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Attachment and Perfection of Security Interests Under Revised Article 9: A "Nuts and Bolts" Primer

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I.Introduction

This issue of the ABI Law Review contains several articles examining various provisions of Revised Article 9 [4] of the Uniform Commercial Code. Most of these articles explore the relationship between Revised Article 9 and the Bankruptcy Code. Our article is an exception to that rule.

In the following pages, we attempt to give the reader a broader look at two important parts of Revised Article 9: attachment and perfection of security interests. In addition, because many provisions on choice of law and scope of Revised Article 9 relate to those subjects, we discuss them as well. We stress that our goal here is not to imagine all the problems which might be encountered as these new provisions meet reality, but rather to show how the general scheme is designed to work. Our emphasis is on those parts of the Revision which change or clarify current law. We devote less attention to the (fortunately) large part of Current Article 9 that remains the same.

II.Scope of Revised Article 9

The Revision will expand the scope of Article 9 to include transactions and types of personal property previously not covered. Moreover, by changing the definitions of many key terms, the Revision will affect additional important changes. Many of these changes have repercussions in attachment and perfection rules and, for that reason, we discuss them briefly here.

A. Agricultural Liens

The Revision will include agricultural liens within Article 9's terms. [5] The general definition section defines agricultural lien to mean an interest in farm products created by statute in favor of a person who either furnished goods or services in the ordinary course of business to a farm debtor or leased real property to a farm debtor, and is not dependent upon possession of the products. [6]

Agricultural liens are not security interests; however, they will be afforded similar treatment for many purposes under Revised Article 9. Attachment rules are necessarily different. A security interest will attach to collateral as provided in section 9−203. An agricultural lien will become "effective" according to the terms of the statute that creates the lien, not the provisions of Article 9.

B. Consignments

The Revision will bring all consignments within Article 9's reach. [7] This can be misleading unless one looks at the definition of "consignment" in section 9−102(20). To qualify as a consignment, a) goods must be delivered to a

merchant for the purpose of sale, have a value over $1,000, not be consumer goods in the hands of the person making delivery, and b) the merchant must deal in goods of that kind under his own name, not be an auctioneer, and not be generally known to sell the goods of others.

This transaction is essentially the same as the one defined in section 2−326(3) of current Article 2. Such transactions will now be covered by Article 9, and the consignor will be in effect a secured creditor. [8] Also, current section 9−114 has been deleted. Since all consignments fitting the description in 9−102(20) will be governed by Article 9, whether or not intended as security, section 9−114 will be unnecessary. The consignor's interest will be the same as a purchase money security interest in inventory [9] and the general priority rules of Article 9 will apply. [10]

A "sale or return" not falling within the definition of consignment in 9−102(20) will not be a consignment for Article 9 purposes. Since under section 2−326 such a transaction gives the consignees' creditors rights in the goods, to protect himself, the consignor must obtain a security interest under section 9−203. [11]

C. Sales of Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes

Current Article 9 treats sales of accounts and chattel paper as secured transactions. Revised section 9−109(a)(3) will expand that treatment to include sales of payment intangibles and promissory notes. One, perhaps the principal, reason for the inclusion of sales of payment intangibles was to facilitate securitization of streams of payment assets. Under current law, "account" is limited to rights to payment generated by goods sold or leased or services rendered. [12] Many thought the current exclusion of sales of other rights to payment was "anomalous," and should be changed. [13]

The drafters agreed, and concluded sales of general intangibles that amounted to payment streams should be governed by Revised Article 9. [14] This was accomplished in two ways. First, the term "account" will be redefined to include some payment streams that are currently general intangibles, including credit−card receivables and health insurance receivables. [15] Second, the remaining payment stream rights (that are not instruments or chattel paper) will become a subset of "general intangibles," called payment intangibles. [16] Payment intangibles will include only those general intangibles where the primary obligation is the payment of money. The term will not, therefore, include general intangibles like patents, copyrights, or franchises. [17]

The impetus for this two−pronged approach was the concern of the banking industry about including loan participations in Article 9, [18] and specifically, the effect of a filing requirement on the loan participation industry. [19] If loan participations were included in the definition of account, participations would require filing. The drafters decided to exempt loan participations from a filing requirement, and did so "[n]ot by defining 'loan participation' (a task that proved futile) but rather by defining as an 'account' nearly every type of payment stream the drafters could think of, other than payment streams represented by chattel paper or instruments." [20] The remaining payment streams that do not fall under the definition of account, including the right to payment of a loan, will fall into the payment intangible classification.

The result of this process is that sales of most kinds of rights to payment will require filing, while sales of payment intangibles, including loan participations, will be perfected upon attachment. [21] The expectation is that, at least in the larger picture, bringing securitization of financial assets under the Article 9 umbrella will benefit the securitization industry. [22]

D. Deposit Accounts

The Revision does not specifically state that deposit accounts will be subject to Article 9's rules. It does so by implication. Current section 9−104(l) excludes from Article 9 all transfers of interests in deposit accounts. The Revision will exclude transfers of interests in deposit accounts only in consumer transactions. [23] "Deposit account" is defined as a demand, time, savings, or passport account maintained with a bank. [24] Note that "deposit account" will be a separate type of collateral, so a description of collateral in a security agreement as "general intangibles" would not cover deposit accounts, because it will not satisfy the requirement that the security agreement describe the collateral. [25]

III.Attachment

A. Attachment−Related Definitions

The rules for attachment of a security interest remain essentially the same in Revised Article 9, with some changes in organization and substance. Before discussing the attachment sections, some additional definitions need examination.

"Debtor" is defined as a person having an interest in the collateral, whether or not that person is also an obligor. [26] Debtor also includes a consignee, and a seller of accounts, chattel paper, payment intangibles, or promissory notes.

"Secured party" is defined to include a person in whose favor a security interest is given, a consignor, a holder of an agricultural lien, or a person who purchases accounts, payment intangibles, chattel paper, or promissory notes. [27] "New debtor" means a person who becomes bound by a security agreement created by another person. [28] In provisions dealing with new debtors, the debtor who created the security agreement which now binds the new debtor is referred to as the original debtor.

B. The Attachment Process

The Revision will continue the three−step approach to attachment of security interests, with a few variations or clarifications. Those steps are:

1. Value Has Been Given

No change has occurred here. Value is defined in section 1−201(44) and includes security for a pre−existing claim. [29]

2. Debtor Has Rights in Collateral

This requirement has been clarified by adding "the power to transfer rights in the collateral to a secured party." [30] The debtor need not own the collateral outright. However, if the debtor has a limited interest, only that interest will be subject to the security interest. The "power to transfer" language refers to those situations where a debtor can give greater rights than he actually has. For example, U.C.C. section 2−403(1) gives a debtor holding voidable title to goods the power to convey good title to a good faith purchaser for value. Since the term "purchaser" includes a secured creditor, under section 9−203(b)(2) such a debtor will have the power to transfer good title to the goods, and a security interest could attach to the goods. [31] In a similar manner, a consignee will be deemed to have all the title his consignor had. As a result, a security interest given by the consignee will attach to the goods in the consignee's possession, even though the consignor retained title to the goods. [32]

3. The Security Agreement

The Revision makes some important changes in this step. Under current law, either the debtor must sign a written security agreement containing a description of the collateral, or the secured creditor must have possession of the collateral pursuant to agreement. The Revision changes and clarifies these rules.

a.The writing requirement

Under section 9−203(b)(3)(A) the debtor will not need to sign a written security agreement. Rather, she must "authenticate" a security agreement. The debtor may do this by signing a tangible record or by adopting an electronic record, such as a computer file, e−mail, or the like. [33]

b.Description of the collateral

Whatever record the debtor adopts must contain a description of the collateral. [34] In section 9−108, the Revision gives some guidance on how this description should read. First, super−generic descriptions like "all personal property" will not be sufficient for security agreements. [35] Second, listing by type as defined in the U.C.C. will be sufficient, except

as to commercial tort claims, consumer goods, consumer securities and commodity accounts. Thus, describing the collateral as "all inventory" will suffice, but "commercial tort claims" will not. The security agreement must specifically identify the tort claim: e.g., "all tort claims arising out of the fire at debtor's factory."

Under current section 9−203 considerable controversy exists on the question of the language of the security agreement. A few jurisdictions require the debtor to sign an agreement that contains specific grant language, such as, "I agree to give secured creditor a security interest in the following property," the so−called "*American Card*" rule. [36] Most jurisdictions follow the "composite rule," which permits the writing requirement to be satisfied by a collection of documents, no one of which contains granting language, but which in the aggregate disclose an intent to grant a security interest in specific collateral. [37]

The Revision does not directly address this controversy, and adoption of the identical definition of "security agreement" as under current law may perpetuate it. However, Official Comment 2 to section 9−203 refers to 9−203(b)(3) as satisfaction of "an evidentiary requirement." If the security agreement is only evidence of intent, the composite rule would seem to provide that evidence.

The composite rule approach will probably have a different focus under the Revision. In most of the cases under current section 9−203, the debtor had signed a financing statement but not a security agreement *per se*. The signed financing statement, coupled with other documents like promissory notes making reference to security, or letters from the debtor to the secured creditor discussing the prospect of security, satisfied the composite rule. Clearly in those cases, the fact of the debtor's signature on the financing statement was important.

Under section 9−502 the debtor's signature on a financing statement will not be required. Execution of the security agreement authorizes the secured creditor to file an initial financing statement. [38] Presumably, secured creditors will begin filing unsigned financing statements. If no separate, identifiable document exists that can be called the security agreement, the authority of the secured creditor to file an initial financing statement must otherwise be established. [39] On that issue, the existence of the filed financing statement is logically irrelevant. Of course, secured creditors will attempt to use the composite rule to establish either the existence of an authenticated security agreement or the authority to file an initial financing statement. That may be permitted, but the filed financing statement will not help on either question.

C. Alternatives to an Authenticated Security Agreement

The Revision permits attachment of a security interest without an authenticated security agreement if (a) the collateral is in the possession of the secured creditor, or (b) the secured creditor has control of the collateral if it is deposit accounts, electronic chattel paper, investment property or letter−of−credit rights. [40]

1. Possession

Possession of the collateral by the secured party may satisfy the requirements for both attachment and perfection, so long as possession is possible, permitted, and accomplished. Section 9−313 provides guidance on how those requirements are satisfied. Attachment by possession requires that the collateral be "[i]n the possession of the Secured Party under section 9−313 pursuant to the debtor's security agreement." [41]

Section 9−313 does not define possession, and indeed will not directly apply to attachment questions; that section by its terms determines only when possession operates to perfect a security interest. However, by reference to it, section 9−203(b)(3)(B) presumably adopts section 9−313's rules about how and when a secured party takes possession of collateral for attachment purposes. [42] By a parity of reasoning, section 9−313(a) will determine the kinds of collateral as to which possession satisfies the evidentiary function of a security agreement for attachment purposes.

One can possess collateral that is tangible, e.g., goods, documents, money, tangible chattel paper, or money. Article 9 does not define possession; Official Comment 3 to section 9−313 suggests that if a bailee rather than the secured party itself will take physical possession of the goods, the secured party should comply with section 9−313(c). However, if an agent of the secured creditor takes possession of the collateral solely for the purpose of possessing on behalf of the

secured creditor, nothing more need be done. [43]

A third party may be in possession of collateral in which a secured creditor claims a security interest was created and perfected by possession. The third party's possession will satisfy the requirements of section 9−203(3)(B) only if the third party "authenticates a record" acknowledging that it holds the collateral for the secured creditor. [44] However, a third party may refuse to give this acknowledgement. [45] If so, the secured creditor does not have possession under section 9−313(c), and has thus not satisfied section 9−203.

2. Control

For certain kinds of collateral − deposit accounts, electronic chattel paper, investment property, and letter−of−credit rights − attachment will occur without an authenticated security agreement if the secured creditor has "control" of the collateral "pursuant to the debtor's security agreement." [46]

The Revision has four sections identifying circumstances under which a secured creditor may obtain control of the types of collateral listed above. These sections are discussed in more detail later in this article. [47] For attachment purposes, the concept of control is somewhat different for each of these types of collateral. Since one important purpose of section 9−203 is the evidentiary or statute of frauds function, the control provisions should be designed to serve that purpose.

For electronic chattel paper, the control provisions do have an evidentiary component. Section 9−105 requires that an "authoritative" copy of a "record" of the electronic chattel paper must exist, it must identify the secured party as the assignee of the record, and the record must be maintained by the secured party. [48] Like tangible chattel paper, which can be possessed, the secured creditor thus claims an interest in electronic chattel paper as a person, other than the debtor, who "holds" the collateral pursuant to an authoritative electronic record which discloses the secured creditor's status as a secured creditor. Indeed, the Official Comments state that section 9−105 is the "functional equivalent of possession of 'tangible chattel paper.'" [49]

The same is probably true for letter−of−credit rights under section 9−107. In a typical letter−of−credit transaction for the sale of goods, the issuer bank (or its nominee if the issuer is a foreign bank or one without a branch in the beneficiary's vicinity) issues a letter of credit for its customer (typically a buyer), in favor of the beneficiary (the seller). If the seller wishes to grant a security interest in the letter of credit to finance its obligations as seller, it may do so. By obtaining "control" of the letter−of−credit right, the seller's secured creditor will satisfy the requirements of section 9−203. Section 9−107 provides that "control" is accomplished by obtaining the consent of the issuer or its nominee to an assignment of the proceeds of the letter of credit under section 5−114. It seems likely that both the assignment and consent will provide a written record of the secured creditor's interest. Moreover, section 5−116(2)(a) requires the beneficiary/debtor to transfer the letter of credit to the assignee. [50]

The control provisions for deposit accounts, and perhaps investment property as well, [51] less clearly serve the evidentiary or statute of frauds purpose. As noted earlier, the "security agreement" described in sections 9−203(b)(3)(B) and (D) is not the authenticated variety. [52] Article 9 defines a security agreement as "an agreement" that creates a security interest; [53] Article 1 defines "agreement" as the "bargain of the parties in fact." [54] It follows that the "security agreement" for purposes of section 9−203(b)(3)(D) need not be in writing, and may be established "by implication from other circumstances including course of dealing." [55]

If the secured party is the bank where the deposit account is maintained, the bank may have a security interest which attaches to the deposit account with no written or other record of the debtor's intent to grant that security interest. [56] As has been observed by others, [57] banks holding a debtor's deposit account are different from third parties in possession of a debtor's property. Debtors who are not themselves banks must maintain their deposit accounts with a bank. Thus, that fact alone does not support the inference that others dealing with debtors and their deposit accounts will be on notice of the bank's security interest. Possession of tangible property by a third party may raise such an inference and justify the absence of a record requirement. Control of a deposit account under section 9−104 may not. [58]

C. The New Debtor

Under Current Article 9, problems arise when a debtor changes organizational status, as for example, when a sole proprietorship incorporates, or "A" corporation merges with or is purchased by "B" corporation. Two secured credit questions are presented in such cases: 1) what happens to a financing statement filed against the "old" debtor, and 2) how, if at all, does the old security agreement apply to the "new" entity?

Even though current section 9−402(7) is a perfection (rather than an attachment) provision, some courts have relied on it to hold a security agreement signed by the old debtor effective to bind the new entity. These courts have treated the status change as merely a name change, with the result that the after−acquired property clause in the original security agreement caused it to attach to collateral acquired by the new entity after the name change. If the name change made the original financing statement seriously misleading, it was effective to perfect only as to collateral acquired "by the debtor" within four months of the change. If the name change was not seriously misleading, that financing statement continued to be effective with respect to collateral acquired after the four−month period. [59]

Other courts concluded the change in status was more than a name change; it resulted in the creation of a new and separate entity. Collateral acquired by the new entity even one day after the change was not subject to the old security agreement, because that entity had not signed that security agreement. Even if the old security agreement had an after−acquired property clause, the clause was not binding on anyone other than the original debtor. [60]

This confusion came about because Current Article 9 addresses only the question of continued perfection of a financing statement when debtors change their names or structure, not the effect of such changes on attachment under security agreements. A financing statement may continue to be effective when the transferee acquires encumbered property, as all courts interpret current section 9−402(7) to say, and as section 9−507(a) of the Revision states. However, that result says nothing about such a transferee's relationship to the security agreement signed by the old debtor. [61]

Sections 9−203(d) and (e) will cure this problem. Section 9−203(d) will determine when an entity qualifies as a "new debtor" and thus becomes bound by the original debtor's security agreement. The new debtor will become bound if it agrees by contract to be bound, is so bound by law other than Article 9, or acquires substantially all the original debtor's assets and becomes generally liable for the original debtor's obligations.

Where the new debtor becomes bound by the original debtor's security agreement, the old agreement will satisfy section 9−203(b)(3), including any after−acquired property clause, and no new agreement is necessary.

