

NEW ARTICLE 9 OF THE UCC: THE GOOD, THE BAD, AND THE UGLY

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In 1998, the Drafting Committee of the American Law Institute approved significant changes to Article 9 of the Uniform Commercial Code, which deals with secured transactions. In this light-hearted but thorough and insightful piece, Professor Burns takes us on a journey through new Article 9. The article begins with a discussion of “the good”: modifications that made clear improvements to the Code. Next, the article focuses on “the bad”: traps for the unwary lying beneath the thicket in new Article 9. Finally, the article points out “the ugly”: the seemingly impenetrable provisions of new Article 9 drafted in non-English. In “The Good, the Bad, and the Ugly,” Professor Burns provides critical direction and guidance to those forced to navigate the rugged terrain of new Article 9. In addition, there is a healthy dose of good humor, making the journey all the more endurable.

INTRODUCTION

In a moment of utter insanity (or, at best, half-wittedness),¹ I agreed, in June 2000, to hold a class (I would be loathe to claim that I “taught” anything) on the new Article 9 of the Uniform Commercial Code (UCC). This Article, which in some sense is in the nature of a morality play, describes what I found in my journey into the forest of new Article 9 and the profound and not-so-profound lessons I learned. My purpose is not to enter into an argument about whether uniform state-law drafting is beneficial, or whether one or more interest group “cap-

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1. My half-wit (as opposed to total insanity) defense is that I knew that I would be teaching new Article 9 in the next academic year at BYU and knew also that BYU was not going to pay me a nickel for preparing this new class. Using my law and economics training, I decided that getting paid a small salary (woefully small, in retrospect) by another law school beat getting paid zero by the home team. And the pressure to prepare served the other useful function of overcoming my customary procrastination. Of course it also ruined my sleep, my diet, and my exercise program for a month, along with causing me to misplace my sense of humor for long stretches of time. All in all, I would not recommend this course of action to anyone who has or hopes to have a family life.

tured” the process with respect to the substantive new Article 9 issues, or to assess the fairness of the new Article 9 rules insofar as they affect consumers, unsecured creditors, or other social concerns.² Instead, this Article will outline the major (and some minor) changes in new Article 9 and alert the uninitiated to some of the land mines, mazes, and utter confusion that lie in wait for them as they enter what, at times, seems like a hitherto unknown 10th ring of Dante’s Hell. Because the new Article 9 became effective on July 1, 2001 (and all states and the District of Columbia have already adopted it), this is a journey that others will inevitably have to take.³

Those who served on the new Article 9 drafting committee may say that I lack standing to criticize new Article 9. I was not on the drafting committee and therefore avoided the hours (and days and months) of tediously boring meetings and rancorous debates.⁴ I am, they may argue, a Johnny (or Jean) come lately who ought not criticize the output of those who toiled so long and hard to create the new Article 9. In truth, however, I am a perfect representative of the typical new Article 9 user: a practitioner, law teacher, or student who was not involved in the drafting process and therefore was not privy to any unstated “intents” but who must now navigate through the new law. Moreover, I am not a critic of everything in new Article 9; some of the drafting is well done and brings greatly needed clarity to the law. My chronicle notes such areas and gives them the lavish praise they deserve. Sadly, however, I cannot generate unqualified enthusiasm for all aspects of new Article 9. Furthermore, regardless of the benefit of a change, the unwary need to be warned of the unexpected surprises that lie in wait.

Parts I and II of this Article describe the preliminary work necessary for a voyager into new Article 9 and outline the dangers that lie ahead. Part III explains the navigational problems in new Article 9. Part IV summarizes modifications that make clear improvements to Article 9. Parts V and VI contain warnings of the dangers awaiting the newcomer

2. Other commentators have begun to debate these issues. *See generally* Peter A. Alces & David Frisch, *On the UCC Revision Process: A Reply to Dean Scott*, 37 WM. & MARY L. REV. 1217 (1996) (arguing that interest groups have not “captured” the UCC drafting process); Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, and the Race to the Bottom*, 83 IOWA L. REV. 569 (1998) (discussing the effect of secured credit on safety and other societal concerns and the benefits and pitfalls of the uniform-law process); Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707 (1998) (describing realities of the uniform drafting process).

3. *See* 845 Secured Transactions Guide (CCH) 2 (July 17, 2001) (reporting that all 50 states and the District of Columbia had adopted New Article 9 and that only four states have enactment dates later than July 1, 2001).

4. *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, 1400–01 (1999) (noting that the “heavy lifting on the project was taken on by volunteer labor” that spent “hundreds of hours of deliberations on difficult and sometimes controversial issues” over a period of six years); Edwin E. Smith, *An Introduction to Revised UCC Article 9*, in THE NEW ARTICLE 9 17, 17 (Corinne Cooper ed., 2d ed. 2000) (stating that “[f]rom 1993 to the summer of 1998, the Drafting Committee met on fifteen occasions” and that the reporters were Professors Steven L. Harris and Charles W. Mooney, Jr.).

to new Article 9. Part VII alerts the newcomer to some of the more notable examples of non-English in the Code. Part VIII lists the questions left unanswered by new Article 9. For clarity, when citing to new Article 9 (and revisions in other articles), this Article will use an “R” before the section number.⁵ References to old Article 9 (and old version of other articles) will not have a preceding “R.”⁶

I. PREPARATION: GATHERING THE MATERIALS FOR THE JOURNEY INTO THE UNKNOWN FOREST

With a hubris born of fourteen years of teaching old Article 9, I approached the new Article 9 with a cocky, can-do sense of confidence. Give me a couple weeks, I thought, and I can conquer this baby. Three hours with new Article 9 brought me to my knees. I had learned lesson number one: new Article 9 is a lot tougher than you thought. Beware of reassurances that the new Article 9 is just a “‘new, improved’ version of its predecessor,”⁷ and that anyone familiar with old Article 9 “will instantly be familiar with much that is found in Revised Article 9.”⁸ The truth is that new Article 9 is tough no matter how well you knew the old Article 9.

After spending a couple of days in total panic, I did the sensible thing: I called out for help.⁹ I telephoned casebook authors to obtain drafts of any materials they had;¹⁰ I had the library send me any books or articles on new Article 9; I thanked God that Professors White and Summers had published a new fifth edition of their hornbook to deal with the new Article 9.¹¹ From my conversations with other secured

5. For example, R9-102 will represent U.C.C. § 9-102 (2000). The same applies for Articles 1, 2, and 8.

6. For example, 9-312 will represent U.C.C. § 9-312 (1995). The same applies for the old versions of Articles 1, 2, and 8.

7. Steven L. Harris & Charles W. Mooney, Jr., *Filing and Enforcement Under Revised Article 9*, 54 BUS. LAW. 1965, 1967 (1999).

8. *Id.* at 1966. The reporters also assert that, whether familiar with the old Article 9 or not, lawyers “will find the revised Article easier to navigate. . . . [T]he language has been updated and simplified, and its subsections have been shortened and separately captioned—all with a view toward making the law more readily accessible and comprehensible.” *Id.* at 1967. My response: liar, liar, pants on fire.

9. To quote the great philosopher, Clint Eastwood: “A [wo]man has *got* to know h[er] limitations.” *MAGNUM FORCE* (Warner Studios 1973).

10. I owe special thanks to Professors Steven L. Harris, Steven D. Walt, William D. Warren, and Douglas J. Whaley.

11. JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE: HORNBOOK SERIES* (5th ed. 2000). The same information is available in 4 JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE, PRACTITIONER TREATISE SERIES* (4th ed. Supp. 1999). Although the paragraph citations for both volumes are the same, the page numbering is different. All page references in this article will be to the Hornbook Series. Prior to dealing with new Article 9, I looked at Professors White and Summers as demi-gods of the UCC. I now see that they are full-fledged deities. To the extent my journey through new Article 9 seemed like a descent into a new tenth ring of Dante’s Hell, Professors White and Summers were my Virgil. I never would have survived without their guidance.

transactions teachers, I learned lesson number two. New Article 9 has united all professors who did not serve on the drafting committee. None of us claims to understand it completely, and all of us dread teaching it.

With my materials assembled, I sat down to work my way through new Article 9 and, in short order, learned lesson number three. Unless you were one of the drafters of new Article 9, be prepared to spend an enormous amount of time navigating through it the first time. While many of the concepts of new Article 9 are the same as those under the old Article 9, getting a handle on the details and interconnections of the new version is extraordinarily difficult and time-consuming. The organization of new Article 9 is different from the old Article 9; the comments, while helpful, are dense; and, numerically, there are substantially more sections in new Article 9, with a corresponding greater need to cross-reference among sections (and to revised sections in Articles 1, 2, and 8). The only way to conquer new Article 9 is with total immersion.¹²

II. ENTERING THE FOREST

Once the initial shock of the renumbering and reorganization of new Article 9 subsides, one realizes that the general contours of the forest have stayed the same. The overarching goal of Article 9 is unchanged: to provide a means of solving the ostensible ownership problem that is created when a debtor keeps possession of personal property that is collateral for a loan.¹³ Article 9 gives a creditor a way to alert others that, although the debtor has possession of the personal property, the property is subject to the creditor's security interest.

In addition to retaining the same goal, the basic framework of Article 9 also remains unchanged. A creditor still must go through the steps of attachment and perfection to become a perfected secured creditor.¹⁴ Furthermore, the rules for attachment and for filing a financing statement remain basically the same (although, in a major improvement, the

12. As one commentator stated: "[Revised Article 9]'s harder to work through than the old Code. There's a huge learning curve and it's chock-full of subtleties. If you don't wallow in it, you could get nailed." Bruce A. Markell, *From Property to Contract and Back: An Examination of Deposit Accounts and Revised Article 9*, 74 CHI.-KENT L. REV. 963, 1027 (1999) (quoting Robert Zadek). To the extent my journey seemed like a trip to the bowels of Dante's Hell, "baptism by fire" would be an appropriate metaphor.

As a teacher, I also needed to decide whether to try to teach both old and new Article 9 or to limit myself to new Article 9. With my newfound appreciation of its difficulty, I decided to teach only new Article 9. In retrospect, this was the right decision. To try to handle both old and new Article 9 in one three-hour course is beyond the ability of mere mortals.

13. See DOUGLAS G. BAIRD & THOMAS H. JACKSON, SECURITY INTERESTS IN PERSONAL PROPERTY: CASES, PROBLEMS, AND MATERIALS 8 (2d ed. 1987) ("The creditor's contractual security interest creates an 'ostensible ownership' problem because the agreement entered into between the debtor and the creditor is not freely observable by other creditors [who see the debtor in possession of the collateral]."); Janger, *supra* note 2, at 596-97 (describing the ostensible ownership problem and Article 9's response to it).

14. R9-203; R9-502.

drafters scrapped the old where-to-file rules).¹⁵ Many of the modifications to these rules reflect a desire to bring Article 9 up to date with technological advances. For instance, new Article 9 allows for electronic records (as well as writings) for security agreements, an “acknowledgment” (in place of a signature) by a debtor, and electronic filings of financing statements.¹⁶ Similarly, new Article 9 continues the basic priority rules of the old Article 9. Generally, the first creditor to file or perfect has priority, with super-priority for a purchase money security interest (PMSI) in some instances.¹⁷ Likewise, new Article 9 conceptually keeps intact the major rules for buyers, fixtures, and secured creditors in bankruptcy.¹⁸ While the drafters expanded and stated in greater detail the default rules, here too, they retained the basic framework of the old Article 9.¹⁹ And, for better or worse, the revisions left untouched the existing law for leases and bailments.

This continuity is reassuring and, not surprisingly, the drafters of the new Article 9 have emphasized it.²⁰ Unfortunately, this continuity also gives a false sense of security and inadvertently creates a trap for the unwary. The similarity between new Article 9 and the old Article 9 is *overall*. It is of little help in navigating the particulars of new Article 9. This was lesson number four for your guide: the forest may have the same basic contours, but the difficulty and hellishness (not God) come in the details.²¹ In particular:

- almost every tree in the forest has been renumbered²² and moved;
- many old trees have been split into two or three smaller bushes, which the user must cross-reference to get a complete and accurate answer;
- there are few signposts to help one find the paths through the newly arranged forest;
- there are land mines throughout the forest, i.e., small, but significant, changes in the rules that only a careful reading will uncover;

15. See *infra* Part IV.E.

16. See *infra* Part IV.A.

17. R9-322; R9-324.

18. For an argument that the rule for buyers in the ordinary course *should* have been changed, see 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, 22–46 (1999–2000).

19. See *infra* Part IV.M.

20. See *supra* notes 5 & 6 and accompanying text.

21. “God is in the details” is attributed to Ludwig Mies van der Rohe. See SIMPSON’S CONTEMPORARY QUOTATIONS 248 (James B. Simpson ed., 1988).

