this variation of the "double-debtor" problem. Under that section, a security interest perfected by a financing statement that is effective solely under Revised section 9-508 generally is subordinate to security interests perfected by another method.<sup>155</sup> It follows that SP-B's security interest ordinarily would have priority. There are exceptions to this general

149. See Recommendation 17.D., REPORT, *supra* note 1, at 142-43.

150. See R. § 9-203(d)(1).

151. *Id.* § 9-203(d)(2).

152. See Recommendation 17.E.-F., REPORT, *supra* note 1, at 143-48.

153. See R. § 9-508(b).

154. See Steven L. Harris, *The Interaction of Articles 6 and 9 of the Uniform Commercial Code: A Study in Conveyancing, Priorities, and Code Interpretation*, 39 VAND. L. REV. 179, 222-25 (1986).

155. See R. § 9-326(a).

subordination, however. As among security interests perfected solely under Revised section 9-508 (e.g., as among SP-A and other secured creditors of *A*), the other priority rules of Revised Article 9 apply (e.g., the first-to-file-or-perfect rule of Revised section 9-322).<sup>156</sup> Moreover, there is an exception to the exception. If security interests so perfected were not created by security agreements entered into by the same debtor (e.g., if *B* became bound by a security agreement originally entered into by *C* in favor of SP-C as well as by the security agreement entered into by *A* in favor of SP-A), the priority is governed by “priority in time of the new debtor’s having become bound.”<sup>157</sup> The latter exception reflects another necessary accommodation of the “double-debtor” problem.

The effort to protect the (possibly) unwitting SP-A from the risk that *B*, as a new debtor, might become bound by *A*’s security agreement obviously has resulted in substantial additional complexity. Even so, the approach taken in Revised sections 9-326 and 9-508 does not provide a complete resolution of SP-A’s problems. For example, it may be purely fortuitous whether perfection of security interests in *B*’s after-acquired collateral is governed by the law of the jurisdiction whose law governed perfection of SP-A’s security interest in *A*’s collateral. Assume that, for choice-of-law purposes under Revised Article 9, *A* is located in State *X* and *B* is located in State *Y*.<sup>158</sup> SP-A’s financing statement filed in State *X* against *A* would not perfect SP-A’s security interest in *B*’s after-acquired collateral. Although SP-A’s financing statement would continue to be effective under Revised section 9-508, it would not perfect SP-A’s security interest in *B*’s collateral because it is not filed in State *Y*, the jurisdiction in which *B* is located.<sup>159</sup> Revised section 9-316(a) would maintain for up to one year the perfection of SP-A’s security interest in collateral *transferred* by *A* to *B*, notwithstanding a change in governing law. But that provision relates only to perfected security interests, which, by definition, have attached;<sup>160</sup> it does not apply to collateral acquired after the change in applicable law.<sup>161</sup>

156. *See id.* § 9-326(b).

157. *Id.*

158. Revised section 9-307 determines where a debtor is located for purposes of Revised Article 9’s choice-of-law rules.

159. *See* R. § 9-301(1).

160. *See id.* § 9-308(a) (security interest is perfected if it has attached and the applicable requirements for perfection have been satisfied).

161. *See id.* § 9-316 cmt. 2 example 5. The result is the same under Former Article 9. *See* U.C.C. § 9-103(1)(d), (3)(e).

One reasonably might question whether the extensive effort to address these was justified. We certainly did during the deliberations of both the Study Committee and the Drafting Committee, ultimately to no avail. In our view, were SP-A actually relying on the after-acquired collateral, normally Article 9 would not be asking too much of SP-A to insist that it discover that a new debtor has entered (or is about to enter) the picture. We recognize, however, that how one evaluates these rules relating to changes in business structure may turn on the paradigm that one chooses to emphasize or believes to be the most typical. In the case of the corporate merger, it is a fairly safe bet that customary due diligence and the involvement of lawyers would result in SP-A's consent being sought and its rights protected. Those who focus on the sole proprietor who incorporates a small business may view the prospects for SP-A to protect itself as materially jeopardized without something like the statutory structure provided in Revised Article 9.

## 2. Priorities in Proceeds of Collateral to Which Nontemporal Priority Rules Apply

Former Article 9 dealt with priorities in proceeds in substantially the same way that it dealt with priorities in original collateral. Under Former section 9-312(6), for purposes of the first-to-file-or-perfect priority rule of Former section 9-312(5), the date of filing or perfection for original collateral also was the date for proceeds of the collateral. With one material exception—proceeds of collateral subject to a purchase money security interest under Former section 9-312(3) or (4)—the Former Article otherwise was silent on the priority of security interests in proceeds.<sup>162</sup> The effect of this silence, however, was to make applicable the first-to-file-or-perfect rule.