What this means is that collateral acquired by the new debtor months and even years after becoming bound as a new debtor may be subject to the old security interest. Section 9−508(a) will continue the effectiveness of a financing statement filed in the original debtor's name, but section 9−508(b) will limit the financing statement's effectiveness to collateral acquired within four months from the time the new debtor became bound if the name of the new debtor results in the old financing statement becoming seriously misleading under section 9−506. However, if the old secured creditor files an initial financing statement (as section 9−509(b) states it may) before the expiration of the four−month period, the financing statement remains effective. [62]

Note that the new debtor rules will not apply to persons to whom a debtor only transfers property in which a security interest will continue under section 9−315. Section 9−508(c) states this expressly, and comment 2 to section 9−326 confirms it. [63] While such transferees hold the collateral subject to the security interest, they are not bound by the after−acquired property clause of the transferor's security agreement. The new debtor provisions in section 9−203(d) will apply only if the transferee becomes bound by "operation of law other than this article." If it is only section 9−315 which determines that the transferee holds the property subject to the transferor's security interest, it is not a case of law "other than this article." [64]

IV.Choice of Law For Perfection, Effect of Perfection and Priority

The remainder of this article examines perfection issues. Before beginning that task, we think it will be helpful briefly to discuss the Revision's new choice of law rules. Where to perfect is clearly as important as how to perfect.

The choice of law rules in current section 9−103 have been changed. The principal change is the elimination of the "last event" test for ordinary goods. Revised section 9−301 will have two general choice of law rules governing perfection and the effect of perfection for all kinds of collateral except certificate of title goods, deposit accounts, investment property, and letter−of−credit rights. [65] It should be said here that section 9−301 will establish the choice of law only for perfection−related and priority questions. Other questions arising out of the parties' agreement will be decided under choice of law rules outside Article 9, including U.C.C. section 1−105. That section will permit the parties to designate the jurisdiction whose law governs those questions.

A. Non−Possessory Security Interests

Section 9−301(1) provides that the debtor's location will determine the choice of law for all non−possessory security interests. Thus, if the question is where should the secured creditor file a financing statement to perfect a security interest in a debtor's property, the substantive law of the state where the debtor is located provides the answer. In non−possessory security interests, location of the collateral will no longer control which law governs perfection. [66]

Section 9−307 gives rules for determining a debtor's location. For individuals, it is the debtor's principal residence. For organizations with one place of business, it is the location of that place. For organizations with multiple places of business, it is the location of its chief executive office. A registered organization is located in the state in which it is registered. [67]

B. Possessory Security Interests

Section 9−301(2) provides that perfection by possession will be governed by the law of the jurisdiction where the collateral is located. This rule, of course, applies only to collateral one can possess; section 9−313 lists those types of collateral.

C. The Effect of Perfection and Priority

While the general rule of section 9−301(1) will determine choice of law for perfection, the location of the collateral will determine choice of law for questions concerning the effect of perfection and priority for tangible personal property. Where tangible property (i.e., negotiable documents, goods, instruments, money or tangible chattel paper) is located in a jurisdiction other than the debtor's location, section 9−301(3)(c) states that the law of the collateral's location will govern the effect of perfection and priority for non−possessory security interests. Thus, if debtor is located in State A but tangible collateral is located in State B, State A's law determines what a secured creditor must do to perfect a non−possessory security interest, but State B's law determines the effect of perfection and priority of the security interest. Official Comment 7 to section 9−301 gives the reason for this bifurcated result. A lien creditor will levy on collateral where it is located. If the debtor is located in another jurisdiction, a choice of law rule on the effect of perfection or priority which looks to the debtor's jurisdiction would lead to the awkward result of permitting legislators in the debtor's state to determine the rights of lien creditors in the state where the property is located.

D. Change of Governing Law

When the debtor changes location, or when the collateral is transferred to another debtor who is located in another jurisdiction, section 9−301(1) makes it clear the new jurisdiction will govern the question of perfection at once. That is to say, when a debtor moves from State A to State B, State A's law will cease to govern perfection. A secured creditor who was perfected under State A's laws will now have its perfected status determined under State B's laws. However, as Official Comment 6 to section 9−301 states, this does not mean one's perfected status is immediately lost. [68]

In the example above, one of State B's laws will be section 9−316. That section states that a security interest perfected under State A's laws will remain perfected until the earliest of

(a) the time perfection ceases under State A's laws,

(b) four months from the time the debtor changes location from A to B, or

(c) one year from the time a debtor transfers the collateral to a person located in B. [69]

If the State A secured creditor reperfects under State B's law before the applicable grace period expires, it is considered continuously perfected under State B's laws. If not, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

For possessory security interests when the collateral changes location, the rule is simple. Section 9−316(c) will require that the security interest be perfected "upon entry" into the new jurisdiction. That means, of course, that the secured party must have possession when the collateral enters the new jurisdiction.

V.Perfection By Filing

As under current law, there will be four main ways to perfect:

1) by filing a financing statement (or notation on a motor vehicle certificate of title);

2) by possession;

3) by control; and

4) by automatic perfection upon attachment.

The perfection rules are found in Part 3, Subpart 2 (sections 9−308 through 9−316) in Revised Article 9. These sections will permit perfection of consensual security interests [70] in many types of collateral by more than one of these methods. The following chart sets out the available methods of perfecting for most types of collateral.

How to Perfect Under Revised Article 9

Collateral	***Authority***	***Filing***	***Possession***	***Other***
Agricultural Lien on Farm Products	9−310, 9−313(a)	X	−−−	−−−
Account	9−310	X	−−−	−−−
Chattel Paper	9−312, 9−313	X	X	−−−
Tangible		X	−−−	Control
Electronic	9−312, 9−314			
Commercial Tort Claims	9−310	X	−−−	−−−
Deposit Account	9−312, 9−314	−−−	−−−	Control
Document	9−312, 9−313	X	X	−−−
Fixtures	9−334, 9−502	X	−−−	Fixture filing in real estate records
General Intangible	9−310	X	−−−	−−−
Goods (except motor vehicles)	9−310, 9−313	X	X	−−−

Instrument	9−312, 9−313	X	X	−−−
Investment Property	9−312, 9−313, 9−314	X	X (if certificated)	Control
Letter of Credit Rights	9−310, 9−312, 9−314	−−−	−−−	Control
Money	9−312, 9−313	−−−	X	−−−
Motor Vehicles	9−311, 9−313	X (only if Debtor is dealer)	X (only if Debtor retitles in new state)	Notation on title

Some of the most extensive revisions are to the filing rules. [71] These changes will facilitate electronic access and make filing and searching much simpler. Simpler filing should mean fewer mistakes. That in turn will likely mean fewer opportunities for bankruptcy trustees to upset security interests under the Bankruptcy Code.

The most important changes fall into four categories:

1) Additional liens and collateral types may be perfected by filing;

2) Changes in the contents of the financing statement;

3) Changes in where to file; and

4) Limits on filing office discretion to reject filings.

A. New Liens and Types of Collateral Which May Be Perfected by Filing

1. Agricultural Liens

As noted above, Revised Article 9 will cover agricultural liens. [72] However, the Revision will extend only to statutory farm products liens which are not dependent on creditor possession of the collateral. These agricultural liens may be perfected only by filing. [73]

2. Instruments

The Revision will allow security interests in instruments to be perfected by filing as well as by possession. Given the ease of filing under the new rules, this is an important change. However, if a secured party relies on filing as to instruments, priority against subsequent purchasers will be less certain than if perfection is by possession. [74] Thus, the prudent secured party may want to take possession in addition to filing. Filing will protect the secured party against the debtor's trustee in bankruptcy even if the secured party fails to obtain possession of all the collateral.

C. Contents of the Financing Statement

Revised Article 9 will make several important changes to the contents of financing statements. The debtor's signature will no longer be required, generic "all assets" descriptions will suffice, and trade names will not. Representatives of the secured party may file without disclosing representative status. Guidance will be given on debtors names and whether errors make the financing statement "seriously misleading."

1. General Requirements of Financing Statement

Under section 9−502, a financing statement will be sufficient if it:

(1) provides the debtor's name,

(2) provides the name of the secured party or a representative of the secured party, and

(3) indicates the collateral . . . . [75]

While a financing statement containing only those items would be effective if accepted by the filing office, that office may rightfully reject so minimal a filing. Section 9−516(b) will allow the filing office to reject a financing statement unless it also includes:

(4) a mailing address for the secured party,

(5) a mailing address for the debtor,

(6) an indication whether the debtor is an individual or an organization,

(7) and if the debtor is an organization,

(7.1) a type of organization,

(7.2) a jurisdiction of organization; or

(7.3) an organizational identification number for the debtor or an indication that the debtor has none. [76]

Fixture filings and financing statements on as−extracted collateral [77] or timber to be cut will have some additional requirements, because these filings will be made in local real estate records. [78] These filings (1) must indicate they are for one of these three types of real−estate−related collateral; (2) indicate that they are to be filed in real estate records; (3) provide a description of the real estate to which the collateral relates; and (4) if the debtor is not the record owner of the real estate, give the name of the record owner. [79]

4. Debtor's Signature Not Needed on Financing Statements

One major change, which will facilitate electronic filings, is deletion of the requirement that the debtor sign the financing statement. [80] A financing statement will be effective, however, only if the debtor authorizes the filing. [81] The Revision sets out two debtor actions which will be deemed as a matter of law to authorize the filing of a financing statement:

(1) authenticating (i.e., signing or otherwise ratifying) a security agreement covering the collateral; or

(2) acquiring collateral in which a security interest continues.

Thus, a debtor who signs or otherwise authenticates a security agreement will automatically authorize the secured party to file a financing statement covering the collateral described therein, even if the security agreement does not mention filing. [82] Similarly, a buyer or other transferee who takes collateral subject to the security interest automatically authorizes a filing in the transferee's name. [83] These *ipso facto* authorizations also extend to amendments, if needed, to perfect as to proceeds.

In any case not covered by these *ipso facto* rules, the secured party will need evidence that the debtor authorized the filing "in an authenticated record." [84] Evidence of authorization need not be given to the filing office, however, and lack of authorization is not a valid ground for rejection by filing officers. [85] The Comments state, "The question of

authorization is one for the court, not the filing office." [86] Instead, lack of authorization, if proven, will render the financing statement ineffective *ab initio.* [87] Further, making an unauthorized filing could subject the filer to actual and statutory damages. [88]

3. Real Estate Description

Real estate descriptions will no longer be required for financing statements on growing crops. This change will eliminate a common source of errors. [89] Under Revised Article 9, real estate descriptions will be required only for financing statements to be filed in real estate records: those for timber to be cut, as−extracted collateral, and fixture filings. [90]

3. Names for Use on the Financing Statement

Section 9−503 gives guidance on getting the debtor's name right on the financing statement. [91] Debtors are divided for this purpose into several groups: organizations (registered or not) and individuals. Let's discuss organization debtors first. "Organization" is very broadly defined to include "a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity." [92] That seems to exclude only individuals and businesses operated by individuals as sole proprietorships.

"Registered organization" is a subset of organization. A registered organization is a limited liability entity, such as a corporation, limited partnership or L.L.C., organized under the law of a state or the federal government. [93] For registered organization debtors, the financing statement will need the organization's legal name as indicated on the public record of the debtor's jurisdiction of organization. For a corporation, of course, that is the name in the articles of incorporation filed with the Secretary of State's Office. Secured parties and searchers should be able to get these names from the public record and thus avoid name errors.

For debtors which are not registered organizations, there are no such easy ways to ascertain the debtor's legal name for filing purposes. If a non−registered organization, such as a general partnership, has an organization name, that name should be used. If the organization is less formal and has no organization name, the financing statement will require "the names of the partners, members, associates or other persons comprising the organization." [94] Special name rules are also provided for debtors which are decedent's estates or trusts. [95]

If the debtor is an individual, the debtor's individual name will be required, even if the credit is for use in a business operated as a sole proprietorship. In addition, the financing statement must indicate which name is the debtor's last name. [96] No guidance or safe harbor is provided for individual names, however, and possible problems are legion. Some cultures put the family name first, before the given name. Some celebrities and others less well known use only one name (Cher, Madonna, and then there's the artist formerly known as Prince). How should one sufficiently indicate the surname for filing in these cases? Some married women use their husband's surname for social purposes, but their original surname for professional purposes. [97] In cases of doubt, one may list more than one variation of the debtor's name on the financing statement.

The Revision also addresses the troublesome issue of trade names. Section 9−503 expressly provides that filing under a debtor's trade name will be neither necessary nor sufficient. [98] While this has become the majority rule under Current Article 9, some cases have held filings under a debtor's trade name to be sufficient. [99] This minority rule greatly complicates subsequent searches, because searchers need to learn and search under the debtor's trade name or names as well as under its legal name. Trade name searches will not be needed under Revised Article 9.

The secured party should also be listed under its legal name, although errors here are less crucial than in the debtor's name. Further, the Revision expressly provides that a financing statement will be sufficient even if it does not indicate the representative capacity, if any, of the secured party named therein. [100]

5. Minor Errors and Omissions

The Revision, like Current Article 9, provides that financing statements will be effective despite minor errors and omissions. [101] Financing statements containing errors which make the record "seriously misleading," of course, will be ineffective.

Since financing statements will continue to be indexed under the debtor's name, errors in that name will be more likely than other errors to render a financing statement seriously misleading, and therefore ineffective. [102] One innovation in the Revision is the "search logic test," used to determine whether an error in a debtor's name makes the financing statement seriously misleading. For example, suppose the debtor's legal name is AB−C Inc., but a filed financing statement lists the debtor as "ABC Ltd." The Revision directs that a search be run under the debtor's correct name (AB−C Inc.). If that search, using the standard search logic of the filing office in question, turns up the "ABC Ltd." filing, then the notice purpose of the erroneous filing will have been served and the error in the debtor's name will be held not seriously misleading. On the other hand, if the search logic of the office means that a search under "AB−C Inc." will not find the ABC Ltd. variant, then the financing statement will be seriously misleading and ineffective.

Thus, searchers will not need to order multiple searches under variations of a registered organization debtor's name. This should result in considerable cost savings. The search logic test, however, may prove much less satisfactory when applied to individuals, where ascertaining the correct name in the first place is more problematic.

6. Change of Debtor's Name

The Revision generally follows current law on post−filing changes in the debtor's name. That is, no action will be needed to maintain perfection unless the change makes the existing filing "seriously misleading." Even in that case, the security interest will remain perfected without action as to all collateral acquired by the debtor before or within four months after the name change. To maintain perfection in property acquired by the debtor more than four months after a name change that makes the old filing seriously misleading, the secured party will need to file an amendment to the existing financing statement under section 9−507(c), in the debtor's new legal name. [103]

7. Description of Collateral

Section 9−504 provides that a financing statement "sufficiently indicates the collateral" if it provides "(1) a description . . . pursuant to section 9−108; or (2) an indication that the financing statement covers all assets or all personal property…" [104] This second rule will be a change. Prior case law often held insufficient any descriptions of collateral phrased in such general terms as "all assets" or "all personal property." [105] Revised Article 9 will preserve that rule for security agreements but allow use of these and similar phrases in financing statements. [106]

8. Correction Statements and Bogus Filings

In recent years, some persons have made a practice of filing financing statements with forged debtor signatures. This practice has often been directed at public officials by tax protestors and others. [107] The filings, of course, cloud the debtor's title to assets, and may block sales and cause unwarranted denials of credit. Current Article 9 does not address this type of harassment.

Revised Article 9 will allow a person to file a correction statement with respect to any financing statement filed under that person's name "if the person believes that the record is inaccurate or was wrongfully filed." [108] This correction statement will let the person against whom an alleged bogus filing has been made put her side of the story in the public record. The provision is modeled on similar provisions of the Fair Credit Reporting Act.

