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HOW REVISED ARTICLE 9 WILL TURN THE TRUSTEE'S STRONG-ARM INTO A WEAK FINGER: A POTPOURRI OF CASES

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How the mighty have fallen,

And the weapons of war perished!

I Samuel 1:27

Introduction

On the effective date ² of Revised Article 9 of the Uniform Commercial Code ("U.C.C."), ³ bankruptcy trustees will have lost indirectly one of their most powerful weapons to enhance the assets of the bankruptcy estate. The strong-arm clause, ⁴ Bankruptcy Code section 544(a), ⁵ has provided bankruptcy trustees ⁶ with substantial recoveries since its enactment in 1978. ⁷ After the adoption of Revised Article 9, these recoveries will be reduced.

At its meeting from July 24–31, 1998 the National Conference of Commissioners on Uniform State Laws ("NCCUSL") ⁸ approved the final draft of a complete revision of Article 9 of the U.C.C. The American Law Institute ("ALI") ⁹ previously approved this draft of Revised Article 9 on May 13, 1998. ¹⁰ Twenty-seven states and the District of Columbia adopted Revised Article 9 as of the close of the year 2000. ¹¹

Many pieces have already appeared describing the changes from the current Article 9. ¹² Since the beginning of the year 2000 alone, at least twelve law review or major professional journal articles, ¹³ twenty-one sets of continuing legal education materials, ¹⁴ and seven legal magazine pieces ¹⁵ have been published dealing with the consequences of the changes effected by Revised Article 9. Many of the pre-2000 articles focused on the history, philosophy or policy animating Revised Article 9. The more recent rash of writings has concentrated on its practical implementation in particular transactions. This critique aims principally for a middle level of specificity. It will not so much consider the philosophical "why's" or the practical "how to's" of the modifications embodied in Revised Article 9; instead, it will focus on "what" changes will be wrought by Revised Article 9 in a particular context: the bankruptcy trustee's avoiding powers under section 544(a) of the Bankruptcy Code. ¹⁶

The breakdown of the impact of Revised Article 9 on the trustee's avoiding powers will be organized around a series of cases that illustrate significant variations from the application of former Article 9. The facts of these cases will be analyzed under Revised Article 9 to demonstrate how there would have been a different result under the new regime. From this analysis we will be able to draw some tentative conclusions about the net (although non-quantifiable) effects of Revised Article 9 on the trustee's avoidance powers. ¹⁷ Of little surprise to those already familiar with Revised Article 9 is that the analysis and conclusions will disclose a reduction in avoidable transfers and thus a diminution in assets distributable by the trustee. The specific areas of reductions, coupled with an example of an expansion of the trustee's avoiding reach, will clarify the effects of this major overhaul in commercial law.

The history of Bankruptcy Code section 544(a) has been chronicled elsewhere.¹⁹ Numerous writers have also considered the purposes of the trustee's avoiding powers. Some have found the norm for avoiding actions in the powers of creditors exercised collectively.²⁰ Others have found it in an expanded conception of property of the estate.²¹ Regardless of the justification for lien avoidance, its efficacy depends on state law.²² With the adoption of Revised Article 9, there will be a number of scenarios in which transactions previously avoidable that will no longer be subject to successful attack. In addition, there will be a range of assets newly within the scope of Article 9. Finally, we will see a number of technical changes that will ease perfection. The sum of these changes will reduce avoidance actions.

A. Broader Scope

Increasing the scope of transactions within the purview of Revised Article 9 was a goal of the Revised Article 9 Drafting Committee.²³ What is not as well known is that Revised Article 9 also attempts to slightly reduce the scope to which some courts had (or conceivably might have) put its predecessor.²⁴ Principal assets subject for the first time to Article 9 include health-care-insurance receivables²⁵ and commercial tort claims.²⁶ Several articles have addressed the straightforward impact of the increased scope of Revised Article 9.²⁷ The number of pre-revision bankruptcy cases relating to assets only now subject to Revised Article 9 are relatively few. On the whole, the previous exclusions from former Article 9²⁸ were sufficiently clear that trustees simply did not bring many actions under section 544(a) which failed solely on the ground that former Article 9 did not apply to the asset in question. Nonetheless, there are several cases which exemplify the limits of former Article 9 that illustrate the impact of Revised Article 9 on the trustee's avoiding powers.

1. When Less Is More Part 1 – Sales of Accounts

The financial community assuredly did not want to see former Article 9 applied to the sort of transaction in the way the Tenth Circuit did in *Octagon Gas Systems, Inc. v. Rimmer (In re Meridian Reserve, Inc.)*.²⁹ The *Octagon Gas* decision was a devastating failure for financing interests.³⁰ The Court recharacterized what appeared to be, and what was intended to be, an absolute sale of an account into a secured transaction, thus creating a substantial windfall for unsecured creditors. Revised Article 9 explicitly reverses the result in *Octagon Gas*.

The court in *Octagon Gas* faced an appeal from a decision by the bankruptcy court,³¹ which had concluded that the payments due from the debtor to an assignee were not property of the estate.³² In 1976 Amcole, a ten-percent owner of Poll Gas, a natural gas distributor, purchased the interests of the owners remaining 90% of the stock in Poll. Instead of paying cash for the purchased stock, Amcole caused Poll to assign a portion of the gross proceeds it would receive for gas transported through its system in perpetuity to the selling shareholders (called by the parties an "overriding royalty interest"), including Rimmer.³³ Rimmer later purchased some of the overriding royalty interests of the other shareholders so that he ultimately owned five percent of all the proceeds payable to Poll under its distribution system.³⁴ Poll subsequently filed chapter 11 and the Bankruptcy Court ultimately confirmed a plan or reorganization transferring the gas transportation system to Poll's secured lender "free and clear of liens, claims, interests, and encumbrances."³⁵ The lender in turn conveyed the system to Octagon, which refused to pay Rimmer anything on account of his overriding royalty interest.³⁶

The bankruptcy court found that Rimmer owned his five-percent interest in the accounts generated by the distribution system, and was thus entitled to continue to receive payments from Octagon.³⁷ The Court of Appeals, however, concluded that Rimmer did not own the five-percent interest but instead merely had a security interest in Poll's accounts.³⁸ The court remanded for a finding of whether Rimmer had filed a financing statement to perfect his security interest.³⁹ The Court of Appeals reasoned that Rimmer's position could not be one of ownership, and must instead be a security interest, because former U.C.C. 9-102(1)(b)⁴⁰ and the accompanying Official Comment 2⁴¹ mandated that even erstwhile buyers of accounts must be treated as secured creditors, and not as owners.⁴²

The holding in *Octagon Gas* sent shivers down the collective spines of the asset securitization industry.⁴³ The court's "plain meaning" interpretation of former U.C.C. § 9-102(1)(b) created an irrebuttable presumption. The court treated an assignment of accounts as a secured transaction even in face of uncontroverted evidence that the parties intended the assignment of the account to be an absolute sale. The threat to the bankruptcy-proof nature of special purpose entities endangered billion's of dollars of financing annually.⁴⁴ Trustees and unsecured creditors would enjoy a

substantial boon by returning to the estate the accounts transferred to the special purpose entity, particularly since the claim in the bankruptcy estate of the entity (and the derivative claim of its secured creditor) would be unsecured.⁴⁵ Notwithstanding the apparent plain meaning construction technique employed by the Court of Appeals, it failed to consider other sections of former Article 9 that suggested a contrary result.⁴⁶ In any event, the Permanent Editorial Board⁴⁷ for the Uniform Commercial Code responded quickly with its Commentary No. 14⁴⁸ that amended the Official Comment to former U.C.C. § 9-102 to make it clear that Article 9 was not "intended to prevent the transfer of ownership of accounts."⁴⁹

Revised Article 9 deals with the *Octagon Gas* threat to asset securitization more directly. Revised U.C.C. § 9-318(a) provides that "[a] debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold."⁵⁰ Barring an action under sections 547 or 548 of the Bankruptcy Code, Revised Article 9 will protect sales of accounts from attack by the trustee. Such a simple solution standing alone would not, however, address the fundamental concerns that animated the drafters of former U.C.C. § 9-102(1)(b). After all, it remains true that third parties will find it difficult to distinguish absolute sales of accounts from loans secured by a lien on those same accounts.⁵¹ Thus, the drafters of Revised Article 9 added subsection (b) to U.C.C. § 9-318:

(b) For purposes of determining the rights of creditors of, and purchasers for value of an account or chattel paper from, a debtor that has sold an account or chattel paper, while the buyer's security interest is unperfected, the debtor is deemed to have rights and title to the account or chattel paper identical to those the debtor sold.⁵²

On the one hand, subsection (b) is designed to protect those to whom an unscrupulous debtor transfers its accounts a second time; if the cautious second purchaser perfects, it prevails over the first purchaser who failed to perfect.⁵³ On the other hand, subsection (a) is crafted to prevent the trustee from reaching the accounts that a debtor, scrupulous or not, has sold; the account that has been sold cannot be property of the estate. The drafters of Revised Article 9 have attempted to walk a tightrope. Revised U.C.C. § 9-318 endeavors to keep a trustee's claim at bay while protecting innocent second purchasers by "deeming" the debtor to continue to own the account as against subsequent purchasers. The inclusion of creditors among the class protected by Revised U.C.C. § 9-318(b) will likely not benefit bankruptcy estates in most states because the derivative powers of creditors possessed by the trustee under section 544(a) will rarely extend to property in which the debtor has no legal interest under state law; deemed ownership will not be enough.⁵⁴ Additionally, subsection (a) makes clear the debtor's lack of an actual interest in the transferred account.⁵⁵

2. When Less Is More Part 2 – Repos

Revised Article 9 may also further strengthen the position of parties to repurchase transactions against claims by trustees. *Granite Partners, L.P. v. Bear, Stearns & Co., Inc.*⁵⁶ illustrates a case in which the court engaged in a fact-intensive analysis of a series of repurchase transactions to determine if they were properly characterized as sales or as secured transactions.⁵⁷ In a repurchase transaction (commonly called a repo), the owner of securities sells them to a buyer, typically a brokerage firm, and the parties simultaneously agree that the initial buyer will sell (and the original seller will buy) an equivalent on an agreed date for an agreed amount.⁵⁸ The repurchase price will be higher than the original sales price to compensate the initial buyer for an amount equivalent to the interest it would have received on a loan of the price paid for the initial purchase of the securities.⁵⁹

Repurchase transactions display characteristics of both secured transactions⁶⁰ and true sales.⁶¹ Starting with the "intention" standard of former U.C.C. § 9-102 for determining whether a transaction is one for security,⁶² the *Granite Partners* court carefully reviewed the Public Securities Association Master Purchase Agreement ("PSA") into which the disgruntled buyers and brokers (with the exception of Merrill Lynch) had entered.⁶³ With respect to the repurchase transactions with Merrill Lynch, the court inspected the trade confirmations issued by the broker for each repo purchase.⁶⁴ The court granted the request for dismissal of the claims against the brokers who had used the PSA because, as a matter of fact, Article 9 did not apply to their transactions.⁶⁵ The court denied the same request by Merrill Lynch because its trade confirmations did not "contain an unequivocal expression of intent."⁶⁶

Former U.C.C. § 9-102(1)(a) has been replaced in Revised Article 9 by a provision that makes no reference to the intent of the parties. Revised U.C.C. § 9-109(a)(1) purports to create an entirely objective standard for the scope of

Article 9: "(a) Except as otherwise provided in subsections (c) and (d), this article applies to: (1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract." Only the objective indicia of the contract⁶⁷ are relevant to its characterization as a secured transaction.⁶⁸ Both secured creditors who desire a sure characterization of the transaction and those who do not wish to be characterized as secured creditors should be able to take greater comfort in the explicit terms of their documents. The likelihood of the success of a challenge to a deal whose form is one of an absolute conveyance will diminish. Trustees will thus see a reduction in their ability to avoid repo-like transactions for lack of perfection.⁶⁹

3. When More Is More

a. Commercial Tort Claims

In 1991 the Colorado Court of Appeals in *Bowlen v. Federal Deposit Insurance Corporation*,⁷⁰ following a decision of a bankruptcy court,⁷¹ concluded that the proceeds of a settlement agreement constituted a general intangible.⁷² Even though former U.C.C. § 9-104(k)⁷³ expressly excluded claims arising out of tort from its scope, the court held that "[t]he proceeds of a settlement agreement resulting from a claim against a third party are considered general intangibles."⁷⁴ Thus, a lender with a perfected security interest in general intangibles defeated a garnishing creditor.⁷⁵ Of greater significance to the reach of the trustee's avoiding powers, under current U.C.C. § 9-108(d)(12) is that a creditor will be able to obtain directly a security interest in a commercial tort claim. This increase in the scope of Revised Article 9 will undoubtedly reduce assets available in the bankruptcy estate.

Nonetheless, trustees should not give up too quickly. In at least some cases the creditor taking the interest in a commercial tort claim will not be the same as the lender who may have a blanket security interest in the debtor's assets.⁷⁶ While the creditor to which the debtor transfers a security interest in the commercial tort claim will probably perfect its interest in the claim, once a commercial tort claim is reduced to a settlement agreement it becomes a payment intangible.⁷⁷ A creditor's security interest in the underlying commercial tort claim will extend to its proceeds in the form of the settlement.⁷⁸ Consequentially, as proceeds, a creditor that has properly perfected its security interest in the commercial tort claim will enjoy an automatically perfected security interest in the payment intangible.⁷⁹

However, automatic perfection continues for only twenty days⁸⁰ and lapses unless the original financing statement (or a timely filed amendment) is sufficient to perfect a security interest in the payment intangible.⁸¹ Trustees therefore will need to be diligent to examine the stage of the underlying litigation and terms of perfection of a bankruptcy debtor whose assets include commercial tort claims. It will be possible that those claims will have been transformed into a different class of collateral in which perfection may have lapsed.

b. Securitizable⁸² Assets

Modern asset securitization grew out of the ancient practice of factoring.⁸³ In securitization transactions, a creditor or other obligee sells its accounts or other obligations to an entity, which in turn issues bonds⁸⁴ or securities⁸⁵ in the entity. Securitization can generate cash more quickly than awaiting payment of the obligation, and raise it more cheaply than borrowing against it.⁸⁶ Under former U.C.C. § 9-102(1)(b),⁸⁷ the only classes of obligations that could safely be securitized were accounts and chattel paper.⁸⁸ Former Article 9 provided protection through the filing of a financing statement for purchasers of only those two U.C.C. classifications of collateral. Any other financial asset could of course be sold; but the possibility remained that a bankruptcy court might find that continued servicing by the seller/debtor would bring the assets back into the estate.⁸⁹

Current U.C.C. § 9-109(a)(3) expands the classes of assets that may be sold with lessened concern with respect to the trustee's reach. Not only can a buyer of accounts and chattel paper protect itself by complying with Article 9, purchasers of payment intangibles and promissory notes can achieve the same level of comfort.⁹⁰ The holders of securities in the purchasing entity can be confident that a trustee of the seller will not be able to reach the stream of payments unless the sales of assets of any of these four classes can be set aside as a preference or fraudulent conveyance.⁹¹ Such an increase in the scope of Article 9 will redound to the detriment of the trustee's efforts to enhance creditor recovery.

Former U.C.C. § 9-104(j)⁹² reflected a policy of non-interference between Article 9 and real estate law: with the exception of rules regarding fixtures,⁹³ Article 9 simply did not apply "to the creation or transfer of an interest in or lien on real estate . . ." Current U.C.C. § 9-109(d)(11) is virtually identical to its forbear.⁹⁴ It too excludes the reach of Article 9 from "the creation or transfer of an interest in or lien on real property . . ." with four exceptions, none of which materially change the results under the former regime. Nothing in the Official Comments to U.C.C. § 9-109 suggests that there will be any change in the scope of Revised Article 9 in connection with real estate. However, what appears to be benign neglect ignores a substantial change that will expand the reach of secured creditors at the expense of trustees' avoiding actions.

The first area of expansion of the scope of Revised Article 9 concerns accounts arising from the sale of real estate. Former U.C.C. § 9-106 defined "account" narrowly to include only rights to payment for goods or services.⁹⁵ Revised U.C.C. § 9-102(a)(2) is much broader: it extends to rights to payment for "property."⁹⁶ Even though "property" is not defined in Revised Article 9, there is every reason to conclude that courts will interpret it broadly enough to reach proceeds of the sale of real estate.⁹⁷

The second change in scope effected by Revised Article 9 relates to the newly coined concept of a supporting obligation. A "supporting obligation" is a "letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument, or investment property."⁹⁸ Supporting obligations will increase the interface between secured transactions in personal property and real estate financing. For example, a creditor still will be able to perfect a security interest in a mortgagee's rights to payments (typically evidenced by an instrument). Unlike perfection in instruments only by possession under former Article 9,⁹⁹ a secured creditor operating under Revised Article 9 will be able to perfect her interest in the instrument simply by filing an appropriate financing statement.¹⁰⁰ Not only has perfection become easier, it will have a much broader scope under Revised Article 9.

The transfer and perfection of obligations secured by real estate has been problematic under the U.C.C. How is a secured creditor to perfect a security interest in an instrument (personal property) secured by a mortgage (real property)? On the one hand, former U.C.C. § 9-102(3) provided that "[t]he application of this Article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this Article does not apply."¹⁰¹ Former U.C.C. § 9-104(j), on the other hand, excluded "the creation or transfer of an interest in or lien on real estate . . ." from its scope.¹⁰² Is a security interest in the mortgage within the scope of a pledge of the note?¹⁰³ Does a security interest in the note pass to a creditor who accepts an assignment of the mortgage?¹⁰⁴

The debtor in *Peoples Bank of Polk County v. McDonald (In re Maryville Savings & Loan)*¹⁰⁵ was in the real estate lending business. To obtain funds for its lending operation, it borrowed money from a local bank.¹⁰⁶ The bank required assignments of the notes and mortgages of the debtor's borrowers as collateral, and it recorded the assignments of several mortgages with the appropriate real estate office in Tennessee.¹⁰⁷ The bank did not, however, perfect its security interest in the notes by taking possession of them.¹⁰⁸ The real estate lender ultimately filed bankruptcy. Before the trustee could commence an avoiding action, the bank initiated a proceeding "seeking a ruling that its security interest in the promissory notes and deeds of trust was perfected . . ."¹⁰⁹ The case ultimately reached the Court of Appeals, which reconciled the apparent conflict between former U.C.C. §§ 9-102(3) and 9-104(j) by holding that Article 9 applied only to the promissory notes, but not to the deeds of trust.¹¹⁰ The Court concluded that the bank's security interest in the notes was not perfected because it had not taken possession of the notes.¹¹¹ Given that the bank had recorded the assignments of the mortgages, however, the Court held that the security interest in the deeds of trust was perfected and remanded the case for reconfiguration of the competing interests in the notes and mortgages.¹¹²

Revised Article 9 makes it clear that perfection in the underlying collateral does *not* perfect the creditor's interest in the personal property obligation: recording an assignment of mortgage will not perfect a security interest in a promissory note.¹¹³ The converse is not true: perfecting a security interest in an obligation *will* perfect the creditor's interest in the supporting obligation.¹¹⁴ In fact, a security interest in a secured obligation automatically attaches itself

to the underlying collateral. ¹¹⁵ A creditor will not need to make reference to the underlying collateral in its security agreement in order for its security interest to attach to and be perfected in a supporting obligation. Given the breadth of the scope of supporting obligations, trustees will find that they will be unable to avoid claims to many ostensibly unencumbered assets.

A. Greater Reach

Not only does Revised Article 9 extend the scope of assets subject to its regime; it also extends the range of secured claims in collateral in several respects. The primary means by which secured creditors can now reach more assets is through an expanded definition of proceeds. There are also several less obvious additions to the secured creditor's arsenal that will impinge on the trustee's avoiding powers.

1. Proceeds

Revised Article 9 expanded definition of "proceeds" reverses two pesky decisions that ultimately were of little commercial effect. Under the pre-1996 version of former U.C.C. § 9-306(1), ¹¹⁶ the Tenth Circuit Court of Appeals held in *In re Hastie*, ¹¹⁷ that cash dividends received by the owner of certificated securities were not proceeds of the underlying stock. ¹¹⁸ The Permanent Editorial Board reassured secured creditors by promulgating an amendment to the definition of proceeds in 1996 that specifically reached distributions on account of investment property. ¹¹⁹ A trustee had also prevailed against a secured creditor in *Cleary Brothers Construction* when a bankruptcy court held that a security interest in equipment did not extend the proceeds of a lease of the equipment. ¹²⁰ Given the lack of support for this conclusion, ¹²¹ the Permanent Editorial Board never attempted to amend the former definition of proceeds. Revised Article 9's expansive definition of proceeds ¹²² eliminates virtually any assault by a trustee on a secured creditor's claim to what a debtor receives on account of collateral. ¹²³

The extension of the purchase money priority of inventory financiers into additional classes of proceeds will reduce assets available to trustees. Under former Article 9 the purchase money priority in inventory extended only to the very limited class of identifiable cash proceeds received before delivery of the inventory. ¹²⁴ Revised U.C.C. § 9-324(b) retains the priority of former Article 9 but expands it to include additional classes of proceeds in the forms of chattel paper (and proceeds of the chattel paper) as well as instruments. ¹²⁵

MBank Alamo National Association v. Raytheon Company, ¹²⁶ illustrates facts that implicate the impact of Revised Article 9 on attachment, perfection, and priority of a purchase money financier of inventory. In 1983 Howe X-ray granted MBank a security interest in its inventory and accounts. ¹²⁷ At virtually the same time Raytheon agreed to sell Howe x-ray equipment in cases where Howe already had a contract with ones of its customers. Raytheon agreed to accept an assignment of the "specific accounts receivable" from the customer rather than cash from Howe. ¹²⁸ Raytheon perfected its security interests in Howe's accounts and collected over \$850,000 from its customers. ¹²⁹ Not even two years later, Howe defaulted to MBank, which then demanded that Raytheon pay over the accounts it had collected. ¹³⁰ Raytheon refused, "claiming that it had a purchase money security interest ("PMSI") in the accounts receivable and that its interests were therefore superior to those of MBank . . ." ¹³¹

Raytheon lost for several reasons, not the least of which was that the court recharacterized the transaction as one that occurred in two stages. According to the court, Raytheon sold its machines to Howe, which then assigned its accounts arising from the resale of the machines to Raytheon. ¹³² In light of this characterization, Raytheon could at most have had a purchase money security interest in the machines and their identifiable cash proceeds, and not proceeds in the form of accounts. ¹³³

Revised Article 9's priority for purchase money security interests in proceeds of inventory does not extend to accounts either; but it does reach chattel paper and its proceeds. ¹³⁴ Suppose that under the new Article 9 regime Raytheon properly follows the steps necessary to obtain purchase money priority in Howe's inventory of x-ray machines which Raytheon sells to Howe. Suppose further that Howe sells the x-ray machines to customers on credit, and takes back either a promissory note or a security interest in the machine for the purchase price. The combination of the monetary obligation and a security interest in the machine constitutes chattel paper ¹³⁵ in which Howe's purchase-money priority would prevail over a competing secured creditor such as MBank.