22. The most notable sections that have the same numbers in old and new Article 9 are 9-203, setting out the requirements for attachment, and 9-207, setting out the secured party’s duty of care when in possession of the collateral. The failure to renumber these sections can only have been an oversight on the part of the drafting committee.

- there are a fair number of new trees in the forest and some whole new groves of trees;
- while some of the changes bring major improvements to Article 9, others are counterintuitive or add entirely new areas of confusion;
- some sections of the new Article 9 are written in a language other than English and can only be understood if one has a preexisting knowledge of the law; and
- despite all the new trees and pruned old trees, a substantial number of questions under the old Article 9 remain unanswered by the new Article 9.

III. NAVIGATING NEW ARTICLE 9: RENUMBERING, ORGANIZATION, AND THE LACK OF SIGNPOSTS

By itself, the renumbering of the Article 9 sections would not require a great expenditure of time or effort to master. However, with a technique that would make a physicist smile, the drafters of new Article 9 intermingled fusion with fission. They consolidated (fused) some previously separate sections while splitting (fissuring) others into two or more smaller sections. Furthermore, to make the game of learning new Article 9 particularly challenging, they gave few organizational road signs and occasionally used definitions “by the negative.”²³ In short order, this traveler discovered lesson number five: users of new Article 9 often need to know *where* (and sometimes *what*) the law is before going to the Code.²⁴

The definitions and classifications of collateral offer a prime example of fusion/consolidation without the aid of signposts. In looking for proper Article 9 collateral, one begins (as one did with old Article 9) with the general statement that “[e]xcept as otherwise provided . . . this article applies to: (1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract”²⁵ Then, as before, new Article 9 lists a few specific inclusions²⁶ and those

23. *E.g.*, R9-102(a)(33), (58).

24. Again, use of the new edition to the White and Summers hornbook or practitioner treatise is essential. *See* WHITE & SUMMERS, *supra* note 11. The reporters for the new Article 9 admit that “[w]hen taken in the aggregate and in the abstract, the revised Article may appear forbidding,” but the reporters go on to assure the user that when “[a]pproached in a given transactional context, Revised Article 9 should prove to be readily navigable.” Harris & Mooney, *supra* note 4, at 1389. This particular journeyer into new Article 9 can report that the first half of the remark is correct, but the second is a lie.

25. R9-109(a)(1). This is basically a rewording of old 9-102(1)(a).

26. *See* R9-109(a)(2)–(6). Among the new inclusions are: agricultural liens, R9-109(a)(2), sales of payment intangibles and promissory notes (as well as sales of accounts and chattel paper), R9-109(a)(3), and consignments, R9-109(a)(4). With respect to consignments, *see infra* Part VI.A. Other new inclusions are found by using an inclusion-by-the-negative approach that requires cross-referencing the definition section, R9-102, with the exclusion sections, R9-109(c) & (d). *See infra* note 27.

matters specifically excluded.²⁷ Under the old Article 9, however, the organization aided the user, to some extent, in finding the categories of collateral. For instance, the old Article 9 defined all forms of “goods” in one section and defined intangibles in another.²⁸ The user of old Article 9 was then left to find the “paper” collateral definitions (chattel paper, documents, and instruments) in the general definitional section, section 9-105, and the investment property definition in section 9-115.

With new Article 9, the task of finding the collateral categories is considerably more difficult. In an effort to make more secured credit available to debtors, new Article 9 expands the categories of permissible collateral.²⁹ While the expansion of credit may be a praiseworthy goal, there is no one place that one can go in new Article 9 to find all the collateral now available. The drafters simply dumped all the collateral definitions in the general definition section, R9-102.³⁰ This section has eighty subsections, contains almost all the definitions for the new Article 9, and has no organization other than the alphabet.³¹ The comments to section R9-102 provide some aid by grouping together the discussions of the types of collateral.³² However, because these comments cover so many definitions and topics, they are necessarily long and dense.³³ Moreover, in some cases, to find what is *included* in new Article 9 as permissible collateral, one must cross-reference the section R9-102 definitions with the *exclusions* in section R9-109(c) and (d).³⁴ Given the expansion of types of permissible collateral, the new Article 9 user is lost without a preexisting knowledge of what to look for.³⁵ Rather than leaving it to the user to wade through eighty definitions, over ten pages of comments, and cross-references to the exclusions section, the drafters could have eased the burden by simply creating a separate definitional section for types of col-

27. R9-109(c)–(d). These sections correspond to old 9-104.

28. See 9-109 (defining all forms of goods); 9-106 (defining intangible goods).

29. See Harris & Mooney, *supra* note 7, at 1984 (stating that one goal of the new Article 9 was to facilitate the expansion of secured credit).

30. See R9-102.

31. See *id.*

32. R9-102 cmts. 4–6.

33. There are over ten pages of comments for R9-102 and twenty-six numbered paragraphs, many with subparts.

34. For instance, the user only finds *which* deposit accounts are included as new Article 9 collateral by cross-referencing section R9-102(a)(29) which defines a “deposit account” with R9-109(d)(13) which excludes “an assignment of a deposit account in a consumer transaction,” and R9-102(a)(26) which defines a “consumer transaction.” Having done all that, one finds that some consumer deposit accounts may be proper new Article 9 collateral. See *infra* notes 243–44 and accompanying text.

35. The most notable new collateral categories are: commercial deposit accounts, rights under letters of credit, commercial tort claims, health-care insurance receivables, and software. R9-102(a)(13), (29), (46), (51), (75), cmts. 4–6. The reporters note that in place of the four types of rights to payments of old Article 9, new Article 9 contains twelve. See Harris & Mooney, *supra* note 7, at 1965. To find the definition and classification of each of these (and I am not sure I did), one has to know first to look for it.

lateral—something they did for the definitions of purchase money security interests.³⁶

One also finds in the definitions of collateral a perfect example of likely confusion through definition-by-the-negative. Under old Article 9, the definition of “equipment” had two parts: a positive explanation and language making it the catch-all category for goods that did not fit elsewhere.³⁷ In new Article 9, the drafters eliminate the positive explanation of “equipment” and leave just the negative statement that it “means goods other than inventory, farm products, or consumer goods.”³⁸ This approach is fine for the lawyer familiar with old Article 9 but not helpful to the newcomer to secured transactions. Indeed, the drafters evidently recognized this problem and included, in the comments, the old positive definition.³⁹ One wonders why they did not just leave the positive part of the definition in the Code itself.

While the drafters fused almost all definitions into one section, they fissured other sections. For instance, to find out how to create and perfect a security interest in, and the priority rules for investment property, one needs to go to at least a dozen sections of new Article 9 and another five sections of Article 8.⁴⁰ Where old Article 9 had one section containing the major priority rules, new Article 9 splits the rules into eight separate sections, most with further subsections.⁴¹ Similarly, the drafters use a separate section to define “control” for each type of collateral for which it is an accepted method of perfection.⁴² While some of this fission may prove helpful in the long run, the proliferation of separate sections (which, at times, seems akin to bunnies breeding) requires the user to spend more time and caution in navigating and cross-referencing.

36. See R9-103.

37. 9-109(2) (stating that goods were equipment “if they are used or bought for use primarily in business . . . or if the goods are not included in the definitions of inventory, farm products or consumer goods”).

38. R9-102(a)(33).

39. R9-102 cmt. 4a. The comments flesh out the meaning of “equipment” in terms similar to those used in the old Article 9.

40. See R9-102(a)(49) (defining “investment property”); R9-102(a)(14) (defining “commodity account”); R9-203(b)(3)(C)–(D) (dispensing with the need for security agreement for investment property in some situations); R9-206 (defining security interest in investment property of securities intermediary or person delivering security); R9-305 (outlining choice-of-law rules for investment property); R9-312 (discussing perfection for investment property); R9-314 (same); R9-309(9)–(11) (discussing automatic perfection in investment property); R8-106 (defining “control” for investment property); R9-106 (same); 8-102(16)–(18) (defining “certificate representing a security,” “securities entitlement” and “uncertificated security”); 8-501(a) (defining “securities account”); R8-301(a) (discussing delivery for certificated security); R9-328 (outlining priority rules for investment property); R9-331 (same); R9-322(c)–(d) (prioritizing for proceeds of investment property); R9-208(b)(4) (enumerating duties of secured party having control of investment property).

41. Compare 9-312, with R9-322 to -329.

42. See R9-104 (defining control of deposit accounts); R9-105 (defining control of electronic chattel paper); R9-106 (defining control of investment property, which sends the user to R8-106 for further instructions); R9-107 (defining control for rights under a letter of credit).

IV. THE GOOD: THE NEW TREES AND CHANGES THAT ARTICLE 9 NEEDED

Putting aside the problems of navigating new Article 9, there is much to praise in the revised article. (Lesson number six: every cloud has a silver lining.⁴³) Many of the changes clarify prior ambiguities or make life simpler, and therefore cheaper, for the secured lender and the debtor.⁴⁴ Some of these changes (such as the new where-to-file rules⁴⁵) have received substantial publicity; others have not. What follows is a short summary of the new rules for which we should all stand and applaud.

A. *Electronic Filing and Other Technology-Related Changes*

New Article 9 contains a number of changes that allow secured creditors and debtors to take advantage of today's technology. Perhaps most importantly, it permits the creditor to file a financing statement electronically,⁴⁶ an innovation that will save trees and simplify life for all concerned. In addition, new Article 9 requires a "record," but not necessarily a paper record, of the security agreement.⁴⁷ The debtor must "authenticate," but need not sign, the security agreement.⁴⁸ In a similar vein, the debtor must "authorize" the filing of the financing statement but need not sign it.⁴⁹ Chattel paper may be electronic instead of paper form, but it still can be used only in connection with chattel.⁵⁰

B. *Safe-Harbor Financing Statement Forms*

To make perfection of a security interest even easier, new Article 9 includes forms for financing statements, financing statement addenda,

43. Okay, it's trite.

44. See, e.g., Charles Cheatham, *Changes in Filing Procedures Under Revised Article 9*, 25 OKLA. CITY U. L. REV. 235, 266-67 (2000).

45. See *infra* Part IV.E.

46. See R9-516(a).

47. Getting to this simple proposition requires referral to three different sections, another example of splitting everything into tiny shrubs. See R9-203(b)(3)(A) (stating that the debtor must authenticate the security agreement); R9-102(a)(7) (defining "authenticate" as including "adopting or accepting a record"); R9-102(a)(69) (defining "record" as "information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form").

48. See R9-203(b)(3)(A); R9-102(a)(7).

49. See R9-509(a). By authenticating a security agreement, the debtor has authorized the filing of a financing statement. R9-509(b).

50. R9-102(a)(11) permits chattel paper to be a "record," which R9-102(a)(69) defines to include electronic medium. However, while the drafters were willing to allow chattel paper without paper, they were not willing to allow chattel paper to be used without a chattel, i.e., with intangibles. R9-102(a)(11) limits chattel paper to records relating to specific goods or software used in goods (which makes the software and the good in which it is used a type of "goods"). R9-102(a)(11). For a discussion of electronic chattel paper, see Jane Kaufman Winn, *Electronic Chattel Paper Under Revised Article 9: Updating the Concept of Embodied Rights for Electronic Commerce*, 74 CHI.-KENT L. REV. 1055 (1999).

and financing statement amendments.⁵¹ If a creditor uses one of these forms, the filing officer may not reject it on the grounds of form or format.⁵²

C. *Erroneous Debtor Names on Financing Statements*

New Article 9 continues the rule of old Article 9 that a financing statement is effective if it substantially satisfies the Code requirements, even though it contains “minor errors” that are not “seriously misleading.”⁵³ However, because old Article 9 did not specify what test to apply when the financing statement had the wrong name for the debtor,⁵⁴ the case law contained a fair number of subjective and conflicting rulings.⁵⁵ New Article 9 cures this problem by giving an objective test for determining whether an erroneous debtor’s name renders a financing statement “seriously misleading” and, therefore, ineffective.⁵⁶ The test is whether an actual search under the correct name would turn up the financing statement.⁵⁷

D. *Post-Filing Name Changes, Mergers, and Transfers of Collateral*

Under old Article 9, there was considerable confusion regarding the effectiveness of a filed financing statement where the debtor changed its name, its organizational structure, merged with another entity, or transferred collateral to a different entity.⁵⁸ Under new Article 9, there is good news and bad news. The good news is that the law has been clarified to a great extent.⁵⁹ The bad news is that finding the answers requires an enormous amount of time (and coffee), exceedingly careful reading, and cross-referencing numerous sections. Name changes are now dealt with in one section;⁶⁰ changes in the debtor’s organizational structure and

51. R9-521. In 9-402(3), old Article 9 provided a brief outline of a financing statement that was sufficient to comply with 9-402(1), the counterpart to R9-502.

52. R9-521 cmt. 2.

53. 9-402(8); R9-506(a).

54. Because financing statements are filed under the debtors’ names, this piece of information, if wrong, is likely to have the most significant effect on a later searcher. JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 31-18b, at 219 (4th ed. 1995).