Filing a correction statement, however, will not change the legal effect of the initial record. If that financing statement is truly unauthorized, it will be ineffective whether or not a correction statement is filed. [109] If the financing statement is authorized and otherwise sufficient, the fact that the debtor filed a correction statement will change nothing. A correction statement is thus incomplete relief to the victim of a truly bogus filing, for that filing remains of record. On the other hand, the drafters were rightly concerned about allowing either debtors or filing officers to remove financing statements from the public record without the secured party's consent. That remedy, one Official Comment indicates, must come from other law. [110]

However, another section of the Revision will allow the debtor−victim of a bogus filing to file a valid termination statement. Section 9−513 on termination statements will require the secured party of record to send the debtor a termination statement within 20 days after receipt the debtor's demand, if there are no longer any obligations secured or commitments to make additional advances. [111]

If a debtor rightfully makes such a demand, and the secured party fails to respond, section 9−509(d)(2) will allow the debtor to file a termination statement without the secured party's consent. Such a termination statement will have to indicate, however, "that the debtor authorized it to be filed." [112] The Comments indicate the victim of a bogus filing could use this section by first sending a demand to the filer at whatever address the filer put on the bogus filing. The filer will be deemed to have received it. [113] If no termination statement is timely sent by the putative secured party, the debtor may proceed to file a termination statement on her own. [114]

D. What Constitutes Filing?

Revised Article 9 for the most part will continue the "tender rule" which makes a filing effective if it is presented to the filing office along with the required fee. The Revision uses the term "communicated" rather than "presented," again to facilitate electronic filings. Filing will also occur if the filing office "accepts" the record even without collecting the fee. [115]

The Revision also tackles a problem not addressed by the current Code, that is, filing office rejection of a properly tendered financing statement. Section 9−516(b) includes an exclusive list of seven reasons for which a filing office may rightfully reject financing statement. [116] If the filing office rejects a filing on any of those seven grounds, "filing does not occur . . . ." [117]

On the other hand, if the office rejects a financing statement on any ground not listed in section 9−516(b), the financing statement "is [nevertheless] effective as a filed record except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files." [118] Thus, wrongfully rejected filings will be fully effective against lien creditors, including the trustee in bankruptcy. Only if the competitor is a subsequent purchaser for value will the filer bear the risk. When a filing office rejects a filing, whether rightfully or not, the office will be required to notify the filer of the reasons for rejection no later than two business days after receipt, so the filer will learn of the problem and can try to remedy it. [119]

Sometimes a filing office accepts a record but then misfiles it or fails to file it at all. In that case, the Revision continues the rule under current law. The filing will be fully effective to perfect the security interest, even though a proper search would not turn it up. [120]

E. Duration of Filing and Continuation Statements

As under Current Article 9, financing statements under the Revision will normally be effective for five years. However, the Revision will allow much longer periods for some long−term transactions. For example, financing statements which indicate they are "filed in connection with a public−finance or manufactured−home transaction" will remain effective for thirty years. [121] Financing statements indicating the debtor is a transmitting utility will remain effective indefinitely, until a termination statement is filed. [122] Real estate mortgages filed as fixture filings will become ineffective, if ever, under real estate law. [123]

As under current rules, continuation statements may be filed to extend the effective dates. Any such continuation statement will have to be filed within the familiar six−month window before the expiration of the current filing. [124] The filing office is supposed to reject continuation statements filed outside this period. [125] Even if the filing office mistakenly accepts an untimely continuation statement, that continuation statement will be ineffective. [126]

F. Safe Harbor Forms

The Revision also provides a form financing statement and a form for amending a financing statement. Section 9−521 provides that filing offices which accept written records will be allowed to reject these safe harbor forms only on the

grounds listed in the section 9−516(b). [127] Thus, a filer who makes hard−copy filings in many jurisdictions will no longer need to seek out each state's preferred size and format for the U.C.C.−1. The filer may simply stock the Revision's uniform version.

G. Changes in Where to File

Once a financing statement has been prepared following the rules just discussed, the next step will be deciding where to file it; a decision that involves both the correct jurisdiction and the correct office in that jurisdiction.

1. Where to File: Which State?

One of the biggest and best changes in Revised Article 9 comes in choice of law for perfection by filing. The current rule that filings on ordinary goods must be made in the state where the goods are located will be abandoned, [128] hopefully making history of some of the attendant problems of tracking the goods and filing in multiple jurisdictions when a debtor owns property in many states. The much simpler new rule for most types of collateral will be: file in the state where the debtor is located. [129]

2. Where Is the Debtor Located?

Revised Article 9 gives useful clues as to where debtors are located for filing purposes. As noted above, the Revision divides debtors into individuals and organizations, and then subdivides organizations into two groups, those which are "registered" and those which are not.

Under section 9−307's general rules, organizations which have only one place of business will be located at that place of business, while those with more than one place of business will be located at their chief executive office. [130] Whether a debtor has only one place of business, and if more, which one is the chief executive office, have been difficult questions under current law. [131] Given that location of the debtor will control most filings under the Revision, these questions could present grave difficulties for the future. However, the drafters of the Revision sought to reduce the problems with a special location rule for registered organizations.

a.Registered organizations

Under section 9−307(e), a registered organization debtor will be located, for filing purposes, in the state where it is incorporated or registered. Some refer to this as the "birth certificate rule." Since a corporation or other registered entity is registered at any one time in only one state, and a searchable public record is maintained of that fact, both filers and searchers should find the new rule easy to use. If the debtor claims to be a registered organization, the creditor may confirm that claim with the relevant Secretary of State and then file in that state. There will be no need, for filing purposes at least, to determine the location of a registered organization's place of business or chief executive office. [132]

The location−of−the−debtor rule should reduce both initial filing costs (only one filing no matter how many states the collateral is in), and the need for subsequent monitoring of the collateral's location to maintain perfection. Refiling will be needed if the debtor relocates to a new state but not, as under current law, every time the collateral moves across state lines.

Example: Assume the debtor is a Nebraska corporation with its main office in Nebraska and inventory located in North Dakota, South Dakota and Iowa. The secured party will take a security interest in the debtor's inventory and accounts. Under current law, the secured party would need to file in all four states because location of the collateral governs filings against inventory (the Dakotas and Iowa). Filings against accounts, on the other hand, are currently based on the location of the debtor, so an additional filing would be needed in Nebraska, if that is the location of this debtor's chief executive office. Under Revised Article 9, only one filing in the state where the debtor is located will be needed. Because this debtor is a corporation registered in Nebraska, that will be the debtor's location for filing purposes. [133] Together, the location−of−the−debtor rule and the birth certificate rule work a major improvement for both filers and searchers. One filing or one search, in the debtor's state of registration, will cover the case. [134]

b.Debtors which are organizations but are not registered

Many organizations are not registered, however, and many debtors are individuals rather than organizations. If the debtor is an organization but is not registered, the general rule of section 9−307(b) will locate the debtor for filing purposes at the debtor's place of business, or its chief executive office if it has more than one place of business. This rule will govern filings against general partnerships and joint ventures, for example. It will also govern filings against limited liability entities organized under foreign law. [135] Lenders who prefer the relative certainty of the birth certificate rule to guessing which is the debtor's chief executive office might require a would−be debtor to incorporate as a prerequisite to the loan or credit.

c.Debtors who are individuals

Revised Article 9 will locate an individual in the state of her principal residence. This will be the rule even if she runs a business as a sole proprietorship in a different state and the loan or credit is for business purposes. [136] Exclusive use of the residence for individuals will change the current rule which directs filing at the individual's residence only if she has no place of business. Of course, when an individual has homes in more than one state, the prudent creditor will make multiple filings.

3. Which Office Within the State Is the Place to File?

Revised Article 9 simplifies the decision on which office to file in by mandating central filing. The only local filings left will be fixture filings, and filings on as−extracted collateral and timber to be cut, all of which will go to the real estate records. All other filings will be made in a single office. [137] Adoption of the central filing rule should substantially reduce filing errors and simplify searches. [138]

4. Post−Filing Events Which May Require Refiling

Even if a secured party manages to file in the right location, subsequent events may require follow−up action to maintain perfection. Here we will discuss the effect of changes in the debtor's location, transfers of the collateral to a different entity, and acquisition of proceeds.

a.Change in the debtor's location

A debtor may change her place of residence or an organization its place of business or chief executive office. If the move causes the debtor to become located for filing purposes in a different jurisdiction than that in which the original financing statement was properly filed, the secured creditor will need to take action (usually by filing in the new jurisdiction) to maintain perfection. If the secured creditor files in the new jurisdiction within four months after a change in the debtor's location, the security interest will remain perfected. [139] If the secured creditor fails to act by the end of the four months, the security interest not only will become unperfected at that time, but also will be "deemed never to have been perfected as against a purchaser of the collateral for value." [140]

b.Transfer of the collateral to another person, subject to the security interest

The four−month rule above will apply when the original debtor relocates to another state but remains the owner of the collateral. Different rules will apply if the original debtor sells or otherwise transfers the collateral to a different entity, subject to the security interest. If the transferee is located for filing purposes in the same state as the original debtor, no action will be needed. The financing statement in the original debtor's name will remain effective against collateral in the hands of the transferee. [141] Action must be taken to maintain perfection, however, if the transferee is located in a different jurisdiction than the original debtor. In that case, the original financing statement will remain effective for a full year after the transfer. [142] Unless the secured party reperfects in the new jurisdiction before the end of that year, the security interest will become unperfected, and as with the four−month rule, will be deemed never to have been perfected as against a post−transfer purchaser for value. [143] To reperfect by filing in the new jurisdiction, the secured party should file there in the name of the transferee. The transferee's acquisition of collateral subject to a security interest or agricultural lien automatically authorizes a filing in the transferee's name. [144]

This refile−within−one−year rule will also apply when a registered organization debtor "reincorporates" in a new state. A registered organization by definition is organized under the law of a single state and that state cannot change. [145] Reincorporation really involves a transfer of property to a different entity, perhaps by merger, rather than change of state of registration for the original debtor. In such a case, the secured party will need to reperfect within one year in the transferee's state of registration for continued perfection. [146]

Some examples from the Official Comments may help here.

Example 1. Sale of Collateral. Assume Dee Corp., an Illinois corporation, grants Secured Party a security interest in Dee Corp.'s equipment. Secured Party properly perfects by filing in Illinois. Later, Dee Corp. sells half of the collateral to Why Corp., a Pennsylvania Corporation, subject to the security interest. The security interest in the collateral continues and remains perfected in the hands of both original debtor Dee Corp. and transferee Why Corp. However, because Why Corp. is located in Pennsylvania rather than Illinois under section 9−307(e), the security interest will become unperfected as to collateral transferred to Why Corp. one year after the transfer, unless Secured Party reperfects under Pennsylvania law. [147]

Example 2. Reincorporation. Lender obtains and perfects by filing in Pennsylvania a security interest in all the equipment of Debtor, a Pennsylvania corporation. Later, Debtor's shareholders decide to reincorporate in Delaware. They form Newcorp., a Delaware corporation, and merge Debtor into Newcorp. The merger involves a transfer of the collateral to Newcorp. Since Newcorp is located in Delaware, not Pennsylvania, the security interest will remain perfected for one year. If Lender reperfects under Delaware law within that year, the security interest will remain perfected under Delaware law. [148]

Reincorporation will normally result in the surviving entity being generally liable for the original debtor's obligations. In such a case, and in other cases where one entity either assumes another's security agreement or becomes generally liable for the debts of another, the party liable has become a "new debtor" under Revised Article 9. The new debtor concept and its consequences for attachment and perfection are discussed above in the Attachment section of this article. [149]

d.Transfer of the collateral: perfection in proceeds

As under current law, a sale or other disposition of collateral will automatically cause the security interest to attach to any identifiable proceeds. [150] The Revision adopts case law that 1) proceeds may be identifiable despite commingling with non−proceeds, as when cash proceeds are deposited into a debtor's general bank account; and 2) the secured party in such cases may use tracing rules such as the lowest intermediate balance rule. [151]

One change is the duration of continued perfection for proceeds. If the security interest in the original collateral was perfected, the security interest in proceeds will remain perfected for 20 days, rather than 10 days as under current law. [152] Otherwise, the perfection rules as to proceeds will not change in substance. If the proceeds are cash proceeds, the security interest will remain perfected even after the 20 days, so long as those cash proceeds remain identifiable. [153] As often happens, if cash proceeds are used to purchase some other type of property, the security interest will attach to that property as proceeds. However, unless the existing financing statement covers this type of collateral, the secured party will need to amend the financing statement's collateral description. [154]

The "same office rule" of current law is also retained. This rule has three prerequisites: 1) the security interest is perfected by filing, 2) the proceeds are a type of collateral in which a security interest could be perfected by filing in the same office where the financing statement in question has been filed, and 3) the proceeds were not purchased with cash proceeds. If all three requirements are met, the security interest in the proceeds will remain perfected after the 20 days, even if those proceeds (maybe equipment received by bartering inventory collateral) are collateral of a type not covered in the financing statement's collateral description (assume it was limited to inventory). The move to a central filing system makes it very likely that the same office rule will apply, since filings on almost all types of property that could be proceeds would go to the same central office in the debtor's jurisdiction.

VI.Perfection Outside Article 9: Goods Covered by Certificates of Title

Filing an Article 9 financing statement is, of course, the principal manner of perfection of security interests. Revised section 9−311 recognizes that, in some circumstances, the existence under federal or state law of an alternative system for perfection, either by filing a proper notice or some other process, makes an Article 9 filing neither necessary nor effective to perfect a security interest. [155] One example of such an alternative system is perfection for goods covered by a certificate of title. We discuss that system, including choice of law rules tailored to that system, here.

A. Choice of Law

Section 9−303 contains the choice of law rules for goods covered by a certificate of title. The basic choice of law rule requires a determination of when a certificate "covers" the goods. [156] Section 9−303(b) states that goods are "covered" by a certificate of title as soon as a valid application and fee are delivered to the appropriate authority. Goods cease to be "covered" by a certificate of title when they become "covered" by a subsequent certificate, or when the earlier certificate ceases to be effective.

Once one has determined which certificate "covers" the goods, the law of the jurisdiction issuing the certificate governs perfection, effect of perfection, and priority. [157]

B. Certificate−Goods Removed to Another State

When goods covered by a certificate of title are moved to another state, the destination state's law governs perfection as soon as a certificate of title issued under its law "covers" the goods. Thus, if State A issues a certificate of title covering D's automobile, and D removes the automobile to State B, State B's law governs perfection as soon as D files a proper application for a State B certificate. However, if D does not file such an application, State A law continues to govern perfection.

If D files a proper application in State B, State A law no longer governs perfection. However, under State B law, the State A secured creditor who perfected under State A law will continue to be perfected. This is because State B's law will include sections 9−316(d) and (e). Section 9−316(d) generally provides that a security interest perfected under State A's law by any method will remain perfected until it would have ceased to be perfected under State A's law, had no certificate been issued by State B.

As a practical matter, the perfection afforded the State A creditor under State B's law will apply only against a lien creditor, unless the State A creditor reperfects under State B law. Section 9−316(e) provides that after four months, the State A security interest perfected under section 9−316(d) will become unperfected as against a purchaser of the goods for value and will be deemed never to have been perfected as to such a purchaser unless reperfected.

C. Perfection

The mechanics of perfection for goods covered by a certificate of title will be governed by the state certificate of title statute. [158] In most cases, this will require the secured party to have its security interest noted on the certificate. [159] Two important exceptions to this rule are identified in section 9−311(a). First, the drafters recognized that it is unlikely a secured creditor will be able to obtain a debtor's cooperation to comply with a destination state's certificate of title law once the debtor has obtained a clean certificate. In such a case, section 9−313(b) will permit the secured creditor who falls under section 9−316(d) to reperfect by taking possession of the goods. [160] Second, while goods otherwise subject to a certificate of title law are held as inventory by a person in the business of selling goods of that kind, Article 9's perfection rules, including filing rules, will apply to a security interest in such goods. [161]

VII. Perfection by Possession

As we discussed earlier, Revised Article 9 will continue to permit perfection by the secured party's possession of certain types of collateral. [162] Section 9−313 authorizes perfection by possession of security interests in negotiable documents, goods, instruments, money and tangible chattel paper. [163]

The principal change in this area concerns goods in the possession of a bailee who has not issued a document covering the collateral. [164] Under Current Article 9, the secured party is treated as in possession, and hence perfected, as soon as notice of the security interest has been sent to the bailee. [165] However, notice will no longer suffice. [166] The Revision will require the secured party to get the bailee to acknowledge in an authenticated record that "it holds possession of the collateral for the secured party's benefit." Thus, the security interest will not become perfected unless and until the bailee makes the required admission in some recorded medium. Nonetheless, that admission may never come for the Revision also provides that the bailee has no duty to make the requisite acknowledgement. [167] Security interests in collateral perfectible by possession (except money) may also be perfected by filing. [168] Since the Revision will not require the debtor's signature on the financing statement, [169] filing will be a quicker and surer route to perfection than awaiting action by the bailee. Even if the secured party prefers to perfect by possession to prevent purchasers from obtaining priority, [170] it will still be prudent to file first, and thus perfect against the trustee in bankruptcy. The secured party can then await the bailee's acknowledgment with less risk.

VII.Perfection by Control

Revised Article 9 permits secured creditors to perfect a security interest in four specific types of collateral by obtaining "control." This method of perfection was introduced with the 1994 amendments to Article 8 as a method to perfect a security interest in investment property. The concept of control was introduced as a substitute for possession for collateral due to changing practices in the securities industry. The Drafting Committee for Revised Article 9 viewed the "control" concept as an important tool in expanding the scope of Article 9 to several new types of collateral. Accordingly, Revised Article 9 expands the types of collateral in which a secured creditor may perfect by obtaining control to include: deposit accounts, letter−of−credit rights and electronic chattel paper.