The trustee is not an entirely uninterested bystander to the expansion of purchase–money priority. The extension of the purchase–money financier's claim in proceeds of inventory will result in a reduction in assets available to the estate in two situations. In cases where the trustee can avoid the senior lender's security interest, she will no longer be able to preserve the avoided lien for the benefit of the estate under section 551 of the Bankruptcy Code with respect to the inventory lender's security interest in the additional classes of proceeds. Secondly, the trustee will lose in cases when there is no other secured creditor and even where the purchase–money lender's financing statement fails to describe the proceeds of the inventory. The trustee's avoiding powers will remain ineffectual by virtue of the automatic perfection and continuation of perfection in proceeds authorized by Revised U.C.C. § 9–315(d)(1).¹³⁶

Revised Article 9 will open another hitherto unavailable avenue of recovery of proceeds for secured creditors: commingled assets. The greater reach of secured creditors can be evaluated in light of a case in which the debtor successfully objected to a secured creditor's claim: *In re Oriental Rug Warehouse Club, Inc.*¹³⁷ The bankruptcy court in *Oriental Rug* disallowed the secured claim of a consignor¹³⁸ in its entirety. Yashar Rug had consigned rugs to the debtor, which had sold them without remitting the proceeds as required by the consignment agreement.¹³⁹ Instead of paying Yashar, the debtor purchased new rugs with the proceeds and it was these rugs in which Yashar asserted its lien.¹⁴⁰ Judge Dreher denied Yashar's claim because it failed to "establish that the alleged proceeds 'arose directly from the sale or other disposition of the collateral and that these alleged proceeds cannot have arisen from any other source.'"¹⁴¹

Yashar Rug will have an easier road to recovery under Revised Article 9. U.C.C. §§ 9–315(b)(1) provides that commingled proceeds nonetheless remain identifiable "to the extent provided by Section 9–336."¹⁴² Section U.C.C. 9–336(c) simply says that "[i]f collateral becomes commingled goods, a security interest attaches to the product or mass."¹⁴³ No longer will secured creditors need to trace their proceeds to specific substitute goods. They will only need to trace the value of the proceeds into a commingled mass in which they will have an aliquot security interest.¹⁴⁴

2. Successors – Attachment and Perfection

Borrowers who change their legal structure after the inception of the lending relationship frequently bedevil secured creditors.¹⁴⁵ Sometimes they transfer their assets to a new entity outside the ordinary course of business. Two cases illustrate the risks of such events to secured creditors and how Revised Article 9 adverts at least some of the dangers.

a.Attachment

The bankruptcy court in *Northeastern Bank of Pennsylvania v. Spirit of the West, Inc. (In re Spirit of the West, Inc.)*,¹⁴⁶ faced the recurring question of whether a lender's security interest in the inventory of a partnership attached to inventory subsequently acquired by the corporation that succeeded to the partnership's business and assets. The bank made several loans to Conklin and Krisovitch as partners of Spirit of the West, and received a security interest in the partnership's inventory which it duly perfected.¹⁴⁷ Conklin and Krisovitch incorporated Spirit of the West, Inc. about a year later and transferred all of the partnership's assets to the new entity.¹⁴⁸ The successor corporation did not execute a new security agreement in favor of Northeastern Bank.¹⁴⁹

Spirit of the West, Inc. filed a chapter 11 and Northeastern Bank sought a declaration that its security interest attached to and was perfected in all of the inventory of the debtor in possession.¹⁵⁰ The bankruptcy court granted the bank's requested relief but only as to inventory transferred from the partnership to the corporation; it denied relief as to new inventory because the bank's "security interest cannot attach to newly acquired corporate assets."¹⁵¹ Former U.C.C. § 9–402(7)¹⁵² was of no assistance to the bank because Northeastern Bank did "not have a security agreement with the Debtor corporation."¹⁵³

b.Perfection

The 1995 Tenth Circuit decision in *LMS Holding Company v. Core–Mark Mid–Continent, Inc.*¹⁵⁴ presents a classic case where a security interest is not perfected as to after–acquired property in the hands of the transferee, even when the transfer is part of a confirmed plan of reorganization. Seven years before the decision in *LMS Holding*, Coremark obtained a perfected security interest in the current and after–acquired inventory of MAKO.¹⁵⁵ MAKO couldn't make

it and filed for protection under chapter 11 shortly thereafter.¹⁵⁶ MAKO's plan of reorganization provided for the sale to Retail Marketing Company of a number of MAKO's retail locations and their inventory, subject to Coremark's security interest.¹⁵⁷ The confirmed plan provided both that Coremark's lien extended to the "assets . . . acquired by RMC [Retail Marketing Company] pursuant to the Plan" and that it would "continue in full force and effect in accordance with [its] terms."¹⁵⁸

Two years later Retail Marketing Company commenced its own chapter 11, and then filed an action seeking to avoid Coremark's security interest.¹⁵⁹ Retail Marketing argued that Coremark failed to perfect its security interest in its after-acquired inventory because it did not file a new financing statement naming Retail Marketing Company as debtor.¹⁶⁰ The bankruptcy court decided in favor of Coremark, holding that the safe harbor of former U.C.C. § 9-402(7)¹⁶¹ for "collateral transferred by the debtor" included after-acquired inventory as well.¹⁶² The District Court reversed on appeal, and held in favor of the debtor in possession.¹⁶³ The Tenth Circuit affirmed the District Court, holding that the inventory acquired by Retail Marketing Company was not collateral "transferred by the debtor," thus taking Coremark outside the safe harbor of former U.C.C. § 9-402(7).¹⁶⁴ The strong arm of the trustee had at long last prevailed.

c. Revised Article 9

Revised U.C.C. § 9-203(d)¹⁶⁵ resolves the attachment problem for cases like *Spirit of the West*. Revised Article 9 creates its own form of statutory successor liability¹⁶⁶ under two circumstances. First, the successor entity becomes bound in cases where the security agreement "becomes effective" (by other law or contract) with respect to the transferee. Second, the initial secured party prevails in transactions where three criteria are met: when the transferee "becomes generally obligated" for the debts of the transferor, where it becomes specifically obligated for the secured debt, and when the transferee succeeds to at least substantially all the assets of the transferor.¹⁶⁷ Cases of incorporation of sole proprietorships and partnerships will almost always fall within the extended reach of U.C.C. § 9-203(d). Additionally, U.C.C. § 9-203(e) goes on to provide that the secured creditor needs no new security agreement from the successor entity.¹⁶⁸

The result in a bankruptcy sale such as in *LMS Holdings* is not as clear. It is a rare purchaser from a bankruptcy estate that becomes generally obligated for the debts of the debtor. Even in business asset sales transactions a buyer may not assume a sufficient amount of the seller's obligations to fall within Revised U.C.C. § 9-203(d)(2). A secured creditor of the transferor can be assured of statutory protection only if the terms of the plan¹⁶⁹ or acquisition documents (in cases when substantially all debts are not assumed) are sufficiently clear to make the original security agreement "effective" with respect to the transferee.¹⁷⁰

Revised Article 9 also offers secured creditors more protection than former law on the issue of perfection of security interests in assets of new debtors. Revised U.C.C. § 9-508(a) establishes a general rule that a financing statement filed against the old debtor continues to be effective in the property of the new or successor entity so long as the transferee is bound by the original security agreement.¹⁷¹ In this respect Revised Article 9 differs little from former law.¹⁷² However, what if the name of the new entity is different from the original debtor? How could even a diligent searcher discover that a security interest granted by the original debtor encumbers a new debtor's property? U.C.C. § 9-508(b) furnishes the answer: if the difference in the two debtors' names is seriously misleading,¹⁷³ then perfection will be lost as to collateral acquired more than four months after the new debtor becomes bound.¹⁷⁴ As a bonus to the secured creditor of the transferee, the old financing statement will even perfect the secured creditor's interests in any property subject to its terms that the new debtor brings with it.¹⁷⁵

Revised U.C.C. 9's treatment of the successorship issue will benefit secured creditors to the detriment of trustees seeking to avoid security interests for the benefit of unsecured creditors. Attachment of security interests in the assets of successors or transferees will be much easier to establish; secured creditors will enjoy a more secure position in lending to small business where changes of legal forms occur with unexpected frequency.¹⁷⁶ While the perfection rules of Revised Article 9 do not differ greatly from former law, the ability to perfect a security interest in collateral not owned by the original debtor can only enhance secured creditor recovery. Trustees' avoidance claims will be weakened by Revised Article 9.

A. Different Classes

Revised Article 9 changes the classification of certain types of property. Coupled with unitized choice of law rules and centralized filing, these changes will be a boon for secured creditors at the expense of trustees.

1. Manufactured Homes

Mobile homes have long been a thorn in the side of the law of secured transactions. Creditors have attempted to perfect security interests in mobile homes by recording a mortgage,¹⁷⁷ by filing a financing statement with the secretary of state as if the mobile home were a good,¹⁷⁸ by making a fixture filing at the local level,¹⁷⁹ by automatic perfection as if the mobile home were a consumer good in a purchase money transaction,¹⁸⁰ and by noting a lien on a certificate of title.¹⁸¹ *Ryen v. Wemco Corp. (In re Fink)*,¹⁸² presents a series of issues related to perfection of security interests in mobile homes to which Revised Article 9 will speak more clearly, although it will by no means resolve all open questions.

Pauline Fink purchased a mobile home from a retailer and financed the purchase with a retail installment contract that granted a security interest in the home to the seller.¹⁸³ The assignee of the installment contract perfected the security interest with a filing describing the mobile home.¹⁸⁴ Fink simultaneously purchased the real estate on which she planned to locate the mobile home, and granted a mortgage to the seller.¹⁸⁵ A short time later she filed under chapter 7 and her trustee filed an action to avoid the security interest in the mobile home.¹⁸⁶

The court described the excavation and the details of the attachment of the mobile home on the land at great length¹⁸⁷ and ultimately concluded that "to the uninitiated eye [the mobile home] looked like any other ranch house."¹⁸⁸ Thus, under New York law, the bankruptcy judge held that the mobile home had become a fixture.¹⁸⁹ The creditor with the security interest in the mobile home became unperfected because it had failed to make a fixture filing under former U.C.C. § 9-313.¹⁹⁰

The conclusion that creditors with a perfected security interest in a good that becomes a fixture (but without a fixture filing in the appropriate real estate records) are unperfected is no longer correct under Revised Article 9.¹⁹¹ The trustee in a case like *Fink* will now lose. The battle between the mobile home lender and the mortgagee remains; however, Revised Article 9 also will resolve this issue. Under U.C.C. § 9-334(e)(4), a creditor with a security interest in a manufactured home¹⁹² in a manufactured home transaction¹⁹³ that is perfected only under certificate of title statute will prevail even over a mortgagee or subsequent owner.¹⁹⁴ A creditor perfected by only a central filing in a manufactured home transaction will, however, be subordinate to a mortgagee or owner.¹⁹⁵ In any event, the notation or central filing will defeat the trustee.

2. Certificates of Deposit

A certificate of deposit may seem like the quintessential instrument. Thus, if all certificates of deposit are instruments, then the only means of perfection under former Article 9 would have been by possession.¹⁹⁶ Initial impressions, however may be deceiving; bankruptcy courts have often struggled with the distinction between instruments on the one hand and accounts or general intangibles on the other.¹⁹⁷ The bankruptcy court in *Drabkin v. Capital Bank, N.A. (In re Latin Investment Corporation)*¹⁹⁸ denied both the trustee's motion for summary judgment seeking to avoid a bank's security interest in a non-negotiable certificate of deposit and the bank's motion seeking dismissal of the trustee's action.¹⁹⁹ The bank had possession of a certificate of deposit for \$200,000 to the debtor.²⁰⁰ However, the certificate bore specific legends to the effect it was "non-negotiable" and "non-transferable."²⁰¹

The trustee argued that the legends made the certificate non-negotiable and rendered it a general intangible.²⁰² Furthermore, if the certificate were a general intangible, the bank's possession would have been ineffective to perfect a security interest in it.²⁰³ The bankruptcy court turned to the definition of instrument under former Article 9.²⁰⁴ The court noted that the trustee was partially correct: the legends obviously rendered the certificate non-negotiable. But it then addressed the question of whether the certificates nonetheless were "a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment."²⁰⁵ If it was, the certificate would still be an instrument. If not, then it would be a general intangible with respect to which the trustee's avoidance action

should prevail. In light of the court's holding that "the test for transferability should be whether a particular type of writing customarily is transferred by delivery in the ordinary course of business" ²⁰⁶ is one of fact, it denied both party's motions for summary judgment.

Revised Article 9 continues to classify negotiable certificates of deposit as instruments. ²⁰⁷ Non-negotiable certificates of deposit fall into a classification from which they were previously excluded: deposit accounts. ²⁰⁸ Moreover, to the detriment of trustees, banks can perfect a security interest in a deposit account at their institution through the exercise of control; a control which is achieved simply by being the bank at which the account is maintained. ²⁰⁹ Summary judgment against the trustee's avoidance action under Revised Article 9 will be granted in a case like *Latin Investment*.

A. Easier Perfection

1. Unitized Choice of Law and Centralized Filing

Konkel v. Golden Plains Credit Union ²¹⁰ illustrates two problems that formerly confronted secured creditors on a regular basis: first, in which state to file in a multistate transaction. Second, where to file within a state even after the correct state was identified. Revised Article 9 reduces the problems confronted in selecting the correct state for perfection, and virtually eliminates the possibility of error in choosing the right place to file within a state. Both of these modifications to the former regime will reduce the productivity of a trustee's avoidance actions.

In *Konkel*, a Kansas credit union financed the purchase of a combine by Lewis, a resident of Kansas who farmed land in both Kansas and Colorado. ²¹¹ Lewis also provided custom harvesting services for farmers in other states, including Colorado. ²¹² Believing that the combines were properly classified as "equipment used in farming operations" under former U.C.C. § 9-401(1)(a), ²¹³ the credit union filed a financing statement in only the office of the register of deeds of Lewis' home county. ²¹⁴ Lewis subsequently sold one of the combines to Konkel, a used equipment dealer in Colorado. ²¹⁵ Lewis failed to pay the credit union so it sued Konkel in conversion. ²¹⁶

Konkel defended on two theories: first, that the combines were not "equipment used in farming operations" because Lewis used them for custom cutting, not farming. ²¹⁷ Filing for perfection of equipment *not* used in farming operations should have been made with the Secretary of State of Kansas pursuant to former U.C.C. § 9-401(1)(c). ²¹⁸ Under Revised Article 9, the Office of the Secretary of State is the only appropriate place for filing regardless of the use to which the owner puts the goods. ²¹⁹ No longer will courts need to consider whether to apply the "normal use test," the "intended use test," or the "actual use test" to determine whether equipment is used in farming operations and thus whether a financing statement has been filed in the correct place. Trustees will have much less fodder for the fuel of an avoidance action under a pure central filing system. The only issue to which the use of the collateral may remain relevant pertains to its classification as a fixture under non-uniform state law. ²²⁰ Even in fixture cases, however, a central filing will be sufficient to perfect the secured creditor's interest. ²²¹ A financing statement covering a fixture that is centrally filed will be subordinate to a locally filed fixture filing or recorded mortgagee, ²²² but nonetheless will be sufficient to defeat a trustee's avoiding action. ²²³

Konkel argued in the second place that the credit union's perfection lapsed four months after Lewis brought the combine into Colorado. ²²⁴ On the one hand, with respect to "ordinary goods," former U.C.C. § 9-103(1)(d)(i) provided that a secured creditor must refile within four months in the state to which a debtor had moved such goods from the initial state in which they were perfected by filing. ²²⁵ Failure to refile would mean that the security interest would be deemed unperfected against a purchaser after removal (such as Konkel). On the other hand, if the combine had been a "mobile good," former U.C.C. § 9-103(3) required a creditor to refile only if the debtor (and not the collateral) changed his location. ²²⁶ The supreme court concluded that the combine was a mobile good and remanded to the trial court the question of whether Lewis had changed his location. ²²⁷

Revised Article 9 renders the "ordinary vs. mobile good" distinction irrelevant. Under the current regime's unitary system, only the location of the debtor is relevant for determining the proper state for perfection under Revised U.C.C. § 9-301. ²²⁸ Thus, while the trial court in *Konkel* would still need to make a finding on the question of Lewis' location, the matter probably would not have reached the supreme court before identifying the crucial issue. Revised Article 9's

simplification of the old complex choice of law rules will reduce the number of successful avoidance actions. The mooted of ephemeral questions about the nature of goods, coupled with centralized filing, will eliminate some formerly fruitful areas of recovery for unsecured creditors.

Like *Konkel*, the old chestnut of *Feldman v. First National City Bank (In re Leasing Consultants, Inc.)*²²⁹ illustrates a perfection problem that Revised Article 9's unitized choice of law rules will eliminate. Leasing Consultants, a corporation with its principal place of business in New York, had leased several pieces of heavy equipment to a corporation with its principal place of business in New Jersey.²³⁰ Leasing Consultants had in turn financed its purchase of the leased equipment with a loan from First National City Bank, which took a security interest in "the lease(s) and the property leased."²³¹ The bank perfected its security interest by filing a financing statements with the Secretary of State of New York and locally in Queens County.²³² The bank did not file in New Jersey.²³³

Both Leasing Consultants and its lessee ended up in bankruptcy a year later.²³⁴ All the parties agreed to a sale of the leased equipment and stipulated that the bank should hold the proceeds subject to the same interests and priorities as had existed in the equipment.²³⁵ The referee in bankruptcy ordered the bank to turn over the proceeds to the estate of Leasing Consultants. The court held that the bank had failed properly to perfect its security interest in the reversionary interests in the leased equipment, which required a filing in New Jersey.²³⁶ The bank appealed and the Court of Appeals agreed with the bankruptcy court's conclusion,²³⁷ although it remanded the case for further proceedings on the question of whether the underlying transactions were true leases.²³⁸

The decision of the court was correct under former Article 9: a non-possessory security interest in *chattel paper* had to be filed in the state in which the debtor was located.²³⁹ In contrast, a security interest in *ordinary goods* must be filed in the state in which the goods were located.²⁴⁰ The Second Circuit affirmed the holding that the bank's interests in the lease and the lessor's reversionary interest in the leased goods must be analyzed separately.²⁴¹ The Court noted that the only interest that a debtor who is a lessor has the ability to assign is the lease, and that leases are properly classified as chattel paper.²⁴² The debtor-lessor's residual interest in the goods subject to the lease is not embodied in the chattel paper. Article 2A now buttresses the court's conclusion,²⁴³ and Revised Article 9 accepts this result.²⁴⁴

Even though Revised Article 9 acquiesces in the Second Circuit's analytical severance of leases from leased goods, its unitized choice of law provisions would have defeated the trustee's avoidance action in *Leasing Consultants*. Filing in the state of the debtor's incorporation is now the only appropriate place for perfection of both chattel paper and the lessor's residual interest in leased goods.²⁴⁵ Thus, the bank's financing statement filed in New York would have perfected its security interest in both the New York lease and the New Jersey equipment subject to the lease.²⁴⁶

1. Super Generic Validation

Former Article 9 described the requirement of sufficiency of collateral in financing statements in terms of "types" or "items" of collateral.²⁴⁷ These terms of limitation gave rise to litigation, much of which has proven fruitful for trustees.²⁴⁸ The decision of the bankruptcy court in *American Honda Finance Corporation v. Cilek (In re Cilek)*,²⁴⁹ is a good example of the strict construction of former U.C.C. § 9-402(1) that Revised Article 9 will reverse. The plaintiff in *Cilek* obtained a security interest in a detailed list of collateral manufactured by Honda Motors and financed by its lending affiliate.²⁵⁰ Honda's initial financing statement was much less thorough than the description in the security agreement. Its first financing statement listed the collateral as "[a]ll Honda motorcycles for which American Honda Finance Corporation gives purchase money financing, together with any other property now or hereafter acquired in which Dealer has an interest."²⁵¹ Nearly four years later Honda filed an amended financing statement with a much fuller description of its collateral:

All 2, 3, and 4 wheeled Honda vehicles, generators, lawnmowers, tillers, outboard motors, snowblowers, engines, water pumps, and other implements, equipment, products, and goods now or hereafter acquired for which Secured Party provides financing, in whole or in part, and all accessions and parts, accessories and equipment attached thereto, together with all replacements, substitutions and additions thereto, and cash and non-cash proceeds thereof Honda parts and cash and non-cash proceeds thereof; and accounts receivable relating to Dealer's business of selling and servicing Honda products.

The borrower ultimately filed chapter 11 and the parties' dispute ranged over a number of issues including Honda's security interest in the spare parts of the borrower's Honda dealership. Both of Honda's efforts to perfect its security interest were futile according to the bankruptcy court. The first financing statement failed because it did "not indicate the types of collateral" in which Honda claimed an interest.²⁵² The only legitimate "types" of collateral, according to the court, were the U.C.C.'s classes of collateral.²⁵³ Nor did the Honda's first attempt successfully list the alternative requisite of "items" of collateral. It failed here because "both 'all Honda motorcycles' and 'any other property' summarize collateral instead of itemizing collateral as required [by U.C.C. § 9-402(1) (1972)]."²⁵⁴ Finally, the court noted that the financing statement's reference to "any other property" was ineffective because it was "not a description of items but a super generic phrase which covers every kind of collateral perfectible under [U.C.C. § 9-102(1)(a) (1972)]."²⁵⁵ Honda's second try at perfection also fell short. Although prolix, the second financing statement also suffered from a fatal flaw because "the term 'Honda parts' neither 'indicate[d] the types of collateral' nor 'describe[d] the items of collateral.'"²⁵⁶

Revised U.C.C. § 9-504 largely obviates the potential for an avoidance action based on the description of collateral in a financing statement.²⁵⁷ The new system strengthens the position of secured creditors, and weakens the potential claims of trustees, in two ways. First, U.C.C. § 9-504(2) specifically authorizes "super generic" financing statements. Creditors that have blanket security interests in the assets of their borrowers²⁵⁸ will not need to be concerned about "types" or "items."²⁵⁹ Second, and more subtly, Revised U.C.C. § 9-504(1) reduces the level of specificity required for those creditors who do not claim a blanket security interest. No longer will the financing affiliates of manufacturers need to be concerned about "types" or "items." Less than "all assets" financing statements must only describe the collateral, and any "description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described."²⁶⁰ Moreover, "reasonable identification" is broadly described in Revised U.C.C. § 9-108(b)²⁶¹ in a way that would have protected Honda's perfection in *Cilek*. The relaxation the requirements for collateral descriptions in financing statements will significantly reduce the reach of avoidance actions.

A. Against Buyers

Cases involving trustees or secured creditors against third parties who claim to own property of a debtor are legion.²⁶² Several provisions of the U.C.C. affected by Revised Article 9 lay at the root of these disputes.²⁶³ These cases typically involved a putative bailor or consignor attempting to preserve unencumbered title to property unwisely left in the possession of a ne'er-do-well insolvent. Most of these cases involved property most appropriately classified as inventory.²⁶⁴ Nevertheless, in *Chrysler Corporation v. Adamatic, Inc.*,²⁶⁵ the Wisconsin Supreme considered the claim of ownership of a buyer of equipment that both the debtor's secured creditor and receiver²⁶⁶ disputed. Chrysler Corporation had purchased a piece of electrical winding equipment from Adamatic²⁶⁷ which had previously granted a blanket perfected security interest to its lender.²⁶⁸ Chrysler subsequently ordered six addition winders from Adamatic²⁶⁹ but, before they were completed, experienced such problems with the first winder that it was returned to Adamatic for repair.²⁷⁰ Even though Chrysler had paid 90% of the purchase price for the first winder,²⁷¹ and made progress payments on the order for six,²⁷² Adamatic ran out of money. Its secured lender attempted to take possession of all the machines, regardless of their state of completion.²⁷³ Chrysler successfully replevied the three winders which Adamatic had at least partially completed and moved them to its plant in Indianapolis.²⁷⁴

The secured lender and the receiver joined in an action to recover all the winders from Chrysler, arguing that Chrysler was not a buyer in ordinary course of business (as then defined in U.C.C. § 1-201(9))²⁷⁵ and thus could not take free of the lender's security interest under former U.C.C. § 9-307.²⁷⁶ The Wisconsin Supreme Court held in favor of Chrysler on the first winder but held in favor of the creditor interests in regard to the remaining ones. With respect to the first winder that Chrysler had returned for repair, the court concluded that the lender's security interest had been divested upon the original sale and could not reattach because Chrysler had accepted the goods. Adamatic was nothing more than a bailee and Chrysler could therefore keep it.²⁷⁷

But Chrysler had not accepted the partially completed winders. On the one hand, the court held that neither title to nor possession of these items had passed to Chrysler.²⁷⁸ On the other, while former U.C.C. § 9-307(1) allowed a buyer in ordinary course of business to take free of a security interest created by its seller, the statute did not expressly require passage of either title or transfer of possession.²⁷⁹ Unfortunately for Chrysler, the court narrowly construed the requirement for a buyer in ordinary course. It concluded that it could not be a buyer in ordinary course of business

because Adamatic had never delivered the winders. ²⁸⁰ Chrysler therefore had to return the equipment or its value. ²⁸¹

Other courts and commentators criticized *Adamatic* for its holding that buyer in ordinary course status could be achieved only where physical delivery of the goods had occurred. ²⁸² Fifteen years later the Wisconsin Supreme Court partially reversed its earlier decision in *Daniel v. Bank of Hayward*. ²⁸³ In *Bank of Hayward*, retail car buyers had traded in their vehicle as a down payment of a new car to be manufactured and delivered to the dealer. ²⁸⁴ The dealer defaulted on its floor plan loan after obtaining the trade-in but before receiving the new car, and its lender was unwilling to release the new car when it arrived without full payment of the floor plan note by the buyers. ²⁸⁵ The buyers sued the bank after paying off the floor plan note. ²⁸⁶ The bank prevailed at trial under *Adamatic* because the car buyer had neither title to nor possession of the new car. On appeal, the Wisconsin supreme court concluded that the time at which a buyer became a buyer in ordinary course of business should be advanced. ²⁸⁷ According to the court, at least in retail automobile sales, identification to contract under former U.C.C. § 2-501(1) ²⁸⁸ is the key to unlocking the door to the status of buyer in ordinary course. The *Bank of Hayward* court carefully limited its holding to the facts of the case, ²⁸⁹ thus leaving its precedential effect in non-consumer transactions in doubt.