During the drafting process the Drafting Committee considered several existing and newly proposed “nontemporal” priority rules—i.e., those not based on priority in time.<sup>163</sup> These included priority rules for security interests in deposit accounts (Revised section 9-327), investment property (Revised section 9-328), letter-of-credit rights (Revised section 9-329), chattel paper and instruments (Revised section 9-330), and collateral subject to special priority rules

162. One other exception was Former section 9-306(5), dealing with returned and repossessed goods.

163. For a discussion of nontemporal priority rules in Revised Article 9, see Randal C. Picker, *Perfection Hierarchies and Nontemporal Priority Rules*, 74 CHI.-KENT L. REV. 1157 (1999).

under Articles 3, 7, and 8 (Revised section 9-331). Because the special priority afforded by these rules is not temporal, some expressed concern that the priority would not carry over to proceeds. Indeed, both Former section 9-312(5) and (6) and Revised section 9-322(a) and (b) indicate that, in the absence of a contrary provision, the first-to-file-or-perfect rule, not the relevant nontemporal priority rule, would apply to proceeds. Moreover, inasmuch as filing is not a permissible method of perfection for certain types of collateral covered by these nontemporal rules, the time of perfection would control priority.<sup>164</sup> Because perfection is conditioned upon attachment, which is conditioned in turn upon the debtor's having rights in the collateral, perfection in proceeds of those types of collateral would not occur until the proceeds came into being as such.<sup>165</sup>

In addition to concerns about the inapplicability of the nontemporal rules to proceeds, the prospect of fully extending the reach of the temporal priority rules to proceeds also generated concerns. For example, assume that on June 1 SP-1 perfects its security interest in a debtor's deposit account by control, on July 1 SP-2 perfects its security interest in the debtor's inventory by filing, and on August 1 SP-1 files a financing statement covering inventory. The debtor then uses cash from the deposit account to purchase new inventory. Under the first-to-file-or-perfect rule, SP-1's security interest would have priority over that of SP-2, even though SP-2 filed first and a search failed to turn up SP-1's filing (which had not yet been made). This effect, the Drafting Committee believed, would undermine the filing system.

The solution reached by the Drafting Committee is an enormously complex and opaque set of priority rules found in subsections (c), (d), and (e) of Revised section 9-322.<sup>166</sup> The upshot is generally to extend the nontemporal priority to most proceeds,<sup>167</sup> but to apply a new first-to-file (*not first-to-file-or-perfect*) priority rule to proceeds consisting of the types of collateral for which filing is the typical means of perfection.<sup>168</sup>

Only time and experience will reveal whether the benefits of the

164. See R. §§ 9-327 (deposit accounts), 9-329 (letter-of-credit rights).

165. See *id.* §§ 9-203(b)(2), 9-308(a).

166. For a general explanation of these rules, see R. § 9-322 cmts. 7-9. For an explanation focusing on the rules' application to deposit accounts, see Markell, *supra* note 33, at 991-1000.

167. See R. § 9-322(c).

168. See *id.* § 9-322(d)-(e).

new rules on proceeds priorities outweigh the costs of complexity. If the rules were implicated only in the unusual case we would be much less concerned. However, as we explained above, one must confront and understand this scheme to reach the conclusion that the first-to-file secured party claiming inventory or equipment will also have priority in after-acquired inventory or equipment purchased with cash proceeds of an encumbered deposit account—a scenario that may become very typical.

### 3. The New Taxonomy of Receivables and Receivables-Related Provisions

Former Article 9 classified collateral consisting of rights to payment into only four types: accounts, chattel paper, instruments, and general intangibles.<sup>169</sup> Nevertheless, as anyone who has taught a law school course on secured transactions knows well, this definitional structure and its treatment under Article 9 are both hard to teach and hard to learn. That said, the expanded receivables-related definitional structure found in Revised Article 9 is substantially *more* complex. Revised Article 9 contains *seven* principal types of collateral consisting of rights to payment: accounts (which include health-care-insurance receivables and certain kinds of as-extracted collateral), chattel paper (which is subdivided into electronic chattel paper and tangible chattel paper), instruments (subdivided into promissory notes and other instruments), letter-of-credit rights, payment intangibles, supporting obligations, and commercial tort claims. If one counts the subcategories (i.e., as-extracted collateral, health-care-insurance receivables, electronic chattel paper, tangible chattel paper, and promissory notes), there are *twelve* types of rights to payment under the revised Article.