55. *See id.* (collecting cases and discussing various tests used by different courts).

56. *See* R9-506(c).

57. *See* R9-506(b)–(c). Under the old Article 9, a number of commentators had advocated that courts adopt this test. *See, e.g.,* WHITE & SUMMERS, *supra* note 54, § 31-18b, at 203. Comment 2 to R9-506 also states that typically an error in the secured party’s name on the financing statement will not be seriously misleading but may give rise to estoppel in some cases. With respect to *post*-filing changes, new Article 9 provides that changes, other than in the debtor’s name, will not render the financing statement ineffective. R9-507(b)–(c).

58. The rules were contained in the second and third sentences of 9-402(7). WHITE & SUMMERS, *supra* note 54, § 31-19 (collecting cases); F. Stephen Knippenber, *Debtor Name Changes and Collateral Transfers Under 9-402(7): Drafting from the Outside-In*, 52 MO. L. REV. 57, 77 (1987).

59. However, not all questions that arose under old Article 9 have been answered in the new Article 9. *See infra* Part VIII.

60. R9-507(b)–(c).

mergers are handled in a different set of sections,⁶¹ and a debtor's transfer of property is handled by a slightly different collection of rules.⁶² The upshot is that, for the most part, creditors will have clear answers to most questions, but finding those answers is not a task for the faint of heart. In Appendix A, I have set out a road map for this particular thicket.

E. Where-to-File Rules

Along with permission for electronic filing, probably no change in new Article 9 deserves greater applause and accolades than the change in the where-to-file rules. Gone is the distinction between ordinary versus mobile goods,⁶³ the thirty-day exception for some PMSIs in ordinary goods,⁶⁴ the impossible to explain (or even state) "last event test" for ordinary goods,⁶⁵ and the differing approaches of states toward intrastate filings.⁶⁶ New Article 9 tosses all these rules into the garbage where they belong. Secured creditors will now file all financing statements for all types of collateral (other than fixtures) in the state where the debtor is located⁶⁷ and only file at one central office within that state.⁶⁸ Furthermore, new Article 9 provides that "registered organizations" (i.e., all incorporated businesses and registered partnerships) are "located" in the state of their incorporation (or registration, in the case of a partnership),⁶⁹ a place easy to determine and one that rarely changes.

In the silly-but-fun category, new Article 9 also resolves a question that, no doubt, has kept many people awake at night: where is the United States? Under the new Article 9, the answer is the District of Columbia,⁷⁰ which may come as a bit of a surprise to those living "outside the beltway."

61. R9-203(d)-(e); R9-316(a)(3); R9-325; R9-326; R9-508.

62. R9-203(d)-(e); R9-315; R9-317(b); R9-320; R9-325; R9-326; R9-507(a).

63. 9-103(1)(a); 9-103(3)(a).

64. 9-103(1)(c).

65. 9-103(1)(b). The only thing to be said in defense of 9-103 is that it was fertile ground for final exam questions.

66. Old 9-401 gave states three choices on where to require intrastate filings. Many states opted for local (county) filings for some types of collateral and central filings for others. See BARKLEY CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* ¶ 2.12 (rev. ed. 1993).

67. R9-301(1). New Article 9 contains special choice-of-law rules for non-filing collateral such as deposit accounts, investment property, letter-of-credit rights, and collateral covered by a certificate of title. R9-303 to -306. For a detailed discussion of the new choice-of-law rules, see Hans Kuhn, *Multi-State and International Secured Transactions Under Revised Article 9 of the Uniform Commercial Code*, 40 VA. J. INT'L L. 1009, 1014-19 (2000).

68. The new Article 9 eliminates all reference to local filing. R9-501(a). In Comment 2 to R9-501, the drafters make clear their intent to have only centralized filings within states.

69. R9-307(e). A special note of thanks is due to Professor LoPucki, who argued for this rule. See Lynn M. LoPucki, *Why the Debtor's State of Incorporation Should Be the Proper Place for Article 9 Filing: A Systems Analysis*, 79 MINN. L. REV. 577 (1995). "Registered organization" and "jurisdiction of organization" are defined in R9-102(a)(70) and R9-102(a)(50), respectively. New Article 9 also indicates the proper "locations" for debtors that are not "registered organizations." R9-307(b).

70. R9-307(h).

*F. Apart from the Buyer Sections, Knowledge Is Irrelevant*⁷¹

In another move that deserves a chorus of hosannas, the drafters of new Article 9 deleted old section 9-401(2), the only remaining knowledge-is-relevant section for priority disputes between creditors.⁷² This section caused nothing but trouble as courts tried to determine how much knowledge triggered it,⁷³ when knowledge was relevant,⁷⁴ and whether the section might apply to financing statements filed in the wrong state.⁷⁵ With the elimination of this section, not only do these issues disappear, but also diligent creditors who do thorough searches are not penalized.⁷⁶

G. Clarification of Proceeds Questions

In the proceeds sections,⁷⁷ the drafters made three important changes and one minor change to clarify ambiguities under old Article 9. First, they wisely eliminated the phrase “received by the debtor,” which had caused litigation under the old Article 9 in cases in which the debtor never actually got his grubby hands on the proceeds.⁷⁸ Under new Article 9, the secured creditor’s security interest in proceeds attaches whether or not the debtor himself ever obtains the proceeds.⁷⁹ Second, to “identify” cash proceeds in a commingled bank account, the drafters allow the use of any tracing method permitted by state law, including the widely used “lowest intermediate balance” approach.⁸⁰ Third, the drafters

71. I always take joy in being the first to inform law students that knowledge is irrelevant, something many had assumed for a long time.

72. See 9-401(2). “A filing which is made in good faith in an improper place or not in all the places required by this section . . . is . . . effective with regard to collateral covered by the financing statement as against any person who has knowledge of the contents of such financing statement.”

73. There were three possible interpretations of *what* type of knowledge triggered 9-401(2): (1) a creditor’s knowledge of a financing statement; (2) a creditor’s reading of the financing statement; or (3) a creditor’s awareness of the important provisions of the financing statement, even if he had never read it. See CLARK, *supra* note 66, ¶ 2.12[3]; WHITE & SUMMERS, *supra* note 54, § 31-17, at 195 (collecting cases).

74. See *First Nat’l Bank & Trust v. First Nat’l Bank of Greybull*, 582 F.2d 524, 526 (10th Cir. 1978).

75. Compare *Northwest Acceptance Corp. v. McClellan Equip. Co.*, 719 P.2d 887, 889 (Or. App. 1986) (holding that 9-401(2) applies in interstate as well as intrastate context), with *In re Nemko Inc.*, 30 U.C.C. Rep. Serv. 2d 401, 408 (E.D.N.Y. 1996) (holding that 9-401(2) does not apply to filings in the wrong state).

76. See BAIRD & JACKSON, *supra* note 13, at 338–39.

77. See R9-102(a)(64); R9-315. Continuation of perfection in proceeds is handled in R9-315(d), a section that does not deserve accolades. See *infra* Part VII.A.

78. In the old Article 9, the “received by the debtor” language was found in 9-306(2), which specified when a security interest in proceeds attached. For typical cases in which courts had to deal with situations in which the debtors never actually got the proceeds, see *In re Reliance Equities, Inc.*, 966 F.2d 1338 (10th Cir. 1992); see also *In re San Juan Packers Inc.*, 696 F.2d 707 (9th Cir. 1983).

79. R9-102(a)(64) cmt. 13(d).

80. R9-315(b)(2) cmt. 3. Both the old and the new Article 9 require that, in order for a security interest to attach to proceeds, the proceeds must be “identifiable.” 9-306(2); R9-315(a)(2). With respect to courts’ use of the lowest intermediate balance method under the old Article 9, see WHITE & SUMMERS, *supra* note 11, § 22-16(a), at 808.

eliminated the special rules for proceeds in insolvency found in old Article 9;⁸¹ now there is one set of rules for proceeds.⁸²

The fourth and smaller change to proceeds comes in the area of continuing automatic perfection in cash proceeds. Under old Article 9, a perfected secured creditor in collateral had continuing automatic perfection (beyond the ten-day grace period) in identifiable cash proceeds only if there was a filed financing statement covering the original collateral.⁸³ Consequently, if a PMSI in consumer goods relied on automatic perfection and did not file for the original collateral, he did not have continuing automatic perfection (beyond the grace period) in identifiable cash proceeds. By eliminating the requirement for a filed financing statement, new Article 9 treats all perfected secured creditors alike for cash proceeds, regardless of how they perfected their interest in the original collateral.⁸⁴

H. Filing for Instruments

While old Article 9 required possession for perfection of an instrument,⁸⁵ new Article 9 permits either possession or filing.⁸⁶ This small change will not only make many transactions less costly for the parties,⁸⁷ but it will also eliminate the confusion that arose under the old Article 9 when a non-check instrument was a proceed of collateral. Under old Article 9, most courts held that non-check instruments (e.g., promissory notes or negotiable certificates of deposit) were not “cash proceeds,”⁸⁸ and therefore a secured creditor could not claim continuing automatic

New Article 9 also enlarges the definition of “proceeds” to include *all* insurance payable to the debtor or claims (including legal claims) arising by reason of loss, nonconformity, or damage to the collateral and all cash and stock dividends. R9-102(a)(64)(B), (D), (E).

81. 9-306(4).

82. R9-315. But that is not completely true. Proving that every good statutory change produces an equal and opposite lousy one, the drafters added special priority rules for proceeds of deposit accounts, investment property, letter-of-credit rights, chattel paper, instruments, and negotiable documents. R9-322(c)–(e). The priority rules for proceeds in these “non-filing” collateral (a new term dreamed up by the drafters that is not defined in R9-102) are exceedingly complex and should be tackled only by a member of Mensa. See R9-322 cmts. 7 & 8. Extra credit will be given to anyone able to explain in English the examples given in Comment 8 to R9-322.

83. 9-306(3)(b). Section 9-306(3) provided the perfected secured creditor a ten-day grace period of automatic perfection in the proceeds. After that ten-day period, the secured creditor needed to fit within one of the subsections to 9-306(3) to continue its perfection in the proceeds. *Id.*

84. See R9-315(d)(2) cmt. 7. The drafters also extended the grace period for automatic perfection in proceeds, without any action, to twenty days. *Id.*

85. 9-304(1).

86. R9-312(a).

87. See Harris & Mooney, *supra* note 7, at 1970–71, 1984.

88. See, e.g., *Citicorp, Inc. v. Davidson Lumber Co.*, 718 F.2d 1030, 1032 (11th Cir. 1983). Under the old Article 9, “cash proceeds” were defined as “[m]oney, checks, deposit accounts, and the like.” 9-306(1). The new Article 9 continues this language. R9-102(a)(9). Even though promissory notes and certificates of deposit, like checks, are instruments, courts held that the non-check instruments were not “cash proceeds.” See *Citicorp*, 718 F.2d at 1032; see also *In re Lewis*, 157 B. R. 555, 564 (Bankr. E.D. Pa. 1993); CLARK, *supra* note 66, ¶ 10.01[2][b][i].

perfection in them through the “cash proceeds” rule.⁸⁹ Nor could a creditor claim continuing automatic perfection in the instrument through the same-office rule (or cash-transformation rule) because a creditor could not file for an instrument.⁹⁰ As a result, a secured creditor could only perfect by possession for a proceed that was a non-check instrument. Not only did this create a burden for the secured creditor, it led to the further question: what should the secured creditor do if the debtor refused to give up possession of the instrument?⁹¹ By allowing perfection by filing for an instrument, new Article 9 will not transform non-check instruments into “cash proceeds,”⁹² but it will permit a secured creditor who has filed to perfect for the original collateral to claim automatic perfection, beyond the grace period, in such an instrument under either the same-office rule or the cash-transformation rule.⁹³

I. Perfection When Promissory Note and Mortgage Are Collateral

New Article 9, like old Article 9, applies only to security interests in personal, as opposed to real, property.⁹⁴ Thus, if a homeowner signs a promissory note and gives a lender a mortgage on her house to secure repayment, the transaction is governed by state real property law, not Article 9.⁹⁵ Under old Article 9, however, a problem arose if the lender-mortgagee then borrowed from another creditor (assume “Finance”) and used the homeowner’s promissory note and mortgage as security for the lender-mortgagee’s loan from Finance. The second transaction—that between the lender-mortgagee and Finance—was (and continues to be) within Article 9.⁹⁶ The ambiguity arose because old Article 9 did not specify how Finance should perfect for the mortgage. Three possibilities existed: (1) Finance could perfect for the promissory note under the Article 9 rules and hope that this also perfected its interest in the mortgage; (2) Finance could perfect for the mortgage under the state real property law and hope that this also perfected for the promissory note; or (3) Finance could perfect for the mortgage under the state real property law

89. 9-306(3)(b). The cash proceed rule is continued in the new Article 9. R9-315(d)(2).