At the outset, it is important to realize that control of collateral in a secured transaction serves two functions. First, control functions as a mechanism of attachment. By obtaining control of the collateral pursuant to an agreement between the debtor and the secured party, the secured creditor will satisfy one of the requirements in section 9−203(a)(3) for attachment of the security interest. [171] Second, control serves as the method of perfecting the security interest. [172] In transactions involving deposit accounts, for example, control serves both functions because control is the exclusive mechanism for perfecting a security interest in a deposit account as original collateral.

The different characteristics of investment property, deposit accounts, letter−of−credit rights and electronic chattel paper required the drafters of Revised Article 9 to develop unique methods for obtaining control. The procedures for obtaining control are outlined in sections 9−104, 9−105, 9−106 and 9−107 and are discussed here in turn.

A. Investment Property

With the amendments to Article 8 in 1994, control was identified as one of four methods available to perfect a security interest in investment property. [173] Investment property is defined in Revised Article 9 as "a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract or commodity account." [174] Current section 9−115 outlines the procedures for obtaining control of these types of investment property and includes a reference to section 8−106 for specific types of investment property. Similarly, Revised Article 9's section 9−106 outlines the methods for taking a security interest in these types of investment property and refers the creditor to section 8−106 to determine how to take control of a certificated security, uncertificated security, or security entitlement. Generally, control over investment property occurs when the secured party "has taken whatever steps are necessary, given the manner in which the securities are held, to place itself in a position where it can have the securities sold, without further action by the owner." [175]

To take control of a certificated security that is held directly by the debtor and not by a securities intermediary, the secured party must get the debtor to deliver the certificate to the secured party, together with any indorsements necessary for the secured party to transfer the certificate without further assistance of the debtor. [176] To take control of an uncertificated security held directly by the debtor, either (1) the issuer of the security must agree to follow the instructions of the secured party without further approval by the debtor or (2) the security may be delivered to the secured party. [177]

Increasingly, both certificated and uncertificated securities are held by a broker or other intermediary. If a variety of securities are held together in an account, the rights are viewed as a "securities entitlement." [178] The term securities entitlement recognizes all of the rights of a debtor in a securities account. The bundle of rights associated with this securities account may be used as collateral in a secured transaction. To take control of a securities entitlement, a secured creditor may become the owner of the account 1) by having the name of the secured party instead of the debtor's name recorded as the entitlement holder of the account, [179] or (2) by entering into an agreement between the secured creditor, the debtor and the securities intermediary that the securities intermediary will comply with entitlement orders originated by the secured party without further consent of the debtor. [180] The control agreement serves to identify the rights of the various parties. [181]

Many of the control agreements that were written after the adoption of the amendments to Article 8 provided that the secured party would not issue any entitlement orders until the debtor was in default under the underlying security agreement. Questions arose as to whether this language made the secured party's right conditional. The drafters of Revised Article 9 eliminated this concern by making it clear in the revised comments to section 8−106 that such an agreement will not interfere with the present intent to establish control. However, if the secured party must obtain the consent of the debtor before it issues an entitlement order, then control will not have been established. [182]

When taking control of investment property, the creditor should recognize that its interest may be primed if the securities intermediary obtains a security interest in the securities entitlements it holds from the debtor. Under section 8−106, the security interest of a securities intermediary is automatically perfected and entitled to priority over any existing security interest held by another secured party. [183] Moreover, a secured creditor who perfects by control is thereby perfected in proceeds of the investment property only to the extent that the proceeds are identifiable cash proceeds. Thus, secured creditors would be wise to perfect their interests in non−cash proceeds by filing with respect to the investment property as well as by obtaining control. [184]

B. Deposit Accounts

Revised Article 9 permits secured creditors to use deposit accounts as original collateral. [185] The decision by the drafters to expand the scope of Article 9 to permit the taking of deposit accounts as original collateral follows a non−uniform amendment to Current Article 9 in five states, including California, Idaho, Louisiana, Hawaii and Illinois, where deposit accounts have been available for use as original collateral for a number of years. [186] There was considerable debate during the drafting process about the appropriateness of including deposit accounts as original collateral. Many expressed a concern that the taking of a security interest in a deposit account would be illusory. Specifically, some opined that the depository bank's security interest in a deposit account was another mechanism to support the bank's common law rights of set−off upon the default of a debtor. Therefore, secured parties other than depository banks would gain very little by obtaining a security interest in a deposit account. [187] Consumer advocates expressed concern about the ability of a consumer to recognize the significance and implications of using a deposit account as collateral. Despite these various opinions, there was a consensus that the taking of a security interest in a deposit account should not be an easy task for a secured creditor. [188] To address these significant concerns, the Drafting Committee excluded consumer deposit accounts from the scope of Revised Article 9 and established control as the exclusive method for taking a security interest in a deposit account. [189] It was hoped that by taking the steps necessary to establish control of a deposit account, both the secured party and the debtor would recognize the significance of the transaction.

Control of a deposit account may be obtained in one of three ways. First, the depository institution where the deposit account is maintained automatically has control over the deposit account. Alternatively, an agreement among the secured party, the debtor and the depository bank where the account is maintained in which the depository bank agrees to follow the secured party's directions without the debtor's consent will establish control over the deposit account. Finally, a secured creditor may obtain control by becoming a customer of the depositary bank by substituting the name of the secured party for the name of the debtor on the account.

Obviously, all depositary institutions will rely on their ability to secure control of a deposit account maintained at their institution. However, non−depository bank secured lenders will want to weigh the outcomes of the priority rules when selecting which of the two remaining alternatives to use to establish control of a deposit account. [190] For example,

section 9−327 provides that a security interest held by the depository bank where the deposit account is maintained will have priority over a conflicting security interest held by another secured party. [191] Section 9−340 provides that the depository bank's set off rights will have priority over the rights of a secured creditor who perfects by obtaining control with an agreement. [192] Thus, to avoid the impact of these rules the secured party should obtain control by substituting its name for the debtor's on the account. [193] By obtaining control in this manner, a secured creditor would have priority over the depository bank's security interest obtained via control. [194] In addition, because the account no longer belongs to the debtor, the depository bank could not exercise its set off rights against the account. [195]

C. Letter−of−Credit Rights

Revised Article 9 also permits a secured creditor to take a security interest in letter−of−credit rights. [196] These new provisions allow a lender which perfects a security interest in accounts, chattel paper, instruments or general intangibles (and certain other types of tangible assets) to also have a perfected security interest in the supporting obligation, including letter−of−credit rights, for the obligation. Lenders will enjoy automatic perfection of their interests in letter−of−credit rights where they constitute supporting obligations of a perfected security interest in other collateral. [197] Control is significant for lenders seeking to exercise newly authorized rights to obtain a security interest in the rights to the proceeds of a letter−of−credit.

A commercial transaction involving a letter−of−credit typically involves three parties; the buyer of the goods, the seller of the goods and the bank which issues the letter−of−credit. In this highly specialized area, banks will allow the seller of the goods to draw on the letter−of−credit upon the presentation of the appropriate documents, such as the seller's draft, an invoice, bill of lading, and packing slip. Sometimes, the seller of the goods will use the letter−of−credit as collateral in a separate transaction with a third party. In an attempt to grant a security interest, [198] the third party must obtain "control" over the letter−of−credit rights. [199] According to Revised Article 9, "control" over letter−of−credit rights is obtained when the bank which issues the letter−of−credit "consents to an assignment of the proceeds of the letter−of−credit under section 5−114(c) or otherwise applicable law or practice." [200] Section 5−114 permits a bank to withhold its consent to an assignment of the letter−of−credit proceeds, but only if it articulates its reasons for doing so. [201] As is common in the industry, the bank will often require the payment of fees and the presentation of documents to obtain payment. [202]

Revised Article 9's provisions with respect to letter−of−credit rights will simplify this specialized area of financing significantly. While it is unlikely that the provisions will change the business practices in this area, they will clarify and solidify the rights of the parties involved.

D. Electronic Chattel Paper

Chattel paper is a classic commercial asset used in a variety of financing transactions. Chattel paper is created whenever a borrower needs to finance a piece of equipment or other assets. It is defined as a writing that includes both a monetary obligation and a security interest in personal property. [203] Electronic chattel paper is defined as "chattel paper evidenced by a record or records consisting of information stored in an electronic medium." [204]

As electronic commerce begins to gain widespread acceptance, the push is on to eliminate the paper requirements in the law. [205] Within the financing industry, the desire to eliminate paper requirements for the documents representing the rights of the various parties has moved cautiously forward. Late in the drafting process for Revised Article 9, the Drafting Committee agreed to include provisions which would permit the taking of a security interest in electronic chattel paper. While the creation of this asset is still in its infancy, the drafters were willing to include this innovative asset and to outline provisions for taking a security interest in the asset. [206]

Section 9−105 of Revised Article 9 outlines the procedures for taking "control" of electronic chattel paper. The drafters sought to create a mechanism which is similar to the possession of tangible chattel paper so that the priority rules available to financiers of tangible chattel paper would also be available to financiers of electronic chattel paper. [207] Generally, the goal of the drafters was to ensure that the original electronic document could be identified as the "authenticated copy" and is therefore distinguishable from other electronic copies of the chattel paper. While electronic chattel paper is an innovative asset, there are currently several processes available in the marketplace which

are available for identifying an "authoritative copy" of electronic chattel paper. [208] The statute does not require that the asset be originated in an electronic format, but, it does place an obligation on the lender account for any paper documents that are converted to an electronic format. [209]

To take "control" of electronic chattel paper the lender must be able to demonstrate the six characteristics of the asset described in section 9−105, which provides:

A secured party has control of electronic chattel paper if the record or records comprising the chattel paper are created, stored and assigned in such a manner that:

(1) a single authoritative copy of the record or records exists which is unique, identifiable, and except as otherwise provided in paragraphs (4), (5) and (6), unalterable;

(2) the authoritative copy identifies the secured party as the assignee of the record or records;

(3) the authoritative copy is communicated to and maintained by the secured party or its designated custodian;

(4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the participation of the secured party;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any revision of the authoritative copy is readily identifiable as an authorized or unauthorized revision. [210]

The language of this provision reveals the efforts of the drafters to recognize the continuing development of new technologies, which will lead to changes in this area of financing. The goal of the drafters was to provide for the creation of a "single, authoritative copy" which cannot be altered without the participation of the secured party. Thus, the language reflects the traits necessary to obtain control of electronic chattel paper without detailing the procedures which must be taken to accomplish this goal. [211]

VIII.Automatic Perfection (or perfection upon attachment)

Revised section 9−309 lists the types of security interests that will be deemed perfected upon attachment, without further action by the secured party. [212] The Revision will retain most of the prior automatic perfection rules, including purchase money security interests in consumer goods (other than goods subject to certificate of title laws) and casual or isolated assignments of accounts. [213] The Revision will add some new categories as well. For example, security interests arising out of a true sale of either payment intangibles or promissory notes will get automatic perfection. With respect to sales of payment intangibles, the exemption from filing is intended to facilitate bank loan participations. [214] If the transfer of an interest in the notes or payment intangibles is for purposes of security rather than a true sale, though there will be no automatic perfection, and the secured party will need to file. Another addition to the automatic perfection list is the assignment of patients' health insurance claims to the doctor or hospital that provided the treatment giving rise to the claim. [215] Assignments of these claims to anyone other than the service provider, however, will not be automatically perfected; filing will be needed.

VIV.Conclusion

Our intent here is to provide a brief guide to the important changes in attachment and perfection made by Revised Article 9. In the attachment arena, as we have seen, the Revisions will bring more assets and transactions into Article 9's scope and better accommodate securitization. On the perfection side, filing rules have been thoroughly reworked to simplify the contents, reduce the number of filings, clarify the location of filings, and rein in unwarranted rejection by filing officers. Perfection by control is fleshed out in greater detail. In both attachment and perfection fields, the Revision will facilitate electronic transactions, thus increasing speed and reducing transaction costs for all parties.

Certainly, the Revision will not solve all the old problems, and just as certainly, it will raise new ones. However, it marks substantial progress toward two of the three purposes of the U.C.C.: "To simplify, clarify and modernize the law governing commercial transactions; and to permit the continued expansion of commercial practices . . . ." [216] The third purpose, of course, is "to make uniform the law among the various jurisdictions." [217] That goal must be fulfilled by the legislatures, now that the drafters have finished their work. [218]

FOOTNOTES:

[1] Professor of Law, Creighton University School of Law. Back To Text

[2] Professor of Law, Creighton University School of Law. Back To Text

[3] Assistant Professor of Law, University of Nebraska College of Law. Back To Text

[4] All citations are to the revised 2000 version of Article 9 of the Uniform Commercial Code, unless otherwise indicated. Citations to the 1972 version of Article 9 currently applicable in most jurisdictions are indicated by the term "current" before the citation. References in the text are to "Revised Article 9" or "Current Article 9." Back To Text

[5] See U.C.C. § 9−109(a)(2); see also id .Comment 3 (stating "[s]ubsection (a)(2) is new. It expands the scope of this Article to cover agricultural liens, as defined in § 9−102."). Back To Text

[6] See U.C.C. § 9−102(a)(5). Possessory and other statutory liens will not be covered by Article 9, though some sections apply to them. Section 9−333, for example, will contain a priority rule for contests between secured parties and such lien−holders. See Aaron Chambers, Lawmakers Modernize Transactions Laws, Chi. Daily L. Bull., Apr. 14, 2000, at 1 (referring to 2000 Article 9 revision, highlighting substantive changes including, "certain statutory, non−possessory liens for the purpose of providing public notice of their existence and setting priorities between creditors, [because] [t]hese liens have proliferated in recent years, and in cases where there is no public notice of their existence, creditors can be at risk."). Back To Text

[7] See U.C.C. § 9−109(a)(4); see also id. Comment 6 (explaining "[t]his article applies to every consignment."). Back To Text

[8] See U.C.C. § 9−109 Comment 6 (declaring "[T]he interest of a consignor is defined to be a security interest under revised § 1−201(37), more specifically, a purchase money security interest in the consignee's inventory."). The Conforming Amendments to Other Articles, Appendix I to Revised Article 9, include an amendment of U.C.C. § 2−326. The current § 2−326(3) will be deleted. Back To Text

[9] See U.C.C. § 9−103(d) Comment 6; see also supra note 5. Back To Text

[10] See U.C.C. § 9−103(d) Comment 6. The Revision makes explicit what might otherwise raise a question: The rights of the consignee as between the consignor and the consignee will not be changed by inclusion of the transaction in Article 9. Other law determines those rights. See U.C.C. § 9−109(a)(4) Comment 6. However, the rights of the consignor vis−à−vis third parties such as creditors of and purchasers for value from the consignee will be governed by Article 9. See U.C.C. § 9−318(a). Back To Text

[11] See U.C.C. § 9−109(4) Comment 6 (stating "[i]n a 'sale or return' transaction the buyer becomes the owner of the goods, and the seller may obtain an enforceable security interest in the goods only by satisfying the requirements of § 9−203."). Also, if a transaction that calls itself a consignment is intended as security, it is subject to Article 9's rules as a security interest. See id. Whether such a consignment is intended as security is left to the courts. An example of such a consignment can be seen in In re Oriental Rug Warehouse Club, Inc., 205 B.R. 407 (Bankr. D. Minn. 1997). There, the consignee set the prices for the goods, was billed on delivery and not sale, and was entitled to recover a profit rather than a percentage commission. See id. Back To Text

[12] See Current U.C.C. § 9−106 (defining "account as any right to payment for goods sold or leased or for services rendered . . . whether or not it has been earned by performance."). See, e.g., N.R.S. § 104.9106 (stating definition of "account" within Nevada's Revised Article 9 provision as "any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance."); see also L & L Roofing Co. v. Transp. Ins. Co., 15 F.3d 1086 (9th Cir. 1994) (finding settlement proceeds are not "accounts" under Nevada's Commercial Code § 104.9106, but rather are "general intangibles."). Back To Text

[13] See Paul M. Shupack, Making Revised Article 9 Safe For Securitizations: A Brief History, 73 Am. Bankr. L.J. 167, 169 (1999) (arguing Current Article 9's "exclusion of non−sales and non−service related rights to payment from the definition of 'account' [is] an anomaly and d[oes] not reflect the intent of the drafters."); see also Homer Kripke, Suggestions for Clarifying Article 9: Intangibles, Proceeds, and Priorities, 41 N.Y.U. L. Rev. 686, 690−93 (1966) (observing specifically "exclusion of non−sales and non−service related rights."). Back To Text

[14] See Steven L. Harris & Charles W. Mooney, How Successful Was the Revision of U.C.C. Article 9?: Reflections of the Reporters, 74 Chi.−Kent L. Rev. 1357, 1369 (1999) (exploring drafting committee's reasoning behind Article 9 revision). Back To Text

[15] See U.C.C. § 9−102(a)(2)(iii), (vii) (noting redefinition of "account" to include credit−card and insurance receivables); see also C. Scott Pryor, Revised Uniform Commercial Code Article 9: Impact in Bankruptcy, 7 Am. Bankr. Inst. L. Rev. 465, 471 (1999) (reporting "[r]evised Article 9 significantly broadens the definition of accounts so that it now includes payment obligations arising out of the sale, lease or license of all kinds of tangible and intangible property, as well as credit card receivables."). Back To Text

[16] See U.C.C. § 9−102(a)(61) (defining "payment intangible"); see also id. Comment 10(a) (explaining new definitions like "payment intangible . . . reflect the expanded scope of Article 9, as provided in § 9−109(a)."). Back To Text

[17] See U.C.C. § 9−102(a)(2) (stating definition of "account" includes rights to payment of money for "(i) property that has been . . . licensed . . ." License and franchise fee receivables are thus not general intangibles, but are accounts); see also Steven L. Schwarcz, Symposium: The Impact on Securitization of Revised UCC Article 9, 74 Chi.−Kent L. Rev. 947, 949−50 (1999) (positing "the definition of an account is expanded from current law to include not only credit card receivables and health−care−insurance receivables but also . . . license and franchise fee receivables.").