Obviously, the Drafting Committee did not create this structure just to make courses in secured transactions more challenging. The separately defined terms are needed for special rules, or special carve-outs from rules, applicable to a particular type of receivable. The definitional structure is merely the tip of the iceberg.

Some of the receivables-related types of collateral are defined specially to accommodate special concerns of obligors on certain

169. See U.C.C. §§ 9-105(1)(b) (defining “chattel paper”), (i) (defining “instrument”), 9-106 (defining “account” and “general intangible”). Although some general intangibles consist primarily of a right to payment, the term as defined is much broader. For purposes of this discussion we have not included deposit accounts as a type of receivable, even though a deposit account consists of a right to payment.



rights to payment (among other reasons). For example, as we discussed above, insurers obligated on health-care-insurance receivables are not subject to the usual rules applicable to account debtors on other accounts.<sup>170</sup> Other definitions facilitate provisions for various methods of perfection. A security interest in electronic chattel paper, for example, may be perfected by filing or control, whereas perfection with respect to tangible chattel paper requires either filing or possession.<sup>171</sup> Security interests arising out of the sale of a payment intangible or promissory note are automatically perfected upon attachment; this approach necessitated the inclusion in the definition of “account” many rights to payment that would have been general intangibles under the Former Article.<sup>172</sup> Security interests in supporting obligations attach and are perfected automatically upon attachment and perfection with respect to the underlying, supported obligation.<sup>173</sup> Security interests in letter-of-credit rights may be perfected only by control, except insofar as they constitute support obligations.<sup>174</sup> The method of control for letter-of-credit rights differs from that for electronic chattel paper.<sup>175</sup>

As the drafting process progressed, there was little serious disagreement on the need for special treatment with respect to certain rights to payment and, consequently, the need for the plethora of new and newly refined definitions. In this context, most viewed the web of receivables-related definitions that emerged as necessary complexity—the price, perhaps, of the broad scope of Revised Article 9. Necessary as these provisions may be, they are complex nonetheless.

#### 4. Complexity in Context

Rather than numbly bemoaning the complexity of Revised Article 9, we think it worth speculating on some of its underlying causes. Certainly the Drafting Committee did not set out to make the

170. See R. § 9-406(i). Persons obligated on a letter of credit also are treated specially. See *id.* § 9-409.

171. See *id.* §§ 9-312(a), 9-313(a), 9-314(a).

172. See *id.* § 9-309(3)-(4); see also *supra* text accompanying notes 60-65, 68-70 (discussing the background of these provisions).

173. See R. §§ 9-203(f), 9-308(d).

174. See *id.* §§ 9-308(d), 9-312(b)(2).

175. Compare *id.* § 9-107 (control of letter-of-credit right) with *id.* § 9-105 (control of electronic chattel paper). For a discussion of this and other aspects of Revised Article 9's treatment of electronic chattel paper, see Jane Kaufman Winn, *Electronic Chattel Paper Under Revised Article 9: Updating the Concept of Embodied Rights for Electronic Commerce*, 74 CHI.-KENT L. REV. 1055 (1999).

Article more complex. Nor did we. Some complexities correspond to the complexity of the transactions and financing patterns that Revised Article 9 addresses. Although Article 9 always has had to deal with complex transactions to some extent, we suspect that the very success of Article 9 has resulted in a substantial increase in the sophistication of secured transactions since the early years of the UCC.

The shape of Revised Article 9 also may reflect a legal culture that is very different from that prevailing decades ago, when the original version of Article 9 was being formed. It is ironic that at a time when “legal” writing is (slowly, but surely) becoming more “plain” and “simple,” the trend in commercial-law codification appears to favor more detail, more forks in the road, less elegance, and “answers” for ever more hypothetical cases. Ironically, this crusade for comprehensiveness and certainty may be fueled in part by rising expectations that result from the high quality of the UCC.<sup>176</sup> A lawyer who seeks guidance on a new issue approaches the common law with trepidation. Perhaps a case exactly on point already has been decided by the highest court in the relevant jurisdiction; if not (and, sometimes, even if so), all bets are off. In contrast, Article 9 has given clear answers to such a wide range of problems arising in secured transactions that users approach it with the expectation that it will answer whatever new question may have just arisen. They are not only disappointed but also surprised when the Article fails them.