What could a trustee have argued against the buyer in a case like *Bank of Hayward* if the car dealer had been in bankruptcy and if there had been no floor plan financier? In a state in which identification to the contract was not the point at which a purchaser became a buyer in ordinary course of business, a trustee could assert that the car subsequently acquired by the dealership was simply property of the estate under section 541(a) of the Bankruptcy Code. Alternatively, a trustee could lay claim to the new car as the holder of the powers of a judicial lien creditor under section 544(a) of the Bankruptcy Code. ²⁹⁰ The buyer would be left with a priority claim under section 507(a)(6) of the Bankruptcy Code, ²⁹¹ but would not be entitled to delivery of the automobile from the trustee. ²⁹²

Revised Article 9 resolves such disputes in favor of the consumer purchaser. Current U.C.C. § 9-320(a) ²⁹³ is virtually identical to former U.C.C. 9-307(1). However, the definition of "buyer in ordinary course of business" in U.C.C. § 1-201(9) has been amended significantly to address the problems raised by *Adamatic* and *Bank of Hayward*:

A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices . . . Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 may be a buyer in ordinary course of business. ²⁹⁴

Revised Article 9 also amends U.C.C. § 2-502(1) and adds a new subsection (2):

(1) Subject to subsections (2) and (3) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provision of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if:

(a) in the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or

(b) in all cases, the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) The buyer's right to recover the goods under subsection (1)(a) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver. ²⁹⁵

Even though the buyer's right to delivery under U.C.C. § 2-502 standing alone would not defeat the claim of a secured creditor, its incorporation into the definition of buyer in ordinary course of business allows the buyer to prevail under *Bank of Hayward* circumstances because U.C.C. § 9-320(1) allows a buyer in ordinary course to take free of a security interest created by the seller. ²⁹⁶ Similarly, the creation of a special property interest in consumer goods upon identification to contract, coupled with defining such a consumer buyer as one in ordinary course, will probably be sufficient against the trustee both to eliminate the goods from the definition of property of the estate and from the avoiding powers under Bankruptcy Code section 544(a).

The foregoing analysis demonstrates a series of reductions in the trustee's avoiding powers effected by Revised Article 9. There is, however, more to the story. There are a small number of circumstances in which the trustee's avoidance powers will be enhanced by the new regime. In situations where a third party is a seller, rather than a buyer,²⁹⁷ a trustee will find it easier to set aside a putative ownership interest in favor of the claims of unsecured creditors.

Former U.C.C. § 2-326(1) created a subcategory of consignments in cases where goods were in the consignee's possession "for sale or return."²⁹⁸ The effect of the consignee's possession "for sale or return" was to subject the goods to the claims of its creditors of the consignee in their entirety, notwithstanding the consignee's limited ownership interest.²⁹⁹ In addition to an actual "sale or return" situation, former U.C.C. § 2-326(3)³⁰⁰ also specified circumstances where consigned goods were "*deemed* to be on sale or return." The legal effect was the same: goods deemed to be on sale or return were subject to creditors' claims.³⁰¹ Former U.C.C. § 2-326(3) went on to afford three methods by which a careful consignor could shelter the goods from the consignee's creditors. The first prophylactic was fact intensive: the consignor must "establish that [the consignee] is generally known by his creditors to be substantially engaged in selling the goods of others."³⁰² The second method by which a consignor could protect its ownership interests was to comply with "an applicable law providing for a consignor's interest or the like to be evidenced by a sign."³⁰³ The consignor's final – and simplest – avenue of protection lay in "compl[ying] with the filing provisions of the Article on Secured Transactions (Article 9)."³⁰⁴ From the trustee's point of view, the key to attacking a transaction under former U.C.C. § 2-326 rested in establishing that a party had delivered goods to the debtor "for sale." If the trustee could prove that the goods had been delivered for sale, and that the putative consignor failed to meet any of the three exceptions, the estate could be enhanced by section 544(a)(1) of the Bankruptcy Code.³⁰⁵ Of considerable import, however, was the answer to the question: for sale by whom?³⁰⁶ Several courts narrowly construed the answer to be: by the debtor alone.³⁰⁷ Revised Article 9 should broaden the class of proper responses.

The decision of the bankruptcy court in *Zwagerman v. Comerica Bank–Detroit (In re Zwagerman)*,³⁰⁸ illustrates a close case where a trustee failed but whose result should be reversed under Revised Article 9. David Bradley had delivered cattle to Zwagerman for custom feeding and ultimate sale since 1981.³⁰⁹ Bradley did not file a financing statement, nor were there any brands, ear tags, or other indications of his ownership of the cattle.³¹⁰ Although the agreement between Bradley and Zwagerman contemplated that Zwagerman would eventually sell the cattle as Bradley's agent,³¹¹ the court found that the cattle were delivered for "fattening . . . [and that] [t]he sale of the cattle was incidental to the fattening contract."³¹² Although the court acknowledged that the question was "a close one,"³¹³ it nonetheless held that the failure of Zwagerman to have an independent power of sale meant that former U.C.C. § 2-326(3) did not apply.

The PEB Study Report³¹⁴ recommended that the phrase "delivered to a person for sale" in former U.C.C. § 2-326(3) "should be expanded to include all deliveries of goods pursuant to which the parties expect the consignee ultimately to sell to others, even though further processing or prior consent to sale is required."³¹⁵ Revised Article 9 accomplishes this result by repealing former U.C.C. § 2-326(3) in its entirety and creating a new definition of consignment at U.C.C. § 9-102(a)(2).³¹⁶ Revised U.C.C. § 9-102(a)(2) expands the former law's language of "for sale" to "for purpose of sale" and should have the effect of allowing the trustee to prevail in a case like *Zwagerman*.³¹⁷ In addition, Revised Article 9 will also require even true consignors who do not authorize their consignees to sell under any circumstances to file a financing statement to protect their ownership interests.³¹⁸ Trustees will therefore gain a little satisfaction from the revisions to Article 9 in consignment situations.³¹⁹

Conclusion

Revised Article 9 effects many changes to matters of scope, reach, classification, and perfection as well as relationships with buyers and other third parties. A careful analysis of its provisions will disclose the situations in which the rules have changed. A review of cases, however, makes more vivid the nature and extent of those changes. This article has only scratched the surface. It has reviewed just sixteen principal cases whose results will now be different. Many outcomes formerly assisting the trustee will now favor the secured creditor. Many widely accepted conventions will need to be reconsidered. Trustees and secured creditors, as well as their lawyers, must give careful attention not only to changes in the system of secured transactions but particularly to adjustments to definitions of

terms. The resulting transformation will leave many longstanding cases in the dust. Courts, commentators and counsel must therefore be extremely careful when citing cases under former Article 9. No matter how innocuous may seem the proposition for which an old case stands, it will be reckless to cite it under the new regime without considered analysis.

FOOTNOTES:

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² July 1, 2001 for those states that have adopted [Revised Article 9](#). See [11 U.C.C. § 9-701 \(1999\)](#) (providing that effective date of Revised Article 9 is July 1, 2001); see also [Bradley Y. Smith, New Article 9 Transition Rules, 74 Chi.-Kent L. Rev. 1339, 1339-40 \(1999\)](#) (noting that effective date has been delayed nearly 3 years to allow practitioners and other interested parties time to gain greater familiarity with revisions, and to increase likelihood that greater number of jurisdictions will adopt it simultaneously). [Back To Text](#)

³ Uniform Commercial Code Revised Article 9 – Secured Transactions (with conforming amendments to Articles 1, 2, 2A, 4, 6, 7, and 8) (copyright 1999 by The American Law Institute and National Conference of Commissioners on Uniform State Laws). References to former Article 9 will be to its 1972 version unless otherwise noted. [Back To Text](#)

⁴ See [David Gray Carlson, The Trustee's Strong Arm Power Under the Bankruptcy Code, 43 S.C. L. Rev. 841, 842 \(1992\)](#) (discussing murky history of term "strong arm" power); see also [R. Paul Barkes, Jr., Note and Comment, Untwisting the Strong-Arm: Protecting Fraud Victims From Bankruptcy, 31 Loy. L.A. L. Rev. 653, 685 \(1998\)](#) (asserting that in bestowing additional status of bona fide purchaser on trustee, Code left unanswered question of whether property acquired through fraud by debtor falls within scope of strong arm powers); [Carlos J. Cuevas, Bankruptcy Code Section 544\(A\) and Constructive Trusts: The Trustee's Strong Arm Powers Should Prevail, 21 Seton Hall L. Rev. 678, 723 \(1991\)](#) (arguing that, inasmuch as Congress intended strong arm powers under Code to continue to have broad scope, property improperly acquired by debtor belongs in estate and trustee must be immune from equitable affirmative defenses). [Back To Text](#)

⁵ [11 U.S.C. § 544\(a\) \(1994\)](#) states:

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

1. a creditor that extends credit to the debtor at the time of commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;
2. a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or
3. a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

[Id.](#); see also [In re Halabi, 184 F.3d 1335, 1337 \(11th Cir. 1999\)](#) (interpreting § 544(a) as authorizing trustee to "stand in shoes" of debtor in exercising strong arm powers); [In re Paul J. Paradise & Associates, Inc., 249 B.R. 360, 366 \(Bankr. D. Del. 2000\)](#) (siding with majority view in deciding that § 544 permits trustee to bring into estate property held in constructive trust); see also [11 U.S.C. § 541 \(1994\)](#) (allowing trustee to recover property for benefit of estate under various sections of Code, including § 544(a)). [Back To Text](#)

⁶ "Trustees" include not only those appointed in chapter 7 cases, but also debtors in possession under chapter 11. See 11 U.S.C. § 701 (1994) (providing for election by United States Trustee of interim trustee); 11 U.S.C. § 1107 (1994) (providing that, subject to certain restrictions, debtor-in-possession may serve as trustee); see also In re Dublin Securities, Inc., 214 F.3d 773, 774 (6th Cir. 2000) (finding that § 1107 confers upon debtor-in-possession same powers enjoyed by chapter 11 trustee); In re Compuadd Corporation, 137 F.3d 880, 883 (5th Cir. 1998) (concluding that plain language of § 1107 permits debtor-in-possession to exercise power trustee has to bring avoidance actions). [Back To Text](#)

⁷ See In re Guillot, 250 B.R. 570, 603 (Bankr. M.D. La. 2000) (finding that sham transfer failed to "wash" real property free of lien, and that trustee as hypothetical bona fide purchaser could avoid transaction, thereby recovering \$182,000 for estate's claimants); In re Glanz, 205 B.R. 750, 753 (Bankr. D. Md. 1997) (holding that trustee exercising strong arm powers under § 544(a) had rights superior to holder of unrecorded deed of trust, resulting in nearly \$600,000 recovery for debtor's estate). But see In re Halabi, 184 F.3d at 1337 (rejecting attempt by trustee in strong arm capacity to avoid assignment of mortgage recorded post-petition where underlying state law denied such rights to mortgagor/debtor). There is no readily available data on annual recoveries pursuant to § 544(a) of the Bankruptcy Code. [Back To Text](#)

⁸ NCCUSL is a national organization of practicing lawyers, judges, law professors, and others appointed by the governors of each of the states. NCCUSL drafts uniform laws in various fields and then proposes them to the various state legislatures for adoption. See Edward J. Janger, Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom, 83 Iowa L. Rev. 569, 586 (1998) (describing problem of "capture" in drafting process); Alan Schwartz & Robert E. Scott, The Political Economy of Private Legislatures, 143 U. Pa. L. Rev. 595, 651 (1995) (stating that problems stemming from reliance on "ill-informed generalists" and influence of interest groups may be unavoidable for any official organization whose goal is to foster uniformity of state laws). [Back To Text](#)

⁹ The ALI was founded in 1923 to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work. Its principal products have been the various Restatements of the common law. See Jonathan R. Macey, The Transformation of the American Law Institute, 61 Geo. Wash. L. Rev. 1212, 1216 (1993) (describing ALI as group of elite attorneys and scholars best known for drafting "Restatements of Law"). But see Charles W. Wolfram, Bismarck's Sausages and the ALI's Restatements, 26 Hofstra L. Rev. 817, 830 (1998) (observing that, despite efforts to maintain objectivity, ALI remains private organization susceptible to outside political influence and hampered by imperfect processes); Nicholas S. Zeppos, Reforming a Private Legislature: The Maturation of the American Law Institute as a Legislative Body, 23 Law & Soc. Inquiry 657, 661 (1998) (describing growing criticism of ALI as "self-interested" and subject to pressures from special interest groups). [Back To Text](#)

¹⁰ See Alvin C. Harrell, UCC Article 9 Revisions Move Toward Summer 1998 Approval, Pt. II, 52 Con. Fin. L. Quarterly Rep. 227 (1998) (reporting that final draft of Revised Article 9 was approved by ALI at meeting in Washington, D.C. in May of 1998); see also Eldon H. Reiley, Guidebook to Security Interests in Personal Property § 1.08, U.C.C. Revision Process and the Scope of Article 9 (Clark Boardman Callaghan 1997) (noting that efforts to fully revise Article 9 have been underway since early 1990s); Gary A. Goodman, Revised UCC Article 9, 456 PLI/Real 445, 448 n.2 (2000) (observing that, although Article 9 had undergone several revisions prior to current revisions approved by ALI in May of 1998, those changes were made primarily to conform to revisions made to other Articles of U.C.C.). [Back To Text](#)

¹¹ The adopting jurisdictions include Alaska, Arizona, California, Delaware, the District of Columbia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Montana, Nebraska, Nevada, North Carolina, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia. See Introduction and Adoptions of Uniform Acts, available at http://www.nccusl.org/uniformact_factsheets/uniformacts-fs-ucca9.htm (describing as highly technical, and therefore not motivated by policy changes, any corrections which need to be made in response to inevitable errors and ambiguities which have come to light in reviewing text of Revised Article 9). Surprisingly, there have already been a substantial number of technical amendments to the text of Revised Article 9 as well as its Official Comments. See also

The ALI Reporter (Winter 2000) <http://www.ali-aba.org/ali/r2202%5Fcomments.htm>. (providing information regarding progress of efforts toward uniform adoption of Revised Article 9). See generally American Bar Association, The New Article 9 (2d ed. Cooper ed. 2000). [Back To Text](#)

¹² See generally [David A. Lander, Understanding the Expanded Scope of Revised Article 9 of the UCC, NO. 9 Norton Bankr. L. Adviser 1 \(2000\)](#) (opining that Revised Article 9 will enhance position of secured lenders by reducing ability of bankruptcy trustee to reach assets in which valid security interest exists); [C. Scott Pryor, Revised Uniform Commercial Code Article 9: Impact in Bankruptcy, 7 Am. Bankr. Inst. L. Rev. 465, 465 n. 5 \(1999\)](#) (providing sampling of numerous articles devoted to Revised Article 9's effect on bankruptcy); G. Ray Warner, Perfection in [Proceeds Under Revised Article 9, 20 Am. Bankr. Inst. J. 16, 16 \(2001\)](#) (examining interplay between perfection rules for proceeds under Revised Article 9 and trustee's strong-arm power under § 544(a)). [Back To Text](#)

¹³ See, e.g., [Donald W. Baker, Some Thoughts on Agricultural Liens Under the New U.C.C. Article 9, 51 Ala. L. Rev. 1417 \(2000\)](#); Charles Cheatham, Changes in [Filing Procedures Under Revised Article 9, 25 Okla. City U. L. Rev. 235 \(2000\)](#); [Beth A. Diebold, The Expanding Concept of Security Interests: An Introduction to Revised UCC Article 9, 12 Loy. Consumer L. Rev. 151 \(2000\)](#); John J. Eikenburg, Jr. Comment, [Filing Provisions of Revised Article 9, 53 S.M.U. L. Rev. 1627 \(2000\)](#); Cynthia B. Faulhaber, "No New Taxes:" Article 9, [Section 31 of The Michigan Constitution Twenty Years After Adoption, 46 Wayne L. Rev. 211 \(2000\)](#); Hans Kuhn, [Multi-State and International Secured Transactions Under Revised Article 9 of the Uniform Commercial Code, 40 Va. J. Int'l L. 1009 \(2000\)](#); [Robert M. Lloyd, The New Article 9: Its Impact on Tennessee Law \(Part II\), 67 Tenn. L. Rev. 679 \(2000\)](#); Richard H. Nowka, Section 9–320 (a) of Revised Article 9 and the Buyer in [Ordinary Course of Pre-encumbered Goods: Something Old and Something New, 38 Brandeis L. J. 9 \(1999–2000\)](#); [Marcu Salitore, Comment, Maintaining Perfection: Practitioners Must Act Soon to Preserve Interests Under the U.C.C. Revised Article 9, 31 Tex. Tech. L. Rev. 1043 \(2000\)](#); [Harry C. Sigman & Edwin E. Smith, Revised U.C.C. Article 9's Transition Rules: Insuring a Soft Landing \(Parts I and II\), 55 Bus. Law. 1065, 1762 \(2000\)](#); Notes, [Operation of the New Article 9 Choice of Law Regime in an International Context, 78 Tex. L. Rev. 679 \(2000\)](#). [Back To Text](#)

¹⁴ See [Edwin E. Smith, Revised UCC Article 9's Treatment of Security Interests in Letters of Credit, 800 PLI/Comm 741 \(January, 2000\)](#). See generally Joel F. Brown & David M. Mason, [Revised Article 9: Changes for the Commercial Lender, 1167 PLI/Corp 795 \(March, 2000\)](#); [Gary A. Goodman, Revised UCC Article 9, 456 PLI/Real 445 \(May, 2000\)](#); Darrell W. Pierce, [Uniform Commercial Code Revised Article 9—Changes to the Filing System, 800 PLI/Comm 79 \(January, 2000\)](#); [Harry C. Sigman & Edwin E. Smith, Revised UCC Article 9 Overview, American Bar Association Continuing Legal Education, SF06 ALI–ABA 1 \(August 17, 2000\)](#); Normal I. Silber, [The Treatment of Consumers Under Revised Article 9, 800 PLI/Comm 89 \(January, 2000\)](#); Edwin E. Smith, [Revised Article 9 Transition Rules: A Soft Landing?, 806 PLI/Comm 377 \(April, 2000\)](#); Sandra Stern, [New Types of Collateral in Article 9, 800 PLI/Comm 7 \(January, 2000\)](#); Steven O. Weise, [An Introduction to the Revised UCC Article 9, 800 PLI/Comm 89 \(January, 2000\)](#); Steven O. Weise, [An Introduction to the Revised UCC Article 9, American Bar Association Continuing Legal Education Conference on Revised Article 9 of the Uniform Commercial Code, SF01 ALI–ABA 1 \(September 7, 2000\)](#); Steven O. Weise, [A Comparison of the Former Article 9 and the New Article 9, American Bar Association Continuing Legal Education Conference on Revised Article 9 of the Uniform Commercial Code, SF01 ALI–ABA 21 \(September 7, 2000\)](#); [Steven O. Weise, Preparing for the Revised UCC Article 9: The Transition Rules, American Bar Association Continuing Legal Education Conference on Revised Article 9 of the Uniform Commercial Code, SF01 ALI–ABA 51 \(September 7, 2000\)](#); Steven O. Weise, [A Comparison of a Security Agreement Under the Former Article 9 and the New Article 9, American Bar Association Continuing Legal Education Conference on Revised Article 9 of the Uniform Commercial Code, SF01 ALI–ABA 71 \(September 7, 2000\)](#); [Reade H. Ryan, Jr., Revised UCC Article 9 – Letters of Credit and Deposit Accounts, American Bar Association Continuing Legal Education Conference on Revised Article 9 of the Uniform Commercial Code, SF01 ALI–ABA 103 \(September 7, 2000\)](#); Linda J. Rusch, [Seller's and Buyer's Rights Under Article 2 \(Current and Revised\) and Article 9 \(Current and Revised\), American Bar Association Continuing Legal Education Conference on Revised Article 9 of the Uniform Commercial Code, SF01 ALI–ABA 133 \(September 7, 2000\)](#); Penelope Christophorou & Sandra M. Rocks, [Memorandum Regarding the 1994 Uniform Version of Article 8 of the Uniform Commercial Code and the Federal Book–Entry Regulations \(With Addendum Regarding Investment Property Changes Under Revised Article 9\), American Bar Association Continuing Legal Education Conference on Revised Article 9 of the Uniform Commercial Code, SF01 ALI–ABA 177 \(September 7, 2000\)](#); Penelope Christophorou & Sandra M. Rocks, [Comparison of](#)

Provisions in Current and Revised Article 9 Relating to Investment Property, American Bar Association Continuing Legal Education Conference on Revised Article 9 of the Uniform Commercial Code, SF01 ALI-ABA 215 (September 7, 2000); Edwin E. Smith, Revised UCC Article 9 Transition Rules, American Bar Association Continuing Legal Education Conference on Revised Article 9 of the Uniform Commercial Code, SF01 ALI-ABA 279 (September 7, 2000). [Back To Text](#)

¹⁵ Barkley Clark, Revised Article 9 of the UCC: Scope, Perfection, Priorities, and Default, 4 N.C. Banking Inst. 129 (April, 2000); Robert Palmer Rees, Revised Article 9 – Secured Transactions in the 21st Century, 13 Utah B.J. 8 (2000); G. Ray Warner, Preparing for the New Article 9, 19 Am. Bankr. Inst. J. 6 (2000); G. Ray Warner, Documenting a Transaction Under the Revised Article 9, 19 Am. Bankr. Inst. J. 20(2000); G. Ray Warner, Default and Foreclosure Under Revised Article 9, 19 Am. Bankr. Inst. J. 20 (2000); G. Ray Warner, Real Estate Transactions Under Article 9, 19 Am. Bankr. Inst. J. 14 (2000); G. Ray Warner, Deposit Accounts as Collateral Under Revised Article 9, 19 Am. Bankr. Inst. J. 18 (2000). [Back To Text](#)

¹⁶ See supra note 4; see also In re Reasonover, 236 B.R. 219, 233 (Bankr. E.D. Va. 1999) (upholding right of trustee as hypothetical bona fide purchaser under § 544 (a) to avoid pre-petition sale of real property where deed was not recorded, but finding that property remained subject to security interest in favor of mortgagee); 5 Collier On Bankruptcy ¶ 544.01 at 1 (15th ed. Rev. 2000) (explaining that trustee's avoiding powers exist to further Code's goal of fair and efficient distribution of debtor's assets to unsecured creditors). [Back To Text](#)

¹⁷ There is no readily available source from which to determine the total dollars recovered by trustees under Bankruptcy Code § 544 (a); thus, there is no way to evaluate the monetary effect of Revised Article 9 on avoidance actions. Nor will Revised Article 9's impact in bankruptcy be limited to actions (no longer) arising under § 544(a) of the Bankruptcy Code. Revised Article 9's changes to the rules on purchase money security interests will also affect claims of exemptions under § 522 (f)(1)(B) of the Bankruptcy Code. See 11 U.S.C. § 522 (f) (1994) (describing circumstances under which debtor may avoid fixing of lien on property to which he is otherwise entitled as an exemption); Rev. U.C.C. § 9-309 (1999) (listing purchase-money security interest among those security interests which are perfected upon attachment); Pryor, supra note 11 at 504-509 (arguing that Revised Article 9's goal of encouraging extension of secured credit may be realized, but at expense, at least in part, of trustee's strong arm powers). The expansion of the definition of proceeds under Revised Article 9 may impact on cash collateral negotiations under § 363 of the Bankruptcy Code. See also 11 U.S.C. § 363 (1994) (authorizing trustee under certain circumstances to use, sell, or lease property of estate); Pryor, supra note 11, at 496-503 (concluding that Revised Article 9's expanded definition of proceeds and its more liberal perfection requirements will combine to diminish pool of assets available to unsecured creditors of bankrupt debtor). [Back To Text](#)

¹⁸ Or, for those whose spines shiver at even a hint of algebra: the trustee's avoidance powers under Revised Article 9 are less than they were under former Article 9.); Linda J. Rusch, Farm Financing Under Revised Article 9, 73 Am. Bankr. L.J. 211, 257 (1999) (arguing that, because filing of financing statement serves as well to perfect agricultural lien under Revised Article 9, trustee's ability to avoid such liens pursuant to § 544 (a) is diminished); Warner, supra note 11, at 17 (explaining that filing of "all-assets" financing statement by secured lender at beginning of transaction will be adequate under Revised Article 9 to perfect security interest in most types of proceeds, thereby reducing potential pool of assets to which trustee exercising its strong arm powers may lay claim). [Back To Text](#)

¹⁹ See, e.g., In re Elin, 20 B.R. 1012, 1017 (Bankr. D. N.J. 1982) (remarking that legislative history of § 544 is "scant" and provides little guidance in determining nature and extent of trustee's strong arm powers); Barkes, supra note 3, at 653-655 (observing that expansion of trustee's status under § 544(a)(3) to include that of bona fide purchaser reflects underlying bankruptcy goal of expanding estate to maximize assets available for payment of creditor claims); Carlson, supra note 3, at 949 (conceding that broadening trustee's powers to include those of hypothetical bona fide purchaser may not necessarily be in harmony with notion of bankruptcy as collective creditors' action). [Back To Text](#)

²⁰ See, e.g., Thomas H. Jackson, Avoiding Powers in Bankruptcy, 36 Stan. L. Rev. 725, 726 (1984) (asserting that power of trustee under § 544(a) of Bankruptcy Code is justified as one of "those powers that preserve the advantages associated with the collective nature of the bankruptcy proceeding . . ."); see also Barkes, supra note 3, at 653 (noting that one purpose of bankruptcy is to create "collective forum" in which available assets are distributed to claimants on

debtor's estate). [Back To Text](#)

²¹ See, e.g., [Carlson, supra note 3, at 949](#) (positing that "[t]he meaning of the strong arm power is that it embodies the trustee's status as representative of all the creditors against property the debtor either owns or has power to convey"); see also [In re Guillot, 250 B.R. 570, 592 \(Bankr. M.D. La. 2000\)](#) (concluding that ideal lien creditor status accorded trustee under § 544(a) creates property interest commensurate with "the scope, rank and extent of the ideal lien, to the full extent of the reach of such a lien...and to the full extent, quantitatively, necessary to pay all claims against the estate, including administrative claims"). [Back To Text](#)

²² See [Thacker v. United Companies Lending Corporation, 256 B.R. 724, 729 \(Bankr. W.D. Ky. 2000\)](#) (deciding that question of whether status of bona fide purchaser has been attained may only be addressed by looking to applicable state law); [Gurley v. Mills \(In re Gurley\), 222 B.R. 124, 136 \(Bankr. W.D. Tenn. 1998\)](#) (holding that reach of strong arm powers of debtor-in-possession must be determined by reference to state law). Technically, however, this is true only of actions pursuant to sections 544 (a)(1) and (2) of the Bankruptcy Code. Congress has enhanced the powers of the trustee over those provided to creditors under state law under § 544 (a)(3) of the Bankruptcy Code. See also Gregg C. Gumbert, Comment, The Trustee as a [Bona Fide Purchaser of Real Property: Making Sense of Section 544\(a\)\(3\), 15 Bankr. Dev. J. 121, 133 \(1998\)](#):

"[T]he recording acts governing real property transfers in a number of states have given protection only to bona fide purchasers, so that in these states the holder of an unrecorded mortgage has priority over a judicial lien creditor." Since the trustee had only the status of a judicial lien creditor under the Bankruptcy Act, the trustee was unable, in certain jurisdictions, to take against a holder of an unrecorded security interest. "It was suggested that the trustee be armed with the powers of a bona fide purchaser of real estate so that he could prevail everywhere over the holder of an unrecorded mortgage." (Quoting [In re Mill Concepts Corp., 123 B.R. 938, 942 \(Bankr. D. Mass. 1991\)](#)).