90. In old Article 9, the same-office rule and the cash-transformation rule are contained in 9-306(3)(a). Both require that the proceed be the type of collateral for which a creditor could perfect by filing in the same office as the original collateral. 9-306(3). For a more detailed discussion of these rules, see *infra* Part VIII.A.

91. See, e.g., *Citicorp*, 718 F.2d at 1031 (holding that creditor must take possession of instrument-proceed); see also *In re Seaway Express Corp.*, 912 F.2d 1125, 1127 (9th Cir. 1990) (dealing with the comparable question of what a secured creditor should do when the proceed is real property and the debtor refuses to give up the deed).

92. R9-102 comment 13(e) states that the “and the like” language may cover some money-market accounts. The comment does not say that “and the like” includes promissory notes or certificates of deposit.

93. R9-315(d).

94. Under the old Article 9, security interests in real property were excluded by 9-104(j). The corresponding section under new the Article 9 is R9-109(d)(11).

95. R9-109(d)(11).

96. 9-102(a)(3) cmt. 4; R9-109(b) cmt. 7.

and perfect for the promissory note under the Article 9 rules.⁹⁷ Not surprisingly, courts came to conflicting conclusions for this question.⁹⁸

To their credit, the drafters of new Article 9 give a definitive answer to this issue. New Article 9 specifies that, in the above example, Finance need only perfect for the promissory note; perfection for the mortgage follows automatically when the creditor perfects in the note.⁹⁹ Unfortunately, a caveat is necessary. At least two members of the new Article 9 drafting committee (and both reporters for the committee) recommend that creditors continue to follow a state's old Article 9 case law because courts may be slow to reject their prior rulings.¹⁰⁰ As a result, in some jurisdictions, creditors may need to continue making filings in the real estate records, as well as under new Article 9.

J. Refinancing and the Commercial PMSI

Under old Article 9, there was considerable confusion about whether, and the extent to which, a PMSI retained its PMSI status if the creditor refinanced or restructured the debtor's loan.¹⁰¹ New Article 9 provides a specific answer for PMSIs in *commercial* transactions.¹⁰² Unfortunately, new Article 9 does not deal with this problem in *consumer* transactions,¹⁰³ where most of the cases under old Article 9 arose.¹⁰⁴

K. Future Advances

In the area of future advances, the new Article 9 comments contain a small, but nonetheless helpful, statement regarding priority when the original loan has been repaid. The comments specify that, even if the debtor has repaid the original loan, the priority date for any future advance is the priority date of the original loan (provided there is a filed financing statement and the security agreement covers future advances, or

97. See WHITE & SUMMERS, *supra* note 54, § 30-7a.

98. *Id.*

99. R9-109(b) cmt. 7; R9-203(g); R9-308(d) cmt. 6 (showing their concern about resolving this question, the new Article 9 drafters addressed it repeatedly). R9-109(b) should also receive an honorary mention in the ugly, non-English category.

100. See JOHN HONNOLD, STEVEN HARRIS & CHARLES MOONEY, CASES, PROBLEMS, AND MATERIALS ON SECURITY INTERESTS IN PERSONAL PROPERTY, TEACHER'S MANUAL 255 (3d ed. 2001). Professors Harris and Mooney were the reporters for the new Article 9 drafting committee. See Smith, *supra* note 4, at 17.

101. See, e.g., *Pristas v. Landaus of Plymouth, Inc.*, 742 F.2d 797, 800-01 (3d Cir. 1984); *In re Matthews*, 724 F.2d 798, 800-01 (9th Cir. 1984); *In re Manuel*, 507 F.2d 990, 993-94 (5th Cir. 1975); 4 WHITE & SUMMERS, *supra* note 54, § 31-9, at 134-38 (collecting cases).

102. R9-103(e)-(f). The new rules provide that, after refinancing, consolidation, or restructuring in a non-consumer transaction, a security interest may be partly PMSI and partly non-PMSI (the "dual status" rule). R9-103 & cmt. 7(a).

103. See R9-103(h) (limiting rules in this area to transactions "other than consumer goods transactions."); see also WHITE & SUMMERS, *supra* note 11, § 22-6a, (explaining that courts could apply the business rules of R9-103 to consumer cases by analogy).

104. See WHITE & SUMMERS, *supra* note 54, § 33-5, at 328-31.

the secured creditor obtains a new security interest).¹⁰⁵ These comments, which one wishes were in the new Code itself, clarify an ambiguity in this area under old Article 9.¹⁰⁶

L. Debtor's Right to an Accounting

Old Article 9 provided a cumbersome procedure for a debtor seeking an accounting from a secured creditor.¹⁰⁷ New Article 9 replaces the old procedure with a detailed explanation of the debtor's right to information and the secured creditor's duty to respond.¹⁰⁸ In addition, new Article 9 puts teeth into the section by providing that failure to comply gives a debtor a right to damages and also potentially limits the creditor's security interest in the collateral.¹⁰⁹

M. Default Rules

By adding specificity to the default rules, new Article 9 clarifies (and, in places, expands) some of the duties of a secured creditor in the post-default setting.¹¹⁰ For instance, new Article 9: tells the creditor whom to notify of a disposition of collateral;¹¹¹ provides a safe-harbor provision for timing of the notice of disposition;¹¹² specifies the content

105. R9-323 cmt. 3, ex. 1.

106. 9-312(7); *see also* WHITE & SUMMERS, *supra* note 54, § 33-4, at 319 & n.10. Although the comments to the future advance section, R9-323, are helpful, the Code section itself is not. *See infra* Part VII.B.

107. 9-208.

108. R9-210. The rights of a debtor when the secured party has control of the collateral are found in a different section, R9-208. The new Article 9 allows a debtor to recover damages if a person files a financing statement without authorization. R9-625(e). In addition, a debtor can also demand that the creditor file a termination statement if there is no longer an obligation due or in the case of "bogus" filings. R9-513 cmt. 3. Failure of the creditor to do so gives the debtor a right to file his own termination statement and to recover damages. R9-509(d)(2); R9-625(e).

109. R9-625(b), (f)–(g). Although failure to reply may result in a limitation in the secured party's security interest, the debtor is unlikely to benefit from any such estoppel. R9-625(g) specifies that if a creditor fails to comply with R9-210, "the secured party may claim a security interest only as shown in the list . . . as against a person that is reasonably misled by the failure." R9-625(g) (emphasis added). R9-628 contains other limitations on a secured party's liability. *See* R9-628. Although the changes in this area of Article 9 are extremely helpful, this is yet another area in which one needs to go to numerous sections to get the full story.

110. For descriptions of the case law under the old Article 9, *see generally* CLARK, *supra* note 66, ch. 4; WHITE & SUMMERS, *supra* note 54, ch. 34. For detailed descriptions of the changes under the new Article 9, *see* TIMOTHY R. ZINNECKER, *THE DEFAULT PROVISIONS OF REVISED ARTICLE 9* (A.B.A. 1999); Donald J. Rapson, *Default and Enforcement of Security Interests Under Revised Article 9*, 74 CHI.-KENT L. REV. 893 (1999); *see also* Harris & Mooney, *supra* note 7, at 1984 (noting that the more detailed rules should result in making more credit available at a lower cost).

111. R9-611(c). Under the old Article 9, there was some confusion regarding whether guarantors were entitled to notice. *See, e.g.,* Canadian Commercial Bank v. Ascher Findley Co., 229 Cal. App. 3d 1139, 1143 (1991) (holding that guarantors were entitled to notice). *But see* Cmty. Bank & Trust Co. v. Copses, 953 F.2d 133, 139 (4th Cir. 1991) (holding that guarantor is not entitled to rights of "debtor"). New Article 9 specifies that, among others, "any secondary obligor" is to be notified. R9-611(c).

112. *See* R9-612(b). This section specifies that, in non-consumer transactions, notice sent after default and at least ten days before disposition is reasonable. *Id.* In all other cases, courts will deter-

and form of the notice (and provides safe-harbor forms);¹¹³ states what a secured party must say to a debtor in a consumer-goods transaction regarding the surplus or deficiency calculation;¹¹⁴ details what is required of a secured creditor who opts to keep the collateral in total or partial satisfaction of the debt;¹¹⁵ and resolves a conflict among the courts by specifying the penalty if the secured party in a non-consumer transaction violates the default rules.¹¹⁶

The biggest disappointment in the new Article 9 default rules is the drafters' failure to give much guidance to creditors and courts regarding the "commercial reasonableness" of the creditor's disposition of collateral.¹¹⁷ While section R9-627 lists some factors a court may consider in this regard,¹¹⁸ the factors are largely tautological restatements of the phrase "commercially reasonable." For instance, the section states that a disposition is commercially reasonable if done "in the usual manner" in a "recognized" market, or conforms to "reasonable commercial practices."¹¹⁹

V. THE BAD: LAND MINES IN THE FOREST

The major changes—such as electronic filings for financing statements¹²⁰ and the simplified where-to-file rules¹²¹—in new Article 9 have been widely announced¹²² and are not likely to cause trouble. While the new Article 9 user may be surprised by some of the less-well-publicized changes outlined in the preceding section, she is unlikely to be dismayed by them.

mine the reasonableness of the timing of the notice under the general "commercially reasonable" standard. R9-612(a) cmts. 2–3.

113. R9-613 (covering non-consumer transactions); R9-614 (covering consumer transactions).

114. R9-616.

115. R9-620; R9-621; R9-622. Because the old Article 9 strict foreclosure section referred to collateral in the "possession" of the secured creditor, there was some question as to whether a creditor could use this remedy for intangible collateral, such as accounts or general intangibles. *See* CLARK, *supra* note 66, ¶ 4.10[2] (collecting cases). The drafters modified the wording in new Article 9 to clarify that strict foreclosure is available for intangible as well as tangible collateral. R9-620 cmt. 7. With respect to retention of collateral in *partial* satisfaction of a debt, *see infra* Part V.G.

116. R9-626. The penalty prescribed by new Article 9 (for non-consumer transactions) is a rebuttable presumption that the collateral was equal to the amount of the loan. R9-626(a) & cmt. 3. Under the old Article 9, courts took three different approaches when a secured creditor did not proceed in a commercially reasonable fashion after default. *See* WHITE & SUMMERS, *supra* note 54, § 34-20. Some courts held the secured party's failure created an absolute bar to a recovery of a deficiency judgment; others held that the debtor was merely entitled to pursue any damage claim he might have but the secured creditor was free to pursue a deficiency judgment; a third group used the rebuttable presumption approach adopted by new Article 9. *Id.* With respect to the language of R9-626(3), *see infra* note 257.

117. Under the new Article 9, as with the old Article 9, every aspect of the disposition of collateral must be commercially reasonable. *Compare* R9-610(b), *with* 9-504(1), (3).

118. R9-627.

119. R9-627(b)(1), (3).

120. *See supra* Part IV.A.

121. *See supra* Part IV.E.

122. *See, e.g.,* Smith, *supra* note 4, at 28.

However, in addition to the beneficial changes, there are a number of other changes with new Article 9 that are more neutral (or, at least, not so clearly helpful) that may come as an unpleasant surprise for the unwary. Some of these changes are relatively minor and may not affect a great number of cases. Yet, where they do apply, they will be land mines to anyone who has not studied new Article 9 carefully. Finding these changes taught your guide lesson number seven: read VERY carefully and never assume anything. Among the potential land mines are:

- (A) modified and sometimes counter-intuitive definitions;
- (B) a requirement that buyers in the ordinary course generally take possession;
- (C) changes regarding buyers not in the ordinary course;
- (D) a new rule for battles between two perfected PMSIs;
- (E) refiling times for a debtor's movement or its merger with a "new debtor" in a different jurisdiction;
- (F) the PMSI status for collateral other than goods;
- (G) a tweaking of the rules for strict foreclosure.

A. *Modified and Counter-Intuitive Definitions*

Some of the most significant changes in definitions involve classifications of collateral. For instance, new Article 9 significantly expands the scope of "account."¹²³ Whereas old Article 9 limited accounts to the "right to payment for goods sold or leased or for services rendered [or to be rendered],"¹²⁴ new Article 9 includes within accounts some rights to payment that likely would have been "general intangibles" under the old version.¹²⁵ For instance, the "account" definition now includes, in addition to those rights specified in the old Article 9, all rights to payments stemming from real property sales, intellectual property licenses, insurance policies, use of credit cards, lottery winnings, and health-care insurance.¹²⁶ Similarly, new Article 9 expands the definition of "general intangible" to include some software and "payment intangibles," a newly created subset of general intangibles.¹²⁷ For three other new forms of permissible collateral (commercial tort claims, letter-of-credit rights, and deposit accounts), the new Article 9 drafters did not include them in any preexisting category, but instead, created a new collateral category for each.¹²⁸ Thus, any Article 9 user who relies on her old Article 9 knowl-

123. R9-102(a)(2).

124. 9-106.