Another likely contributor to the pressure for increased certainty of result, and thus increased complexity of the statute, is the practice of requiring the debtor’s attorney to issue a written opinion on attachment, perfection, and other secured-transactions-related issues as a condition to the extension of credit. Particularly in the case of publicly issued, secured debt, the ability of the debtor’s counsel to issue a “clean opinion” can make the difference between a transaction that closes and one that does not. Accordingly, the Drafting Committee often was inclined to address in the revised Article what some pooh-poohed as “opinion-letter issues.”

Finally, the impact of reported decisions on the desire for certainty should not be overlooked. As was the case with the revision of Article 6, the fear that judges will “get it wrong” loomed large at the Article 9 Drafting Committee meetings.<sup>177</sup> Although they do not

176. As the Seventh Circuit observed, “The Uniform Commercial Code is an uncommonly well drafted statute.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Devon Bank*, 832 F.2d 1005, 1008 (7th Cir. 1987).

177. See Steven L. Harris, *Article 6: The Process and the Product—An Introduction*, 41 ALA.

hold a monopoly on rendering incorrect decisions under Article 9,<sup>178</sup> bankruptcy judges posed a particular concern. Bankruptcy is the “acid test” of the durability of a security interest; a security interest that is unenforceable on the day of reckoning will have failed in one of its essential purposes. It is unsurprising that much—probably most—Article-9-related litigation takes place in the bankruptcy courts. What is surprising, however, is that this litigation gives rise to a large number of published judicial opinions. In fairness to the bankruptcy courts, we sense that often they have not had much help from counsel on either side of cases resulting in bad decisions. And in fairness to the courts and counsel, we further suspect that in many of these cases the stakes simply were not sufficient to warrant thorough analysis and briefing. Bankruptcy courts have no choice whether to decide cases implicating Article 9; however, they need not make the opinions part of the permanent jurisprudence.

*B. Dichotomies, Fuzzy Lines, Rough Justice, and Punting to the Courts*

It would be a mistake to conclude from the foregoing that Revised Article 9 has adopted a complex and detailed approach to every aspect of secured transactions. In some areas, the revised Article eschews complex rules that attempt to dictate the results under myriad factual settings and instead provides a clear, unadorned path for reaching a desired result (e.g., perfection of a security interest). Parties who stray from the path do so at their peril.

Consider, for example, the revised Article’s treatment of perfection of security interests in collateral that is in the possession of a person other than the debtor or the secured party. Under Former section 9-305, perfection could be achieved by the bailee’s receipt of “notification of the secured party’s interest.” Under Revised section 9-313, however, perfection occurs when “the person in possession authenticates a record acknowledging that it holds possession of the

L. REV. 549, 580 (1990).

178. See, e.g., *Octagon Gas Sys., Inc. v. Rimmer*, 995 F.2d 948 (10th Cir. 1993). In *Octagon Gas*, the court “erroneously stated that ‘[t]he impact of applying Article 9 to [the buyer’s] account is that Article 9’s treatment of accounts sold as collateral would place [the buyer’s] account within the property of [the seller’s] bankruptcy estate.’” PEB COMMENTARY NO. 14, TRANSFER OF ACCOUNTS OR CHATTEL PAPER (1994) (quoting *Octagon Gas*, 995 F.2d at 955). Revised section 9-318 rejects *Octagon Gas* insofar as the opinion interpreted Article 9. See also Harris, *supra* note 118 (discussing two Second Circuit opinions that reflect misunderstanding of a fundamental principle underlying Article 9).

collateral for the secured party's benefit."<sup>179</sup> The path to perfection is clearly marked and concisely articulated, i.e., obtain a signed writing or other authenticated record that recites the acknowledgement specified in the statute. Short of that, the contents of other authenticated records that might satisfy the statutory requirement are left to our imagination (and that of the courts). A secured party that chooses to rely on an acknowledgement that strays from the precise statutory formulation acts at its own risk.