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²³ See Steven L. Harris & Charles W. Mooney, Jr., How Successful was the [Revision of UCC Article 9?: Reflections of the Reporters, 74 Chi.-Kent L. Rev. 1357, 1359 \(1999\)](#) (explaining that goal of Revised Article 9 was facilitation of extension of secured credit); [Pryor, supra note 11 at 470–78](#) (discussing Drafting Committee's implementation of PEB Study Committee's recommendations regarding scope of Article 9, as well as enforcement and perfection of security interests); Steven O. Weise, An Introduction to the [Revised UCC Article 9, 800PLI/Comm 89, 91 \(2000\)](#) (stating that revisions were intended to create greater certainty in financing transactions). [Back To Text](#)

²⁴ See [infra Sections I.A.1 and 2. Back To Text](#)

²⁵ [U.C.C. § 9–109 \(d\)\(8\) \(1999\)](#):

(d) This article does not apply to:

(8) a transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment, but Sections 9–315 and 9–322 apply with respect to proceeds and priorities in proceeds.

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²⁶ [U.C.C. § 9–109 \(d\)\(12\) \(1999\)](#):

(d) This article does not apply to:

(12) an assignment of a claim arising in tort, other than a commercial tort claim, but Sections 9–315 and 9–322 apply with respect to proceeds and priorities in proceeds

[Id. Back To Text](#)

²⁷ See, e.g., George A. Nation, Revised Article 9 Of The UCC: The Proposed Revisions Most Important To Commercial Lenders, 115 Banking L.J. 212 (1998); Marsha E. Simms, Asset Securitization, Practicing Law Institute 754 PLI/Comm 335 (1997). [Back To Text](#)

²⁸ U.C.C. § 9–104 (1972, as amended in 1995):

This Article does not apply

(a) to a security interest subject to any statute of the United States, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property; or

to a landlord's lien; or

(c) to a lien given by statute or other rule of law for services or materials except as provided in Section 9–310 on priority of such liens; or

(d) to a transfer of a claim for wages, salary or other compensation of an employee; or

(e) to a transfer by a government or governmental subdivision or agency; or

(f) to a sale of accounts or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts or chattel paper which is for the purpose of collection only, or a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract or a transfer of a single account to an assignee in whole or partial satisfaction of a preexisting indebtedness; or

(g) to a transfer of an interest in or claim in or under any policy of insurance, except as provided with respect to proceeds (Section 9–306) and priorities in proceeds (Section 9–312); or

(h) to a right represented by a judgment (other than a judgment taken on a right to payment which was collateral); or

(i) to any right of set-off; or

(j) except to the extent that provision is made for fixtures in Section 9–313, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder; or

(k) to a transfer in whole or in part of any claim arising out of tort; or

(l) to a transfer of an interest in any deposit account (subsection (1) of Section 9–105), except as provided with respect to proceeds (Section 9–306) and priorities in proceeds (Section 9–312); or

(m) to a transfer of an interest in a letter of credit other than the rights to proceeds of a written letter of credit.

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²⁹ 995 F.2d 948 (10th Cir. 1993), cert. denied 510 U.S. 993 (1993). [Back To Text](#)

³⁰ Philip Maher, Investment Dealers' Digest, Aug. 2, 1993 at 15 ("The ruling [in Octagon Gas] stunned the structured finance community . . ."); Asset Sales Report, Aug. 2, 1993 at 1 ("The decision has overwhelmingly negative implications for structured finance . . ."). [Back To Text](#)

³¹ The district court on appeal had summarily affirmed the bankruptcy's courts decision. Octagon Gas, 995 F.2d at 951. [Back To Text](#)

³² [Id. Back To Text](#)

³³ Id. (stating "Amcole transferred to each shareholder a proportionate 'overriding royalty interest' in the gross proceeds received by Amcole from gas sold through the Poll System.") [Back To Text](#)

³⁴ Id. at 952. (stating "In 1983 and 1984, Rimmer purchased, from the original assignees, a portion of the 'overriding royalty interests' created by the 1976 Agreement and the 1982 Assignment. . . Pursuant to the parties' various cross-transfers, the 1987 Assignment provided that ' . . . Rimmer will own from this date forward a full Five Percent (5%) perpetual overriding royalty interest on all proceeds payable to [Poll] under the [System]'"). [Back To Text](#)

³⁵ Id. (stating "The Plan provided that the Poll System would be transferred to Norwest [Poll's secured lender] 'free and clear of liens, claims, interests, and encumbrances'"). [Back To Text](#)

³⁶ See Octagon Gas Systems, Inc. v. Rimmer (In re Meridian Reserve, Inc.), 995 F.2d 948 ,952 (10th Cir. 1993) (stating "Thereafter, Norwest conveyed the System to Octagon. After assuming control of the System, Octagon refused to recognize any interest held by Rimmer in the System gas sale proceeds and failed to make any payments to Rimmer"). [Back To Text](#)

³⁷ Id. (stating "The bankruptcy court held that Rimmer owned a five percent interest in the proceeds of gas sold through the Poll System which was not affected by the Plan or the transfer of the Poll System to Octagon"). [Back To Text](#)

³⁸ Id. at 959 (stating that "Because extracted gas is a 'good,' Poll's right to payment for gas sold, as well as Rimmer's five percent interest in Poll's right to payment, is an account"). [Back To Text](#)

³⁹ Id. at 957–58 (stating "The court must make findings regarding whether Rimmer's account was a perfected security interest – i.e., whether U.C.C. filings were required or made"). [Back To Text](#)

⁴⁰ U.C.C. § 9–102 (1)(b) (1972) (stating "(1) Except as otherwise provided in § 9–104 on excluded transactions, this Article applies . . . (b) to any sale of accounts . . ."). [Back To Text](#)

⁴¹ U.C.C. § 9–102 official cmt. 2 (1972) (providing "Commercial financing on the basis of accounts and chattel paper is often so conducted that the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered by subsection (1)(b) whether intended for security or not . . ."). [Back To Text](#)

⁴² See Octagon Gas, 995 F.2d at 955:

Having determined that the interest acquired by Rimmer is an account under Article 9, it follows that Article 9 applies to Rimmer's five percent interest in the Poll Systems's gas sale proceeds . . . even though the transactions giving rise to Rimmer's account were not intended to secure a debt. . . . Official Comment 2 to . . . § 9–102 . . . , explains that in the case of commercial financing on the basis of accounts, "the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered by [9–102(1)(b)] whether intended for security or not. The buyer is then treated as a secured party and his interest as a security interest." [Back To Text](#)

⁴³ See Report: Special Report By The Tribar Opinion Committee: U.C.C. Security Interest Opinions, 49 Bus. Law. 364, 370 n.30 (1993) ("Reaction of experienced commercial practitioners appears to be uniform that to the extent that the majority opinion of the divided court in the recent case of Octagon Gas Sys., Inc. v. Rimmer, 955 F.2d 948 (10th Cir. 1993), is interpreted as holding that there is no distinction between a sale of, and a lien on, accounts, the case is wrongly decided."); Steven L. Schwarcz, "Octagon Gas Ruling Creates Turmoil For Commercial and Asset-Based Finance," N.Y.L.J., Aug. 4, 1993, at 1 ("The Tenth Circuit, however, recently decided in Octagon Gas Systems Inc. v. Rimmer that a transfer of accounts, even if a true sale, will not remove the accounts from the transferor's bankruptcy estate. This result, and the logic of the court's decision, are patently wrong for several reasons.") (footnote omitted). [Back To Text](#)

⁴⁴ See Paul E. Weber & R. Kenneth MacCallum, "Rating Agencies Offer Response to Octagon," N.Y.L.J., Oct. 12, 1993, at 11 ("In rated transactions, the new Standard & Poor's and Moody's criteria may result in it being

uneconomical, or impossible, for companies in the Tenth Circuit to have securitizations rated by these agencies. Regardless of the approach of the rating agencies, investors have expressed concern about the implications of Octagon and might demand higher spreads to compensate for their perception of the Octagon risk."'). [Back To Text](#)

⁴⁵ Even if the special purpose entity had filed a financing statement, it would be treated as a secured creditor, not an owner. The automatic stay of § 362 (a) of the Bankruptcy Code and ultimately the threat of cram down under § 1129 (b)(2)(A) of the Bankruptcy Code would loom over the interests of the putative owners. [Back To Text](#)

⁴⁶ See, e.g., U.C.C. § § 9–502, 9–504 (1972). [Back To Text](#)

⁴⁷ The Permanent Editorial Board ("PEB") is composed of members of both National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Law Institute ("ALI"), and periodically makes recommendations to NCCUSL and the ALI for revisions to the U.C.C. See Agreement Describing the Relationship of the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and the Permanent Editorial Board with Respect to the Uniform Commercial Code, 187–192 (July 31, 1986) (amended January 18, 1998) (governing existence of PEB); see also Henry D. Gabriel, The Revision of The Uniform Commercial Code – Process and Politics, 19 J.L. & Com. 125, 128–29 (1999) (explaining role of PEB in U.C.C. revision process); Steven L. Schwarcz, A Fundamental Inquiry Into The Statutory Rulemaking Process of Private Legislatures, 29 Ga. L. Rev. 909, 915 (1995) (discussing private rulemaking process for uniform state laws such as U.C.C. and explaining role of PEB); Robert E. Scott, Symposium on the Revision of Article 9 of The Uniform Commercial Code: The Politics of Article 9, 80 Va. L. Rev. 1783, 1804 (1994) (discussing role of PEB in rulemaking and revision process). [Back To Text](#)

⁴⁸ See U.L.A., Uniform Commercial Code Appendix II: PEB Commentary on the Uniform Commercial Code Commentary No. 14 (June 10, 1994). [Back To Text](#)

⁴⁹ U.C.C. § 9–102 official cmt. 2 (1995):

Neither § 9–102 nor any other provision of Article 9 is intended to prevent the transfer of ownership of accounts or chattel paper. The determination of whether a particular transfer of accounts or chattel paper constitutes a sale or a transfer for security purposes (such as in connection with a loan) is not governed by Article 9. Article 9 applies both to sales of accounts or chattel paper and loans secured by accounts or chattel paper primarily to incorporate Article 9's perfection rules. The use of terminology such as "security interest" to include the interest of a buyer of accounts or chattel paper, "secured party" to include a buyer of accounts or chattel paper, "debtor" to include a seller of accounts or chattel paper, and "collateral" to include accounts or chattel paper that have been sold is intended solely as a drafting technique to achieve this end and is not relevant to the sale or secured transaction determination.

Id. See generally Nikiforos Mathews, Note, Circuit Court Erie Errors and the District Courts Dilemma: From ROTO–LITH and the Mirror Image Rule to Octagon, 17 Cardozo L. Rev. 739, 740, 745 (1996) (discussing attempt by PEB to clarify meaning of Article 9 and amendment to U.C.C. § 9–102 Official Comment 2 after Octagon decision); Paul M. Shupack, Making Article 9 Safe for Securitization: A Brief History, 73 Am. Bankr. L.J. 167, 180 (1999) (discussing confusion caused by Octagon and discusses reaction of PEB). [Back To Text](#)

⁵⁰ See U.C.C. § 9–318 (a) (1999). In case the Octagon Gas court didn't get it, see also U.C.C. 9–318 official cmt. 2 (1999) (stating that "[s]ubsection (a) makes explicit what was implicit, but perfectly obvious, under former Article 9: The fact that a sale of an account or chattel paper gives rise to a 'security interest' does not imply that the seller retains an interest in the property that has been sold."); Lois R. Lupica, Asset Securitization: The Unsecured Creditor's Perspective, 76 Tex. L. Rev. 595, 658 (1998) (arguing that Octagon Gas decision was incorrect and that it was major reason behind amendment to Article 9 meant to deal with securitization); Steven L. Schwarcz, Symposium: The Impact on Securitization of Revised U.C.C. Article 9, 74 Chi.–Kent L. Rev. 947, 952 (1999) (discussing Revised U.C.C. 9–318 (a) and its implications). [Back To Text](#)

⁵¹ Inasmuch as it was often difficult to distinguish between loans secured by assignments of those receivables and sales of the receivables which provided for some "recourse" against the seller, the original drafters decided that it made good sense "to avoid difficult problems of distinguishing between transactions intended for security and those

not so intended." As a result, sales of accounts and chattel paper were included within the scope of Article 9. Donald J. Rapson, "Receivables" Financing Under Revised Article 9, 73 Am. Bank. L.J. 133, 136 (1999) (footnotes omitted) (discussing difficulty of distinguishing sales from secured loans). See generally Robert D. Aicher and William J. Fellerhoff, Characterization of a Transfer of Receivables As a Sale or a Secured Loan Upon Bankruptcy of the Transferor, 65 Am. Bankr. L.J. 181, 185 (1991) (noting intention of original drafters of Article 9 not to provide any guidance to determine whether transaction is sale or loan); Schwarcz, supra note 49, at 948–49 (discussing reasoning behind why both sales and secured transactions were covered under current Article 9); G. Ray Warner, Asset Securitization Under Revised Art. 9, 2000 ABI JNL. LEXIS 73, *1, 3 (acknowledging difficulty distinguishing between sale and secured transactions). [Back To Text](#)

⁵² U.C.C. § 9–318(b) (1999). [Back To Text](#)

⁵³ See U.C.C. § 9–318 official cmt. 3 (1999):

3. Buyers of Accounts and Chattel Paper. Another aspect of sales of accounts and chattel paper also was implicit, and equally obvious, under former Article 9: If the buyer's security interest is unperfected, then for purposes of determining the rights of certain third parties, the seller (debtor) is deemed to have all rights and title that the seller sold. The seller is deemed to have these rights even though, as between the parties, it has sold all its rights to the buyer. Subsection (b) makes this explicit. As a consequence of subsection (b), if the buyer's security interest is unperfected, the seller can transfer, and the creditors of the seller can reach, the account or chattel paper as if it had not been sold.

Example: Debtor sells accounts or chattel paper to Buyer–1 and retains no interest in them. Buyer–1 does not file a financing statement. Debtor then sells the same receivables to Buyer–2. Buyer–2 files a proper financing statement. Having sold the receivables to Buyer–1, Debtor would not have any rights in the collateral so as to permit Buyer–2's security (ownership) interest to attach. Nevertheless, under this section, for purposes of determining the rights of purchasers for value from Debtor, Debtor is deemed to have the rights that Debtor sold. Accordingly, Buyer–2's security interest attaches, is perfected by the filing, and, under Section 9–322, is senior to Buyer–1's interest.

Id.; see also U.C.C. § 9–109 official cmt. 5 (1999) (explaining that U.C.C. § 9–318 (b) permits subsequent creditors or purchasers to gain higher priority right than original purchaser if they failed to file and perfect). [Back To Text](#)

⁵⁴ Curiously, none of the Official Comments to U.C.C. § 9–318 (1999) suggest or give an example of why creditors were included in U.C.C. § 9–318 (b). [Back To Text](#)

⁵⁵ U.C.C. § 9–615 (e) (1999) reinforces the drafters' position that a sale is a sale, not a recoverable secured transaction:

(e) If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes:

1. the debtor is not entitled to any surplus; and
2. the obligor is not liable for any deficiency.

[Id.](#) [Back To Text](#)

⁵⁶ 17 F. Supp.2d 275 (S.D.N.Y. 1998). [Back To Text](#)

⁵⁷ See id. at 298–300 (determining proper characterization of repurchase transactions); see also County of Orange v. Fuji Sec., Inc. (In re County of Orange), 31 F. Supp.2d 768, 777 (C.D. Cal. 1998) (analyzing same issue in light of limitations in California Constitution on amount of debt that counties may incur). See generally Jeanne L. Schroeder, Repo Madness: The Characterization of Repurchase Agreements Under the Bankruptcy Code and the U.C.C., 46 Syracuse L. Rev. 999, 1008 (1996) (discussing how repo transactions should be characterized). [Back To Text](#)

⁵⁸ The broker's side of the transaction is generally known as a reverse rep. For a history of the use of repurchase agreements see Marcia Stigum, The Repo and Reverse Market (1989) (discussing history and use of repurchase

agreements). See generally Joseph G. Fallon, Comment, Symposium on Securities Market Regulation: The Government Securities Act of 1986: Balancing Investor Protection with Market Liquidity, 36 Cath. U. L. Rev. 999, 1005–6 (1987) (discussing and defining repurchase agreements); Mark E. VanDerWeide and Satish M. Kini, Subordinated Debt: A Capital Markets Approach to Bank Regulation, 41 B.C. L. Rev. 195, 220 n.87 (2000) (defining repurchase agreements as "an agreement between two parties where one party agrees to sell a security to the other party and agrees to repurchase the security from the other party at a fixed price at a specific date in the future."). [Back To Text](#)

⁵⁹ See generally Christian A. Johnson, Derivatives and Rehypothecation Failure: It's 3:00 p.m., Do You Know Where Your Collateral Is?, 39 Ariz. L. Rev. 949, 969 (1997) (explaining that upon repurchase of securities that secured party will pay additional money in order to compensate third party for use of their money); Kenneth C. Kettering, Repledge and Pre-default Sales of Securities Collateral Under Revised Article 9, 74 Chi-Kent L. Rev. 1109, 1121 (1999) (summarizing Article 9 implications of repurchase agreements); Elizabeth M. Osenton, Comment, The Need For A Uniform Classification of Repurchase Agreements: Reconciling Investor Protection with Economic Reality, 36 Am. U. L. Rev. 669, 674 (1989) (discussing features of repurchase agreements). [Back To Text](#)

⁶⁰ Both repos and collateralized loans involve temporary exchange of a security for cash. In both transactions, at maturity the cash is returned to the initial seller, plus a transaction charge, and the security is returned to the initial buyer. With both transactions the security is marked to market on a daily basis so, if the collateral value drops, the buyer can request additional collateral. In both transactions the institution providing the cash is not exposed to market risk, since a fluctuation in the market value of the underlying security will not affect the investor's return. See In re County of Orange, 31 F. Supp.2d at 777. See, e.g., Osenton, supra note 58, at 674–75 (asserting that "[a] repurchase transaction possesses several qualities of a secured loan" and discussing such qualities); Gary Walters, Note, Repurchase Agreements and the Bankruptcy Code: The Need For Legislative Action, 52 Fordham L. Rev. 828, 829, 837–841 (1984) (discussing fact that repurchase transactions may be considered secured loans and analyzes characteristics that favor such classification). [Back To Text](#)

⁶¹ See In re County of Orange, 31 F. Supp.2d at 777 (stating "[A] reverse repo is different from a collateralized loan. A lender on a secured loan takes collateral. A repo buyer takes title."); see also SEC v. Drysdale Sec. Corp., 785 F.2d 38, 41 (2d Cir. 1986) (stating "most significant difference between repos and a standard collateralized loans . . . [is that] [i]n the later transaction the lender hold pledged collateral for security and may not sell it in the absence of a default. In contrast, repo 'lenders' take title to the securities received and can trade, sell or pledge them."); Cohen v. Army Moral Support Fund (In re Bevill, Bresler & Schulman Asset Mgmt. Corp.), 67 B.R. 557, 596–597 (D.N.J. 1986) (holding "[t]he repo buyer's unrestricted right to trade the securities during the term of the agreement represents an incident of ownership which does not pass to a secured lender in a collateralized transaction."). [Back To Text](#)

⁶² See U.C.C. § 9–102(1)(a) (1972) (stating "(1) Except as otherwise provided in § 9–104 on excluded transactions, this Article applies (a) to any transaction (regardless of form) which is intended to create a security interest in personal property . . . "); see also U.C.C. § 9–102 official cmt. 1 (1972) (stating "[T]he principal test whether a transaction comes under this Article is: is the transaction intended to have effect as security?"); Aicher, supra note 50, at 194 (explaining what courts look to when trying to characterize "repos" and includes in that courts look to intent of parties in light of all facts and circumstances underlying such transaction); Walters, supra note 59, at 836 (explaining that in determining how to characterize repo transactions one should look to any master repurchase agreement in trying to determine intent between parties). [Back To Text](#)

⁶³ See Granite Partners L.P. v. Bear Stearns & Co., Inc., 17 F. Supp.2d 275, 300–304 (S.D.N.Y. 1998). [Back To Text](#)

⁶⁴ See id. at 304. [Back To Text](#)

⁶⁵ See id. (noting "because the PSA Agreement is not ambiguous, because it clearly provides that the parties intended the transaction to be treated as a purchase and sale, and because such a finding is consistent with the practices and expectations of the securities industry [citation omitted], Count XI of the Complaint is dismissed as to Bear Stearns and DLJ . . ." (Emphasis added.)). [Back To Text](#)

⁶⁶ Id. (stating "unlike the PSA Agreement, it [the trade confirmations] does not contain an unequivocal expression of intent. In cases where the express terms of a contract or agreement are ambiguous, unclear, or conflicting, and the intended meaning and operation of the contract cannot reasonably be derived from the 'four corners of the writing,' courts allow the 'introduction and examination of extrinsic evidence of intent as an aid in interpretation.'"). [Back To Text](#)

⁶⁷ Course of dealing and usage of trade would, of course, continue to be relevant to interpretation of the contract. See U.C.C. § 1–205 (1972) (defining course of dealing and usage of trade and setting forth their use as tools for interpretation). [Back To Text](#)

⁶⁸ While Official Comment 2 to U.C.C. § 9–109 (1999) recites that the revised section was not intended to effect a "change in meaning" from former U.C.C. § 9–102(1), the omission of the specific reference to the intent of the parties should nonetheless reduce the scope of evidence relevant to determining the question of whether a transaction is other than a secured one. See U.C.C. § 9–109 official cmt. 2 (1999) (setting forth intentions behind revisions). [Back To Text](#)

⁶⁹ Revised Article 9 also extends its "non–reach" to absolute sales of other interests which will advance securitization of those assets. See infra text accompanying notes 81–89. [Back To Text](#)

⁷⁰ 815 P.2d 1013, 1015 (Colo. Ct. App. 1991) [Back To Text](#)

⁷¹ See Virginia Nat'l Bank v. Phoenix Marine Corp. (In re Phoenix Marine Corp.), 20 B.R. 424 (Bankr. E.D. Va. 1982) (ruling "general intangibles" encompassed proceeds from lawsuit). Other courts have disagreed with this conclusion. But see Owen v. CNA Ins./Cont'l Cas. Co., 750 A.2d 211, 215 (N.J. Super. Ct. App. Div. 2000) (agreeing that Article 9 excludes proceeds of tort claims); Meridian Bank v. Bell Fuel Corp. (In re Bell Fuel Corp.), 97 B.R. 193, 194 (Bankr. E.D. Pa. 1989), rev'd, 99 B.R. 602 (E.D. Pa. 1989) (concluding exemptions of interests in insurance policies or claims prevented bank from extending security interest to all "general intangibles"). Whether Bowlen was correctly decided is not relevant to the fundamental issues created by the expansion of the scope or Revised Article 9. [Back To Text](#)

⁷² See Bowlen v. Fed. Deposit Ins. Corp., 815 P.2d 1013, 1015 (Colo. Ct. App. 1991) (involving claim arising out of loan, although principles related to proceeds, perfection and priority equally applicable to commercial tort claims); see also Bd. of County Comm'rs of County of Adams v. Berkeley Vill., 580 P.2d 1251, 1255 (Colo. Ct. App. 1978) (holding anticipated proceeds from cause of action "general intangibles" within U.C.C.); Friedman, Lobe & Block v. C. L. W. Corp., 512 P.2d 769, 771 (Wash. Ct. App. 1973) (assignment of anticipated proceeds within "general intangibles" under U.C.C.). [Back To Text](#)