125. R9-102(a)(2) cmt. 5.

126. R9-102(a)(2).

127. Compare R9-102(a)(42), (61) cmt. 5, with 9-106.

128. R9-102(a)(13), (29), (51) (defining commercial tort claims, deposit accounts, and letter-of-credit rights). All three are specifically excluded from the definitions of "account" and "general intangible." See R9-102(a)(2), (42).

edge in this area for classification or description of collateral may have a rude awakening.¹²⁹

Yet, more problematic than the modified definitions are the counterintuitive ones. In this area, the blue ribbons go to: (1) the treatment of commercial tort claims, letter-of-credit rights, and deposit accounts as new collateral categories, and the inclusion of rights to lottery winnings as accounts;¹³⁰ (2) the categorization of some software as general intangibles and others as goods;¹³¹ and (3) the use of the word “debtor” to refer to the person who owns the collateral and the word “obligor” to refer to the person who owes the money.¹³²

With respect to tort claims, letter-of-credit rights, deposit accounts, and lottery winnings, the unwary might guess that all these payment rights would be “payment intangibles,” the new subset of general intangibles where the “principal obligation is a monetary obligation.”¹³³ However, the expanded definition of “account” specifically sweeps lottery winnings into that category,¹³⁴ while tort claims, letter-of-credit rights, and deposit accounts are each a separate category of collateral.¹³⁵ To add a final twist to this confusion, the drafters state that when a commercial tort claim is settled, it ceases to be a tort claim and the right to payment under the settlement becomes a payment intangible and, hence, a general intangible.¹³⁶

The treatment of software as either a good or a general intangible will delight the law professor looking for a trick final exam question, but will be a nuisance to the user of new Article 9. Under new Article 9, the categorization of software depends upon whether it is embedded in a good, such as a computer.¹³⁷ If the software is embedded in a good, then the software is a good (with the type of good depending on the debtor’s use of the computer).¹³⁸ If the software, however, is not embedded in a good (e.g., the computer disks sold by the computer store), it is a general intangible.¹³⁹ In other words, even though one can hold in one’s hand the

129. Although a creditor may use the “super-generic” description of collateral (such as “all personal property”) in a financing statement, *see* R9-504, the creditor must specify the categories of collateral in its security agreement. R9-108(6); R9-203(b)(3)(A). Thus, knowing the proper classification of collateral is essential to creation of a security interest. R9-109 cmt. 16 (“[B]ecause ‘deposit account’ is a separate type of collateral, a security agreement covering general intangibles will not adequately describe deposit accounts.”).

130. R9-102(a)(2), (13), (29), (51).

131. R9-102(42), (44). Software that is embedded in a good is treated as a good, with the type of good dependent upon the debtor’s use of the computer. R9-102(a)(75).

132. R9-102(28), (59).

133. R9-102(a)(61).

134. R9-102(a)(2)(viii).

135. R9-102(a)(13), (29), (51).

136. *See* R9-109 cmt. 15.

137. R9-102(a)(44).

138. *Id.*

139. R9-102(a)(44), (75) cmts. 4a, 5d, 25.

disks and CD-ROMs at the computer software store, they are arguably general intangibles.

Any perplexity with software pales in comparison with the new definitions of “debtor” and “obligor.” Old Article 9 created some confusion by using “debtor” to refer to *both* the person who owed the money and the person who had rights in the collateral, if they were different.¹⁴⁰ To their credit, the drafters of new Article 9 separated these two entities and gave each its own name.¹⁴¹ The problem is that the drafters chose “obligor” as the word to refer to the person owing the money, and “debtor” as the term for the person with rights in the collateral.¹⁴² While the use of the term “obligor” is unobjectionable, confusion is bound to result from the adoption of “debtor”—a word that in common parlance refers to a person owing money—as the label for the person who owns the collateral. One wonders why the drafters did not choose “collateral owner” or “collateral-rights holder.”

B. Buyers in the Ordinary Course and Possession

Under old Article 9, neither the definition of buyer in the ordinary course (BOC), nor the section giving such a buyer priority over a prior perfected secured creditor, required that the buyer take possession of the purchased goods.¹⁴³ Although in most cases buyers did take possession of the goods, occasionally they did not. In the latter cases, courts would typically do fact-based, case-by-case inquiries to decide if a particular buyer not in possession qualified to be a BOC.¹⁴⁴ In one especially unusual case, *Tanbro Fabrics Corp. v. Deering Milliken, Inc.*,¹⁴⁵ the court held a buyer qualified as a BOC even though the secured creditor (not the seller-debtor) had possession of the goods.¹⁴⁶

New Article 9 and the revised Article 1 definitions make it much more difficult for a buyer not in possession of the purchased goods to claim to be a BOC. The definition of “buyer in the ordinary course” now states: “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 [BOC]”¹⁴⁷ Furthermore, section R9-320(e) specifically reverses the *Tanbro* decision.¹⁴⁸

140. *Id.* 9-105(1)(d).

141. R9-102(a)(28), (59) & cmt. 2(a).

142. *Id.*

143. *See* 1-201(9) (defining “Buyer in the ordinary course”); 9-307(1) (giving priority for such a buyer in some situations).

144. *See* CLARK, *supra* note 66, ¶ 3.04[2]; WHITE & SUMMERS, *supra* note 54, § 33-13, at 353 n.2 (collecting cases).

145. 350 N.E.2d 590, 592–93 (N.Y. 1976).

146. *Id.*

147. R1-201(9). The revised comment states that this sentence “prevents a buyer that does have the right to possession as against the seller from being a [BOC].” R1-201 cmt. 9. In most cases only a

C. *Changes Regarding Buyers Not in the Ordinary Course*

There are two significant changes in the rules for buyers not in the ordinary course (BNOC). One involves buyers of tangible property; the other pertains to buyers of intangible property.

With respect to buyers of tangible property, the change involves battles between BNOCs and PMSIs. Under old Article 9, a BNOC prevailed in a battle with an unperfected secured creditor if the BNOC gave value and took delivery of the collateral without knowledge of the security interest and before the secured creditor perfected.¹⁴⁹ Unless the BNOC was a transferee in bulk, there was no grace period for filing for an unperfected PMSI.¹⁵⁰ In other words, assuming the BNOC was not a transferee in bulk and met the other requirements of the section, he won over an unperfected PMSI.

Under new Article 9, however, the PMSI's grace period for filing has been enlarged to cover battles with all BNOCs, not just transferees in bulk.¹⁵¹ This means that even if a buyer meets all the requirements to be a BNOC, a PMSI may nonetheless have priority over him if the PMSI files within the grace period, although that filing comes *after* the buyer gave value and took delivery.¹⁵²

With respect to intangible property, old Article 9 simply had no provision for a buyer to be a BNOC. New Article 9, however, includes a provision permitting a purchaser of intangibles to be a BNOC and prevail over a prior unperfected secured creditor.¹⁵³

D. *Battles Between Two Perfected PMSIs*

Under old Article 9, there was some confusion regarding the proper approach to battles between two perfected PMSIs, both of whom met the requirements for super-priority.¹⁵⁴ The dispute typically arose when a

buyer who is buying for personal, family, or household use will be able to use the "right-to-recover" phrase. R2-502; R2-716.

148. See R9-320 cmt. 8.

149. 9-301(1)(c).

150. *Id.*

151. R9-317(e). The extent of the filing grace period also has been enlarged from ten to twenty days. While R9-317(e) grants the PMSI this twenty-day grace period for filing in battles with "buyers," the introductory words of R9-317(e) eliminate its use in a battle between a PMSI and a buyer in the ordinary course under R9-320, or in a consumer-to-consumer buying transaction fitting within R9-321.

A small change in the BNOC rule is the use of the phrase "takes free of" in place of old Article 9's "subordinates." R9-317. The drafters changed the wording to make clear that in those instances when a BNOC *does* prevail over a secured creditor, the buyer takes the collateral completely free of the secured creditor's claims. See R9-317 cmt. 6.

152. As with old Article 9, under new Article 9, the PMSI's grace period for filing begins to run when the debtor receives the collateral. R9-317(e).

153. R9-317(d). Because there can be no PMSI in intangibles, these buyers are not subject to the grace period for PMSI filings. See *infra* Part V.F.

154. See *infra* note 156.

debtor obtained partial financing for a purchase from a lender PMSI, the seller PMSI extended credit for the remainder of the purchase price, and both PMSIs met the requirements for super-priority.¹⁵⁵ In resolving such disputes, courts could take two approaches. A court could treat the PMSIs as equal and order the proceeds from the sale of the collateral to be split on a pro rata basis; however, the majority used the first-to-file-or-perfect rule of section 9-312(5), on the theory that this was the fallback rule.¹⁵⁶

Interestingly, the drafters of the new Article 9 rejected both of these approaches and adopted a third one, for which they cite no case support.¹⁵⁷ The new rule is that if one of the perfected PMSIs is a seller PMSI, that PMSI gets priority over a lender PMSI, even if the latter was the first to file.¹⁵⁸ Despite the traditional distinction between real and personal property law, the drafters cite, as their rationale for choosing this result, the restatement of real property law.¹⁵⁹

E. Refiling Times for Movement and Mergers

Under new Article 9, as under old Article 9, if the debtor moves its place of business, the perfected secured creditor has a four-month grace period to file in the new location.¹⁶⁰ However, under new Article 9, if a debtor transfers collateral to a person (whether a “new” debtor or not)¹⁶¹ that is located in a different jurisdiction, the perfected secured creditor has a newly created one-year grace period to file in the new jurisdiction under the name of the transferee.¹⁶² This difference in grace periods for refiling is likely to catch a few newcomers to revised Article 9 by surprise.

In addition, there is some ambiguity about whether to treat reincorporations of debtors as movements of the debtor (and, therefore, subject

155. 9-312(3)–(4). The disputes typically involved two PMSIs in collateral other than inventory, making 9-312(4) the operative section.

156. *See, e.g.,* John Deere Co. v. Prod. Credit Ass’n, 686 S.W.2d 904 (Tenn. Ct. App. 1984), where the trial court used a pro rata split of the proceeds, but the court of appeals reversed on the ground that the dispute was governed by 9-312(5)’s first-to-file-or-perfect rule. *Id.* at 904, 907. Most courts, like the Tennessee appellate court, opted to use the first-in-time rule. *See* CLARK, *supra* note 66 ¶ 3.09[5], at 3-133 (collecting cases). Professors White and Summers similarly concluded, under the old Article 9, that 9-312(5) should govern. *See* WHITE & SUMMERS, *supra* note 54, § 33-5, at 335, n.38. *But see* CLARK, *supra* note 66, ¶ 3.09[5], at 3-133 (arguing for a pro-rata split).

157. R9-324(g).

158. *Id.*

159. *See* R9-324 cmt. 13 (citing RESTATEMENT (THIRD) OF PROPERTY § 7.2(c) (1997)).

160. *See* 9-103(3)(e); R9-316(a)(2).

161. A “new debtor” is a debtor that, through contract, law, or by generally assuming the obligations and assets of the original debtor, becomes bound by the original debtor’s security agreement. R9-203(d). A transferee who does not become bound by the security agreement of the transferor is still a “debtor,” although not a “new debtor,” because it has an interest in the collateral. R9-102(a)(28). The one-year period for reperfecting in the case of a transfer of collateral to a debtor in another jurisdiction applies whether the transferee is a new debtor or not. R9-316(a)(3) & cmt. 2. *See also supra* note 316 and accompanying text.

162. R9-316(a)(3).

to the four-month rule) or as transfers to an entity in a different jurisdiction (and, therefore subject to the one-year rule). The comments state the drafters' intent to have reincorporations treated as transfers subject to the one-year rule,¹⁶³ and many courts are likely to rely on this comment to resolve the question. The code section itself, however, refers to transfers "to a person that thereby becomes a debtor," suggesting that the transferee entity must be in existence at the time of the transfer.¹⁶⁴ A reincorporation creates a new legal entity in the reincorporation state and would not technically fit within the wording of the transfer section of new Article 9.

An even more dangerous land mine lies in the wording of the grace-period rule. Both grace periods only apply to collateral in which the secured creditor was perfected *before* the move or transfer.¹⁶⁵ Because a security interest cannot be perfected in collateral until there is attachment (which requires that the debtor have rights in the collateral),¹⁶⁶ neither grace period applies to collateral that the debtor (or "new debtor") acquires, and to which the security interest attaches, *after* the movement or transfer. Thus, even if the creditor has an after-acquired property clause, she will not be perfected in any collateral acquired *after* the move or transfer until she files in the new jurisdiction. Put another way, with respect to collateral the debtor acquires after the move or transfer, there is no grace period for perfection in the new jurisdiction.¹⁶⁷

F. PMSI Status for Collateral Other Than Goods

Under old Article 9, there was no statutory prohibition on a secured creditor being a PMSI for intangibles or other non-goods collateral.¹⁶⁸ Furthermore, as one commentator noted, "there is no logical reason to exclude intangible collateral from purchase money treatment if the right case comes along."¹⁶⁹ However, under new Article 9, the PMSI status is specifically restricted to sellers and lenders who enable the debtor to acquire rights in goods or in software that is, or will be, embedded in goods

163. R9-316 cmt. 2, ex. 4.

164. R9-316(a)(3). Professors White and Summers are sufficiently uncertain about this point to say "we believe" that reincorporations are within the transfer section, R9-316(a)(3). See WHITE & SUMMERS, *supra* note 11, § 22-15d, at 804.