The relationship between Article 9 and federal patent and copyright laws has been uncertain. In the case of patents and trademarks, courts have generally held that federal law preempts Article 9's filing system only where federal law includes a provision mandating filing in a federal office. For example, the court in In re Cybernetic Sys., 239 B.R. 917, 920 (9th Cir. B.A.P. 1999), concluded the federal patent law mandated federal recordation in the Patent Office only for transfers of a patent. Recordation of assignments of less than full ownership, including security interests in a patent, was discretionary under the Patent Act, and thus not preempted. See id. A similar result has been reached in trademark cases, such as In re Together Dev. Corp., 227 B.R. 439, 441 (Bankr. D. Mass. 1998).

The results have been somewhat different for transfers of security interests in copyrights. The leading case, In re Peregrine Entm't, Ltd., 116 B.R. 194, 203 (C.D. Cal. 1990), held that the federal copyright law preempted Article 9's filing system. The only way to perfect either a transfer of or the grant of a security interest in a copyright was to file the proper notice in the Copyright Office. See id.

Patents, copyrights and trademarks will continue to be general intangibles under § 9−102(a)(42). Like current § 9−104(a), revised § 9−109(c)(1) defers to federal law. It does so in a manner different from current § 9−104(a). Section 9−109(c) defers to federal law only if it "preempts this article." U.C.C. § 9−109(c). Official Comment 8 to § 9−109, in an apparent reference to Peregrine, states: "Some (erroneously) read the former section to suggest that Article 9 sometimes deferred to federal law even when federal law did not preempt Article 9. Subsection (c)(1) recognizes explicitly that this Article defers to federal law only when and to the extent that it must – i.e., when federal law preempts it." U.C.C § 9−109 Comment 8.

Exactly what effect, if any, this change will have is unclear. One court, In re World Auxiliary Power Co., 244 B.R. 149, 154 (Bankr. N.D. Cal. 1999) has already concluded federal copyright law does not preempt Article 9's filing system for unregistered copyrights, because no specific federal law regulates perfection of such copyrights. This sort of limitation of Peregrine may be the goal of revised § 9−109(c)(1). See Steven O. Weise, The Financing of Intellectual Property under Revised U.C.C. Article 9, 74 Chi.−Kent L. Rev. 1077, 1080 (1999) (asserting "[a]rticle 9 defers to federal intellectual property law only 'to the extent' that federal law in fact preempts Article 9. Peregrine suggested that Article 9 deferred in its entirety whenever there was any federal rule that applied to a transaction."). Back To Text

[18] See Harris & Mooney, supra note 11, at 1372. Back To Text

[19] See Schwarcz, supra note 14, at 955 noting the following:

[o]ne of the major controversies that arose during the Article 9 revision effort was how to perfect the sale of payment intangibles. Bankers were concerned that a perfection requirement of filing financing statements would subject them to costly new procedures when selling loan participations, a form of payment intangible. A somewhat practical solution was reached to mitigate this concern: the sale of payment intangibles would be deemed to be automatically perfected, without the need to file financing statements.

Id. Back To Text

[20] Harris & Mooney, supra note 11, at 1372. Back To Text

[21] See U.C.C. § 9−309(3) (asserting sale of payment intangible is perfected upon attachment). Health−care insurance receivables are accounts, and thus filing will be required where the health−care−insurance receivable is assigned for financing purposes. U.C.C. § 9−309 Comment 5. If the insured assigns the health−care−insurance receivable to the provider of health care, no filing will be necessary. U.C.C. § 9−309(5). Back To Text

[22] See Schwarcz, supra note 14, at 950−51. Professor Schwarcz believes the uncertainty connected with perfection of sales of financial assets under state common law, with the resulting bankruptcy problems if the sale is found to be unperfected, militate in favor of Article 9 inclusion of these assets. See id. Back To Text

[23] U.C.C. § 9−109(d)(13); see also id. Comment 16 (explaining "[b]y excluding deposit accounts from the Article's scope as original collateral in consumer transactions, subsection (d)(13) leaves those transactions to law other than this Article. However in both consumer and non−consumer transactions, sections 9−315 and 9−322 apply to deposit accounts as proceeds with respect to priorities in proceeds."). Back To Text

[24] See U.C.C. § 9−102(a)(29); see also id. Comment 12 (indicating that the revised definition of "deposit account" incorporates definition of "bank"). Back To Text

[25] See U.C.C. § 9−108 (setting forth description of collateral requirements); see also U.C.C. § 9−109 Comment 16 (pointing out "deposit accounts" are "separate type[s] of collateral, [thus,] a security agreement covering general intangibles will not adequately describe deposit accounts. Rather, a security agreement must reasonably identify the deposit accounts that are the subject of a security interest . . . ."). Back To Text

[26] See U.C.C. § 9−102(a)(28); see also id. Comment 2(a) (redefining "debtor" and adding "new defined terms [to the current U.C.C. § 9−105 definition of debtor, such as], 'secondary obligor' and 'obligor.'"). Back To Text

[27] See U.C.C. § 9−102(a)(72); see also id. Comment 2(b) (theorizing "[t]he definition of 'secured party' clarifies the status of various types of representatives."). Back To Text

[28] See U.C.C. § 9−102(a)(56); see also id. Comment 8 (noting that term "New Debtor" is one of many filing− related definitions used exclusively in filing provisions of Part 5). Back To Text

[29] See U.C.C. § 9−203(b)(1) (stating that "Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to collateral only if: value has been given . . . ."); see also U.C.C. § 1−201(44) (defining "value" as . . . any consideration sufficient to support a simple contract, including the taking of property in satisfaction of or as security for a pre−existing claim."). Back To Text

[30] U.C.C. § 9−203(b)(2). See also id. Comment 2 (explaining that when all of elements of subsection (b) exist, security interest is created, is enforceable between parties, and attaches under subsection (a)). Back To Text

[31] The same cannot be said for the debtor's power under U.C.C. § 2−403(2). Since entrusting goods to certain merchants gives the merchant power to convey good title only to a buyer in the ordinary course of business, a debtor who is such a merchant would have no power to grant a security interest in goods entrusted to the debtor. See U.C.C. § 9−203 Comment 6; see also U.C.C. § 2−403(2) (asserting "[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business."). Back To Text

[32] See U.C.C. § 9−319(a):

Except as otherwise provided in subsection (b), for purposes of determining the rights of creditors of, and purchasers for value of goods from, a consignee, while the goods are in the possession the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer.

Id.

See also U.C.C. § 9−318 Comment 2 (explaining that consignee has all rights and title that consignor has if consignor's security interest in unperfected, and he has these rights even though, as between parties, he only has limited interest in goods). Back To Text

[33] "Authenticate" is defined as meaning to sign or otherwise adopt a record. U.C.C. § 9−102(a)(7). "Record" means information on either an electronic or tangible medium. U.C.C. § 9−102(a)(69). See U.C.C. § 9−203 Comment 3 (explaining under (3)(A), debtor must authenticate security interest that provides description of collateral. However, this does not reject "[t]he deeply rooted doctrine that a bill of sale, although absolute in form, may be shown in fact to have been given as security."). Back To Text

[34] "Collateral" means property subject to an agricultural lien or security interest, and includes proceeds, consigned goods, and accounts, chattel paper, payment intangibles or promissory notes, which have been sold. U.C.C. § 9−102(a)(12). See supra note 22, U.C.C. § 9−108. Back To Text

[35] See U.C.C. § 9−108(c) (holding that supergeneric description like "all the debtors assets" does not "reasonably identify the collateral."). Super−generic descriptions will be permitted, however, in financing statements. See U.C.C. § 9−504 and Part V(B)(7), infra. Back To Text

[36] American Card Co. v. H.M.H. Co., 196 A.2d 150, 152 (R.I. 1963) (noting "[i]t is not possible for a financing statement which does not contain the debtor's grant of a security interest to serve as a security agreement."). Back To Text

[37] See, e.g., In re A−1 Paving and Contracting, Inc., 116 F.3d 242, 243−44 (7th Cir. 1997) (citing Gibson County Farm Bureau Coop. Ass'n v. Greer, 643 N.E. 2d 313, 320 (Ind. 1994)) (stating ". . . Indiana's highest court held that a properly−filed UCC−1 financing statement may create an effective security interest under Article 9 of Indiana's Uniform Commercial Code if . . . the finder of fact determines that the parties intended the financing statement to serve as a security interest.") (emphasis added); see also Greer, 643 N.E. 2d at 320 (asserting ". . . once the writing requirement of § 9−203(1) is satisfied, whether the parties intended the writing to create a security interest is a question of fact for the trier of fact to determine."). Back To Text

[38] See U.C.C. § 9−509(b) (observing "[b]y authenticating or becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing of an initial financing statement . . . . "); see also id. Comment 4 (explaining that under subsection (b) "[t]he authentication of a security agreement ipso facto constitutes the debtor's authorization of the filing of a financing statement covering the collateral described in the security agreement.") (emphasis in original). Additionally, the comment notes that the secured party does not need separate authorization. Id. See also infra text accompanying notes 77−85. Back To Text

[39] See U.C.C. § 9−509(a) (providing for alternative methods for secured creditor to file initial financing statement in absence of separate document which can be called security agreement; specifically if debtor authorizes filing in an authenticated record or if creditor holds agricultural lien, effective at time of filing, where financing statement covers only collateral in agricultural lien); see also id. Comment 3 (explaining further that "[a] person who files an unauthorized record in violation of subsection (a)(1) is liable under § 9−625 for actual and statutory damages."). Back To Text

[40] See U.C.C. § 9−203(b)(3)(D); see also id. Comment 5 (noting that "one evidentiary purpose of the formal requisites stated in subsection (b) is to minimize the possibility of future disputes as to the terms of the security agreement (e.g., as to the property that stands as collateral for the obligation secured.")). Back To Text

[41] U.C.C. § 9−203(b)(3)(B). Official Comment 4 to § 9−203 explains the meaning of "security agreement" in § 9−203(b)(3)(B). The "security agreement" language here refers not to an authenticated security agreement satisfying 9−203(b)(3)(A); rather, it requires that the secured party's possession of the collateral "is pursuant to the debtor's security agreement." Id. If a debtor owes her jeweler money, and delivers her watch to him for repair, the jeweler is not in the possession of the watch "pursuant to the debtor's security agreement." See also U.C.C. § 9−313(a) (stating "[a] secured party may perfect a security interest in negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under section 8−301."). Back To Text

[42] See U.C.C. § 9−203 Comment 4 (stating "[p]ossession as contemplated by § 9−313 is possession for purposes of subsection (b)(3)(B)"). Back To Text

[43] See U.C.C § 9−313 (specifically noting "possession" is not defined, but in determining whether a person has possession, principles of agency apply). Official Comment 3 of U.C.C. § 9−313 also addresses the problem of "dual agency," where the agent represents both the secured creditor and the debtor. "The fact of dual agency is not of itself inconsistent with the secured party's having taken possession . . . ." Id. A court must determine if the debtor so controls the agent that the debtor in effect retains possession. Id. Back To Text

[44] See U.C.C. § 9−313(c); see also U.C.C. § 9−312(d) (permitting perfection of goods in the possession of a bailee who has issued a nonnegotiable document by simple notification). "Perfection under subsection (d) occurs when the bailee receives notification of the secured party's interest in the goods, regardless of who sends the notification." Id. Comment 7. Thus, the acknowledgement contemplated by § 9−313(c) is not required. Id. Section 9−203(b)(3)(B) refers to possession "under § 9−313." By its terms, § 9−313(c) does not apply to goods covered by a document; however, the possession and notice contemplated in § 9−312(d) for purposes of perfection should also satisfy the possession requirement of § 9−203(b)(3)(B). Back To Text

[45] See U.C.C. § 9−313(f) (asserting "[a] person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit."); see also id. Comment 8 (noting arrangements for possession of goods are not standardized). The new requirement that a bailee acknowledge that it holds collateral for the secured party is discussed infra Part VII. Back To Text

[46] See U.C.C. § 9−203(b)(3)(D); see also id. Comment 4 (explaining how "Control" of electronic chattel paper may be obtained). "Control" is also the manner in which secured creditors must perfect security interests in deposit accounts and letter−of−credit rights. It is a permitted method of perfection for electronic chattel paper and investment property. Perfection by control is discussed in Part VIII, see text accompanying notes 168−207 infra. Back To Text

[47] See infra Part VIII, (A)−(D) (discussing U.C.C. §§ 9−103, 9−104, 9−105, and 9−106). Back To Text

[48] See U.C.C. § 9−105; see also U.C.C. § 9−102(31) (defining electronic chattel paper as "chattel paper evidenced by a record or records consisting of information stored in an electronic medium"). Back To Text

[49] See U.C.C. § 9−105 Comment 2 (explaining need for special definition of "control" as functional equivalent of possession of tangible chattel paper because "electronic chattel paper can not be transferred, assigned, or possessed in the same manner as tangible chattel paper . . . . "); see also id. Comment 3 (noting that requirement for establishing control of electronic chattel paper is that a particular copy be an "authoritative copy."). Back To Text

[50] U.C.C. § 5−116(2) Comment 3. Note that the issuer of a letter of credit has a security interest in any document presented to the issuer in connection with the letter of credit. No security agreement is necessary, and the security interest generally will be perfected automatically or by possession. See U.C.C. § 5−118 Comment 2. Back To Text

[51] See U.C.C. § 9−109 (deferring to revised U.C.C. § 8−106 on control issues). That section, which has been extensively amended to conform to Revised Article 9, identifies ways one may obtain control over various types of investment property. See U.C.C. § 8−106. Sections 8−106(c) and (d) may present the same evidentiary problem encountered in deposit accounts. Back To Text

[52] U.C.C. § 9−203 Comment 4 discusses the "security agreement" term in § 9−203(b)(3)(B). "That phrase refers to the debtor's agreement to the secured party's possession for the purpose of creating a security interest." Id. Presumably the same meaning was intended for the phrase as it appears in § 9−203(b)(3)(D). Back To Text

[53] U.C.C. § 9−102(a)(73). Back To Text

[54] U.C.C. § 1−201(3). Article 1's definitions are applicable to secured transactions. See U.C.C. § 9−102(c). Back To Text

[55] Id. Back To Text

[56] U.C.C. § 9−104(a)(1). Back To Text

[57] 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, 1015 (1999). Back To Text

[58] If, as seems likely, banks will routinely add "deposit accounts" to collateral descriptions in security agreements authenticated by business debtors, this may not be much of a problem. Moreover, even where no record of the security agreement exists, the general awareness of a bank's right of set−off against accounts may carry over to awareness of the possibility of a security interest in deposit accounts. See Markell, supra note 55, at 1016. Finally, "deposit account" is defined to exclude from its coverage accounts evidenced by an instrument. See U.C.C. § 9−102(a)(29). Accounts evidenced by a certificate of deposit are probably not deposit accounts. While certificates of deposit generally bear the legend "non−negotiable" and "non−transferable," most courts have concluded they are nonetheless "instruments" for Article 9's purposes. See, e.g., In re Omega Envtl. Inc., 219 F.3d 984 (9th Cir. 2000); Evan H. Krinick, Nonnegotiable Certificates of Deposit, 117 Banking L.J. 347, 348 (2000). Back To Text

[59] See, e.g., Lieberman Music Co. v. Hagen, 394 N.W.2d 837 (Minn. Ct. App. 1986). Back To Text

[60] See, e.g., Citizens Sav. Bank v. Sac City State Bank, 315 N.W.2d 20 (Iowa 1982). Back To Text

[61] U.C.C. § 9−508 Comment 2 states the problem in the following manner: "[F]ormer Article 9 was less clear with respect to whether an after−acquired property clause would be effective to create a security interest in property acquired by the new corporation or the merger survivor and, if so, whether a financing statement filed against the original debtor would be effective to perfect the security interest. This section and sections 9−203(d) and (e) are a clarification." Back To Text

[62] Revised Article 9 provides a useful new test for determining when a name change renders a financing statement seriously misleading. See infra text accompanying notes 98−99. Back To Text

[63] In discussing the new priority rule in § 9−326, Official Comment 2 notes that the priority rule does not apply to new initial financing statements filed in the name of the new debtor. "Nor does it encompass a financing statement filed against the original debtor which remains effective against collateral transferred by the original debtor to the new debtor." Back To Text

[64] The consequences of the Revision's new debtor rules can best be understood by looking at a typical priority problem involving a new debtor. Section 9−326 states that a secured creditor claiming a security interest in property of the new debtor (other than property transferred by the original debtor to the new debtor) that is perfected in a manner solely under § 9−508 is subordinate to a security interest in the same property perfected in manner other than section 9−508, i.e., one where the new debtor signed a financing statement in the new debtor's name. Here is an example of how this works.