⁷³ See U.C.C. § 9–104 (k) (1972) (stating "This Article does not apply . . . (k) to a transfer in whole or in part of any claim arising out of tort . . ."); see also Jonas v. United States Small Bus. Admin. (In re Southland Supply, Inc.), 657 F.2d 1076, 1080 (9th Cir. 1981) (providing that security interest portions of California U.C.C. do not apply to transfers arising out of tort). [Back To Text](#)

⁷⁴ Bowlen, 815 P.2d at 1015. [Back To Text](#)

⁷⁵ See id.; see also El Paso County Bank v. Charles R. Milisen & Co., Inc., 622 P.2d 594, 596 (Colo. Ct. App. 1980) (recognizing bank's status as secured creditor not extinguished by creditor's garnishment). [Back To Text](#)

⁷⁶ See U.C.C. § 9–504 (1999) (providing that "all assets" financing statements, although not "all assets" security agreements, are valid under Revised Article 9); id. § 9–204 (b) (stating that notwithstanding assertions in security agreements and financing statements, preexisting lenders will not automatically have security interest in borrower's commercial tort claims because commercial tort claims cannot be encumbered by after–acquired property clauses); id. § 9–108(e) (asserting that collateral must be described with some specificity). [Back To Text](#)

⁷⁷ See U.C.C. § 9–109 official cmt. 15 (1999) (noting "that once a claim arising in tort has been settled and reduced to a contractual obligation to pay, the right to payment becomes a payment intangible and ceases to be a claim arising in tort"). [Back To Text](#)

⁷⁸ See U.C.C. § 9–10 (d)(12) (1999) (stating "This article does not apply to . . . an assignment of a claim arising in tort, other than a commercial tort claim, but Sections 9–315 and 9–322 apply with respect to proceeds and priorities in proceeds"); id. § 9–315 (delineating secured party's rights on disposition of collateral and in proceeds); id. § 9–322 (explaining priorities among conflicting security interests in and agricultural liens on same collateral). [Back To Text](#)

⁷⁹ See U.C.C. § 9–315(c) (1999) (stating "A security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected."). [Back To Text](#)

⁸⁰ See id. § 9–315(d) (stating "A perfected security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds . . ."). Note that the period of automatic perfection under Revised Article 9 is ten days longer than under former law. See, e.g., U.C.C. § 9–306 (3) (1972) (noting [security interest] ceases to be perfected after 10 days). [Back To Text](#)

⁸¹ See U.C.C. § 9–315(d)(3) (1999) (stating "A perfected security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds unless . . . (3) the security interest in the proceeds is perfected other than under subsection (c) [automatic temporary perfection] when the security interest attaches to the proceeds or within 20 days thereafter."); see also U.C.C. § 9–315 official cmt. 4 (1999) (noting "[g]enerally, a security interest in proceeds becomes unperfected on the 2 day after the security interest attaches to the proceeds."). [Back To Text](#)

⁸² The neologism "securitizable" reflect the classes of obligations that a debtor (originator) may package and sell to another the special purpose corporation. See Meredith S. Jackson, Leap of Faith: Asset-Based Lending to Asset-Backed Securitization – A Case Study, 2 *Stan. J.L. Bus. & Fin.* 193, 197 (1995) (describing securitizable assets in terms of those that can be rapidly monetarized such as commercial loan receivables and trade accounts receivable). Other securitizable assets include residential mortgage loans and even music royalties. See Teresa N. Kerr, Note, *Bowie Bonding in the Music Biz: Will Music Royalty Securitization be the Key to the Gold for Music Industry Participants?*, 7 *UCLA Ent. L. Rev.* 367, 381 (2000) (outlining David Bowie's music royalty securitization); see also Fischer v. First Chicago Capital Mkts., Inc., 195 F.3d 279, 281 (1999) (detailing securitization of healthcare accounts receivable). [Back To Text](#)

⁸³ See Schwarcz, supra note 49, at 949 (stating "[w]hereas factoring was the only significant form of commercial financing to involve sales of financial assets (accounts and chattel paper) when the UCC originally was adopted, securitization – which involves the sale of a whole range of financial assets – has now become significant."); see also Lupica, supra note 49, at 596 n.3 ("Factoring originated in England in the fourteenth century as a way for textile manufacturers to liquidate their accounts receivable."). [Back To Text](#)

⁸⁴ See generally Henry Hansmann & Reiner Kraakman, The Essential Role of Organizational Law, 110 *Yale L.J.* 387, 420–421 (2000) (stating "In a typical asset securitization transaction, a corporation transfers some of its assets (say, its accounts receivable) to a wholly owned subsidiary corporation created just for purposes of the transaction. The subsidiary in turn issues bonds backed by the accounts receivable, paying the receipts from the bond issue to the parent corporation as compensation for those assets."). But see *The Steinhardt Group, Inc., v. Citicorp*, No. 96–15–SLR, 1996 U.S. Dist. LEXIS 20552, at *30 (D. Del. Dec. 2, 1996) (treating bond sale as separate transaction from securitization). [Back To Text](#)

⁸⁵ See generally *The Steven A. Goldberg Co. v. Remsen Partners, Ltd.*, 170 F.3d 191, 192–93 (D.C. Cir. 1999) (noting "[a]ccording to the record securitized financing is a method of raising money by creating marketable securities from an income-producing asset."); Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1104 (3d Cir. 1997) (describing securitization as "a process that involves the sale of accounts receivable or loan paper to a specially created trust that in turn sells interests or securities in that trust."); Lupica, supra note 49, at 599 (describing securitization and its risks). [Back To Text](#)

⁸⁶ See Anthony Saunders, et al., The Economic Implications Of International Secured Transactions Law Reform: A Case Study, 20 U. Pa. J. Int'l Econ. L. 309, 320–321 (1999) ("Since the first use of pass-through bonds involving government agencies as quasi-guarantors to securitize fixed rate mortgage loans in the early 1970s, the securitization technique has been successfully extended to a variety of other assets. As the transaction costs of using available securitization technology have declined, the advantages to financial institutions have become more apparent."). [Back To Text](#)

⁸⁷ See U.C.C. § 9–102 (b) (1972) (stating "(1) Except as otherwise provided in § 9–104 on excluded transactions, this Article applies . . . (b) to any sale of accounts or chattel paper."). See generally U.C.C. § 9–109(a)(3) (1999) (adding "payment intangibles" and "promissory notes" to scope of article); U.C.C. § 9–109 official cmt. 4 (1999) (explaining treatment of new additions to article). [Back To Text](#)

⁸⁸ "Safely" was, of course, a relative term as the Octagon result demonstrated. See Octagon Gas Sys., Inc. v. Rimmer (In re Meridian Reserve, Inc.), 995 F.2d 948, 957 (10th Cir. 1993) (treating pre-petition sale of accounts as property of estate); supra text accompanying notes 28–41. [Back To Text](#)

⁸⁹ Christopher W. Frost, Asset Securitization and Corporate Risk Allocation, 72 Tul. L. Rev. 101, 128 (1997) ("[I]f the asset securitization fails to completely segregate the assets by eliminating all of the debtor-originator's ownership interest, the securitized assets will be property of the estate and available for use in the reorganization . . ."). [Back To Text](#)

⁹⁰ See U.C.C. § 9–109 (a)(3) (1999) (stating "(a) Except as otherwise provided in subsections (c) and (d), this article applies to . . . (3) a sale of accounts, chattel paper, payment intangibles, or promissory notes . . ."). [Back To Text](#)

⁹¹ See U.C.C. § 9–318(a) (1999) (providing that debtor who sells assets from any of four listed classes "does not retain a legal or equitable interest" in them); id. § 9–318 (b) (providing no protection for subsequent purchasers or creditors in cases of sales of payment intangibles or promissory notes). [Back To Text](#)

⁹² See U.C.C. § 9–104(j) (1972) (stating "This Article does not apply . . . (j) except to the extent that provision is made for fixtures in § 9–313, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder . . ."); see also Barclays Am./ Bus. Credit, Inc., v. Leonard (In re Standard Conveyor Co.), 773 F.2d 198, 204 (8th Cir. 1985) (interpreting rents as excluded from article 9 security interests). [Back To Text](#)

⁹³ See infra text accompanying notes 188–192 for a description of some of the effects of Revised Article 9 on the perfection and priority of security interests in fixtures. See generally U.C.C. § 9–109 (1999) (relating general scope of article 9). [Back To Text](#)

⁹⁴ See U.C.C. § 9–109 (d)(11) (1999):

- a. This article does not apply to . . . (11) the creation or transfer of an interest in or lien on real property, including a lease or rents thereunder, except to the extent that provision is made for . . . (A) liens on real property in Sections 9–203 and 9–308; (B) fixtures in Section 9–334; (C) fixture filings in Sections 9–501, 9–502, 9–512, 9–516, and 9–519; and (D) security agreements covering personal and real property in Section 9–604 . . .

Id. U.C.C. § 9–109 official cmt. 10 (1999) (covering interests in real property). [Back To Text](#)

⁹⁵ See U.C.C. § 9–106 (1995) (stating "account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by instrument or chattel paper, whether or not it has been earned by performance); Plymouth Sav. Bank v. I.R.S., 187 F.3d 203, 207–208 (1st Cir. 1999) (noting treasury regulation modeled after U.C.C. 9–106, treasury regulation defined "account" as "any right to payment for goods sold or leased or for services rendered"); Commerce Bank v. Chrysler Realty Corp., 76 F. Supp. 2d 1113, 1118 (D. Kan. 1999) (noting dealers accounts receivable were accounts within 9–106 because there was a right to payment for services rendered). [Back To Text](#)

⁹⁶ See U.C.C. § 9–102 (a)(2) (1999):

(2) "Account", except as used in "account for", means a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a State, governmental unit of a State, or person licensed or authorized to operate the game by a State or governmental unit of a State. The term includes health–care–insurance receivables. The term does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter–of–credit rights or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.

Id.; see also Rosenfeld v. Port Auth., 108 F. Supp. 2d 156, 162 (E.D.N.Y. 2000) (noting 9–102 (1)(a)(2) security interest is an interest securing payment of performance of obligation); U.S. Test. Inc. v. NDE Env'tl. Corp., 196 F.3d 1376, 1382 (Fed. Cir. 1999) (noting that under 9–102(a)(42) general intangibles include payment intangibles). [Back To Text](#)

⁹⁷ See U.C.C. § 9–102 (a)(64) (1999) (defining "proceeds" in terms of collateral); id. § 9–102 (a)(12) (defining "collateral" as "property subject to a security agreement."); id. § 9–102 (a)(73) (providing that "security agreement" creates security interest); id. § 9–109 (stating "this article applies to . . . a transaction, regardless of form, that creates a security interest in personal property . . ."); id. § 9–109 (a)(1). The drafters of Revised Article 9 clearly knew how to describe collateral in terms ultimately of personal property. The use of the unlimited term "property" in the definition of "account" can only mean that accounts generated by the sale of real estate fall within its ambit. [Back To Text](#)

⁹⁸ See U.C.C. § 9–102 (a)(77) (1999); In re Bennett Funding Group v. Breeden, 234 B.R. 600, 606 (N.D.N.Y. 1999) (noting comment to 9–102 states certain sales have nothing to do with commercial financing and are excluded by 9–104 (f)); In re Contractors Equip. Supply. Co., 861 F.2d 241, 245 (9th Cir. 1988) (noting Article 9 applies to transactions involving security interests in accounts receivable and transactions that involve sales of accounts receivable). [Back To Text](#)

⁹⁹ See U.C.C. § 9–304 (1) (1972) ("A security interest in . . . instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession . . ."); Omega Env'tl. Inc. v. Valley Bank (In re Omega Env'tl. Inc.), 219 F.3d 984, 986 (9th Cir. 2000) (noting under 9–304 bank had perfected security interest in Certificate of Deposit since bank had possession); Ryan v. Zinker (In re Sprint Mortgage Bankers Corp.), 177 B.R. 4, 7 (Bankr. E.D.N.Y. 1995) (noting party must take possession of note to perfect security interest). [Back To Text](#)

¹⁰⁰ See U.C.C. § 9–312 (a) (1999) ("A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing."); Falconbridge U.S., Inc. v. Bank One Ill., (In re Vic Supply Co., Inc.), 227 F.3d 928, 930 (7th Cir. 2000) (noting creation of security interest is not required to precede the filing of the financing statement). See generally C. Scott Pryor, Revised Uniform Commercial Code Article 9: Impact in Bankruptcy, 7 Am. Bankr. Inst. L. Rev. 465, n.68 (1999). [Back To Text](#)

¹⁰¹ See U.C.C. § 9–102 (3) (1972); In re Churchill Mortgage Inv. Corp., 233 B.R. 61, 70 (S.D.N.Y. 1999) (citing 9–102(3) and rejecting plaintiffs argument that Article 9 does not apply in deciding rights of parties to real property); In re D.J. Maltese, Inc., 42 B.R. 589, 591 (Bankr. E.D. Mich. 1984) (opining under 9–102(3) right to receive payment under contract of sale is personal property). [Back To Text](#)

¹⁰² See U.C.C. § 9–104 (j) (1972); In re Kavolchuck, 154 B.R. 793, 797 (S.D.Fla. 1993) (stating Article 9 does not cover security interests in real property leases or rents collected); First Fed. Sav. v. City Nat'l Bank, 87 B.R. 565, 568 (Bankr. W.D.Ark. 1988) (noting because of 9–104(j) the argument that security interest was created by filing U.C.C. financing statements because rent was characterized as realty fails). [Back To Text](#)

¹⁰³ See, e.g., *In re Anthony*, No. 90–2146, 1992 U.S. App. LEXIS 17577, at *14 (10th Cir. July 21, 1992) (noting when mortgagee pledges a note 9–102(3) applies to the security interest); SEC v. Elliott, 953 F.2d 1560, 1580 (11th Cir. 1992) (noting pledging the note creates security interest in an instrument); First Nat'l Bank of Boston v. Larson (In re Kennedy Mortgage Co.), 17 B.R. 957, 959 (Bankr. D.N.J. 1982) (explaining that creditor had possession of notes but had not recorded assignments of mortgages securing the notes held to be perfected in the mortgages). [Back To Text](#)

¹⁰⁴ See Peoples Bank of Polk County v. McDonald (In re Maryville Savings & Loan), 743 F.2d 413 (6th Cir. 1984) (explaining that assignee of mortgages recorded assignments but did not take possession of the notes); Elliott, 953 F.2d at 1580 (noting assignment passed security interest to creditor); In re Mortgage Inv. Corp., 625 F.2d 281, 284 (9th Cir. 1980) (stating recording assignment of mortgage gives constructive notice of assignee's interest). [Back To Text](#)

¹⁰⁵ 743 F.2d 413 (6th Cir. 1984). [Back To Text](#)

¹⁰⁶ Debtor, through its duly authorized officers, executed a "Promissory Note, Security Agreement and Disclosure Statement" on June 10, 1981. The document provided for the payment, upon demand, by debtor to plaintiff of the principal sum of \$75,000, together with interest from the date of execution until the date of payment at the rate of 18% per annum. See id. at 414. [Back To Text](#)

¹⁰⁷ As collateral for the loan, debtor assigned to plaintiff all rights in certain promissory notes and deeds of trust encumbering real property located in Blount County, Tennessee. This assignment was accomplished by debtor's execution of a "General Assignment of Promissory Note and Trust Deeds." This assignment was duly recorded with the Register of Deeds of Blount County, Tennessee, on June 15, 1981, the usual manner for recordation in Tennessee of interests in real estate. See id. [Back To Text](#)

¹⁰⁸ Defendant [chapter 11 debtor] asserted that plaintiff's failure to take actual possession of the notes and deeds of trust prevented perfection of plaintiff's security interest under Uniform Commercial Code § 9–304 (1). Id. at 415. [Back To Text](#)

¹⁰⁹ Id. [Back To Text](#)

¹¹⁰ See Peoples Bank of Polk County v. McDonald (In re Maryville Savings & Loan), 743 F.2d 413, 416 (6th Cir. 1984) ("We are persuaded that § § 9–102 (3) and 9–104 (j) may be reconciled by holding in this case that article nine be applied in regard to the promissory notes but not in regard to the deeds of trust"). [Back To Text](#)

¹¹¹ See id. at 416–417 ("Since plaintiff did not take possession of the notes, plaintiff's security interest in the notes was not perfected"). [Back To Text](#)

¹¹² See id. at 417 (stating "[P]laintiff's security interest in the deeds of trust is therefore deemed to be a perfected interest."). The decision of the Court of Appeals left the parties nonplussed; both sought clarification of what the debtor was do with the funds it had collected and continued to hold. The Court held in favor of the debtor. It concluded that the deeds of trust "did not render the transaction predominantly real estate related" under Tennessee law. Thus, the trustee's claim to the proceeds of the notes secured by the deeds of trust prevailed over the assignee bank which had failed to perfect its interest in the notes under the U.C.C. See id. [Back To Text](#)

¹¹³ "[I]t is implicit from subsection (b) [of U.C.C. § 9–109 (1999)] that one cannot obtain a security interest in a lien, such as a mortgage on real property, that is not also coupled with an equally effective security interest in the secured obligation." U.C.C. § 9–109 official cmt. 7 (1999); see Ryan v. Zinker (In re Sprint Mortgage Bankers Corp.), 177 B.R. 4, 7 (Bankr. E.D.N.Y. 1995) (stating party must take possession of note to create security interest); Bankers Trust Co. v. Battaglia, No. 97–CV–0847E, 1999 U.S. Dist. LEXIS 15465, at *16 (W.D.N.Y. Aug. 20, 1999) (noting Article 9 imposes good faith obligation in enforcement of secured transactions). [Back To Text](#)

¹¹⁴ See U.C.C. § 9–109 official cmt. 7 (1999).

Example 1: O borrows \$10,000 from M and secures its repayment obligation, evidenced by a promissory note, by granting to M a mortgage on O's land. This Article does not apply to the creation of the real-property mortgage. However, if M sells the promissory note to X or gives a security interest in the note to secure M's own obligation to X, this Article applies to the security interest thereby created in favor of X. The security interest in the promissory note is covered by this Article even though the note is secured by a real-property mortgage. Also, X's security interest in the note gives X an attached security interest in the mortgage lien that secures the note and, if the security interest in the note is perfected, the security interest in the mortgage lien likewise is perfected.

Id.; see also Milledgeville Cmty. Credit Union v. Corn, 716 N.E.2d 864, 868 (Ill. 1999) (stating filing is not required to perfect purchase money interest in consumer goods). [Back To Text](#)

¹¹⁵ See U.C.C. § 9-203 (f) ("The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by § 9-315 and is also attachment of a security interest in a supporting obligation for the collateral."); § 9-308(e) ("Perfection of a security interest in a right to payment or performance also perfects a security interest in a security interest, mortgage, or other lien on personal or real property securing the right."); Kunkel v. Sprague Nat'l Bank, 128 F.3d 636, 640 (8th Cir. 1997) (noting there was no right in collateral since the transaction was not present sale). [Back To Text](#)

¹¹⁶ See U.C.C. § 9-306 (1) (1972):

"Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement. Money, checks, deposit accounts, and the like are "cash proceeds". All other proceeds are "non-cash proceeds".

Id.; In re Certain Pharm. & Proceedings of Northland Providers, Inc., 78 F.2d 954, 962 (D. Minn. 1999) (noting in § 9-306 after transfer of collateral security interest continues in collateral and proceeds); Midlantic Commercial Co. v. Prime Sportswear Corp., No. 95 Civ. 10192, 1999 U.S. Dist. LEXIS 13238, at *12 (S.D.N.Y. Aug. 26, 1999) (stating under 9-306(1) proceeds include anything received upon sale, exchange, collection or other disposition of collateral). [Back To Text](#)

¹¹⁷ FDIC v. Hastie (In re Hastie), 2 F.3d 1042 (10th Cir. 1993). [Back To Text](#)

¹¹⁸ Id. at 1044:

The receipt of cash dividends by a registered owner of certificated securities bears no resemblance to the events specified in the definition of proceeds or to an act of disposition generally. Common stock represents an ownership interest in the issuing corporation. [Citation omitted.] Under Oklahoma law, a cash dividend is a distribution of the issuing corporation's capital surplus or retained earnings. Okla. Stat. Ann. tit. 18, 1049 (West 1986). Thus, although the cash dividend distributes assets of the corporation, it does not alter the ownership interest represented by the stock. The cash dividend, therefore, is not a disposition of the stock.

[Id.](#) [Back To Text](#)

¹¹⁹ See U.C.C. § 9-306 (1) (1996):

1. "Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement. Any payments or distributions made with respect to investment property collateral are proceeds. Money, checks, deposit accounts, and the like are "cash proceeds". All other proceeds are "non-cash proceeds."

Id. (Emphasis added). See generally Conagra, Inc. v. Farmers State Bank, 237 Mich. App. 109, 121 (holding government disaster relief check for crops was identifiable proceeds); Drewes v. Lesmeister (In re Lesmeister), 242 B.R. 920, 925 (Bankr. D. N.D. 1999) (holding disaster relief payments for crops were proceeds). [Back To Text](#)

¹²⁰ Gen. Elec. Credit Corp. v. Cleary Bros. Constr. Co., Inc. (In re Cleary Bros. Constr. Co., Inc.), 9 B.R. 40, 41 (Bankr. S.D. Fla. 1980) ("The money sought by plaintiff was not received when the collateral was sold, exchanged or collected. The words 'otherwise disposed of' related to a permanent or final conversion, not a temporary use"). [Back To Text](#)

¹²¹ See, e.g., CLC Equip. Co. v. Brewer (In re Value-Added Communs.), 139 F.3d 543, 545 (5th Cir. 1998) (discussing equipment lease that included proceeds from collateral); In re Keneco Fin. Group, Inc. 131 B.R. 90, 96 (Bankr. N.D. Ill. 1991) (holding that rent received was proceeds of chattel paper leases); Feldman v. The Phila. Nat'l Bank (In re Leasing Consultants Inc.), 408 F.Supp. 24, 37-38 (E.D. Pa. 1976) (noting secured party is entitled to rent which represents proceeds of chattel paper). [Back To Text](#)

¹²² See U.C.C. § 9-102 (a)(64) (1999):

(64) "Proceeds" means the following property:

- A. whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;
- B. whatever is collected on, or distributed on account of, collateral;
- C. rights arising out of collateral;

(D) to the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral; or

(E) to the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.

Id. See, e.g., In re Value-Added Communs., 139 F.3d at 546 (applying definition of proceeds); FDIC v. Hastie (In re Hastie), 2 F.3d 1042, 1045 (10th Cir. 1993) (applying definition of proceeds). [Back To Text](#)

¹²³ The incorporation of the expanded definition of proceeds into Revised Article 9's deficiency calculation formula may open the door for trustees to eliminate deficiency claims by secured creditors which conduct a sale of collateral that is not commercially reasonable. Revised U.C.C. § 9-626 provides that:

- a. In an action arising from a transaction, other than a consumer transaction, in which the amount of a deficiency or surplus is in issue, the following rules apply:

(2) Except as otherwise provided in Section 9-628, if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of:

(A) the proceeds of the collection, enforcement, disposition, or acceptance; or

(B) the amount of proceeds that would have been realized had the non-complying secured party proceeded in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

Id. Consider a situation where a secured creditor who is owed a debt of \$300,000 simply discards its repossessed collateral because it is worthless in its current condition. Had the creditor spent \$100,000 to repair the collateral, it would have sold for \$300,000. The hypothetical sale proceeds would have covered both debt and the cost of preparation for sale. One might think that the creditor's deficiency should be reduced to \$200,000, giving the secured creditor credit for the \$100,000 it didn't spend. Such will not be the case under Revised U.C.C. § 9-626 (a)(2)(B)

because the debtor gets credit for what would have been received had the secured creditor conducted a commercially reasonable sale. In cases where the trustee can establish that a disposition of repossessed collateral was not commercially reasonable, she can object to the deficiency claim to the extent the secured creditor could have reduced the deficiency by the expenditure of additional funds. The trustee's objection would extend to not only the margin between the contribution of value and the hypothetical selling price, but would include the amount of the contribution itself. [Back To Text](#)

¹²⁴ See U.C.C. § 9–312 (3) (1972):

1. A perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory and also has priority in identifiable cash proceeds received on or before the delivery of the inventory to a buyer . . .

Id.; see also Kunkel v. Sprague Nat'l Bank, 128 F.3d 636, 646 (8th Cir. 1997) (discussing higher priority of identifiable cash proceeds received on or before the delivery of inventory to a buyer); Sony Corp. of Am. v. Bank One, 85 F.3d 131, 133 (4th Cir. 1996) (discussing priority for identifiable cash proceeds from sale of inventory). [Back To Text](#)

¹²⁵ Rev. U.C.C. § 9–324 (b) (1999):

(b) Subject to subsection (c) and except as otherwise provided in subsection (g), a perfected purchase–money security interest in inventory has priority over a conflicting security interest in the same inventory, has priority over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper, if so provided in Section 9–330, and, except as otherwise provided in Section 9–327, also has priority in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer.