165. R9-316(a) (stating that "[a] security interest perfected . . . remains perfected").

166. R9-308(a); R9-203(b)(2). Under R9-316(a), perfection continues during the four-month or one-year grace period for collateral for which there was attachment and perfection before the move or merger. However, R9-316(a) does not apply to collateral for which there was not perfection (because the debtor had not yet obtained the collateral and therefore there was no attachment) at the time of move or merger. See *id.*

167. This appears to be the result intended by the drafters. See R9-316 cmt. 2, ex. 5; R9-508 cmt. 4. In the case of a transfer of collateral, if the transferee does not qualify as a "new debtor," the secured creditor for the transferor would not be entitled to assets acquired by the transferee in any case. See *infra* Appendix A.

168. 9-107.

169. CLARK, *supra* note 66, ¶ 3.09[2][b], at 3-134.

(and, therefore, is, or will be, goods).¹⁷⁰ Thus, absent collateral that is a good (or software that is or will become a good), a secured creditor cannot be a PMSI under new Article 9.¹⁷¹

G. *Strict Foreclosure*

In the area of strict foreclosure, the right of a secured creditor to keep the collateral instead of selling it, the drafters of new Article 9 made one specific change, and hope to make a second one. The specific change is new Article 9's allowance for partial strict foreclosure in non-consumer transactions where the collateral is worth less than the amount of the loan.¹⁷² Under old Article 9, there was no partial strict foreclosure.¹⁷³ If the secured creditor kept the collateral, she did so in satisfaction of the complete indebtedness and, therefore, forfeited her right to seek a deficiency judgment.¹⁷⁴

Under new Article 9, if the debtor agrees (and this will be a major "if"), the secured creditor can use strict foreclosure for *partial* satisfaction of the debt in non-consumer transactions.¹⁷⁵ Thus, a secured creditor may keep the collateral (instead of disposing of it) and still seek a deficiency judgment.¹⁷⁶

The second, hoped-for, change in this area involves "constructive" strict foreclosure. Under old Article 9, some courts held that if a secured creditor kept the collateral for an unreasonably long period of time after repossession, the creditor had *in effect* opted for strict foreclosure and, therefore, gave up her right to seek a deficiency judgment.¹⁷⁷ Under new Article 9, the drafters *hope* to abolish this line of cases by requiring that the secured creditor affirmatively "accept" the collateral in full, or partial, satisfaction of the debt.¹⁷⁸ The comments state that this wording was intended to preclude any judicial finding of "constructive" strict foreclosure, and that a court should consider any delay in disposing of the col-

170. See R9-103(a)(1), (c), cmt. 5. Software that is embedded in goods is goods. See *supra* notes 131, 139 and accompanying text.

171. See R9-103(a)-(c).

172. R9-620.

173. See 9-505(2) (allowing a secured party in possession to "propose to retain the collateral in satisfaction of the obligation").

174. See *id.* The debtor had the right to object to strict foreclosure and if the debtor did so, the secured creditor was required to sell the collateral. *Id.*

175. R9-620(a)(1). The debtor's consent to strict foreclosure for partial satisfaction of the debt must be given after default. R9-620(c). R9-620 contains special requirements for strict foreclosure where the collateral is consumer goods. R9-620(a)(3), (e). Moreover, R9-620(g) forbids partial strict foreclosure in consumer transactions. R9-602(10) further provides that the parties cannot contract around these rules.

176. See R9-620(a) ("[A] secured party may accept collateral in full as *partial* satisfaction of the obligation." (emphasis added)).

177. See, e.g., *Schmode's Inc. v. Wilkinson*, 361 N.W.2d 557, 559 (Neb. 1985); *In re Boyd*, 73 B.R. 122, 124 (Bankr. N.D. Tex. 1987); CLARK, *supra* note 66, ¶ 4.10[4]; WHITE & SUMMERS, *supra* note 54, § 34-9, at 428 & n.16 (collecting cases).

178. R9-620(a)-(b).

lateral as simply a factor in determining the commercial reasonableness of the later sale.¹⁷⁹ This change is in the “hoped-for” category because there is no guarantee that courts will not, in egregious factual situations, continue to find “constructive” strict foreclosure.¹⁸⁰

VI. THE REALLY BAD: CLUSTER BOMBS THAT CHANGE WHOLE SUBJECT AREAS OR CREATE SUBJECTWIDE CONFUSION

The last section dealt with small changes in particular sections that have the potential of being land mines for the unwary. Now we get to lesson number eight: things can always be worse.¹⁸¹ In addition to small, unexpected changes, the user of new Article 9 will also encounter cluster bombs: changes affecting (and, in some cases, wrecking havoc on) whole subject areas. Some of these modifications may be sound and prove beneficial in the long run. Soundness aside (and this author doubts the value of some of them), these are major and complex changes to entire areas of the law that are destined to test the sanity of the most learned scholar of the old Article 9.

The major areas changed or added to the new Article 9 are:

- (A) consignments;¹⁸²
- (B) a distinction between the requirements for a financing statement versus those for acceptance by a filing officer;¹⁸³
- (C) the rules for possession by a bailee;¹⁸⁴
- (D) perfection by control;¹⁸⁵
- (E) the transition rules.¹⁸⁶

A. *Consignments*

Under new Article 9, the area of consignments has changed from being a minor nuisance into a full-blown, complex maze with at least one unsettling result.¹⁸⁷ Under old Article 9, consignors technically needed to consider the requirements of both Article 2 and Article 9.¹⁸⁸ If the consignment was a “security consignment” (i.e., something called a consignment that, in effect, created a security interest), the consignor was re-

179. R9-620 cmt. 5.

180. See *supra* note 100 and accompanying text. Under old Article 9, at least one court also held that a secured creditor who had taken all the appropriate steps for strict foreclosure but who intended to immediately resell the collateral was required to treat the transaction as a sale and turn over to the debtor the surplus from the sale. See *Reeves v. Foutz & Tanner, Inc.*, 617 P.2d 149, 151 (N.M. 1980).

181. Put another way, the grass can always be browner.

182. R9-109(a)(4).

183. R9-502; R9-516.

184. R9-312(d); R9-313(c).

185. R9-312(b); R9-314.

186. R9-701 to 709.

187. R9-101 cmt. 4(a).

188. See 9-114(1).

quired to comply with the Article 9 rules, including filing a financing statement.¹⁸⁹ For a non-security consignment, the consignor could avoid the Article 9 rules (although the consignor was permitted to file a “protective” Article 9 filing¹⁹⁰) if he could meet the requirements of section 2-326(3)(a) or (b).¹⁹¹ As a practical matter, however, few consignors met those requirements, and, therefore, virtually all consignors needed to comply with Article 9 to be protected against creditors of the consignee.¹⁹²

Under new Article 9, the user is faced with a daunting task just to determine the location of the law of consignments. Not only does the user need to consult both Articles 2 and 9, she may also need to check the state’s non-Code common and statutory law.¹⁹³ After working through the various sections and comments (something that consumes the better part of a day and a gallon of coffee), one discovers that, under new Article 9, there are now three, rather than two, types of consignments.¹⁹⁴ New Article 9 contains the rules for two of the three;¹⁹⁵ the third, under revised Article 2, is left in the limbo of non-Code law.

New Article 9 handles “security consignments” in the same way as old Article 9.¹⁹⁶ Because this transaction, although labeled “consignment,” is actually a secured credit transaction, the consignor is treated as just another secured creditor who must comply with the Article 9 rules to have protection against other creditors of the consignee.¹⁹⁷

New Article 9, however, creates a new type of consignment, the “R9-102 consignment,” for lack of a better term.¹⁹⁸ This consignment is not a disguised security interest¹⁹⁹ but one that meets all the requirements of a newly added “consignment” definition. The R9-102 consignment definition requires, *inter alia*, that: the consignee deal in goods of that kind under a name different from the consignor; the consignee *not* be “generally known by its creditors to be substantially engaged in selling the goods of others;” the consigned goods not be consumer goods; and the consigned goods have a value of at least \$1,000.²⁰⁰ If a consignment

189. 1-201(37); 9-102; 9-114; 9-302. For a description of consignment law under the old Article 9, see WHITE & SUMMERS, *supra* note 54, § 30-4.

190. 9-408; see also WHITE & SUMMERS, *supra* note 54, § 30-4, at 29.

191. 2-326(3)(a)–(b). See generally WHITE & SUMMERS, *supra* note 54, § 30-4.

192. See WHITE & SUMMERS, *supra* note 54, § 30-4. Under 9-114, the non-security consignor who could not satisfy 2-326(3)(a) or (b) not only had to make an Article 9 filing, she also was required to notify prior perfected secured creditors of the consignee. See 9-114.

193. See generally 2-101 to -725. See *infra* notes 196–208 and accompanying text.

194. See *infra* text accompanying notes 196–210 for a discussion of security assignments, “R9-102 consignments,” and non-Article 9 consignments.

195. See R9-102(a)(20) & cmt. 14; R9-109(a)(1) & cmt. 6.

196. See R9-102 cmt. 14; R9-109 cmt. 6.

197. R1-201(37); R9-102 cmt. 14; R9-109(a)(1) & cmt. 6. The new Article 9, like the old Article 9, allows cautionary filings. R9-505.

198. R9-102(a)(20).

199. “Security consignments” are specifically excluded from the R9-102 consignment definition. See R9-102(a)(20)(D).

200. R9-102(a)(20).

fits within the R9-102 definition (as many commercial consignments will), then the rules of new Article 9 apply, and the consignor must file a financing statement to have protection against the consignee's creditors.²⁰¹ New Article 9, however, gives the R9-102 consignor a major advantage by treating him as a PMSI in inventory²⁰² (whereas a "security interest" consignor is treated as a regular secured creditor subject to the first-in-time rule²⁰³). As a result, if the R9-102 consignor fulfills the perfection requirements of an inventory PMSI (filing and notification of prior perfected secured creditors before delivery of the goods to the consignee), the R9-102 consignor will have super-priority over prior perfected secured creditors of the consignee with respect to the consigned goods.²⁰⁴

Thus far, although complicated, new Article 9 is an improvement on old Article 9. Most commercial consignors will now know exactly what they must do in order to have protection against creditors of the consignee. The problem comes with the third type of consignment, the "non-Article 9" consignment. New Article 9 does not govern this consignment because it is not a disguised security interest and it does not fit within the R9-102 definition (either because it involves consumer goods or because the consignee is "generally known by its creditors to be substantially engaged in selling the goods of others").²⁰⁵ Article 9 gives this consignor no advice regarding how to protect himself.²⁰⁶ Furthermore, revised Article 2 specifically eliminates the old consignment section.²⁰⁷ The upshot is that, where there are claims by the consignee's creditors, the state's non-Code common and statutory law governs. According to one of the reporters for new Article 9, the drafting committee's intent was for courts to go to *pre*-Code law, treat such non-Article 9 consignments as pure bailments and allow the consignor to recover his goods even though he did not take any actions under the Code.²⁰⁸ Unfortu-

201. R9-109(a)(4) cmt. 6; R9-319 & cmt. 6.

202. R9-103(d).

203. R9-322.

204. R9-324(b). As with an inventory PMSI, the consignor will be limited in his super-priority to the goods themselves or cash proceeds. *Id.* In addition, as a PMSI, when the consignor is battling a lien creditor, a trustee in bankruptcy, or a buyer not in the ordinary course, the consignor will have a twenty-day grace period for filing. R9-317(e). The R9-102 consignor also has an advantage over the "security interest" consignor in that the R9-102 consignor does not have to follow the strict Article 9 rules on foreclosure but "may get its goods back by whatever method is permitted under the state law outside of Article 9." See WHITE & SUMMERS, *supra* note 11, § 21-4, at 729.

205. R9-102(a)(20)(A)(iii); R9-102(a)(20)(C).

206. See R9-102 cmt. 14. One is tempted to call the non-Article 9 consignor a "true" consignor. However, the new Article 9 drafters occasionally use the term "true" consignor to refer to the R9-102 consignor. See R9-109 cmt. 6.

207. R2-326 cmt. 4. As defined, a "sale or return" does not cover consignments. See R2-326 cmts. 1-2, R9-109 cmt. 6 ("If a transaction is a 'sale or return,' as defined in revised Section 2-326, it is not a 'consignment.'").