X Corporation signs a security agreement giving SP−1 a security interest in all presently owned and after−acquired equipment. SP−1 files an initial financing statement naming the debtor as X Corporation.

X sells all its assets to Y Corporation, which assumes all X's debts. Y Corporation is a new debtor under § 9−203(d), and is thus bound by X Corporation's security agreement given SP−1, including the after−acquired property clause.

Assume on the date Y became bound as a new debtor Y owned equipment as described in the SP−1 security agreement. That equipment is now subject to SP−1's security interest, which is perfected in this equipment under § 9−508.

Assume Y gave a security interest to SP−2 in the equipment owned by Y at the time Y became bound as a new debtor. If SP−2 perfects by filing an initial financing statement naming the debtor as Y Corporation, that security interest has priority over SP−1, even if SP−1's financing statement was filed first, and even if SP−2 filed after Y Corporation became bound under SP−1's security agreement. [The same result would apply to new equipment acquired by Y Corporation after it became bound under SP−1's security agreement.] Note that the priority rule of § 9−326 does not apply to collateral subject to a security interest created by the transferor that is transferred by the original debtor to the new debtor. Section 9−325 provides that the transferor's secured creditor wins, assuming it was perfected on the date of transfer. Back To Text

[65] U.C.C. § 9−303 contains choice of law rules for goods covered by a certificate of title, § 9−304 covers the same question for deposit accounts, § 9−305 covers investment property, and § 9−306 covers letter−of−credit rights. Back To Text

[66] Section 9−301(3)(A) will have a special rule for fixtures, growing timber and as−extracted collateral. Perfection will be governed by the law of the jurisdiction where the fixtures or timber are located, not where the debtor is located. If a court applied § 9−301(1) in cases where the debtor was located in State A, but the fixtures were located in State B, the law of State A would govern perfection. However, § 9−501 of State A's law would direct the secured party to file a fixture filing in the office where one would record a mortgage on the related real property. That would send the secured party to somewhere in State B. Section 9−301(3)(A) simply sends the secured party directly to State B. Back To Text

[67] These and other choice of law rules as they relate to perfection are more extensively discussed infra, Part IV, see infra text accompanying notes 125−133. Back To Text

[68] U.C.C. § 9−301 Comment 6. Back To Text

[69] U.C.C. § 9−316. Back To Text

[70] Agricultural liens, unlike consensual Article 9 security interests, may be perfected only by filing. See infra, text accompanying note 70. Back To Text

[71] Other very helpful treatments of the revised filing rules are found in William H. Lawrence, William H. Henning & R. Wilson Freyermuth, Understanding Secured Transactions 129−74 (2d ed. 1999); Charles Cheatham, Changes in Filing Procedures Under Revised Article 9, 25 Okla. City L. Rev. 235 (2000) [hereinafter Changes]; Robert M. Lloyd, The New Article 9: Its Impact on Tennessee Law (Part I), 67 Tenn. L. Rev. 125 (1999) [hereinafter New Article 9]; Harry C. Sigman, The Filing System Under Revised Article 9, 73 Amer. Bankr. L.J. 61 (1999) [hereinafter Filing]; 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) [hereinafter Twenty Questions]. Back To Text

[72] U.C.C. § 9−109(a)(2). See also supra text accompanying notes 2−3. For an excellent discussion of the impact of these changes, see Linda J. Rusch, Farm Financing Under Revised Article 9, 73 Amer. Bankr. L.J. 211 (1999). Back To Text

[73] U.C.C. §§ 9−308, 9−310. Back To Text

[74] U.C.C. §§ 9−312(a), 9−313, 9−330(d). Back To Text

[75] U.C.C. § 9−502(a). Back To Text

[76] U.C.C. § 9−516(b)(4)–(5). The organizational identification number is a unique number assigned by the jurisdiction in which the debtor is organized. See id. Comment 3. Back To Text

[77] See U.C.C. § 9−102 (a)(6) defining "as−extracted collateral" as:

(A) oil, gas, or other minerals that are subject to a security interest that:

(i) is created by a debtor having an interest in the minerals before extraction; and

(ii) attaches to the minerals as extracted; or

A. accounts arising out of the sale at the wellhead or minehead of oil, gas or other minerals in which the debtor had an interest before extraction.

Id.; see also Robert M. Lloyd, The New Article 9: Its Impact on Tennessee Law (Part II), 67 Tenn. L. Rev. 329, 382 (2000) [hereinafter Impact] (defining "as extracted collateral" as "new classification of collateral that embraces 'oil, gas or other minerals' to which a security interest attaches as they are extracted, as well as 'accounts arising out of the sale at the wellhead or mine−head of oil, gas or other minerals in which the debtor had an interest before extraction.'") (citing Revised U.C.C. § 9−102 (a)(6)). Back To Text

[78] See U.C.C. § 9−501(a)(1) (stating in part "the office in which to file a finance statement to perfect the security interest or agricultural lien is . . . the office designated for the filing or recording of a record of a mortgage on the related property…."); see also Neil B. Cohen & Edwin E. Smith, Symposium: International Secured Transactions & Revised Article 9, 74 Chi.−Kent L. Rev. 1191, 1200 n.29 (1999) [hereinafter International] ("the proper place to file is the office designated for the filing or recording of a record of a mortgage on the related real property."). Back To Text

[79] See U.C.C. § 9−502(b) (listing elements for "Real−Property−related financing statements" that cover "as extracted collateral" to satisfy sufficiency requirements of Revised U.C.C. § 9−502(a)). Back To Text

[80] See U.C.C. § 9−502 Comment 3 (stating "[w]hereas former § 9−402(1) required the debtor's signature to appear on a financing statement, this Article contains no signature requirement. The elimination of the signature requirement facilitates paperless filing."). Back To Text

[81] The debtor's authorization to file is required only if the financing statement is filed to perfect a security agreement, rather than an agricultural lien. See U.C.C. § 9−509. Agricultural liens are created by statute rather than by agreement of the parties. See id. The debtor's authorization is not required for filing a financing statement since the lien itself is not dependent on the debtor's consent. See id. See, e.g., U.C.C. § 9−509(a)(2):

> a. [Person entitled to file record.] A person may file an initial financing statement, amendment that adds collateral covered by a financing statement, or amendment that adds a debtor to a financing statement only if:
>
> 1. the person holds an agricultural lien that has become effective at the time of the filing and the financing statement covers only collateral in which the person holds an agricultural lien.

Id.

See also U.C.C. § 9−509 Comment 5 (stating "[u]nder subsection (a)(2), the holder of an agricultural lien may file a financing statement covering collateral subject to the lien without obtaining the debtor's authorization. Because the lien arises as a matter of law, the debtor's consent is not required."). Back To Text

[82] It is common to file a financing statement before a security agreement has been executed, and that practice will be permitted under the Revision. See U.C.C. § 9−502(d) (noting "[a] financing statement may be filed before a security agreement is made or a security interest otherwise attaches."). One question is whether specific authority to pre−file will be needed, or whether the debtor's subsequent execution of a security agreement will bring the case within the ipso facto authorization rule of § 9−509(a)(2). It would seem logical to treat the debtor's subsequent execution of a security agreement as ratification of pre−filing. The Official Comments indicate that questions of authority to file are to be answered using non−Code law, "including the law with respect to ratification of past acts . . . ." See U.C.C. § 9−509 Comment 3 observing:

Subsection (a)(1) substitutes for the debtor's signature on a financing statement the requirement that the debtor authorize in an authenticated record the filing of an initial financing statement or an amendment that adds collateral. Also under subsection (a)(1), if an amendment adds a debtor, the debtor who is added must authorize the amendment.

Id.

See also U.C.C. § 9−502 Comment 3 (describing "Debtor's Signature; Required Authorization"). Back To Text

[83] See, e.g., U.C.C. § 9−509(b) and Official Comments; see also id. (describing "[s]ecurity agreement as authorization"); Changes, supra note 68, at 254 (stating "[r]evised 9−509 (b) clearly outlines the circumstances in which someone is 'authorized' to make a filing" and listing these circumstances). Back To Text

[84] See U.C.C. § 9−509(1) (stating in part "[a] person may file an initial filing statement . . . only if . . . the debtor authorizes the filing in an authenticated record . . .") (emphasis added). Back To Text

[85] See U.C.C. § 9−516(b) and text infra accompanying notes 113−116 (describing circumstances where filing does not occur because of filing office's refusal to accept record pursuant to § 9−516 titled "What Constitutes Filing; Effectiveness of Filing."); see also Edwin E. Smith, Overview of Revised Article 9, 73 Am. Bankr. L.J. 1, 16 (1999) (stating "[t]he reasons set forth in § 9−516 (b) are the only grounds for filing office rejection."). Back To Text

[86] U.C.C. § 9−509 Comment 1. Back To Text

[87] See U.C.C. § 9−510(a) (stating "[a] filed [financing statement] is effective only to the extent that it was filed by a person that may file it under § 9−509."); see also Impact, supra note 74, at 84 (opining "[s]ection 9−510 (a) provides that a financing statement is effective only to the extent that it is authorized . . . ."). Back To Text

[88] See U.C.C. § 9−625(e)(3) (asserting "[i]n addition to any damages recoverable under subsection (b), the debtor, consumer, obligor, or person named as a debtor in a filed record, as applicable, may recover $500 in each case from a person that files a record that the person is not entitled to file . . . ."); see also Kenneth K. Kettering, Repledge Deconstructed, 61 U. Pitt. L. Rev. 45, 45 n.4 (1999) (declaring § 9−625(e)(3) is a provision "prohibiting unauthorized filings and imposing sanctions for violation of the prohibition."). Back To Text

[89] Under Current Article 9, real estate descriptions are required in both security agreements and financing statements covering growing crops. See U.C.C. § 9−502(b). Omitting the real estate description from the security agreement means no attachment, at least until the crops are harvested and no longer "growing." Omission of the description from the financing statement means no perfection, again until harvest. Even if a description is included in both, it may be challenged as insufficient or incorrect. Back To Text

[90] See U.C.C. § 9−502(b) (describing "[r]eal−property−related financing statements."); see also Changes, supra note 68, at 249−50 (explaining requirements that financing statement must satisfy under Revised 9−502(b)). Back To Text

[91] See U.C.C. § 9−503 (giving general direction on how to correctly include debtor's name on financing statement). Back To Text

[92] See U.C.C. § 1−201(28) (defining "organization" and stating "[t]his is the definition of every type of entity or association, excluding an individual, acting as such."); see also Changes, supra note 68, 242 n.33 (opining "[i]n UCC § 1−201 (28) 'organization' is defined very broadly. It includes everything that falls within the definition of 'registered organization' in Revised § 9−102(a)(70) and also many other types of entities."). Back To Text

[93] See U.C.C. § 9−102(a)(70) (defining "registered organization" as "an organization organized solely under the law of a single state or the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized."). Back To Text

[94] U.C.C. § 9−503(a)(4):

> a. [Sufficiency of debtor's name.] A financing statement sufficiently provides the name of the debtor:
>
> 1. in other cases:
>
> A. if the debtor has a name, only if it provides the individual or organizational name of the debtor; and
> B. if the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor

Id.

See also Earl F. Leitess & Steven N. Leitess, Article: Inventory Financing under Revised Article 9, 73 Am. Bankr. L.J. 119, 127 (1999) (discussing method to sufficiently provide "name of the debtor" and making reference to § 9−503(a)(4) in footnote). Back To Text

[95] See U.C.C. § 9−503(a)(2) (if debtor is decedent's estate, financing statement must provide name of decedent and indicate debtor is an estate); see also U.C.C. § 9−503(a)(3) (if debtor is trust or trustee acting as to property held in trust, financing statement must use trust's name as set out in trust instrument, or, if no name is there specified, give settlor's name and "additional information sufficient to distinguish the debtor from other trusts having one or more of the same settlors."). Back To Text

[96] See U.C.C. § 9−516(b)(3)(C) stating the following:

> a. [Refusal to accept record; filing does not occur.] Filing does not occur with respect to a record that a filing office refuses to accept because:

1. the filing office is unable to index the record because:

A. in the case of an initial filing statement that provides the name of a debtor identified as an individual or an amendment that provides a name of a debtor identified as an individual which was not previously provided in the financing statement to which the record relates, the record does not identify the debtor's last name . . . .

Id.

See also U.C.C. § 9−503 Comment 2 (asserting even if name provision of financing statement is correct, filing office must reject statement if individual's last name is not identified). Back To Text

[97] These and many other examples come from a list−serve exchange involving Professors John Krahmer of Texas Tech and G. Ray Warner of University of Missouri, Kansas City. Copies of e−mail messages are on file with the authors at Creighton University Law School. Back To Text

[98] See U.C.C. § 9−503(b):

[a] financing statement that provides the name of the debtor in accordance with subsection (a) is not rendered ineffective by the absence of (1) a trade name or other name of the debtor; or (2) unless required under subsection (a)(4)(B), names of partners, members, associates, or other persons comprising the debtor.

Id.

See also U.C.C. § 9−503(c) ("[a] financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor.") (emphasis added). Back To Text

[99] See, e.g., Brushwood v. Citizens' Bank (In re Glasco, Inc.), 642 F.2d 793, 796 (5th Cir. 1981) ("[f]iling under an assumed trade name is effective unless it is misleading….") (quoting Siljeg v. National Bank of Commerce, 509 F.2d 1009, 1012 (9th Cir. 1975)); see also In re Platt, 257 F. Supp. 478, 482 (E.D. Pa. 1966) (holding trade name [Plat Fur Co.] to be sufficient identification of debtor). Back To Text

[100] See U.C.C. § 9−503(d) (stating "[f]ailure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement."). Back To Text

[101] See U.C.C. § 9−506 (describing effect of errors or omissions in financing statement). Back To Text

[102] See U.C.C. § 9−506(b) (asserting mistake or error "in the name of the debtor" in financing statement is "seriously misleading."); see also supra note 98, U.C.C. § 9−506. Back To Text

[103] See U.C.C. § 9−512(a)(1) (amendment to financing statement under the Revision must identify "by its file number, the initial financing statement to which the amendment relates."). Back To Text

[104] U.C.C. § 9−504. Back To Text

[105] See, e.g. In re Boogie Enters., 866 F.2d 1172, 1175 (9th Cir. 1989) (claiming "personal property" is not proper description of collateral); In re Fuqua, 461 F.2d 1186, 1188 (10th Cir. 1972) (holding financing statement, which included description of collateral as "all personal property," was insufficient to perfect security interest in livestock, feed, and farming equipment); Merchants Nat'l Bank v. Halberstadt, 425 N.W.2d 429, 430−431 (Iowa Ct. App. 1988) (concluding financing statement claiming interest in various farm equipment, inventory, and "all personal property" did not perfect interest in coins and jewelry); In re Becker, 53 B.R. 450, 452 (W.D. Wis. 1985) (claiming "all farm personal property" is insufficient to perfect interest in farm equipment). Back To Text

[106] See U.C.C. §§ 9−108, 9−504. Back To Text

[107] See, e.g., United States v. Greenstreet, 912 F.Supp. 224, 226 (N.D. Texas 1996) (finding if purported financing statements are not within requisites of law, they are void and of no legal consequence). Back To Text

[108] U.C.C. § 9−518. Back To Text

[109] See U.C.C. § 9−510(a). Back To Text

[110] See U.C.C. § 9−518 Comment 3. Back To Text

[111] See U.C.C. § 9−513(c) (positing rule set forth in text above applies to collateral other than consumer goods). There is a slightly different rule for consumer goods filings in subsection (a) of § 9−513. See, e.g., Twenty Questions, supra note 68, at 873 (stating "secured party is obligated, within twenty days after the secured party obtain an authenticated demand from the debtor, to send the debtor or file directly a termination statement when there is neither an outstanding secured obligation nor a commitment to give value."). Back To Text

[112] U.C.C. § 9−509(d)(2). Back To Text

[113] See U.C.C. § 1−201(26) (providing in part that "[a] person 'receives' a notice . . . when . . . (b) it is duly delivered at the place . . . held out by him as the place for receipt of such communications."). Back To Text

[114] See U.C.C. § 9−513 Comment 3 (noting "if a termination statement is not forthcoming [after receipt of notification by the secured party], the person named as debtor itself may authorize the filing of a termination statement . . . ."). Back To Text

[115] See U.C.C. § 9−516(a). Back To Text

[116] See U.C.C. § 9−520(a) (requiring rejection of any record falling within seven grounds listed in § 9−516(b) and prohibiting rejection for any other reason). The seven grounds are:

1) The record was sent via a medium unauthorized by that filing office;

2) The filer did not tender an amount equal to or greater than the filing fee;

3) The filing office cannot index the record because either the debtor's name, or in the case of an amendment or continuation statement, the identification of the original filing, is missing;

4) The record does not provide a name and address for the secured party;

5) The record does not provide the debtor's mailing address, or indicate whether the debtor is an individual or organization, and if an organization, whether it is registered, and if so, the jurisdiction of registration;

6) If either the original record or an amendment indicates an assignment, the record does not provide a name and address for the assignee; and

7) In the case of a continuation statement, the record is not filed within the six−months window under § 9−515(d).