[Id. Back To Text](#)

¹²⁶ 886 F.2d 1449 (5th Cir. 1989). [Back To Text](#)

¹²⁷ See id. at 1450. [Back To Text](#)

¹²⁸ See id. Back To Text

¹²⁹ See id. (stating "[S]ubsequent to the assignments, Raytheon filed financing statements in specific accounts receivable of Howe. Between July 1983 and December 1984, Raytheon collected over \$ 850,000.00"). [Back To Text](#)

¹³⁰ See id. (stating "[B]y November 1984, Howe had defaulted on its obligations to MBank and DuPont. MBank and DuPont, pursuant to their security interests, demanded payment from Raytheon from the accounts receivable that it had collected."). [Back To Text](#)

¹³¹ See id. at 1450–1451. [Back To Text](#)

¹³² See Mbank Alamo Nat'l Ass'n v. Raytheon Co., 886 F.2d 1449, 1452 (5th Cir. 1989) (stating "[W]e view this as a two–step transaction in which Raytheon first advanced machines to Howe for retail sale and, once these machines were sold, Howe then assigned the accounts receivable to Raytheon"). [Back To Text](#)

¹³³ See id. (stating "[U]nder § 9–312(c), a PMSI inventory is limited to that inventory or to 'identifiable cash proceeds received on or before the delivery of the inventory to a buyer. . . '"). [Back To Text](#)

¹³⁴ See supra note 123. It is true that the second paragraph of Official Comment 8 to Rev. U.C.C. § 9–324 (1999) states that "the purchase–money priority in inventory does not carry over into proceeds consisting of accounts or chattel paper." U.C.C. § 9–324 official cmt. 8 (1999) (Emphasis in the original.) However, the immediately following

paragraph notes that

[T]he purchase–money priority in inventory does carry over to proceeds consisting of chattel paper and its proceeds . . . to the extent provided in Section 9–330. Under Section 9–330(e), the holder of a purchase–money security interest in inventory is deemed to give new value for proceeds consisting of chattel paper. Taken together, Sections 9–324(b) and 9–330(e) enable a purchase–money inventory secured party to obtain priority in chattel paper constituting proceeds of the inventory, even if the secured party does not actually give new value for the chattel paper, provided that the purchase–money secured party satisfies the other conditions for achieving priority. (Emphasis in the original.)

Id. Back To Text

¹³⁵ See infra note 238; Patterson v. Ford Motor Credit Co., No. 98–2771, 2000 U.S. App. Lexis 1303, at *9 (4th Cir. 2000) (noting monetary obligation and security interest in specific goods qualify as chattel paper); In re Vienna Park Props., 976 F.2d 106, 116 (2d Cir. 1992) (noting monetary obligation and security interest constitute chattel paper). Back To Text

¹³⁶ U.C.C. § 9–315 (d)(1) (1999):

a. A perfected security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds unless:

1. the following conditions are satisfied:

(A) a filed financing statement covers the original collateral;

(B) the proceeds are collateral in which a security interest may be perfected by filing in the office in which the financing statement has been filed; and

(C) the proceeds are not acquired with cash proceeds.

Id.; see also In re Reliance Equities, Inc., 966 F.2d 1338, 1343 (10th Cir. 1992) (discussing automatic perfection); Aircraft Trading & Servs., Inc. v. Braniff, Inc., 819 F.2d 1227, 1235 (2d Cir. 1987) (same). Back To Text

¹³⁷ 205 B.R. 407 (Bankr. D. Minn. 1997). Back To Text

¹³⁸ The court first determined that the consignment was a disguised secured transaction. See id. at 411. Back To Text

¹³⁹ See id. at 409 (stating "[D]ebtor sold a portion of the consigned rugs but failed to remit the proceeds from the sales to Yashar as provided by their agreement. Instead, the Debtor invested the proceeds from the sale of Yashar's rugs into the purchase of replacement rug inventory or otherwise retained the proceeds."). Back To Text

¹⁴⁰ Id. at 410 (stating "[Y]ashar argues that, although the originally consigned rugs are no longer possessed by the Debtor, Yashar is entitled to a secured claim against the Debtor's current inventory as proceeds arising from the Debtor's sale of the consigned rugs."). Back To Text

¹⁴¹ See id. at 411 (quoting C.O. Funk & Son, Inc. v. Sullivan Equip., Inc., 92 Ill. App. 3d 659, 664 (1981); Ford Motor Credit Co. v. Troy Bank & Trust Co., 76 B.R. 836, 837 (Bankr. M.D. Ala. 1986) (noting need for identifiable proceeds to recover money from sale of collateral); In re Armstrong, 56 B.R. 781, 787 (Bankr. W. D. Tenn. 1986) (noting security interest continues in any identifiable proceeds from sale of collateral). Back To Text

¹⁴² U.C.C. § 9–315 (1999):

(a) Except as otherwise provided in this article and in Section 2–403(2): . . .

(2) a security interest attaches to any identifiable proceeds of collateral.

(b) Proceeds that are commingled with other property are identifiable proceeds:

1. if the proceeds are goods, to the extent provided by Section 9–336 . . .

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¹⁴³ U.C.C. § 9–336 (c) (1999). Back To Text

¹⁴⁴ See id. (providing that "a security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected" thereby eliminating any initial perfection problems, either); see also U.C.C. § 9–315 (d) (1999) (noting that continuation of perfection for more than 20 days may be issue, but probably not in most cases); supra text accompanying note 133 (discussing trustee's avoiding powers with respect to claims of purchase money lenders). Back To Text

¹⁴⁵ See, e.g., ITT Commercial Fin. Corp. v. Bank of the West (In re Compu–Centro, USA, Inc.), 37 F. Supp. 2d 829, 835 (W.D. Tex. 1996), rev'd 166 F.3d 295 (5th Cir. 1999) (detailing subsequent incorporation of partnership). See generally Crews v. First Union Nat'l Bank of Fla. (In re Michelle's Hallmark Cards & Gifts, Inc.), 219 B.R. 316 (Bankr. M.D. Fla. 1998) (noting subsequent incorporation of four alleged sole proprietors); Budsberg v. Premier Credit Co. (In re Kincaid), 218 B.R. 965 (Bankr. W.D. Wash. 1998). Back To Text

¹⁴⁶ 164 B.R. 34, 37 (Bankr. M.D. Pa. 1993) (holding that bank's security interest in inventory of partnership continued after partnership's incorporation but did not attach to newly acquired corporate assets); see In re Just for Kids, Inc., 150 B.R. 123, 124–25 (Bankr. M.D. Pa. 1992) (stating that creditor's security interest in sole proprietorship's assets could not attach to assets acquired after incorporation); Bank of Yellville v. Scott (In re Scott), 113 B.R. 516, 522–23 (Bankr. W.D. Ar. 1990) (maintaining that creditor's security interest in debtor's property did not extend to inventory acquired by debtor after incorporation). Back To Text

¹⁴⁷ In re Spirit of the West, 164 B.R. at 35.

In June of 1989, Northeastern Bank of Pennsylvania ("NEB") made a loan to Grover E. Conklin III ("Conklin") and Patricia A. Krisovitch ("Krisovitch"), individually and trading as Spirit of the West, a partnership, in the amount of Ninety–Five Thousand Dollars (\$ 95,000.00) secured by a mortgage on real estate owned by Conklin and a security interest in the inventory of the partnership. . . . The line of credit was secured by the prior security interest duly perfected by filed financing statements.

Id. Back To Text

¹⁴⁸ See id. (stating "[O]n or about June of 1990, the Debtor was incorporated and the assets of the partnership were conveyed to the new corporate entity."). Back To Text

¹⁴⁹ See id. (stating "NEB has neither alleged nor established that there was any security agreement between itself and the debtor corporation."). Back To Text

¹⁵⁰ See id. at 37 (stating "[T]he prayer of Northeastern Bank of Pennsylvania requesting that this Court enter an Order confirming its perfected first lien security interest in inventory of the Debtor corporation is GRANTED but only to the extent that the Bank can establish that this inventory pre–dated the transfer to the debtor corporation."). Back To Text

¹⁵¹ Id. at 37 (maintaining that first lien of ABC was effective because NEB's security interest did not attach to assets acquired after incorporation). Back To Text

¹⁵² U.C.C. § 9–402 (7) (1972):

(7) A financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or names of partners. Where the debtor so changes his name or in the case of an organization its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time. A filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer.

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¹⁵³ Northeastern Bank of Pa. v. Spirit of the West, Inc. (In re Spirit of the West, 164 B.R. 34, 35 (Bankr. M.D. Pa. 1993) (noting that under UCC § 9–201 such security agreement would have been effective); see LMS Holding Co. v. Core–Mark Mid–Continent, Inc., 50 F.3d 1520, 1525 (10th Cir. 1995) (holding that under U.C.C. § 9–402 (7), filed financing statement is only capable of perfecting security interest in property acquired by debtor prior to filing); Steinberg v. Am. Nat'l Bank & Trust Co. of Chicago (In re Meyer–Midway, Inc.), 65 B.R. 437, 441–43 (Bankr. N.D. Ill. 1986) (noting that U.C.C. § 9–402 (7) permits perfection of security interest by filing of financing statement, but not if financing statement is seriously misleading). Back To Text

¹⁵⁴ LMS Holding Co., 50 F.3d at 442 (holding that financing statement concerning merged corporation and names of premerger borrowers was "seriously misleading" and therefore not effective to perfect creditor's security interest in collateral); see In re Lintz West Side Lumber, Inc., 655 F.2d 786, 791 (7th Cir. 1981) (finding that financing statement was seriously misleading and therefore did not perfect security interest in debtor's assets); In re Hinson and Hinson, Inc., 62 B.R. 964, 968 (Bankr. W.D. Pa. 1986) (maintaining that security interest in debtor's assets was not binding because it was likely that trustee could be seriously misled by financing statement). Back To Text

¹⁵⁵ LMS Holding, 50 F.3d at 1522 (stating "[I]n 1988, MAKO, Inc. ('MAKO'), a chain of convenience stores, granted Coremark a security interest in its inventory, after–acquired inventory, and inventory proceeds. Coremark perfected its security interest by filing a financing statement naming MAKO as the debtor"). Back To Text

¹⁵⁶ See id. (stating "MAKO subsequently filed a chapter 11 bankruptcy petition"). Back To Text

¹⁵⁷ See id. (stating "[A]s part of MAKO's reorganization plan, RMC, an unrelated third party entity, agreed to acquire certain assets in MAKO's convenience stores and take over store operations. The acquired assets included specific inventory subject to Coremark's perfected security interest"). Back To Text

¹⁵⁸ Id. (describing assets that RMC agreed to acquire as part of MAKO's reorganization plan). Back To Text

¹⁵⁹ See LMS Holding Co. v. Core–Mark Mid–Continent, Inc., 50 F.3d 1520, 1522 (10th Cir. 1995) (stating "[O]n July 29, 1992, RMC commenced this adversary proceeding seeking inter alia to avoid Core–mark's asserted security interest in its after–acquired inventory pursuant to 11 U.S.C. 544(a)(1)"). Back To Text

¹⁶⁰ See id. (stating "RMC [argued] that Coremark's security interest in its after–acquired inventory was unperfected because Coremark did not file a financing statement naming RMC as the debtor after RMC acquired the MAKO assets and took over store operations under the MAKO plan."); see also U.C.C. § 9–302(1) (1972) (providing that filing financing statement was only means by which secured creditor could perfect its interests in inventory not in its possession under former Article 9); Rev. U.C.C. § 9–310(a) (1999) (stating same result obtains under Revised Article 9). Back To Text

¹⁶¹ See supra note 151 (stating circumstances under which filing of financing statement is sufficient to perfect security interest). Back To Text

¹⁶² LMS Holding, 50 F.3d at 1523 (stating "[T]hus, the court held that Coremark's financing statement covering the MAKO collateral remained effective and served to perfect its security interest in RMC's after–acquired inventory 'without the necessity of refileing a financing statement in [RMC's] name'"). Back To Text

¹⁶³ See id. (stating "RMC appealed to the district court which reversed the bankruptcy court's holding."). [Back To Text](#)

¹⁶⁴ See id. at 1525 (stating "we conclude the financing statement Coremark filed in the name of MAKO did not perfect its security interest in RMC's after-acquired inventory."); supra note 151 (stating circumstances under which filing of financing statement is sufficient to perfect security interest). [Back To Text](#)

¹⁶⁵ See U.C.C. § 9-203(d) (1999):

(d) A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this article or by contract:

(1) the security agreement becomes effective to create a security interest in the person's property; or the person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

Id. Back To Text

¹⁶⁶ See Quinn v. Teti, No. 99-9433, 2000 U.S. App. LEXIS 27210, at *5-6 (2d Cir. Oct. 27, 2000) (noting that negligence and breach of contract claims depend on whether company has assumed successor liability); see also Davila v. Magna Holding Co., No. 97C 1909, 1998 U.S. Dist. LEXIS 14188, at *8 (N.D. Ill. Aug. 31, 1998) (noting that in Illinois, successor liability is when one corporation sells its assets to another corporation, and successor corporation not liable for debts and liabilities of prior company); Nathan F. Coco, An Examination of Successor Liability in the Post-Bankruptcy Context, 22 J. Corp. L. 345, 346 (1997) (noting that under traditional rule of successor liability, corporation that purchases all, or substantially all, of assets of another corporation does not thereby become liable for predecessor corporation's debts and obligations). There are four well-known exceptions to this rule. An asset-purchasing corporation may be held liable for unknown or contingent claims of its predecessor where: (1) asset-purchasing corporation expressly or impliedly agrees to assume liability; (2) transaction is, in fact, consolidation or merger between two entities; (3) asset-purchasing corporation is mere continuation of predecessor; or (4) transaction is nothing more than fraudulent attempt to avoid liability). See id. at n.4. [Back To Text](#)

¹⁶⁷ See U.C.C. § 9-203 official cmt. 7 (1999). [Back To Text](#)

¹⁶⁸ See id. § 9-203(e):

(e) If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(1) the agreement satisfies subsection (b)(3) with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

1. another agreement is not necessary to make a security interest in the property enforceable.

Id. Back To Text

¹⁶⁹ See supra text accompanying note 157 for portions of MAKO plan of reorganization quoted by Tenth Circuit. This writer is unable to predict whether terms referenced would have been sufficient to have made Coremark's security agreement "effective" within meaning of Revised U.C.C. § 9-203(d)(1). [Back To Text](#)

¹⁷⁰ See U.C.C. § 9-203(d) official cmt. 7 (1999) (stating subsection (e) makes clear that enforceability requirements of subsection (b)(3) are met when new debtor becomes bound under original debtor's security agreement). Subsection (d) explains when new debtor becomes bound. Persons who become bound under paragraph (2) are limited to those who both become primarily liable for original debtor's obligations and succeed to (or acquire) its assets.

Oddly, this comment does not address meaning of statutory language found at Rev. U.C.C. § 9-203(d)(1). However, U.C.C. § 9-508 official cmt. 3 (1999) can be consulted for amplification. Section 9-203(d) explains when new debtor

becomes bound by original debtor's security agreement. Under § 9–203(d)(1), new debtor becomes bound as debtor if, by contract or operation of other law, the security agreement becomes effective to create security interest in new the debtor's property. For example, if applicable corporate law of mergers provides that when A Corp. merges into B Corp., B Corp. becomes debtor under A Corp.'s security agreement, then B Corp. would become bound as debtor following such merger. Similarly, B Corp. would become bound as debtor if B Corp. contractually assumes A's obligations under security agreement. [Back To Text](#)

¹⁷¹ See [U.C.C. § 9–508\(a\) \(1999\)](#) (discussing financing statement naming original debtor). [Back To Text](#)

¹⁷² See [U.C.C. § 9–402\(7\) \(1972\)](#) (noting that financing statement gives name of debtor). [Back To Text](#)

¹⁷³ See [U.C.C. § 9–506\(c\) \(1999\)](#) (defining "seriously misleading" in purely operational terms: "If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with § 9–503(a), the name provided does not make the financing statement seriously misleading"). [Back To Text](#)

¹⁷⁴ See [id. § 9–508\(b\)](#):

- a. If the difference between the name of the original debtor and that of the new debtor causes a filed financing statement that is effective under subsection (a) to be seriously misleading under Section 9–506:
 1. the financing statement is effective to perfect a security interest in collateral acquired by the new debtor before, and within four months after, the new debtor becomes bound under Section 9–203(d); and
 2. the financing statement is not effective to perfect a security interest in collateral acquired by the new debtor more than four months after the new debtor becomes bound under Section 9–203(d) unless an initial financing statement providing the name of the new debtor is filed before the expiration of that time.

[Id. Back To Text](#)

¹⁷⁵ See [id. § 9–504](#) (noting that "all assets" financing statements are acceptable and such retroactive attachment and perfection may be of substantial value to secured creditor); see also [U.C.C. § 9–402\(7\) cmt. 7](#) (stating that "the old financing statement, if legally still valid under the circumstances, would continue to protect collateral acquired before the change and ...acquired within the four months"); [In re Bailey, 228 B.R. 267, 272 \(Bankr. D. Kan. 1998\)](#) (noting that new financial statement that sufficiently directs searcher to old financial statement gives notice and perfects that interest). [Back To Text](#)

¹⁷⁶ See [Harry C. Sigman, The Filing System Under Revised Article 9, 73 Am. Bankr. L.J. 61, 81 \(1999\)](#) (noting that new debtor may be obligated to secured creditors); see also [William M. Burke, The Duty to Refile Under Section 9–402\(7\) of the Revised Article 9, 35 Bus. Law. 1083, 1089 \(1980\)](#) (stating "[i]n order to perfect any security interest in the new property acquired by the transferee, the secured creditor must either file a financing statement signed by the transferee or take possession of the new property"). [Back To Text](#)

¹⁷⁷ See [George v. Commercial Credit Corp., 440 F.2d 551, 552 \(7th Cir. 1971\)](#) (noting that state law recognized mobile home as fixture); [First Nat'l Bank of Chicago v. Valley Liquors, Inc. \(In re Valley Liquors, Inc.\), 103 B.R. 961, 971 \(Bankr. N.D. Ill. 1989\)](#) (noting that mobile home became chattel when placed on land); [In re Batchelder, 235 F. Supp. 654, 655 \(D. Me. 1964\)](#) (discussing mortgage on mobile home). [Back To Text](#)

¹⁷⁸ See [Commercial Credit Corp., 440 F.2d at 552](#) (stating trustee's argument that mobile home is not fixture); [Shelter Am. Corp. v. Ray, 800 P.2d 743, 745 \(Okla. Ct. App. 1990\)](#) (result subsequently reversed by change in Oklahoma law, 47 Okla. Stat. § 1110.E (1991)). [Back To Text](#)

¹⁷⁹ See In re Reed, 147 B.R. 571, 573 (D. Kan. 1992) (noting that mobile home became fixture when attached to concrete foundation and seller's assigned lost priority for failure to make fixture filing); Williams v. People's First Nat'l. Bank & Trust Co., (In re Allen), 221 B.R. 232, 234 (Bankr. S.D. Ill. 1998) (noting that creditors lien would be in place even if no fixture filing was on record); Hoagland v. Beabout (In re Beabout), 110 B.R. 883, 885 (Bankr. S.D. Ill. 1990) (noting that once mobile home became fixture and not personal property it had to be filed under § 9–313). [Back To Text](#)

¹⁸⁰ See U.C.C. § 9–302(1)(d) (1972) (noting that "a financing statement must be filed to perfect all security interests except...filing is required for a motor vehicle required to be registered; and fixture filing is required for priority over conflicting interests in fixtures to the extent provided in § 9–313"). [Back To Text](#)

¹⁸¹ See Green Tree Acceptance v. Wyoming Nat'l Bank, No. 91–8040, 1993 U.S. App. LEXIS 20090, at *4 (10th Cir. Aug. 2, 1993) (noting that certificate of title listed the owners and lien holder); Nelson v. Smith (In re Smith), 245 B.R. 625, 628 (Bankr. W.D. Mo. 2000) (holding for trustee in avoidance action where creditor had failed to note its lien on certificate of title to mobile home); Williams v. People's First Nat'l. Bank & Trust Co., (In re Allen), 221 B.R. 232, 233 (Bankr. S.D. Ill. 1998) (holding that fixture filing unnecessary to perfect security interest in mobile home if lien noted on title). [Back To Text](#)

¹⁸² 4 B.R. 741 (Bankr. W.D.N.Y. 1980). [Back To Text](#)

¹⁸³ See id. at 742 (noting "Pauline Fink[,] purchased a mobile home from Palmer Mobile Homes [and] entered into a retail installment contract. The security interest was transferred by assignment to Endicott [Trust Company]"). [Back To Text](#)

¹⁸⁴ See id. (stating "Endicott filed a financing statement which described the collateral as 24x52 1977 Bendix"). [Back To Text](#)

¹⁸⁵ See id. (noting "[t]he realty was transferred . . . by Wemco to the bankrupt and the bankrupt gave back to Wemco a purchase money mortgage for the full purchase price"). [Back To Text](#)

¹⁸⁶ See id. (noting "[t]his is an action by the Trustee to avoid a security interest in a mobile house claimed by defendant, Endicott Trust Company of New York"). [Back To Text](#)

¹⁸⁷ A foundation was evacuated. A septic tank was installed. Concrete footers were installed around the edge of the crawl space and at least one pillar of concrete blocks was erected in the center of the crawl space. Concrete blocks were installed and cemented to the footers. After this was done, the house was delivered to the lot in two sections (12' x 52') on steel cradles. The sections with cradles were then placed on the cement blocks. The house sections were bolted together. A roof cap was put on over the place in the roof where the sections were joined together and it was cemented and nailed down. Siding was put on the two ends of the house and nailed over the spot where the joinder of the section occurred to give the appearance of a continuous wall. The septic system was hooked up. Water lines were connected. An electrical line was connected to the store's system and the store's electrical system and capacity were increased. At this point, the top course of cinder blocks were placed in but not cemented to the course immediately below. No tie downs were used in the construction. The house even has an open fireplace, although this hangs on the side of the house. From the pictures in evidence, the house appears to be a normal ranch home without front or back steps.

[Id. Back To Text](#)

¹⁸⁸ Id. at 744. [Back To Text](#)

¹⁸⁹ See Ryen v. Wemco Corp (In re Fink), 4 B.R. 741, 744 (Bankr. W.D.N.Y. 1980) (stating "The house in the manner in which it was annexed to real property certainly meets the test set forth in the cases [describing the law of fixtures in New York] cited above."). [Back To Text](#)

¹⁹⁰ U.C.C. § 9–313 (1) (b) (1972) provides:

(1) In this section and in the provisions of Part 4 of this Article referring to fixture filing, unless the context otherwise requires

(b) a "fixture filing" is the filing in the office where a mortgage on the real estate would be filed or recorded of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of subsection (5) of Section 9–402.

Id.

It also appears from the cryptic opinion that the avoided security interest was not preserved for the benefit of the estate notwithstanding § 551 of the Bankruptcy Code: "With regard to Wemco's interest, it is paramount to the trustee because Wemco had a filed mortgage agreement which is a lien upon the real property." Id. Back To Text

¹⁹¹ See infra text accompanying notes 218–220. Back To Text

¹⁹² U.C.C. § 9–334 (e) (4) (53) (1999) provides:

(53) "Manufactured home" means a structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or 40 body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air–conditioning, and electrical systems contained therein. The term includes any structure that meets all of the requirements of this paragraph except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the United States Secretary of Housing and Urban Development and complies with the standards established under Title 42 of the United States Code.

Id. Back To Text

¹⁹³ U.C.C. § 9–102 (a) (54) (1999) provides:

(54) "Manufactured–home transaction" means a secured transaction:

- A. that creates a purchase–money security interest in a manufactured home, other than a manufactured home held as inventory; or
- B. in which a manufactured home, other than a manufactured home held as inventory, is the primary collateral.

Id. Back To Text

¹⁹⁴ U.C.C. § 9–334 (e)(4) (1999) provides:

(e) A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if:

- 1. the security interest is:
 - A. created in a manufactured home in a manufactured–home transaction; and
 - B. perfected pursuant to a statute described in Section 9–311(a)(2).

Id. Back To Text

¹⁹⁵ U.C.C. § 9–334 (c) (1999) provides:

(c) In cases not governed by subsections (d) through (h), a security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor.

Id. Back To Text

¹⁹⁶ "A security interest in . . . instruments . . . may be perfected by the secured party's taking possession of the collateral." U.C.C. § 9–305 (1972). Because perfection by filing did not extend to instruments under former Article 9. See § § 9–302(1)(a) and 9–304(1) (stating possession of instruments was the only means of perfection); Fogler v. Casa Cotton Fin. Co. (In re Allen), 134 B.R. 373, 375 (B.A.P. 9th Cir. 1991) (stating that "Promissory notes are instruments. Security interests in instruments can only be perfected by possession."). Back To Text

¹⁹⁷ See, e.g., FDIC v. Cardinal Resources, Inc., 724 F.Supp. 466 (E.D. Ky. 1989), *aff'd*, 888 F.2d. 127 (6th Cir. 1989) (certificate of deposit was an instruments) and Coral Petroleum, Inc. v. Banque Paribas (In re Coral Petroleum, Inc.), 50 B.R. 830 (Bankr. S.D. Tex. 1985) (certificate of deposit was not an instrument). Back To Text

¹⁹⁸ 156 B.R. 102 (Bankr. D.D.C. 1993). Back To Text

¹⁹⁹ Drabkin v. Capital Bank, N.A. (In re Latin Inv. Corp.), 156 B.R. 102, 110 (Bankr. D.C.) ("Based on the foregoing, it is ORDERED that the bank's motion for summary judgment is denied; it is further ORDERED that the trustee's cross-motion for summary judgment is denied . . ."). Back To Text

²⁰⁰ Id. at 103 ("Pursuant to the hypothecation agreement, the debtor delivered possession of the CD to the bank. Since then, the bank has continuously possessed the CD . . ."). Back To Text

²⁰¹ Id. ("Resolving [the avoidance action] involves determining how to perfect a security interest in a certificate of deposit (CD) bearing the legend 'non-negotiable' and 'non-transferable.'"). Back To Text

²⁰² Id. "According to Murray Drabkin, ('the trustee') . . . the 'non-transferable' legend renders the CD a 'general intangible' and therefore perfection can occur only by filing financing statement."). Back To Text

²⁰³ Id. Only filing under former Article 9 could effect perfection of a security interest in general intangibles. U.C.C. § 9–302(1) (1972). The same result obtains under Revised Article 9. U.C.C. § 9–310(a) (1999). Back To Text

²⁰⁴ U.C.C. § 9–105 (1)(i) (1972) provides:

(i) "Instrument" means a negotiable instrument (defined in Section 3–104), or a certificated security (defined in Section 8–102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment.