208. E-mail from Professor Steven L. Harris, Revised Article 9 Reporter, to Jean W. Burns, Professor of Law, Brigham Young University (June 27, 2000) (on file with author); see also WHITE &

nately, (1) this “intent” of the drafters is not set out in the revised Code sections or the comments,²⁰⁹ (2) there is no guarantee that the courts will know that they are to go to *pre*-Code law, and (3) a fair number of states are likely to have no non-Code common or statutory law dealing with such consignments, or the laws that do exist may vary from state to state. Indeed, this author conducted a limited and wholly unscientific survey of three experienced Article 9 professors and came up with three different views on how courts may treat non-Article 9 consignments.²¹⁰ Thus, the unsatisfying (and sadly ironic) result is that the non-Article 9 consignor now has less certainty and less protection than either the “security interest” consignor or the R9-102 consignor. One is also left with the distinct impression that consignments will be the herpes of the UCC: a problem that is never solved and never goes away.

B. The Financing Statement Requirements and Acceptance by the Filing Office

In a move that likely resulted from a desire for specificity, the drafters of new Article 9 have taken the old, simple rules for determining the adequacy of a financing statement and added several new levels of bewildering confusion. Working through the new maze, which requires cross-referencing numerous sections and exceedingly careful reading, is a trip only for the strong (and possibly masochistic).

One begins with R9-502(a),²¹¹ the revision of old 9-402(1),²¹² which lays out the requirements for a financing statement. Other than eliminat-

SUMMERS, *supra* note 54, § 30-4, at 29 (“Under pre-Code law, a consignor could generally retrieve consigned goods in competition with the consignee’s creditors (and trustee) . . .”).

209. The only hint of this intent is found in a comment, which states that “[u]nder common law, creditors of a bailee were unable to reach the interest of the bailor (in the case of a consignment, the consignor-owner).” See R9-109 cmt. 6. However, the comment does not say that these common-law rules are intended to apply to non-Article 9 consignments. See *id.* Rather, the comment goes on to state that these common law rules no longer apply to consignments fitting within the R9-102 definition. See *id.*

210. Professor Steven Harris, a reporter for the drafting committee, feels confident that courts will understand that non-Article 9 consignors are to be treated like true bailors and, therefore, the pre-Code law protects this consignor even if she has taken no steps under Article 9. E-mails from Professor Steven L. Harris, Revised Article 9 Reporter, to Jean W. Burns, Professor of Law, Brigham Young University (June 27, 2000) (on file with author). Professor Steven Walt agrees with Harris that courts will and should go to extra-Code law. E-mail from Steven Walt, Professor of Law, University of Virginia, to Jean W. Burns, Professor of Law, Brigham Young University (June 28, 2000, Dec. 1, 2000, & Dec. 4, 2000) (on file with author). However, he is not as sanguine as Professor Harris that courts will (or should) go to *pre*-Code law. *Id.* Walt believes courts may well go to non-Code statutory and common law developed *while* the old Article 9 was in effect and, as a result, the non-Article 9 consignor may not have the full and complete protection that Harris predicts. See *id.* Professor Douglas Whaley agrees that courts should follow either the Harris or Walt approach, but points out that, given the complexity and density of the new Article 9 and its comments, courts may (mistakenly) rule that a non-Article 9 consignment falls within R2-326’s “sale or return” category. E-mail from Douglas Whaley, James W. Shocknessy Professor of Law, Ohio State University, to Jean W. Burns, Professor of Law, Brigham Young University (Dec. 3, 2000) (on file with author). If so, then the consignor’s goods will be subject to the claims of consignee’s creditors while in the consignee’s hands.

211. See R9-502(a).

ing the need for the debtor's signature and allowing for electronic filings,²¹³ the new section is as easy to master as the old one. The complexity begins when one turns to R9-516, a section without a counterpart in old Article 9, which lists *additional* bases—beyond what is in R9-502—on which a state filing officer may properly refuse to accept a financing statement.²¹⁴ Thus, to have a full understanding of what is necessary for a financing statement to be sufficient to perfect and to be accepted by the filing office, the user of new Article 9 needs to go to two sections, rather than just one.

However, the annoyance of going to two sections instead of one is minor in comparison to the labyrinth of confusion added by R9-516(d), R9-520, and R9-338, which deal with the results of a filing office's acceptance or rejection of a financing statement.²¹⁵ Given the two different lists of requirements in R9-502 and R9-516,²¹⁶ the multiple subsections of R9-516(b) (which are important for purposes of R9-520),²¹⁷ the difference between omitted and erroneous information, and the four possible actions of a filing office (proper acceptance, wrongful acceptance, proper rejection, and wrongful rejection),²¹⁸ one is confronted with a truly mind-bending set of combinations and permutations, which, if one has a long day and nothing to do, one can work through.²¹⁹ Appendix B contains this author's best efforts at working through this maze.

C. Bailee in Possession

Under old Article 9, there were two rules for perfection when the collateral was in the hands of a party other than the debtor or the creditor (i.e., a bailee) at the time the creditor's interest attached.²²⁰ If that third party, the bailee, had issued a negotiable document of title, the secured creditor perfected in the document or the goods (with perfection in the document having priority over perfection in the goods).²²¹ In all other cases, the secured creditor perfected in any of three ways: (i) hav-

212. See 9-402(1).

213. R9-502 cmt.3; R9-516(a).

214. R9-516(b)(3)–(5) (listing reasons, other than failure to comply with the requirements of R9-502, for which a filing officer may properly refuse to accept a financing statement).

215. See R9-516(d), R9-520, R9-338.

216. See R9-502; R9-516.

217. See R9-516(b).

218. See R9-516; R9-520.

219. If one wishes to retain some semblance of sanity and sense of humor, one is well advised to keep close at hand Harry C. Sigman, *Twenty Questions About Filing Under Revised Article 9: The Rules of the Game Under New Part 5*, 74 CHI.-KENT L. REV. 861 (1999). Another Article 9 professor suggests following up this exercise with a stiff drink. I leave that to the reader's discretion.

220. See 9-304(2)–(3).

221. 9-304(2). Because perfection in the document had priority over perfection in the goods, the cautious secured creditor always perfected through the document.

ing the bailee issue a document of title in the secured party's name; (ii) notifying the bailee; or (iii) filing as to the goods.²²²

Under new Article 9, there are now three rules: one for a bailee who has issued a negotiable document of title;²²³ one for a bailee who has issued a nonnegotiable document of title;²²⁴ and one for a bailee who has issued no document of title.²²⁵ The new rules are particularly tricky for someone familiar with old Article 9 because they follow the old rules for two-thirds of the way and then make a change for the last third.

Under new Article 9, if a bailee has issued a negotiable document of title, then, as under old Article 9, the secured creditor can perfect in the document or the goods, with perfection in the document having priority over perfection in the goods.²²⁶ If a bailee has issued a nonnegotiable document of title, then the secured party may perfect by any of the three methods permitted by the second rule of old Article 9.²²⁷ Furthermore, as under old Article 9, if the secured party chooses the notification-of-the-bailee route, the creditor is perfected when the bailee receives the notification, even if the bailee does not acknowledge receipt of the notification.²²⁸

The change in new Article 9 arises in the most common bailment situation: when a bailee has issued *no* document of title, negotiable or not. Under old Article 9, this third possibility was handled the same as that in which a bailee had issued a nonnegotiable document of title.²²⁹ Under new Article 9, however, there is a different rule for the third situation. To make the puzzle more challenging, the drafters tucked the new rule in the center of a different section from that containing the other bailee rules.²³⁰ Under new Article 9, in the third situation, the secured creditor is perfected by filing for the goods or "when the [bailee] authenticates a record acknowledging that it holds possession of the collateral for the secured or [third] person's benefit."²³¹ In other words, in the most common bailment situation, (i.e., where the bailee has not issued any document of title) the secured creditor *will* need to obtain an acknowledgment from the bailee, unless the creditor files for the goods.

A later subsection exacerbates the potential confusion by stating: "A person in possession of collateral is *not* required to acknowledge that

222. 9-304(3).

223. See R9-312(c).

224. See R9-312(d).

225. R9-313(c).

226. 9-304(2); R9-312(c).

227. 9-304(3); R9-312(d).

228. 9-304(3); 9-305; 9-305 cmt. 2; R9-312(d) cmt. 7. R9-312(d) comment 7 also states that it is irrelevant who notifies the bailee. See R9-312(d) cmt. 7.

229. 9-304(3).

230. R9-313(c); R9-312 cmt. 7 (noting that R9-312(d) does not apply to goods in the possession of a bailee who has not issued a document of title); R9-313 cmt. 4 (same).

231. R9-313(c)(1).

it holds possession for a secured party's benefit."²³² Although this provision seems at odds with the prior one (dealing with the secured party's need to get acknowledgment from a bailee who has not issued a document of title), the later subsection is apparently meant to say the obvious: the secured party cannot force a bailee to acknowledge or unilaterally force the bailee to hold the collateral for the secured party's benefit.²³³ To muddy the waters further, other subsections deal with a secured party's use of his own agent, from whom obviously no acknowledgment is necessary.²³⁴

D. Investment Property, Deposit Accounts, and Letter-of-Credit Rights

Because new Article 9 allows investment property, deposit accounts, and letter-of-credit rights to be used as collateral, the drafters obviously needed to include rules governing attachment, perfection, and priority disputes for these types of property.²³⁵ Admitting their necessity, however, does not make these rules any easier to master. Moreover, the drafters heightened the difficulty in this area by using a "fission" approach under which every step in the trail has its own section.²³⁶

By far, the most difficult of the three is investment property. Technically, a creditor may perfect by filing or control.²³⁷ However, because perfection by control always trumps perfection by filing, any cautious creditor will want control.²³⁸ To determine what constitutes "control" for investment property, new Article 9 sends one to revised Article 8.²³⁹ There, one finds that the applicable definition of "control" depends upon the type of investment property in question.²⁴⁰ Thus, the secured creditor

232. R9-313(f) (emphasis added).

233. See R9-313 cmt. 6. R9-313(g)(2) adds that a bailee's acknowledgment does not give rise to any duties or responsibilities under Article 9. Any imposition of duties on the bailee is left to agreement of the parties. R9-313 cmt. 8. I thank Professor Steven Walt for helping me through this particular thicket.

234. R9-313(h)-(i). Both old Article 9 and new Article 9 allow for a secured party to use an agent for purpose of perfection by possession. See 9-305 cmt. 2; R9-313(f), (h), (i) & cmts. 3, 9. The difference between a bailee and a secured party's agent is that a bailee typically has possession of the collateral *before* the creditor seeks to perfect, whereas the secured creditor chooses his agent to possess for or after perfection. See R9-313 cmt. 3 (noting that R9-313(c) does not apply if the secured party's agent, as opposed to an independent bailee, has possession of the collateral). Of course, a bailee can agree to become the secured creditor's agent. Moreover, R9-313 comment 4 notes that "[i]n some cases, it may be uncertain whether a person who has possession of collateral is an agent of the secured party or a non-agent bailee" and that, in those cases, "prudence might suggest that the secured obtain the person's acknowledgement to avoid litigation."

235. The old Article 9 did permit investment property and letter-of-credit proceeds to be collateral but excluded deposit accounts. 9-104(l), (k); 9-115. The new Article 9 deals with all three. R9-102 cmts. 5-6.

236. See *supra* note 40 and accompanying text.

237. R9-312(a); R9-314(a).

238. R9-328(1).

239. R9-106. "Control" also relieves the creditor from getting a written security agreement. See R9-203(b)(3)(D).

240. "Security certificate," an "uncertificated security," a "security entitlement," and a "commodity account" are defined in 8-102(16), 8-102(18), 8-102(17), & R9-102(a)(14), respectively. See also R8-

must first determine into which category of investment property the collateral falls and then find the appropriate way to “control” it. After the creditor jumps these hurdles, he needs to go to yet another section to find the rules for priority for investment property.²⁴¹ Having done so, he finds that a creditor/broker always wins.²⁴²

With respect to deposit accounts, the creditor must first determine whether the account is being used in a “consumer transaction,” in which case it cannot be Article 9 collateral.²⁴³ To answer this question, new Article 9 establishes a three-prong test.²⁴⁴ The key here is realizing that all three prongs must be satisfied for a transaction to qualify as a “consumer transaction.” Consequently, some deposit accounts that might appear to be “consumer” accounts are, in fact, not within the definition and, therefore, are available as collateral under new Article 9. For instance, if a debtor owns a business, the debtor’s personal bank account can be collateral for a loan to the business.²⁴⁵

Assuming the deposit account does not fall within the “consumer transaction” exclusion, new Article 9 sends the secured creditor to another section to find out how to perfect the account.²⁴⁶ The short answer is that the creditor must control the account.²⁴⁷ Not surprisingly, the drafters define “control” for a deposit account in yet another section (which provides three methods of control).²⁴⁸ Then, under the every-move-deserves-its-own-provision approach, the drafters require the creditor to go to still another section to find the rules for priority disputes in deposit accounts.²⁴⁹ This time the section can be subtitled: the bank holding the account always wins.²⁵⁰

106(a)–(b) (defining control for certificated securities); R8-106(c)–(e) (defining control for an uncertificated security or a securities entitlement); R9-106(b) (defining control for a commodities account). For a model control agreement, see Sandra Rocks & Robert Wittie, *Getting Control of Control Agreements*, 31 UCC L.J. 318 (1999).