U.C.C. § 9−516(b). Back To Text

[117] U.C.C. § 9−516(b). Back To Text

[118] U.C.C. § 9−516(d). See id. Comment 3 (discussing effect of filing officer's unjustified refusal to accept record). Back To Text

[119] See U.C.C. § 9−520(b) (notice must give reason for rejection as well as "the date and time the record would have been filed had the filing office accepted it."). The two−business−day time limit of § 9−520 and other such limits in Part 5 of Article 9 may not be met by busy or inefficient filing offices. The Revision provides no remedy for the filer in such a case, but offers this solace to the filing office in § 9−524:

Delay by the filing office beyond a time limit prescribed by this part is excused if:

(1) the delay is caused by interruption of communication or computer facilities, war, emergency conditions, failure of equipment, or other circumstances beyond the control of the filing office; and

(2) the filing office exercises reasonable diligence under the circumstances.

U.C.C. § 9−524. Back To Text

[120] See U.C.C. § 9−517. Back To Text

[121] U.C.C. § 9−515(b). A public−finance transaction is a secured transaction involving issuance of debt securities with a maturity of 20 or more years, where the debtor or secured party is a State or governmental unit of a State. See U.C.C. § 9−102(67). A manufactured−home transaction is a secured transaction creating a security interest in which a manufactured home is the primary collateral, and is not held as inventory. See U.C.C. § 9−102(54). Manufactured home is defined, at greater length than we have space for here, in § 9−102(53). Back To Text

[122] See U.C.C. § 9−515(f) (discussing effectiveness of transmitting utility financing statements). Back To Text

[123] See U.C.C. § 9−515(g) (noting effectiveness of mortgages with respect to real−property law); see also id. Comment 2 (stating "a mortgage effective as a fixture filing remains effective until its effectiveness terminates under real−property law). Back To Text

[124] See U.C.C. § 9−515(d) ("a continuation statement may be filed only within six months before expiration of the five year period . . . " in § 9−515(a) or thirty−year period in § 9−515(b)). Back To Text

[125] See U.C.C. § 9−516(b)(7) (failure to file continuation statement within the six−month period of § 9−515(d) will result in rejection of such record by the filing office pursuant to § 9−520(a)). Back To Text

[126] See U.C.C. § 9−510(c) (stating ineffectiveness of continuation statement "not filed within the six month period . . ." specified in § 9−515(d)); see also Twenty Questions, supra note 68, at 888 (asserting "[i]n the case of a wrongfully accepted (or mistakenly filed) continuation statement, the worst that can happen is that a financing statement that actually lapsed appears to have been continued, thus deferring potential deletion date − it continues to be discoverable."). Back To Text

[127] See U.C.C. § 9−521(a) & (b) (acknowledging that filing offices are only permitted to reject safe harbor forms pursuant to § 9−516(b); see also Changes, supra note 68, at 245 (claiming "[r]evised 9−521 provides sample uniform forms of financing statements and amendments that are designed to be acceptable for filing in every filing office in the United States."). Back To Text

[128] See current U.C.C. § 9−103(1) (where to file to perfect security interest in ordinary goods). Back To Text

[129] The location−of−the−debtor rule is used under Current Article 9 only for accounts, chattel paper, general intangibles and mobile goods. See current U.C.C. § 9−103 (3) & (4). Revised Article 9 extends that rule to most types of collateral when perfection is by filing. U.C.C. § 9−301(1). However, the location−of−the−debtor rule does not apply to agricultural liens or goods covered by a certificate of title. For agricultural liens, one will file in the state where the collateral is located. U.C.C. § 9−302. Perfection by certificate of title is covered by § 9−303 and is discussed infra, in text accompanying notes 154−158.

Location of the collateral also will continue to control real estate related collateral such as fixture filings, timber to cut, and "as extracted collateral." U.C.C. § 9−301(3) & (4). Back To Text

[130] U.C.C. § 9−307(b)(2) & (3). Back To Text

[131] A good illustration of the difficulties in determining which office is a debtor's chief executive office is Mellon Bank v. Metro Communications, Inc., 945 F.2d 635 (3d Cir. 1991), where a corporate debtor was the target of a leveraged buyout and gradually shifted its operations from one state to another, then filed a bankruptcy petition. Determining which office was the debtor's chief executive office 90 days before the filing of the bankruptcy petition required extensive discovery, hearings and an appeal to the Third Circuit. See also In re Thompson, 665 F.2d 941, 949−50 (9th Cir. 1982) (recognizing difficulty in determining principal place of business and concluding that drafters of Code contemplated two−fold inquiry focusing on place from which debtor manages main part of business operations and reasonable expectations of creditors). Back To Text

[132] Suppose the debtor is a national bank, chartered under federal rather than state law. The definition of registered organization includes those organized under federal law as well as state law. See U.C.C. § 1−201(70). Section 9−307(f) directs that filings against such debtors be made in whatever state federal law directs, if it does so direct. For national banks, that would usually be the state of the bank's headquarters as noted in its charter. If federal law instead allows the debtor to designate its own state of location, then the state so chosen by the debtor will be the place to file. If neither of the above rules apply to a federally chartered organization, filings should be made in the District of Columbia. See U.C.C. § 9−307(f).

What if the debtor is the federal government itself? Perhaps the biggest surprise of Revised Article 9 is § 9−307(h)'s solemn pronouncement, "The United States is located in the District of Columbia." U.C.C. § 9−307(h). Professor Bob Lloyd notes, "Those who have worked to free Congress of its beltway mentality will certainly lose heart to hear this." New Article 9, supra note 68, at 156 n. 268. Of course, the purpose of this apparently broad provision is quite limited. It simply designates the District of Columbia as the place to file when the United States government is the debtor. Id. Back To Text

[133] U.C.C. § 9−307(e). Back To Text

[134] See Lynn M. Lopucki, Why the Debtor's State of Incorporation Should Be the Proper Place for Article 9 Filing, 79 Minn. L. Rev. 577 (1995) (arguing that filing by state of registration is easier for both filers and searchers); see also Filing, supra note 68, at 63 (stating that filing by location of debtor should result in fewer filings overall, fewer wrong place errors, fewer failure to refile errors, and consequently, less litigation). Back To Text

[135] To borrow an example from the Comments, assume a British corporation is doing business at several U.S. locations, with its chief executive office in London. Where should we file to perfect an interest on U.S.−related collateral owned by this debtor? First, even though this debtor is an organization, it is not a registered organization as the term is used in the Revision, because the debtor is incorporated under foreign law, not U.S. domestic law. See U.C.C. § 9−102(70). That means the birth certificate rule will not apply, so we must return to the general rule that this organization is located in the jurisdiction of its chief executive office−−Great Britain in our example.

However, the Revision requires one more step before we decide to file in Great Britain. That step is to ask whether the non−U.S. jurisdiction "requires information concerning . . . a nonpossessory security interest to be made [public through a filing system] as a condition . . . of obtaining priority over . . . a lien creditor" U.C.C. § 9−307(c). Like Current Article 9, the Revision "refuse[s] to 'locate' a [foreign] debtor in a jurisdiction that does not provide for public filing of security interests." Patrick J. Borchers, Choice of Law Relative to Security Interests and Other Liens in International Bankruptcies, 46 Am. J. Comp. L. 165, 191 (1998). In other words, if the debtor's non−U.S. location has a public filing system for priority over lien creditors, we must use it. Id. If the non−U.S. jurisdiction does not have such a system, however, § 9−307(c) will deem the debtor to be located in the District of Columbia for filing purposes. The complexities of this determination may lead creditors to file against foreign debtors both in the District of Columbia and the foreign country. See U.C.C. § 9−307(c) Comment 3. Back To Text

[136] U.C.C. § 9−307(b)(1). Official Comment 2 provides "An individual debtor is deemed to be located at the individual's principal residence with respect to both personal and business assets." See U.C.C. § 9−307(b)(1) Comment 2; see also Filing, supra note 68, at 63−4 (discussing location of individual debtor with respect to filing). Back To Text

[137] See U.C.C. § 9−501. The single office may not even be a governmental office. The Legislative Note to § 9−501 authorizes a state to contract with a private party to maintain the state's filing system, and in such a case, that private party's office should be listed in that state's version of § 9−501; see also Filing, supra note 68, at 62 (discussing intrastate filing under Revised Article 9). Back To Text

[138] It will be interesting to see if all the states adopt a central filing system or if states that currently require local or dual filing will instead adopt non−uniform rules to continue those practices. The revenue and jobs in local filing offices that would be lost in a completely centralized system led to the options and non−uniform filing systems under the existing Code. Those interests could still pose problems for widespread adoption of the Revision's filing rules. Back To Text

[139] Perfection will continue for four months after the debtor's move, unless the financing statement in the original jurisdiction would have lapsed earlier. See U.C.C. § 9−316(a)(1) – (a)(2). In that case, perfection based on that financing statement ends on date of lapse. Id.; see also Filing, supra note 68, at 66 (discussing effect of debtor's move on perfection of security interest under Revised Article 9). Back To Text

[140] See U.C.C. § 9−316(b); see also Filing, supra note 68, at 66 (discussing effect of debtor's move on perfection of security interest under Revised Article 9). Back To Text

[141] As under current law, mere transfer of collateral to a different owner does not trigger a need to reperfect. Section 9−507(a) provides: "A filed financing statement remains effective with respect to collateral that is sold . . . or otherwise disposed of . . . and in which a security interest or agricultural lien continues…"; see U.C.C. § 9−507(a); see also current U.C.C. § 9−402(7); Filing, supra note 68, at 80 (stating that where security interest in collateral continues despite transfer of collateral, filing that perfected security interest continues to be effective, even if secured party knows of or consents to transfer). Back To Text

[142] More precisely, the financing statement will cease to be effective to perfect on collateral in the transferee's hands at the earlier of one year after the transfer, or the date the original financing statement would have lapsed, usually five years after filing unless a timely continuation statement is filed. See Filing, supra note 68 at 71 (discussing maintenance of perfection where transferee of collateral is located in different jurisdiction). Back To Text

[143] U.C.C. § 9−316(a)(3) − (b). Back To Text

[144] Section 9−509(c) provides: By acquiring collateral in which a security interest or agricultural lien continues under § 9−315(a)(1), a debtor authorizes the filing of an initial financing statement . . . ." U.C.C. § 9−509(c). Even though the transferee merely takes collateral subject to the security interest, and does not assume the debt, the transferee will become a debtor under the Revision, which defines a debtor as, "(A) a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor," U.C.C. § 9−102(a)(28)(A). Back To Text

[145] A "registered organization" is "an organization organized solely under the law of a single State . . . ." U.C.C. § 9−102(a)(70). A registered organization continues to be located in the state where it was organized notwithstanding suspension, lapse of status, or dissolution. See Filing, supra note 68, at 67 (discussing registered organizations). Back To Text

[146] See Filing, supra note 68 at 67 (discussing effect of reincorporation on perfected security interests). Back To Text

[147] See U.C.C § 9−507 Comment 3. Back To Text

[148] See U.C.C. § 9−316 Comment 2 (Example 4). Back To Text

[149] See supra text accompanying notes 56−61. Back To Text

[150] See U.C.C. § 9−315. This rule also applies to agricultural liens. Compare current U.C.C. §§ 9−306(2) with 9−203(3) and 9−315. Back To Text

[151] U.C.C. § 9−315(b) and Comment 3. See, e.g., Univ. C.I.T. Credit Corp. v. Farmer's Bank of Portageville, 358 F. Supp. 317, 325 (E.D. Mo. 1973). Back To Text

[152] Compare U.C.C. § 9−315(a) (stating "a perfected security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds" with current U.C.C. § 9−306(3) (allowing only 10 days). Back To Text

[153] See U.C.C. § 9−315(d)(2). Back To Text

[154] The debtor's acquisition of proceeds is deemed to authorize amending the financing statement. See U.C.C. § 9−509(b)(2). Back To Text

[155] The relationship of Article 9's filing system to federal patent and copyright laws is discussed briefly in supra note 14. Other federal law also has an impact on Article 9's filing system. For example, 7 U.S.C. § 1631, "the 1985 Food Security Act", resulted in the creation in many states of a separate filing system for farm products. Under this system a financing statement, called an Effective Financing Statement ("EFS") is filed with the state's office of the Secretary of State and contains information concerning farm debtors, their crops, and those claiming a security interest in those crops. See 7 U.S.C. § 1631. The purpose of filing an EFS is not to perfect a security interest in crops. Rather, it must be done to obtain priority over one who has registered as a buyer of the farm products. If an EFS has not been properly filed, a buyer who would otherwise qualify as a buyer in ordinary course of business will take the farm products free and clear of a perfected security interest. See generally Charles W. Wolfe, Section 1324 of the Food Security Act of 1985: Congress Preempts the "Farm Products Exception" of Section 9−307(1) of the Uniform Commercial Code, 55 UMKC L. Rev. 454 (1987); see also D.L. Uchtman, Julie A. Bauer & A.M. Dudek, The UCC Farm Products Exception−A Time to Change, 69 Minn. L. Rev. 1315, 1327−29 (1983) (discussing ineffectiveness of filing system in protecting of purchasers of farm products). Back To Text

[156] U.C.C. § 9−303(c) (1999). Back To Text

[157] See U.C.C. § 9−303(c). Back To Text

[158] See U.C.C. § 9−311(b). See generally Candace M. Jones, Ronald S. Gross & Lee A. Schott, Electronic "Chattel Paper" Under Revised Article 9, 31 U.C.C. L.J. 47, 61 (discussing Revised U.C.C. Article 9 § 311). Back To Text

[159] See, e.g., Neb. Rev. Stat. § 60−110 (Reissue 1998). Back To Text

[160] U.C.C. § 9−311 Comment 7. Official Comment 7 to § 9−313 makes it clear that 9−313(b) does not itself authorize such repossession. It simply states when a secured creditor may use repossession as a means of perfection. Id. Only secured creditors perfected under § 9−316(d) may do so. Back To Text

[161] See U.C.C. § 9−311(a). Back To Text

[162] See supra text accompanying notes 38−42. Back To Text

[163] U.C.C. § 9−313(a). Back To Text

[164] This discussion does not apply to certificated securities held by a bailee. Security interests in certificated securities cannot be perfected by possession through acknowledgement by a bailee under § 9−313(c). Interests in certificated

securities may be perfected either by filing, as with other investment property collateral, or by taking delivery under § 8−301. Back To Text

[165] See current U.C.C. § 9−305 and Comment 2; see also In re Hinds, 10 Cal. App. 3d 1021, 1024 (Cal. Ct. App. 1970) (noting secured party is deemed to have possession from the time bailee receives notification of the secured party's interest). The pre−Code rule required evidence that the bailee had agreed to hold the collateral for the benefit of the secured party. Revised Article 9 returns to the pre−Code view. Back To Text