Id. Back To Text

²⁰⁵ Id. Back To Text

²⁰⁶ Drabkin v. Capital Bank, N.A. (In re Latin Inv. Corp.), 156 B.R. 102, 106 (Bankr. D.D.C. 1993). Back To Text

²⁰⁷ U.C.C. § 9–102 (a) (47)(1999) provides:

(47) "Instrument" means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary endorsement or assignment. The term does not include (i) investment property, (ii) letters of credit, or (iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card.

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²⁰⁸ U.C.C. § 9–102 (a) (29) (1999) provides:

(29) "Deposit account" means a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.

Id.

Former Article 9 explicitly excluded certificates of deposit from the scope of deposit accounts:

(e) "Deposit account" means a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization, other than an account evidenced by a certificate of deposit

U.C.C. § 9–105(1)(e) (1972) (Emphasis added). official cmt. 12 to U.C.C. § 9–102 makes it clear that the elision of the exclusion of certificate of deposit from the definition of deposit account in Revised Article 9 was deliberate: "a nonnegotiable certificate of deposit would be a deposit account only if it is not an 'instrument' as defined in this section . . ." Back To Text

²⁰⁹ U.C.C. § 9–104 (a) (1999) provides:

a. A secured party has control of a deposit account if:

(1) the secured party is the bank with which the deposit account is maintained

Id. Back To Text

²¹⁰ 778 P.2d 660 (Colo. 1989). Back To Text

²¹¹ See id. at 661, n.3 ("[i]n his deposition, Lewis stated that . . . he would cut crops in Oklahoma during the early part of the season, move the operation to Kansas and Nebraska, and finish the season in Colorado"). Back To Text

²¹² See id. Back To Text

²¹³ U.C.C. § 9–401(1)(a) (1972) states:

(1) The proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is equipment used in farming operations, or farm products, or accounts or general intangibles arising from or relating to the sale of farm products by a farmer, or consumer goods, then in the office of the . . . in the county of the debtor's residence or if the debtor is not a resident of this state then in the office of the . . . in the county where the goods are kept, and in addition when the collateral is crops growing or to be grown in the office of the . . . in the county where the land is located;

Id. See also U.C.C. § 9–401 official cmt. 3 (1999) (stating that in states where it is felt wise to preserve local filing for transactions of essentially local interest, either Second or Third Alternative of subsection (1) should be adopted); Woodrum v. Ford Motor Credit Co. (In re Dillard Ford, Inc.), 940 F.2d 1507, 1512 (11th Cir. 1991) (stating that it is clear from usage of term in section 9–401 (1) that "type" is, for example, goods, accounts, chattel paper, general intangibles, etc.). Back To Text

²¹⁴ See Konkel v. Golden Plains Credit Union , 778 P.2d 660, 661 (Colo. 1989). Back To Text

²¹⁵ See id. ("Lewis transported the combines from Hamilton County, Kansas, to a farm he had recently purchased in Baca County, Colorado [and] sold one of the combines in Colorado to Bud Konkel"). Back To Text

²¹⁶ See id. ("Golden Plains [Credit Union] filed a complaint in the Baca County District Court against Konkel for conversion of the combine, seeking its return or damages"). [Back To Text](#)

²¹⁷ See id. at 662 ("Konkel argues that Golden Plains never perfected its security interest in the combine . . . because Golden Plains did not file its financing statement in the Office of the Kansas Secretary of State. Implicit in this is the argument that the combine is equipment other than 'equipment used in farming operations' within the meaning of [U.C.C. § 9–401(1)(a)]"). [Back To Text](#)

²¹⁸ U.C.C. § 9–401(1)(c) (1972) provides:

1. The proper place to file in order to perfect a security interest is as follows:

(c) in all other cases, in the office of the [Secretary of State].

Id. See also Borg–Warner Acceptance Corp. v. Fedders Fin. Corp. (In re Hammons), 614 F.2d 399, 405 (5th Cir. 1980) (concluding that secured party must determine correct place which to file financing statement based on facts existing at time when last event necessary for perfection of security interest occurs); Id. (stating that while both time of filing rule and time of attachment rule have merit, neither rule furthers important policy of providing notice to subsequent creditors of prior existing security interest). [Back To Text](#)

²¹⁹ U.C.C. § 9–501 (1999) states:

a. Except as otherwise provided in subsection (b), if the local law of this State governs perfection of a security interest or agricultural lien, the office in which to file a financing statement to perfect the security interest or agricultural lien is: (2) the office of [the Secretary of State] [or any office duly authorized by [the Secretary of State]], in all other cases, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing.

Id. See also Sanyo Elec., Inc. v. Howard's Appliance Corp. (In re Howard's Appliance Corp.), 874 F.2d 88, 92 (2d Cir. 1989) (stating that proper place for filing determined at time security interest attaches to collateral); Red Carpet Homes of Johnstown, Inc. v. Gerling (In re Knapp), 575 F.2d 341, 344 (2d Cir. 1978) (stating same). [Back To Text](#)

²²⁰ See U.C.C. § 9–102(41) (1972) ("Fixtures' means goods that have become so related to particular real property that an interest in them arises under real property law"). See, e.g., Rochman v. Cape Mercantile Bank & Trust Co. (In re Casper), 156 B.R. 794, 800 (Bankr. S.D. Ill. 1993) (holding that under Illinois law classification of property as a fixture is based on three criteria: (1) actual annexation to realty, (2) application to the use or purpose for which the land is appropriated, and (3) intention to make the article a permanent accession to the realty); see also In re Bristol Ass'n., Inc., 505 F.2d 1056, 1061 (3d Cir. 1974) (noting that amendments to comments to U.C.C. Sec. 9–102 n.1 made clear drafters' intention that "only that portion of package unrelated to the real property" be governed by article nine when "a promissory note and mortgage together become the subject of a security interest"). [Back To Text](#)

²²¹ See supra note 218. [Back To Text](#)

²²² U.C.C. § 9–334(e)(1)(A) (1999) states:

(e) A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if:

1. the debtor has an interest of record in the real property or is in possession of the real property and the security interest:

A. is perfected by a fixture filing before the interest of the encumbrancer or owner is of record.

Id. [Back To Text](#)

²²³ U.C.C. § 9–334 (e)(3) (1999) states:

(e) A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if:

1. the conflicting interest is a lien on the real property obtained by legal or equitable proceeding after the security interest was perfected by any method permitted by this article

Id. See also U.C.C. § 9–334 official cmt. 9 (1999) ("[s]ubsection (e)(3) . . . adopts a first-in-time rule applicable to conflicts between a fixture security interest and a lien on the real property obtained by legal or equitable proceedings. Such a lien is subordinate to an earlier-perfected security interest, regardless of the method by which the security interest was perfected. . . Subsection (e)(3) thus protects a perfected fixture security interest from avoidance by a trustee in bankruptcy under Bankruptcy Code Section 544(a), regardless of the method of perfection"); Paulman v. Gateway Venture Partners III, L.P. (In re Filtercorp, Inc.) 163 F.3d 570, 578 (9th Cir. 1998) (stating that whether security agreement creates lien on particular assets is question of state law). [Back To Text](#)

²²⁴ See Konkel v. Golden Plains Credit Union, 778 P.2d 660, 662 (Colo. 1989) (stating: "[K]onkel argues that Golden Plains' security interest lapsed under [U.C.C. § 9–103(1)(a) (1995)] when Golden Plains failed to file a financing statement in Colorado four months after Lewis brought the combine into Colorado"). [Back To Text](#)

²²⁵ U.C.C. § 9–103(1)(d)(i) (1972) states:

(1) Documents, instruments, letters of credit, and ordinary goods.

- a. When collateral is brought into and kept in this state while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is required by Part 3 of this Article to perfect the security interest,

(i) if the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months after the collateral is brought into this state, whichever period first expires, the security interest becomes unperfected at the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal;

Id. See also United States v. Burnette–Carter Co., 575 F.2d 587, 592 (6th Cir. 1978) (noting that U.C.C. Sec. 9–103(1)(d)(i) clearly adopts conditional protection version of four month rule); United States v. Squires, 378 F.Supp. 798, 804 (S.D. Iowa 1974) (holding that secured party who failed to perfect security interest under U.C.C. Sec. 9–103(1)(d) would have "junior interest to the buyer for value"). [Back To Text](#)

²²⁶ U.C.C. § 9–103 (3)(e) (1972) states:

(3) Accounts, general intangibles and mobile goods.

(e) A security interest perfected under the law of the jurisdiction of the location of the debtor is perfected until the expiration of four months after a change of the debtor's location to another jurisdiction, or until perfection would have ceased by the law of the first jurisdiction, whichever period first expires. Unless perfected in the new jurisdiction before the end of that period, it becomes unperfected thereafter and is deemed to have been unperfected as against a person who became a purchaser after the change.

Id. See also Orix Credit Alliance, Inc. v. Flat Top Nat'l Bank (In re Raleigh Commercial Dev. Corp.), No. 92–2351, 1993 U.S. App. Lexis 13523, at *3 (4th Cir. June 9, 1993) (stating that to be classified as mobile goods under this provision, equipment must be: (1) mobile; and (2) of type normally used in more than one jurisdiction); Fin. Co. of Am. v. Hans Mueller Corp. (In re Automated Book–Binding Servs., Inc.), 471 F.2d 546, 555 (4th Cir. 1972) (stating that U.C.C. Sec. 9–103 (3) was designed to protect secured parties whose debtors absconded with their collateral). [Back To Text](#)

²²⁷ See Konkel, 778 P.2d at 666 ("we conclude that the combine Konkel purchased was a mobile good [and] [o]n remand, the trial court . . . must also determine if Lewis had 'changed his location' under [U.C.C. § 9–103(3)(d)] at the time Konkel purchased the combine"). [Back To Text](#)

²²⁸ U.C.C. § 9–301(1) (1999) ("[e]xcept as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection"). See also id. § 9–301 official cmt. 4 (stating "[t]he approach taken in paragraph (1) also eliminates some difficult priority issues and the need to distinguish between 'mobile' and 'ordinary' goods"); Fairbanks Steam Shovel Co. v. Wills, 240 U.S. 642, 647 (1916) (holding that duty rests upon seller to select proper recording district). [Back To Text](#)

²²⁹ 486 F.2d 367 (2d Cir. 1973). [Back To Text](#)

²³⁰ See id. at 369 ("In March and June of 1969 Leasing entered into eight leases with Plastimetrix covering heavy equipment. The leased equipment was at all relevant times located in New Jersey"). [Back To Text](#)

²³¹ Id. [Back To Text](#)

²³² See id. ("On December 30 and 31, 1969 the Bank filed financing statements against Leasing with the Secretary of State of New York and the Registrar of the City of New York Queens County, where Leasing had its principal place of business"). [Back To Text](#)

²³³ See id. [Back To Text](#)

²³⁴ Id. ("On October 14, 1970 Leasing was adjudicated bankrupt by the United States District Court for the Eastern District of New York. On October 30, 1970 Plastimetrix filed a petition under chapter XI of the Bankruptcy Act in the United States District Court for the District of New Jersey."). [Back To Text](#)

²³⁵ See Feldman v. First Nat'l City Bank (In re Leasing Consultants, Inc.), 486 F.2d 367, 369 (2d Cir. 1973). [Back To Text](#)

²³⁶ See id. at 371 (stating "Appellant Bank contends that (1) whether the leases be considered 'true leases' or security devices, the filing of the security interest in New York (where lessor and the chattel paper were located) covered all of the lessor's rights in the rentals and related equipment wherever located"). See generally Pentech Int'l. Inc. v. Wall Street Clearing Co., 983 F.2d 441, 444 (2d Cir. 1993) (noting that Article 9 of the Uniform Commercial Code gives preference to secured creditors unless UCC provides otherwise); In re The Answer – The Elegant Large Size Discounter, Inc., 115 Bankr. 465, 469 (Bankr. S.D.N.Y. 1990) (stating "significant factor in determining whether or not a lease or a security agreement is involved is the objective intention of the parties"); Watkins v. Air Vt., Inc. (In re Air Vt., Inc.), 44 Bankr. 440, 443 (Bankr. D. Vt. 1984) (stating "whether an agreement is a true lease or a security agreement is determined by . . . looking to the contents of the document and to the factual setting of the transaction . . . as well as to the subsequent treatment of the agreement by the parties") (citation omitted). [Back To Text](#)

²³⁷ See id. at 372 ("We conclude, as did the district court, that the future reversionary interest is likewise an interest in goods . . ."); see also First Wisconsin Nat'l Bank of Milwaukee v. Ford Motor Credit Co. (In re Watertown Tractor & Equip. Co.), 94 Wis. 2d 622, 632 (1980) (holding "reversionary interest in farm machinery and equipment, which [were] earlier settled to be goods, rather than accounts, chattel paper, etc., under Uniform Commercial Code, should similarly be labeled as an interest in goods"). [Back To Text](#)

²³⁸ See id. at 373 ("We conclude that the case should be remanded for a determination by the district court, following an evidentiary hearing, whether the lease instruments were in fact 'true leases'"). [Back To Text](#)

²³⁹ U.C.C. § 9–103(4) (1972) states:

Chattel paper. The rules stated for . . . accounts in subsection (3) apply to a non–possessory security interest in chattel paper[.]

Id. See also Gray v. Jefferson Loan & Inv. Bank (In re Commercial Mgmt. Serv., Inc.), 127 B.R. 296, 299 (Mass. 1991) (citing In re Leasing Consultants, Inc., for statement that leases with both monetary obligation and lease of specific goods constitute chattel paper); Thomas H. Jackson, Embodiment of Rights in Goods and the Concept of Chattel Paper 50 U. Chi. L. Rev. 1051, 1051 (1983) (defining chattel paper as "a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods.") (citation omitted). [Back To Text](#)

²⁴⁰ U.C.C. § 9–103(1)(b) (1972) states:

1. Documents, instrument, letters of credit, and ordinary goods.
 - a. Except as otherwise provided in this subsection, perfection and the effect of perfection or non-perfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.

Id. See In re Howards Appliance Corp., 91 B.R. 208, 211 (E.D.N.Y. 1988) (stating New York and New Jersey have both adopted U.C.C. § 9–103, making perfection governed by law of state in which last event on which perfection is based occurs); Kunkel v. Ries (In re Morken), 199 B.R. 940, 961 (Bankr. D. Minn. 1996) (stating § 9–103(1)(b) requires law of jurisdiction in which collateral was found when last perfecting event occurred governs whether security interest is perfected). [Back To Text](#)

²⁴¹ See Feldman v. First Nat'l City Bank (In re Leasing Consultants, Inc.), 486 F.2d 367 (2d Cir. 1973)

(citing cases dealing with reversionary interests in collateral). [Back To Text](#)

²⁴² U.C.C. § 9–102(a)(11) (1999) states:

(11) "Chattel paper" means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, or a lease of specific goods. The term does not include charters or other contracts involving the use or hire of a vessel. If a transaction is evidenced both by a security agreement or lease and by an instrument or series of instruments, the group of records taken together constitutes chattel paper.

[Id.](#) [Back To Text](#)

²⁴³ See U.C.C. § 2A–103(1)(q) (1998). [Back To Text](#)

²⁴⁴ See U.C.C. § 9–330 official cmt. 11 (1999) (citing In re Leasing Consultants with approval); see also Edwin E. Smith, Overview of Revised Article 9, 73 Am. Bankr. L.J. 1, 6 (1999) (stating that Revised § 9–330(d) places supremacy on secured party if possession taken with good faith, value, and without knowledge); Earl F. Leites & Steven N. Leites, Inventory Financing Under Revised Article 9, 73 Am. Bankr. L.J. 119, 125 (1999) (stating Rev. U.C.C. § 9–330(b), deals with purchase of chattel paper or instruments, that will invite inventory financiers to place a notice in their financing statements to effect that, "sale or other transfer of chattel paper or other proceeds of collateral to a third party violates the rights of secured party.") (citation omitted); Linda J. Rusch, Farm Financing Under Revised Article 9, 73 Am. Bankr. L.J. 211, 248 n.244 (1999) (claiming that Revised Article 9 no longer demarcates "claiming the instrument as mere proceeds and claiming the instrument as more than mere proceeds" when dealing with instruments). [Back To Text](#)

²⁴⁵ U.C.C. § 9–301(1) (1999) (stating that "except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral"). See also Smith v. Mark Twain Nat'l. Bank, 805 F.2d 278, 284–85 (8th Cir. 1986) (focusing on state law in discussing powers of trustee regarding priority over debtors' deposits in creditor–bank); Bryant v. Secretary, 227 B.R. 89, 92 n.26 (W.D. Va. 1998) (reasoning that defects in lien under state law are not cured and avoidance of lien does not cure defect); In re Boyertown Auto Body Works, No. 91–2075, 1991

U.S. Dist. LEXIS 17372 at * 10 (E.D. Pa. Nov. 27, 1991) (stating that "under Pennsylvania's priority rules, an unperfected security interest is subordinate to the rights of a lien creditor") (citation omitted); First Nat'l Bank and Trust Co. v. Lasich (In re Three Lakes Cocktail Lounge & Rest., Inc.), 131 B.R. 70, 72 (Bankr. W.D. Mich. 1991) (stating that creditor's interest "is subordinate under M.S.A. 19.1301(1)(b) . . . to the Trustee's § 544(a)(1) status as a judicial lien creditor"). [Back To Text](#)

²⁴⁶ See supra text accompanying note 231.; see also United States v. McDermott, 507 U.S. 447, 452–53 (1993) (holding that state-law lien was not first in time since it did not attach until after federal lien was filed); Mitchell v. Transamerica Commercial Fin. Corp. (In re Doughty's Appliance, Inc.), 236 B.R. 407, 411 (Bankr. D. Or. 1999) (explaining "effects of perfection or non-perfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected") (citing U.C.C. § 9–103(1)(b)); Ledford v. Easy Living Furniture (In re Jackson), No. 3–84–00195, 1985 Bankr. LEXIS 5341 at * 3 (Bankr. S.D. Ohio Sept. 12, 1985) (noting that although federal law allows trustee with strong arm powers, exercise of such powers is decided under state law) (citation omitted). [Back To Text](#)

²⁴⁷ U.C.C. § 9–204(1) (1972) states:

1. A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral.

Id. See Am. Rest. Supply Co. v. Wilson, 371 So. 2d 489, 489 (Fla. Dist. Ct. App. 1979) (stating that "security interest cannot be enforced against the debtor or third parties unless the collateral is in the possession of the secured party or the security agreement contains a description of the collateral"); Prod. Credit Assoc. v. Bartos, 430 N.W.2d 238, 242 (Minn. Ct. App. 1988) (holding that even though appellant's portrayal in appellant's financing statement was arguably ambiguous, it was clear enough to distinguish the general type of collateral subject to a security interest). [Back To Text](#)

²⁴⁸ See Gill v. United States (In re Boogie Enters.), 866 F.2d 1172, 1174 (9th Cir. 1989) (stating that financing statement describing collateral for loan as "personal property" was insufficient to perfect creditor's security interest in proceeds of lawsuit settlement); Johnson v. First Nat'l Bank (In re Fuqua), 461 F.2d 1186, 1188 (10th Cir. 1972), (holding that a financing statement whose report of collateral phrased "all personal property" was inadequate to perfect security interest in livestock, feed, and farming equipment.); see also Becker v. Barron (In re Becker), 53 B.R. 450, 452 (W.D. Wis. 1985) (stating "all farm personal property" insufficient to perfect interest in farm equipment); Merchants Nat'l Bank v. Halberstadt, 425 N.W.2d 429, 430 (Iowa Ct. App. 1988) (holding that financing statement asserting interest in farm equipment and products and "all personal property" did not perfect interest in coins and jewelry). [Back To Text](#)

²⁴⁹ 115 B.R. 974 (Bankr. W.D. Wis. 1990). See also Patterson v. Shumate, 504 U.S. 753, 763 (1992) (stating "[w]e express no opinion on the separate question whether § 522(d)(10)(E) applies only to distributions from a pension plan that a debtor has an immediate and present right to receive, or to the entire undistributed corpus of a pension trust"); In re Pauquette, 38 B.R. 170, 173 (Bankr. D. Vt. 1984) (stating debtor's control of funds in IRA renders it dissimilar from other retirement plans). [Back To Text](#)

²⁵⁰ In re Cilek, 115 B.R. at 990 states:

On July 10, 1980, the Debtors granted Honda Finance a security interest in certain collateral. The security agreement described the "Collateral" as "now or hereafter acquired Inventory and the Proceeds of such Inventory, together with any other property now or hereafter acquired in which Dealer has an interest." The security agreement defined "Inventory" as "all new Honda motorcycles acquired from AMERICAN HONDA MOTOR CO., INC., for which Secured Party now or hereafter provides financing, in whole or in part, and all accessions and parts, accessories and equipment attached thereto, together with all replacements, substitutions and additions thereto." The security

agreement defined "Proceeds" as "all cash and non-cash proceeds received directly or indirectly from the Sale of Inventory, including without limitation all accounts, contract rights, chattel paper and instruments, and all amounts paid and/or payable pursuant to policies of insurance covering Inventory.

Id. Back To Text

²⁵¹ Id. See also F.R. of N.D. v. First Nat'l Bank (In re F.R. of N.D., Inc.), 54 B.R. 645, 648-49 (Bankr. D. N.D. 1985) (stating "all furniture, fixtures, and small wares" was sufficient description of debtor's assets for financing statement, but not for security agreement); Herrell v. Bank of Elroy (In re Mitchell Bros. Constr., Inc.), 52 B.R. 92, 93 (Bankr. W.D. Wis. 1985) (stating "super-generic" classification which do not point out types or describe items of collateral are sufficient in financing statements if intent is to explain blanket lien on all debtor's assets); Bankers Trust Co. v. Zecher, 426 N.Y.S.2d 960, 963 (N.Y. Sup. Ct. 1980) (stating "all present and hereafter acquired equipment wherever located" was sufficient description in financing statement to perfect security interest in debtor's restaurant equipment). Back To Text

²⁵² In re Cilek, 115 B.R. at 994. See also cases cited supra notes 244-48. Back To Text

²⁵³ See In re Cilek, 115 B.R. at 994 ("Within the meaning of the Uniform Commercial Code as adopted by Wisconsin, types of collateral refers to goods, accounts, general intangibles, documents, instruments and chattel paper."); see also In re H. L. Bennett Co., 588 F.2d 389, 393 (3d Cir. 1978) (holding classification to be insufficient because it neither specifies the items of collateral or type of property); Gill v. United States (In re Boogie Enters., Inc.), 866 F.2d 1172, 1173 (9th Cir. 1989) (stating that California had adopted portion of U.C.C. allowing creditor to perfect security interest by filing financing statement that explains nature of collateral). Back To Text

²⁵⁴ Am. Honda Fin. Corp. v. Cilek (In re Cilek), 115 B.R. 974, 994 (Bankr. W.D. Wis. 1990). See also In re Granny Frannies, 39 B.R. 377, 380 (Bankr. D.S.C. 1984) (holding that when creditor has perfected its security interest by filing financing statement and debtor, without the creditor's consent, removes the collateral or shifts title to the collateral, the creditor's perfected security interest endures); Bank of Utica v. Smith Richfield Springs, Inc., 294 N.Y.S.2d 797, 799 (N.Y. Sup. Ct. 1968) (explaining financing statement is sufficient if it highlights types or indicates items of collateral). Back To Text

²⁵⁵ In re Cilek, 115 B.R. at 994 (stating "any other property" is not portrait of items but super generic phrase which includes all types of collateral perfectible under Wisconsin statute). See also Dillard Ford, Inc., v. Ford Motor Credit Co. (In re Dillard Ford, Inc.), 940 F.2d 1507, 1511 (11th Cir. 1991) (stating § 9-102 requires us to look at the substance, not the form, of a transaction.); In re Leasing Consultants, Inc., 486 F.2d 367, 372 (2d Cir. 1973) (stating under U.C.C. § 9-102(1)(a) there was assignment clearly created security interest in the Bank and made requirements of Article 9 applicable to the Bank's interest in the equipment). Back To Text

²⁵⁶ In re Cilek, 115 B.R. at 995. Back To Text

²⁵⁷ U.C.C. § 9-504 (1999) states:

A financing statement sufficiently indicates the collateral that it covers only if the financing statement provides:

1. a description of the collateral pursuant to Section 9-108; or
2. an indication that the financing statement covers all assets or all personal property.