Of the many examples of rules and concepts in Revised Article 9 which are painted with a broad brush, leaving the details to be developed by the courts, three will suffice for present purposes. Revised Article 9 continues the dichotomy between security interests arising out of sales and those in which the security interest secures an obligation. Although each type of security interest is treated the same for most purposes, some differences exist. For example, a security interest arising out of a sale of a payment intangible is automatically perfected, whereas filing is necessary to perfect a security interest in a payment intangible which secures an obligation.<sup>180</sup> As with all such dichotomies, some transactions lie close to the borderline, and parties who engage in these transactions would be prudent to take the precaution of making alternative assumptions. Revised Article 9 also retains the vague but hard-to-improve-upon "commercially reasonable" standard as the lynchpin of a secured party's remedies on default.<sup>181</sup>

Revised Article 9 likewise reflects considerable restraint in dealing with the enforcement of subordinate security interests. The goal of the revised Article in this context is to encourage parties holding conflicting security interests to find out about one another and act cooperatively before a disposition occurs. To achieve this goal, Revised Article 9 needs very few provisions, the most significant of which requires an enforcing secured party to give notice of an intended disposition to other secured parties (including senior secured parties) that have filed against the debtor with respect to the collateral involved.<sup>182</sup> Many questions that were open under Article 9 remain open under the revised Article.<sup>183</sup>

179. R. § 9-313(c)(1); *see also supra* text accompanying notes 40-41.

180. *See* R. §§ 9-309(3), 9-310.

181. *See, e.g., id.* § 9-610(b) (disposition of collateral following default must be commercially reasonable).

182. *See id.* § 9-611.

183. The revised Article does answer some questions on this subject, however. *See, e.g., id.*

On the other hand, in some areas experience may demonstrate that the approach of Revised Article 9 is too timid. Particularly lamentable in this respect is the treatment—or the lack thereof—of certain aspects of consumer transactions. For example, for nonconsumer transactions Revised section 9-626 adopts the “rebuttable presumption” rule for a secured party’s noncompliance with the Article. Until late in the drafting process, drafts of the revised Article included an alternative “absolute bar” rule, thereby inviting each enacting state to choose the approach that it deemed most appropriate for consumer transactions. That approach would have cleared up a good deal of confusion and uncertainty under the Former Article. Unfortunately, as a part of a compromise, the rebuttable presumption rule codified in Revised section 9-626(a) explicitly applies only to transactions other than consumer transactions. Revised section 9-626(b) represents a damage-control effort; it provides:

(b) [**Non-consumer transactions; no inference.**] The limitation of the rules in subsection (a) to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches.

Whether subsection (b) will yield in practice its apparently intended consequences remains to be seen. We fear that it will induce counsel to litigate anew the proper rule in consumer transactions, even when the applicable rule was settled under the applicable jurisdiction’s Former Article 9.

## CONCLUSION

Revised Article 9 emerged from the lengthiest and most publicly vetted uniform law project to date. Preparatory work for the Study Committee began in the fall of 1989. Now, in June 1999, we continue to stumble across stylistic and other minor errors as well as a few that are more substantive. No one can expect such a large and complex statutory treatment to be “perfect” and free of error. This is especially so when one considers that the heavy lifting on the project was undertaken by volunteer labor.<sup>184</sup> It is to this volunteer labor that the project owes its success. The Drafting Committee was dedicated

§ 9-615(g) (junior secured party’s right to retain cash proceeds of disposition).

184. As reporters, we did receive a modest stipend, however.

and hard working. Its chair, William M. Burke, guided the Drafting Committee firmly, but gently, through hundreds of hours of deliberations on difficult and sometimes controversial issues. Credit also goes to the hundreds of persons who contributed in other ways—as formal advisors to the Drafting Committee, as members of the ALI's Members Consultative Group, as Uniform Law Commissioners, through bar committees, through interest groups, through trade associations, and as individuals concerned about improving commercial law.

Looking back on the drafting process, we are reminded constantly that Revised Article 9 was not written upon a blank slate. The revised Article is a direct outgrowth of its predecessor, a statute thought by many to be the “crown jewel” of the Uniform Commercial Code. Upon completion of the PEB Study Committee Report, we were surprised to have discovered so many flaws and shortcomings in Former Article 9. More than six years later, however, having completed the drafting of a wholesale revision of the Former Article, we are humbled by the process and the challenge. It is now even clearer to us how outstanding was the work of the original drafters and those who drafted the 1972 revisions. We owe a great debt to those drafters, including, among others, Grant Gilmore, Robert Braucher, Peter Coogan, Robert Haydock, and Homer Kripke. We cannot reflect on our involvement with the revision of Article 9 without also reflecting on theirs. And, in looking forward to July 1, 2001, and beyond, we dare to hope that the statute to which we have dedicated such a substantial part of our professional lives will live up to the high standards they set.



# THE CHARLES GREEN LECTURE