[166] See U.C.C. § 9−313(c). Back To Text

[167] See U.C.C. § 9−313(f). In addition, the Revision makes it clear that Article 9 imposes no duties upon a bailee who has acknowledged status as a bailee. The secured party must either contract with the bailee or find non−Article 9 law to govern the relationship. See U.C.C. § 9−313(g)(2). Back To Text

[168] See U.C.C. §§ 9−310, 9−312. Back To Text

[169] See U.C.C. § 9−502. Of course, perfection by filing presupposes that debtor has authenticated a security agreement. If, instead, secured party relied on bailee's possession to satisfy attachment requirements of § 9−203(b)(3)(A) as well as to perfect, filing will not be an alternative route to perfection. Back To Text

[170] See U.C.C. §§ 9−330, 9−331. Back To Text

[171] See U.C.C. §§ 9−203(a)(3), 9−104 and Comment 1; see also supra text accompanying notes 43−55. Back To Text

[172] See U.C.C. § 9−203(a). Back To Text

[173] See generally On the Edge: Revised UCC Article 8 and Security Interests in Investment Securities, 1995 ABI JNL. LEXIS 145 at * 3 (focusing on indirect holding of securities by brokerage houses and banks). Perfection of security interest in investment property may be by control, possession, filing or automatic perfection in certain situations. While these alternative methods are available to a secured creditor, each method will have a different impact on a secured creditor's priority rights against other creditors. Back To Text

[174] See U.C.C. § 9−102(a)(49); see also U.C.C. § 8−102(a)(15) (defining security); U.C.C. §§ 8−501, 8−102(a)(17) (defining security entitlements); U.C.C. § 9−102(a)(15) (defining commodity contracts); U.C.C. § 9−102(a)(14) (defining commodity accounts). Back To Text

[175] See U.C.C. § 8−107 Comment 1. Back To Text

[176] See U.C.C. §§ 8−106(a), (b) and (e) (discussing control of securities); see also U.C.C. § 8−301(a) (stating delivery of certificated security occurs when (1) purchaser acquires possession of certificate; (2) another person, other than securities intermediary, acquires possession on behalf of purchaser or acknowledges that it will hold certificate on behalf of purchaser; or (3) securities intermediary, acting on behalf of purchaser acquires possession of certificate in registered form and bearing specific endorsement in favor of purchaser). Back To Text

[177] See U.C.C. § 8−106(c) (1994) (discussing control of securities); see also U.C.C. § 8−301(b) (1994) (stating delivery of uncertificated security occurs when issuer registers purchaser as registered owner or another person, other than securities intermediary, becomes registered owner on behalf of purchaser). Back To Text

[178] See U.C.C. § 8−102(a)(17). Back To Text

[179] See U.C.C. § 8−102(a)(7) (stating Article 8 defines entitlement holder as person identified in records of securities intermediary as person having security entitlement against securities intermediary). Back To Text

[180] See U.C.C. § 8−106(d). In addition, the secured creditor may take control of the individual securities within the securities account. Back To Text

[181] See generally Sandra M. Rocks and Robert A. Wittie, Getting Control of Control Agreements, 31 U.C.C. L.J. 318 (Containing two control agreement forms. The first form, intended for use when the lender and broker−dealer are not affiliated with each other, contains detailed representations and covenants. A second form is intended for use when the lender and broker−dealer are affiliates and a streamlined form can be used.); see also Howard Darmstadter, Sandra M. Rocks & Steven O. Weise, A Model "Account Control Agreement" Under the New Article 8 of the Uniform Commercial Code, 53 Bus. Law. 139 (1997) (discussing control agreements). Back To Text

[182] See U.C.C. § 8−106 and Comment 4 (noting that Revised Article 9 also changed rule that applied when two secured creditors obtained control over investment property); see also U.C.C. § 8−510, (noting that instead of rule that dueling security interest will rank equally as set forth in the 1994 amendments to Article 9, Revised Article 9 adopts first in time rule and awards priority to first secured creditor to obtain control). See generally Peter Saviglia, Secured Interests in Investment Property Under Current Law and Under the 1998 Revisions to Article 9 Code, 32 U.C.C. L.J. 84. Back To Text

[183] See U.C.C. § 9−328. Back To Text

[184] See U.C.C. §§ 9−312(b)(1), 9−314(a); see also In re U.S. Physicians, Inc., 236 B.R. 593, 604 (Bankr. E.D. Pa. 1999) (stating that to secure having perfected security interest, one should file as well as take control); Joseph B. C. Kluttz, David Line Batty & V. Nicole Nichols, How to Be Secure When Your Collateral Is a Security: A Guide to the Creation and Perfection of Security Interests in Investment Property Under the 1994 Revisions to the Uniform Commercial Code, 4 N.C. Banking Inst. 183, 194 (2000) (recognizing that by taking control and filing with respect to investment property, secured creditor is also protected in event that security is improperly classified by court in subsequent litigation). Back To Text

[185] Under current law, a secured creditor may have an interest in a deposit account only to the extent it contained proceeds of other collateral. See In re Charter First Mortg., Inc., 56 B.R. 838, 849 (Bankr. D. Or. 1985) (stating that where proceeds are commingled with other property, secured creditors have perfected security interest in cash and deposit accounts only to extent proceeds are identifiable). Revised Article 9 will permit the secured creditor to take a security interest in the deposit account as original collateral. See generally 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).

Deposit account is defined in Revised Article 9 as "a demand, time, savings, passbook or similar account maintained with a bank." U.C.C. § 9−102(a)(29). The definition excludes investment property and therefore excludes a securities account or money market account a debtor maintains with a bank. Similarly, the definition excludes "accounts evidenced by an instrument." This language was added to clarify the treatment of uncertificated certificates of deposit. Under Revised Article 9, an uncertificated certificate of deposit will be treated like a deposit account provided there is no writing evidencing the bank's obligation to pay. In contrast, under Revised Article 9, a nonnegotiable certificate of deposit may be a deposit account if it is not an instrument. Specifically, following the Article 3 definition of an instrument, a nonnegotiable certificate of deposit will be a deposit account if it is not "of a type that in the ordinary course of business is transferred by delivery with any necessary indorsement or assignment." U.C.C. § 3−104. Back To Text

[186] See Cal. Com. Code § 9302(1)(g)(ii) (West 1990 and Supp. 1999); Haw. Rev. Stat. §§ 490:9−104, 490:9−302 (West 1997); Idaho Code § 28−9−104, 28−9−302(1)(j) (2000); Ill. Rev. Stat. Ch. 215, 5/9−104, 9/9−302 (West 1993); La. Rev. Stat. 10:9−104, 10:9−305(4) (2000). Back To Text

[187] As opponents pointed out, if a debtor has continuing access to an account, it is unlikely that there will be significant amount of funds in the account at the time of default or bankruptcy. See Steven L. Harris & Charles W. Mooney, Jr., How Successful Was the Revision of the U.C.C. Article 9?: Reflections of the Reporters, 74 Chi.−Kent L. Rev. 1357, 1365−66 (1999) [hereinafter Harris & Mooney] (listing areas of disagreement on variety of issues related to deposit accounts and approach taken to resolve disagreements). Back To Text

[188] See Harris & Mooney, supra note 184, at 1366 (stating it was clear that for secured party to retain perfected interest in proceeds it would have to do something more than simply add deposit accounts to long list of collateral in security agreement). Back To Text

[189] See U.C.C. § 9−312(b)(1). Back To Text

[190] See U.C.C. § 9−104(b) Comment 3 (noting secured creditor should recognize that debtor may continue to have access to controlled deposit accounts). Back To Text

[191] See U.C.C. § 9−327(3). Back To Text

[192] See U.C.C. § 9−340(c). Back To Text

[193] See U.C.C. § 9−104(a)(3). Back To Text

[194] See U.C.C. § 9−327(4). Back To Text

[195] See U.C.C. § 9−340(c). Back To Text

[196] U.C.C. § 9−102(a)(51) (defining letter−of−credit rights as right to payment or performance under letter−of−credit, whether or not beneficiary has demanded or is entitled to demand payment or performance). Letter−of−credit rights does not include the right of a beneficiary to demand payment or performance under a letter of credit. Id. Back To Text

[197] See U.C.C. § 9−308(d) (stating "[p]erfection of a security interest in collateral also perfects a security interest in a supporting obligation for the collateral."); Weyerhaeuser Co. v. Israel Discount Bank of New York, 895 F. Supp. 636, 636 fn.8 (S.D.N.Y. 1995) (discussing how under NY version of UCC, security interest in letter of credit is perfected when security interest in underlying collateral is perfected); see also U.C.C. § 9−329(b) Comment 2 (stating automatically perfected security interest in letter−of−credit rights which constitute supporting obligations will lose to secured party who obtains control of letter−of−credit rights). Back To Text

[198] Obviously, for a security interest to arise, the other requirements in § 9−203, including the requirement that the lender give value and the debtor have rights in the collateral (in this case the letter−of−credit), must be satisfied. Back To Text

[199] See U.C.C. §§ 9−203(b)(3)(D), 9−314(a), 9−107. Back To Text

[200] See U.C.C. § 9−107. Back To Text

[201] U.C.C. § 5−114(c) (stating that issuer need not recognize assignment until it consents to assignment). See John F. Dolan, Security Interests in Letter−of−Credit Rights, 74 Chi.−Kent L. Rev. 1035, 1045 (1999) (noting that bank may generally only refuse to recognize assignment if such refusal is reasonable); see also Optopics Lab. Corp. v. Savannah Bank of Nigeria, Ltd., 816 F. Supp. 898, 903 (S.D.N.Y. 1993) (discussing various insufficient grounds for bank to refuse to recognize assignment of letter of credit proceeds). Back To Text

[202] See Dolan, supra note 198, at 1044−46 (discussing fact that banks are permitted to demand presentation of certain documents and payment of fee before paying beneficiary of letter of credit); see also Airline Reporting Corp. v. First Nat'l Bank of Holly Hill, 832 F.2d 823, 826 (4th Cir. 1987) (noting traditionally banks require presentation of documents and payment of fee before honoring letter of credit). Back To Text

[203] See U.C.C. § 9−102(a)(11) (defining chattel paper as record evidencing both monetary obligation and security interest). Back To Text

[204] See U.C.C. § 9−102 (a)(31); 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, 1060−68 (1999) [hereinafter Winn] (discussing generally role of electronic chattel paper); see also U.C.C. § 9−102(a)(78) (defining "tangible chattel paper" as "chattel paper evidenced by a record or records consisting of information that is inscribed on a tangible medium"). Back To Text

[205] See Adam White Scoville, Clear Signatures, Obscure Signs, 17 Cardozo Arts & Ent. L.J. 345, 363 (1999) (discussing validity of electronic signatures under existing law and efforts to change law). See generally Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106−229, 114 Stat. 464 (2000) (to be codified at 15 U.S.C. §§ 7001−7031 and Uniform Electronic Transactions Act (1999)), available at http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm (proposing that barriers be removed to electronic commerce by permitting electronic recording and signing of documents). Back To Text

[206] See James M. Swartz, Electronic Commerce and Issues in Buying Chattel Paper, 53 Consumer Fin. L.Q. Rep. 91, 93−94 (1999) [hereinafter Swartz) (discussing drafting of Revised Article 9 provisions relating to perfection of security interests in electronic chattel paper); Winn, supra note 201, at 1060−67 (providing overview of drafting process related to inclusion of electronic chattel paper and discussing concerns related to inclusion). Back To Text

[207] See U.C.C. § 9−105 (stating requirements for party to establish control of electronically transmitted chattel paper); see also Robert W. Ihne, Chattel Paper Financing and Revised Article 9: What's New and What's Not, 32 UCC L.J. 371, 376 (2000) (maintaining that when both written version of chattel paper and electronic version exist simultaneously written version would have superior priority claim); Winn, supra note 201, at 1060−61 (maintaining that control of electronic chattel paper is equivalent to possession of paper chattel paper and describing methods by which control can be established under Revised Article 9). Back To Text

[208] See U.C.C. § 9−105 and Comment 4 (describing requirements for achieving control of electronic chattel paper); Winn, supra note 201, at 1061−62 (noting that maintaining authoritative copy of electronic chattel paper requires business information system capable of identifying authoritative copy and keeping it separate from all other copies). Back To Text

[209] U.C.C. § 9−102 Comment 5. The comment indicates that electronic chattel paper may be created initially in an electronic format or by "converting" tangible chattel paper into an electronic format. Id. See U.C.C. § 9−105 Comment 5. The drafters note the possibility that two parties might claim to have control, one of the electronic version and another of a tangible version. The comment states that it would be difficult under these circumstances for the purchaser of an electronic version to claim that it was in control of the single "authoritative copy" unless it could show that the tangible chattel paper no longer existed or had been marked to indicated that it was no longer the authoritative copy. Id.; see also Winn, supra note 201, at 1061 (noting that although paper chattel paper may be converted into electronic format, holder must demonstrate that proper degree of security was maintained during conversion). Back To Text

[210] U.C.C. § 9−105. Back To Text

[211] See Swartz, supra note 203, at 94 (noting that Revised Article 9 leaves it to marketplace to determine what processes and technologies will be used to obtain control over electronic chattel paper). This approach differs from the approach taken with the early amendments to revised Article 8 as well as the approach taken by some of the early "electronic signature" statutes. See Winn, supra note 201, at 1057−58 (maintaining that revisions to Article 8 were overly technologically specific, and therefore were irrelevant and created greater degree of uncertainty); see also Raymond T. Nimmer, Electronic Signatures and Records: The New U.S. Perspective, 17 No. 12 Computer and Internet Law 8 (2000) (discussing recent developments in law that allow electronic signatures to substitute for written signatures). Back To Text

[212] U.C.C. § 9−309. Section 9−309, entitled "Security Interest Perfected Upon Attachment," provides:

The following security interests are perfected when they attach:

(1) a purchase−money security interest in consumer goods, except as otherwise provided in Section 9−311(b) with respect to consumer goods that are subject to a statute or treaty described in Section 9−311(a);

(2) an assignment of accounts or payments intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles;

(3) a sale of a payment intangible;

(4) a sale of a promissory note;

(5) a security interest created by the assignment of a health−care−insurance receivable to the provider of the health−care goods or services;

(6) a security interest arising under Section 2−401, 2−505, 2−711(3); or 2A−508(5), until the debtor obtains possession of the collateral:

(7) a security interest of a collecting bank arising under Section 4−210;

(8) a security interest of an issuer or nominated person arising under Section 5−118;

(9) a security interest arising in the delivery of a financial asset under Section 9−206(c);

(10) a security interest in investment property created by a broker or securities intermediary;

(11) a security interest in a commodity contract or commodity account created by a commodity intermediary;

(12) an assignment for the benefit of all creditors of the transferor and subsequent transfers by the assignee thereunder; and

1. a security interest created by an assignment of a beneficial interest in a decedent's estate.

Id. Back To Text

[213] U.C.C. § 9−309 (listing security interests that are perfected upon attachment); see Edwin E. Smith, Overview of Revised Article 9, 73 Am. Bankr. L.J. 1, 18−19 (1999) [hereinafter Smith] (discussing various types of collateral that may be perfected by possession under old and new Article 9). Back To Text

[214] U.C.C. § 9−309(3) − (4) (noting security interests arising out of sale of payment intangibles and promissory notes are automatically perfected); see Smith, supra note 210, at 5−6 (discussing treatment of payment intangibles and promissory notes under Revised Article 9). Back To Text

[215] U.C.C. § 9−309(5) (establishing automatic perfection for security interests "created by assignment of a health care insurance receivable to the provider of the health care"); see Smith, supra note 210, at 6 (noting that although health insurance claims are included under Revised Article 9, other types of insurance claims are not). Back To Text

[216] See U.C.C. § 1−102(2). Back To Text

[217] Id. Back To Text

[218] As of February 2, 2001, the website of the National Conference of Commissioners of Uniform State Law discloses that 28 states and the District of Columbia have enacted Revised Article 9. An additional 13 states and the U.S. Virgin Islands have introduced the bill to the legislature in 2001. Those states are: Arkansas, Colorado, Georgia, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, Wisconsin

and Wyoming. NCCUSL – Introductions & Adoptions of Uniform Acts, http://www.nccusl.org/uniformact_factsheets/uniformacts−fs−ucca9.htm. By our reckoning, that means the following nine states have not yet introduced a bill to adopt the Revisions: Alabama, Connecticut, Florida, Idaho, Louisiana, New York, Ohio, Pennsylvania and South Carolina. It appears very unlikely that the hoped−for July 1, 2001, effective date can be achieved in all jurisdictions. Back To Text