Id. See G. Ray Warner, Documenting a Transaction Under Revised Article 9, 19 Am. Bankr. Inst. J. 20, 21 (2000) (discussing revised § 9-504 (2) validation of super-generic descriptions of property in financing statement provides lenders with incentive to use such description because they provide maximum protection); C. Scott Pryor, Revised Uniform Commercial Code Article 9: Impact in Bankruptcy, 7 Am. Bankr. Inst. L. Rev. 465, 476 (1999) (discussing enforceability of super-generic descriptions of collateral against third parties under Revised § 9-504 (2)). Back To Text

²⁵⁸ Creditors with less than "all asset" security agreements have some incentive not to file an "all assets" financing statement. Current U.C.C. § 9–625 authorizes a \$500 sanction against persons who file "a record that the person is not entitled to file under Section 9–509(a)." U.C.C. § 9–625 (e)(3) (1999). Recovery of actual damages is authorized under U.C.C. § 9–625(b) (1999). See Clark Barkley, Revised Article 9 of the UCC: Scope, Perfection, Priorities, and Default, 4 N.C. Banking Inst. 129, 180 (2000) (discussing liability for damages under Revised 9–625 (b) for violating rules of article 9); Edwin E. Smith, Overview of Revised Article 9, 73 Am. Bankr. L.J. 1, 53 (1999) (discussing secured parties liability under revised article 9 for violating enforcement provisions). [Back To Text](#)

²⁵⁹ See U.C.C. § 9–504 official cmt. 2 (1999) ("Debtors sometimes create a security interest in all, or substantially all, of their assets. To accommodate this practice, paragraph (2) expands the class of sufficient collateral references to embrace 'an indication that the financing statement covers all assets or all personal property.' If the property in question belongs to the debtor and is personal property, any searcher will know that the property is covered by the financing statement"); see also McLeod v. Sears, Roebuck & Co. (In re McLeod) 245 B.R. 518, 524 (Bankr. E.D. Mich. 2000) (putting third parties on notice that further inquiry is required sufficiently describes collateral in financial statement under current article 9); Julian B. McDonnell, Is Revised Article 9 A Little Greedy, 104 Com. L.J. 241, 250 (1999) (stating collateral need not be particularized since revised § 9–504(2) permits the use of super-generic descriptions). [Back To Text](#)

²⁶⁰ U.C.C. § 9–108(a) (1999). See Marion W. Benfield, Consumer Provisions in Revised Article 9, 74 Chi.–Kent L. Rev. 1255, 1296 (discussing that revised § 9–108 continues current § 9–110 requirement that descriptions not be specific if reasonably identifiable in financing statements); Charles Cheatham, Changes in Filing Procedures under Revised Article 9, 25 Okla. City U. L. Rev. 235, 248 (stating under revised article 9 super-generic descriptions of collateral are fine in financial statements although under § 9–108 such descriptions are insufficient in security agreements where reasonable identification is required). [Back To Text](#)

²⁶¹ U.C.C. § 9–108(b) (1999) states:

- a. Except as otherwise provided in subsection (d), a description of collateral reasonably identifies the collateral if it identifies the collateral by:
 1. specific listing;
 2. category;
 3. except as otherwise provided in subsection (e), a type of collateral defined in [the Uniform Commercial Code];
 4. quantity;
 5. computational or allocational formula or procedure; or
 6. except as otherwise provided in subsection (c), any other method, if the identity of the collateral is objectively determinable.

Id. See Warner, supra note 256, at 20 (continuing with reasonable identification standard, revised article 9 rejects more restrictive case law standards); Smith, supra note 257, at 13 (discussing that in revised article 9, reasonable identification is a flexible standard). [Back To Text](#)

²⁶² See Fischer v. Bar Harbor Banking & Trust Co., 857 F.2d 4, 6 (1st Cir. 1988) (deciding between secured creditor and owner of partially completed yacht); Rohweder v. Aberdeen Prod. Credit Ass'n, 765 F.2d 109, 111 (8th Cir. 1985) (deciding case between secured creditor of operator of feed lot and owner of cattle); Carey Aviation, Inc. v. Giles World Mktg. Inc., 46 B.R. 458, 460 (Bankr. D. Mass. 1985) (deciding dispute between inventory financier and purchaser of airplane); Gen. Elec. Credit Corp. v. Gayl (In re Darling's Homes, Inc.), 46 B.R. 370, 374 (Bankr. D. Del. 1985) (deciding dispute between inventory financier and purchasers of mobile homes); Thompson v. McMaster (In re Fritz–Mair Mfg. Co.), 16 B.R. 417, 418 (Bankr. N.D. Tex. 1982) (deciding case between purchaser of oil field pump–jack and trustee). [Back To Text](#)

²⁶³ See, e.g., U.C.C. § 1–201(9), 2–326, 2–502, 2–716, and 9–307 (1972); First Bank of N.D. v. Pillsbury Co., 801 F.2d 1036, 1039 (8th Cir. 1986) (demonstrating that first purchasers must show they fit within protection of U.C.C. §

9–307(1)); Martin Marietta Corp. v. N.J. Nat'l Bank, 612 F.2d 745, 751 (3d Cir. 1979) (discussing the interpretation and applicable test standard of two phrases in UCC § 1–201(9)). [Back To Text](#)

²⁶⁴ See infra Section II. [Back To Text](#)

²⁶⁵ 208 N.W.2d 97 (1973). [Back To Text](#)

²⁶⁶ Id. at 102 (describing dispute over ownership). Although not referenced in the court's opinion, the receiver was appointed under Wis. Stat. § 128.01. See Wis. Stat. § 128.01 (1999) (stating "[t]he circuit courts shall have supervision of proceedings under this chapter and may make all necessary orders and judgments therefor; and all assignments for the benefit of creditors shall be subject to this chapter."); see also Letter from Russell A. Eisenberg, receiver (on file with author). [Back To Text](#)

²⁶⁷ See Chrysler Corp. v. Adamatic Inc., 208 N.W.2d 97, 99 (Wisc. 1973) (stating "Chrysler's first transaction with Adamatic . . . involved a contract calling for Adamatic to produce a prototype six–coil winder."). [Back To Text](#)

²⁶⁸ See id. (stating "[i]n 1967, Adamatic had entered into various security agreements with Lakeshore"). [Back To Text](#)

²⁶⁹ See id. at 100 (stating "Chrysler had decided to enter into a second transaction with Adamatic"). [Back To Text](#)

²⁷⁰ See id. (stating "upon Adamatic's suggestion, it was decided to ship the units back to Milwaukee for additional work by Adamatic"). [Back To Text](#)

²⁷¹ See id. at 99 (stating "[b]y the time the machine had been completed for shipment, Chrysler had paid 90 percent of the original purchase price"). [Back To Text](#)

²⁷² See id. at 100 (stating "Chrysler agreed to make progress payments after the work was 25 percent complete"). [Back To Text](#)

²⁷³ See Chrysler Corp. v. Adamatic Inc., 208 N.W.2d 97, 101 (Wisc. 1973) (stating "Lakeshore learned that Chrysler was trying to take delivery of the first twelve–coil winder. . . [b]y telephone, Lakeshore's president directed Adamatic not to ship the machines"). [Back To Text](#)

²⁷⁴ See id. (stating "Chrysler then commenced this replevin action to obtain possession of the machines. . . the sheriff seized the three twelve–coil winders and the cell inserter. . . the sheriff also seized the original six–coil winder . . . and the goods were turned over to Chrysler and removed to Indianapolis"). [Back To Text](#)

²⁷⁵ U.C.C. § 1–201(9) (1972):

"Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre–existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

Id. See also Martin Marietta Corp. v. New Jersey Nat'l Bank, 612 F.2d 745, 751 (3d Cir. 1979) (defining "buyer in ordinary course of business" under U.C.C. § 1–201(9)); In re Skinner Lumber Co., 37 B.R. 250, 252 (Bankr. S.C. 1983) (citing In re Mid–Atlantic Piping Prods. of Charlotte, Inc. 24 B.R. 314 (Bankr. W.D.N.C. 1982)) (stating "[a] 'buyer in ordinary course of business' does not include one who uses a transfer for total or partial satisfaction of a money debt."). [Back To Text](#)

²⁷⁶ U.C.C. § 9–307 (1) (1972):

A buyer in ordinary course of business (subsection (9) of Section 1–201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

Id. See also In re Certain Pharm. & Proceedings of Northland Providers, 78 F. Supp. 2d 954, 962 (D. Minn. 1999) (describing instance where party asserts claim to proceeds obtained from sale of pharmaceuticals seeking benefits of U.C.C. § 9–307 (1)); Mitchell v. Transamerica Commercial Fin. Corp. (In re Doughty's Appliance Inc.), 236 B.R. 407, 411–12 (Bankr. D. Or. 1999) (citing U.C.C. § 9–307(1) and stating that provision renders Bank's security interest "subordinate to ...interest as purchaser"). [Back To Text](#)

²⁷⁷ See Chrysler Corp., 208 N.W. 2d at 104 (stating "[t]here is sufficient evidence to show that Chrysler acquired full title in the six–coil winder and cell inserter at the time of their initial delivery, and that Lakeshore's security interest could not reattach to the goods in the absence of a rejection by Chrysler. The rights acquired by Adamatic were those of a bailee"). [Back To Text](#)

²⁷⁸ See id. at 106 (stating "[t]here is no contention that title passed to Chrysler prior to the physical transfer occasioned by the replevin"). [Back To Text](#)

²⁷⁹ See supra notes 272–73. [Back To Text](#)

²⁸⁰ See Chrysler Corp. v. Adamatic Inc., 208 N.W.2d 97,107 (Wisc. 1973) (stating "if Chrysler is to be afforded a status as a buyer in ordinary course of business, we conclude that such status must be determined as of the time he [sic] actually took possession of the goods"). [Back To Text](#)

²⁸¹ Id. at 108 (stating "Chrysler must either return the goods or account for their value"). [Back To Text](#)

²⁸² See Margit Livingston, Certainty, Efficiency, And Realism: Rights In Collateral Under Article 9 Of The Uniform Commercial Code, 73 N.C. L. Rev. 115, 159–60 (1994): (stating "[i]n determining when a party becomes BIOCB [Buyer in Ordinary Course of Business], the courts have considered various points along a temporal continuum that follows the steps in the typical transaction: (1) contract formation; (2) identification of goods to the contract; (3) the passage of title from seller to buyer; (4) delivery of goods to the buyer; and (5) acceptance of the goods by the buyer.") (emphasis added). But see Douglas G. Baird & Thomas H. Jackson, Possession and Ownership: An Examination of the Scope of Article 9, 35 Stan. L. Rev. 175, 210 n.102 (1983) (stating "[a] party should become a 'buyer' for purposes of determining when he can assert priority over third parties at the moment he takes possession of the goods and not before" and citing Adamatic as example of court reaching such conclusion); Hal M. Smith, Title & The Right to Possession under the Uniform Commercial Code, 10 B.C. Indust. Com. L. Rev. 39, 59–61 (1968) (asserting part should not achieve "buyer" status until taking possession of goods). [Back To Text](#)

²⁸³ 425 N.W.2d 416 (1988). [Back To Text](#)

²⁸⁴ Id. at 417 (stating "[t]he purchasers agreed to purchase a 1984 Chevrolet van which had not yet been manufactured and to trade in the older motor home"). [Back To Text](#)

²⁸⁵ Id. at 418 (stating "[t]he Bank was willing to release the van only if the purchasers paid in full the Bank's interest in the van pursuant to the Floor Plan Note"). [Back To Text](#)

²⁸⁶ Id. (stating "[purchasers] brought this action against the Bank to recover damages to the extent of the over–payment together with consequential damages"). [Back To Text](#)

²⁸⁷ Application of U.C.C. § 2–502(1) might seem to have supplied a more straightforward resolution of the Daniels' claim:

Subject to subsection (2) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions the immediately preceding section may on

making and keeping good a tender of any unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price.

U.C.C. § 2-502(1) (1972). Neither Chrysler Corporation nor the Daniels could assert a claim under U.C.C. § 2-502(1), however, because more than ten days had elapsed between the initial payment and the seller's insolvency. See also Koreag, Controle et Revision, S.A. v. Refco F/X Assoc., Inc. (In re Koreag, Controle et Revision S.A.), 961 F.2d 341, 358 (2d Cir. 1992) (stating "section 2-502 (1) authorizes recovery of specific goods from an insolvent buyer where the goods have been identified to the pertinent contract pursuant to section 2-501."); Creditors' Comm. v. Agri Dairy Prod., Inc. (In re James B. Downing & Co.), 74 B.R. 906, 909 n.4 (Bankr. N.D. Ill. 1987) (stating "[t]he defendants also refer to § 2-502 of the U.C.C....[s]ection 2-502 of the U.C.C. is remedial...[i]t offers certain remedies to buyers only after they establish special property rights under § 2-502"). [Back To Text](#)

²⁸⁸ U.C.C. § 2-501 (1) (1998) in pertinent part, states:

1. The buyer obtains a special property and insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs
 - a. when the contract is made if it is for the sale of goods already existing and identified:
 - b. if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers[.]

Id. See Ogden Martin Sys., Inc. v. Whiting Corp., 179 F.3d 523, 529 (7th Cir. 1999) (discussing § 2-501 in Indiana); First Nat'l Bank v. Smoker 286 N.E. 2d 203, 212 (Ind. Ct. App. 1972) ("[i]dentification refers to when the goods are still in the possession of the seller"). [Back To Text](#)

²⁸⁹ Daniel v. Bank of Hayward, 425 N.W. 2d 416, 423 (Wisc. 1988) (stating "[w]e rest our decision on the circumstances surrounding the transaction in this case and the manner in which sales are made in this industry"). [Back To Text](#)

²⁹⁰ See James J. White & Robert S. Summers, Uniform Commercial Code (5th ed. 2000) at 235 ("When one considers not only the ten-day limitation but also the possibility (if not probability) that buyer's 2-502 rights will be subordinate to the rights of the trustee in bankruptcy and to the rights of secured creditors, the importance of this section diminishes even further.") But see Mitchell v. Transamerica Commercial Fin. Corp. (In re Doughty's Appliance, Inc.), 236 B.R. 407, 417 (Bankr. D. Or. 1999) (holding that trustee's avoidance powers do not cut off ownership rights of buyers in ordinary course, at least with respect to claims by such buyer's against inventory financiers). [Back To Text](#)

²⁹¹ 11 U.S.C. § 507 (a)(6) (2000) provides:

(a) The following expenses and claims have priority in the following order:

(6) Sixth, allowed unsecured claims of individuals, to the extent of \$ 1,950 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

Id. See generally In re Duval Manor Assocs., 1997 Bankr. Lexis 350, 10-12 (Bankr. E.D. Pa. 1997) (discussing scope of (a)(6)); Zohdi v. Louisiana State Univ. Found., 234 B.R. 371, 379 (Bankr. M.D. La. 1999) (looking to provisions (a) (1-6)). [Back To Text](#)

²⁹² See In re Surplus Furniture Liquidators, Inc. of Highpoint, 199 B.R. 136 (Bankr. M.D.N.C. 1995) (approving sale of furniture by DIP). See generally Richard E. Coulson, Alvin C. Harrell & Timothy D. line, Case Developments in Consumer Bankruptcy Highlight Need for Statutory Reform, 51 Cons. Fin. L. Q. Rep. 261 (1997) (highlighting record

number of consumer bankruptcy filings in 1996). [Back To Text](#)

²⁹³ [U.C.C. § 9–320\(a\) \(1998\)](#) states:

(a) Except as otherwise provided in subsection (e), a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence.

[Id.](#); § 9–320 official cmt. 2 ("[t]his section states when buyers of goods take free of a security interest even though perfected"). [Back To Text](#)

²⁹⁴ [U.C.C. § 1–201\(9\) \(1998\)](#). [Back To Text](#)

²⁹⁵ [U.C.C. § 2–502 \(1999\)](#). [Back To Text](#)

²⁹⁶ [U.C.C. § 2–502](#) official cmt. 3 (1999) states:

Under subsection (2), the buyer's right to recover consumer goods under subsection (1)(a) vests upon acquisition of a special property, which occurs upon identification of the goods to the contract. See [id.](#) § 2–501. Inasmuch as a secured party normally acquires no greater rights in its collateral than [sic] its debtor had or had power to convey, see Section 2–403(1) (first sentence), a buyer who acquires a right to recover under this section will take free of a security interest created by the seller if it attaches to the goods after the goods have been identified to the contract. The buyer will take free, even if the buyer does not buy in ordinary course and even if the security interest is perfected.

[Id.](#) See generally [Fifth Third Bank v. Chrysler Fin. Co.](#), No. 18132, 2000 Ohio App. Lexis 4730, at *13 (Ohio Ct. App. Oct. 13, 2000) (discussing rights of buyer in ordinary course of business in regard to perfected security interests). [Back To Text](#)

²⁹⁷ See [supra](#) text accompanying notes 264–282. See generally [Pointer \(U.S.A.\), Inc. v. H & D Foods Corp.](#), 60 F. Supp. 2d 282, 286 (S.D.N.Y. 1999) (involving third party seller). [Back To Text](#)

²⁹⁸ [U.C.C. § 2–326\(1\) \(1998\)](#) states:

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

(b) a "sale or return" if the goods are delivered primarily for resale.

[Id.](#) See generally [In re Wicaco Mach. Corp.](#), 49 B.R. 340, 343 (Bankr. E.D.N.Y. 1984) (discussing when consignment is deemed on sale or return). [Back To Text](#)

²⁹⁹ [U.C.C. § 2–326\(2\) \(1998\)](#) states:

(2) Except as provided in subsection (3), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

[Id.](#) See generally [In re Truck Accessories Distrib., Inc.](#), 238 B.R. 444, 447 (Bankr. E.D. Ark. 1999) (applying 2–326(2) in Arkansas). [Back To Text](#)

³⁰⁰ [U.C.C. § 2–326\(3\) \(1998\)](#) states:

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions

of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum". However, this subsection is not applicable if the person making delivery

- a. complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or
- b. establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or

(c) complies with the filing provisions of the Article on Secured Transactions (Article 9).

Id. See generally *Makse Jewelry, Inc. v. Rock*, No. 99 Civ. 11420, 2000 U.S. Dist. Lexis 17029, at *11 (S.D.N.Y. Nov. 28, 2000) (applying § 2–326(3) in New York). [Back To Text](#)

³⁰¹ See supra note 298. See generally *In re Flo–Lizer, Inc.*, 946 F.2d 1237, 1239 (6th Cir. 1991) (discussing ramifications of arrangement deemed sale or return); *In re Wicaco Mach. Corp.*, 49 B.R. at 342–3 (stating goods which are deemed to be on sale or return "are subject to the claims of the creditors of the party to whom the goods have been delivered unless certain notice requirements have been fulfilled"). [Back To Text](#)

³⁰² See supra note 299. See generally *Heller Fin. Inc. v. Samuel Schick, Inc. (In re Wedlo Fin.)*, 248 B.R. 336, 342 (Bankr. N.D. Ill. 2000) (holding debtor was generally known by its creditors to be substantially engaged in selling the goods of others); *In re Russell*, 254 B.R. 138, 143 (Bankr. W.D. Va. 2000) (discussing Virginia's § 2–326(3)). [Back To Text](#)

³⁰³ See supra note 299. At least one court held that the phrase "applicable law" referred only to a statute and not to a common–law rule. See, e.g., *Vonins, Inc. v. Raff*, 243 A.2d 836 (App.Div. 1968). Very few states adopted such a law. [Back To Text](#)

³⁰⁴ See supra note 299. [Back To Text](#)

³⁰⁵ See, e.g., *Ciba–Geigy Corp. v. Flo–Lizer, Inc. (In re Flo–Lizer)*, 946 F.2d 1237, 1240–41 (6th Cir. 1991) (applying U.C.C. § 2–326 because "Ciba–Geigy failed to take any of the statutorily specified actions to provide Banque Paribas and other creditors with fair notice that they could not safely rely upon the herbicide as security, or potential security, for credit extended to Flo–Lizer"); *Barber v. McCord Auto Supply Co. (In re Pearson Indus. Inc.)*, 147 B.R. 914, 923 (Bankr. C.D. Ill. 1992) (holding "consignment of paper goods . . . to facilitate sales transactions . . . thus [constituting] 'for sale' within the meaning of § 2–326(3)"); *Armor All Products v. Amoco Oil Co.*, 194 Wis.2d 35, 48 (1995) (concluding "the goods were not delivered 'for sale' because the agreement between Amoco and AFSCO was a pure warehousing and delivery agreement, and was not any type of consignment agreement which made AFSCO a sales agent for Amoco's private label products"). [Back To Text](#)

³⁰⁶ See id. at 56 (determining that "the test . . . is whether an objective analysis of the transaction documents, the course of performance between the parties and the actions taken by the bailee could lead a reasonable creditor to conclude that a consignment existed"). [Back To Text](#)

³⁰⁷ See *Glenshaw Glass Co. v. Ontario Grape Grower's Mktg. Bd.*, 67 F.3d 470, 476 (3d Cir. 1995) (noting U.C.C. § 2–326 does not apply "to a bailment in which the bailee has no authority to sell the bailor's goods"); *Walter E. Heller & Co. v. Riviana Foods, Inc.*, 648 F.2d 1059, 1062 (5th Cir. 1981) (refusing to apply U.C.C. § 2–326 where debtor "acted only as a warehouseman for defendant, and had no independent authority to sell defendant's merchandise"); *In re Key Book Services Inc.*, 103 B.R. 39, 43 (Bank. D. Conn. 1989) (refusing to apply U.C.C. § 2–326 where debtor had no authority to sell books). [Back To Text](#)

³⁰⁸ 125 B.R. 486 (W.D. Mich. 1991). [Back To Text](#)

³⁰⁹ See id. at 488:

Since approximately 1969 the debtors, Gordon and Joan Zwagerman, operated a farm at which they fattened hogs and cattle and sold them for slaughter. Beginning in November 1981 until they filed their chapter 7 bankruptcy petition on December 30, 1985, the debtors engaged in a practice known as "custom feeding". David Bradley, d/b/a the Red River Company, would furnish cattle under fattening agreements. [Back To Text](#)

³¹⁰ [Id.](#) (pointing out "[t]here were no ear tags, brands or other marks to differentiate between the cattle"). [Back To Text](#)

³¹¹ [Id.](#) (discussing how "Zwagerman would feed the cattle until they weighed approximately 1100 pounds, after which time Zwagerman would sell the cattle as Bradley's agent at an agreed upon price."). [Back To Text](#)

³¹² [Id.](#) at 491. [Back To Text](#)

³¹³ [Id.](#) at 492. [Back To Text](#)

³¹⁴ The PEB had created a committee to study Article 9 in 1990. See [PEB Study Group, Uniform Commercial Code Article 9: Report](#), 1 (1992) (hereinafter "PEB Study Report"). The PEB Study Group issued the PEB Study Report on December 1, 1992. [Back To Text](#)

³¹⁵ See [PEB Study Report, supra note 313, at 122](#). [Back To Text](#)

³¹⁶ [U.C.C. § 9-102 \(a\)\(20\) \(1999\)](#) states:

(20) "Consignment" means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:

(A) the merchant:

(i) deals in goods of that kind under a name other than the name of the person making delivery;

(ii) is not an auctioneer; and

(iii) is not generally known by its creditors to be substantially engaged in selling the goods of others;

(B) with respect to each delivery, the aggregate value of the goods is \$1,000 or more at the time of delivery;

(C) the goods are not consumer goods immediately before delivery; and

(D) the transaction does not create a security interest that secures an obligation

[Id.](#) [Back To Text](#)

³¹⁷ See [Clark, supra note 14, at 135](#) (explaining the revision regarding consignment); [Linda Rusch, Farm Financing Under Revised Article 9](#), 73 Am. Bankr. L.J. 211, 223 (1999) ("A person who qualifies as a merchant and who feeds animals for others prior to selling these animals could be engaging in a consignment under Revised Article 9."); John E. Murray, Jr. & Harry M. Flechtner, The Summer, 1999 Draft Of Revised Article 2 Of The Uniform Commercial Code: What Hath NCCUSL Rejected?, [19 J.L. & Com. 1, 64 \(1999\)](#) (exploring revision's implications). [Back To Text](#)

³¹⁸ Revised Article 9 subjects all true consignors to the requirement of filing a financing statement to protect their ownership interests. "Consignors should carefully examine the perhaps unintended results of this definitional concept, such as the claim of a trustee in bankruptcy or debtor in possession asserting that the consignor's goods now are property of the debtor's estate in bankruptcy." [Earl F. Leites & Steven N. Leites, Inventory Financing Under Revised Article 9](#), 73 Am. Bankr. L.J. 119, 126 (1999). [Back To Text](#)

³¹⁹ U.C.C. § 9–102(a)(20) (1999) will not, however, reach pure bailments. Thus the result in Armor All v. Amoco, supra note 305 should not be affected. [Back To Text](#)