241. R9-328.

242. *Id.* If a debtor borrows from his stock broker, the broker automatically has “control” of the debtor’s security account, R8-106(e), and “control” not only relieves the broker from obtaining a written security agreement, R9-203(b)(3)(D), and provides perfection, R9-314, but gives the broker priority over any prior perfected secured creditor. R9-328(2). The same is true with a commodities account. R9-328(4). The only way for a creditor other than a broker to have priority over a broker would be by having the creditor’s name shown as the customer on the securities account. R8-106(d)(1); see also Note, *Super-Priority of Securities Intermediaries Under the New Section 9-115(5)(c) of the Uniform Commercial Code*, 108 HARV. L. REV. 1937, 1939 (1995). With respect to priority in proceeds of investment property, see *supra* note 82.

243. R9-109(d)(13). For help in the area of deposit accounts, see Markell, *supra* note 12, at 974–76.

244. R9-102(a)(26).

245. See R9-102(a)(26)(i) (requiring that “an individual incurs an obligation primarily for personal, family, or household purposes”).

246. R9-312.

247. R9-312(b)(1). “Control” of a deposit account also replaces the need for a written security agreement. R9-203(b)(3)(D).

248. R9-104.

249. R9-327.

250. See *id.* Under R9-104(a)(1), the bank at which the account is maintained automatically has “control” if it becomes a creditor of the debtor. In addition, having control relieves the bank of ob-

The creditor needs to use a whole different set of sections to work through security interests in letter-of-credit rights.²⁵¹ The creditor will typically want to perfect through “control,” which, of course, is defined differently than “control” for investment property or a deposit account. And, needless to say, the creditor will need to go to yet another section to find the rules for priority disputes involving letter-of-credit rights.²⁵²

E. Transition Rules

Obviously, with old security agreements (using the old Article 9 definitions) already in place and financing statements effective for five years, creditors need transition rules to govern transactions made under old Article 9 but tested after new Article 9 became effective. Part 7 of new Article 9 contains the rules,²⁵³ but trying to summarize these complicated, detailed sections would require another article.²⁵⁴ Luckily, others have done this work. This author’s advice is to run, do not walk, to your nearest library to get copies of these articles.²⁵⁵

VII. THE UGLY: DRAFTING IN NON-ENGLISH

In a number of places in new Article 9, the drafters used a language that looks like English but is totally incomprehensible.²⁵⁶ Lesson number nine: even in the United States, English can be a foreign language for statutory drafters. In these instances, the problem is not one of navigation (i.e., *finding* the right section). Rather, the problem is figuring out what the law is based on the language of new Article 9. Here, the only

taining a written security agreement under R9-203(b)(3)(D). Under R9-327(3), the bank will have priority over prior perfected secured creditors. The only exception will be if the prior secured creditor had itself listed as the sole customer on the deposit account. See R9-327(4); R9-104(a)(3). The same rules apply if the bank has a right of setoff. See R9-340. With respect to priority in proceeds of deposit accounts, see *supra* note 82 and accompanying text.

251. Aid in this area is available from John F. Dolan, *Security Interests in Letter-Of-Credit Rights*, 74 CHI.-KENT L. REV. 1035 (1999). As Dolan notes: “The statutory route to th[e] conclusion [that generally a security interest in a letter-of-credit right will be perfected by control] winds its way somewhat tortuously through a complex of Revised Article 9 sections.” *Id.* at 1044.

252. The creditor is perfected without control if he is perfected in the account for which the letter-of-credit right is a supporting obligation. R9-308(d). However, because perfection by “control” has priority over any other form of perfection, R9-329(1), a cautious creditor will want control. “Control” for a letter of credit right is defined in R9-107. As with investment property and deposit accounts, “control” also substitutes for a written security agreement. See R9-203(b)(3)(D). R5-114(d) and R9-409 deal with the question of when an issuer bank can withhold consent.

253. R9-329. With respect to priority in proceeds of letter-of-credit rights, see *supra* note 82.

254. R9-701 to -709.

255. See, e.g., Harry C. Sigman & Edwin E. Smith, *Revised U.C.C. Article 9’s Transition Rules: Insuring a Soft Landing* (pts. 1 & 2), 55 BUS. LAW. 1065, 1763 (2000); Bradley Y. Smith, *New Article 9 Transition Rules*, 74 CHI.-KENT L. REV. 1339 (1999); Steven O. Weise, *Transitioning to Revised Article 9*, in *THE NEW ARTICLE 9*, *supra* note 4, at 59.

256. See Louis F. Del Duca et al., *Simplification in Drafting—The Uniform Commercial Code Article 9 Experience*, 74 CHI.-KENT L. REV. 1309, 1310 (1999) (noting that the drafters of the new Article 9 were encouraged to use “plain English”). One wishes the drafters had heeded this advice more often.

solution is to know what the law is before you try to find it in the language of new Article 9.²⁵⁷

A. *Continuing Automatic Perfection in Proceeds*

One finds a prime example of the you-gotta-know-the-law-before-you-get-there phenomenon in the section dealing with automatic continuing perfection for proceeds.²⁵⁸ While this was a difficult topic to master under old Article 9, it is impossible to work through in new Article 9 absent a preexisting knowledge of the law.

Under old Article 9, to determine whether there was continuing automatic perfection in proceeds (beyond the ten-day grace period), one needed to go through the four subsections of section 9-306(3), the trickiest of which was (3)(a).²⁵⁹ This subsection contained both the same-office and the cash-transformation rules.²⁶⁰ By carefully reading this subsection, however, the user could discern that the same-office rule applied when the collateral was sold or swapped for some form of noncash proceeds and, (i) there was a filed financing statement covering the original collateral, and (ii) the proceeds were a type of collateral for which perfection was possible through a filing in the same office where the original financing statement was filed.²⁶¹ The cash-transformation rule applied when the collateral was sold for cash and the debtor then used the cash to buy some second-generation noncash proceed.²⁶² To have continuing automatic perfection in the second-generation noncash proceed, the cash-transformation rule required that the two requirements of the same-office rule be satisfied and also that the original financing statement have listed the type of property constituting the second-generation noncash proceed.²⁶³

New Article 9 does not change the substance of the rules for continuing automatic perfection in proceeds but sets them out in a different

257. Unfortunately space does not permit and life is too short for a listing of all the instances of non-English in the new Article 9. Only a few notable examples will be dealt with in this section. However, honorary mentions must also go to R9-109(b) (stating perfection for promissory note also perfects for mortgage), and R9-626(a)(3) (outlining the rebuttable presumption test when a secured creditor fails to comply with the default rules).

258. New Article 9 continues the distinction between "cash" and "noncash" proceeds that was in the old Article 9. Compare R9-102(a)(9), (58), with 9-306(a). In the new Article 9, however, the definitions of "proceeds" and "cash proceeds" have been moved from the proceeds section, R9-315, to the general definition section, R9-102. New Article 9 defines "proceeds," "cash proceeds," and "noncash proceeds" in R9-102(a)(64), R9-102(a)(9), and R9-102(a)(58), respectively. Although not stated plainly anywhere in the new Article 9, R9-322 comment 8 confirms that, as under the old Article 9, proceeds of proceeds are "proceeds." See R9-322 cmt. 8.

259. 9-306(3)(a).

260. *Id.* The old rule provided for ten days of automatic perfection. *Id.* Unless the creditor fit within one of the provisions for continuing automatic perfection, the creditor needed to perfect for the proceeds before the ten days expired. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

form. The same-office rule is now broken down into three subsections, which, when combined, have the identical requirements as under the old Article 9.²⁶⁴ The truly bewildering aspect of new Article 9 is its treatment of the cash-transformation rule, which, on first reading, appears to have disappeared. In fact, the rule is alive and well but hiding in R9-315(d)(3), which states that there is continuing automatic perfection in the proceeds “when the security interest attaches to the proceeds.”²⁶⁵ The key to solving the puzzle is to realize that *if* the conditions spelled out in the old Article 9 cash-transformation rule are met, then, because the original financing statement describes the noncash proceeds and has been filed in the correct place, the original financing statement automatically perfects for these proceeds.²⁶⁶ Apparently under the assumption that everyone realized this, the drafters of new Article 9 deleted the old language and just left the short statement of R9-315(d)(3).²⁶⁷

B. *Priority for Future Advances*

Another place where one needs to know the law before reading new Article 9 is in the rule for priority for future advances. Under old Article 9, the drafting of this section was far from perfect, but the basic rule was discernible easily from the Code: the security interest for the future advance “has the same priority . . . as [that for] the first advance.”²⁶⁸ Moreover, the relation-back priority for the future advance was contained in the general section on priority rights between perfected secured creditors.²⁶⁹

Here too, new Article 9 does not alter the substantive law (although, naturally, the drafters gave it its own section).²⁷⁰ Once again, however, one cannot learn this from the language of new Article 9. First, the general priority section, R9-322, does not say anything about the relation-back priority of future advances.²⁷¹ Moreover, the language of R9-323, which deals specifically with future advances, suggests just the opposite by saying that “perfection of the security interest dates from the time an advance is made.”²⁷² In fact, this language deals with the very limited situation where the secured creditor does not have a future advance clause in its security agreement or does not get a new security agreement to cover the future advance. As Professors White and Summers explain, “[t]he real role of section 9-323 is to state several intricate—but rather

264. See R9-315(d)(1)(A)–(C).

265. R9-315(d)(3).

266. See R9-315 cmt. 5 (spelling out how the new rule reaches exactly the same result as the old rule in the cash-transformation situation).

267. Compare 9-306(3)(a), with R9-315(d)(3).

268. 9-312(7).

269. 9-312.

270. See R9-323.

271. See R9-322.

272. R9-323(a).

unimportant—*exceptions* to the general rule.”²⁷³ The important—and general—rule of relation-back priority for future advances is tucked into the comments to R9-323:

Under a proper reading of the first-to-file-or-perfect rule . . . , it is abundantly clear that the time when an advance is made plays no role in determining priorities among conflicting security interests except when a financing statement was not filed and the advance is the giving of value as the last step for attachment and perfection. Thus, a secured party takes subject to all advances secured by a competing security interest having priority under section 9-322(a)(1).²⁷⁴

C. Choice-of-Law Rules

The old Article 9 choice-of-law rules were such an unmitigated disaster that one is loathe to quibble with any part of the new rules.²⁷⁵ Two parts of the new rules, however, deserve special recognition in the sloppy-drafting category. First is R9-301(2), which states that “[w]hile collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection”²⁷⁶ A quick reading of this section might lead one to believe that the old where-the-collateral-is rule is still alive.²⁷⁷ A more careful reading of the section and the comments, however, clarify that this statement applies only when the secured creditor uses *possession* of the collateral, rather than filing, to perfect.²⁷⁸ Unfortunately, the drafters of new Article 9 worded this obvious proposition (i.e., if a secured creditor possesses the collateral, then the state where the collateral is physically kept governs perfection) in such a way and positioned it so as to guarantee it will create confusion.

The second piece of sloppy drafting is a carryover from old Article 9: the phrase telling the user that the R9-301 rules determine “*the effect of perfection or nonperfection . . . of a security interest in collateral.*”²⁷⁹ This superfluous phrase has no independent meaning apart from what

273. WHITE & SUMMERS, *supra* note 11, § 24-3, at 845. Professors White and Summers also give the sage advice that “[s]ometime when one has an hour or so to waste, one might look at example 2 [in R9-323 comment 3] to try to understand it or the policy behind it.” *Id.* They conclude that “[t]he drafting committee listened too closely to someone who was impossibly tied up in the details of Article 9.” *Id.* Professor Jay Westbrook aptly characterizes the language of R9-323 as “the very same old narrow exception that was badly translated from the Swedish in 9-312(7) in the Current Art. 9.” E-mail from Jay Westbrook, Professor of Law, University of Texas Law School, to Jean W. Burns, Professor of Law, Brigham Young Law School (Dec. 6, 2000) (on file with author).

274. R9-323 cmt. 3.

275. *See supra* Part IV.E.

276. R9-301(2).

277. *See* 9-103(1)(b); *see also* WHITE & SUMMERS, *supra* note 11, § 22-15, at 801 (noting this confusion).

278. R9-301(2). The last words of R9-301(2) give some hint by saying “of a possessory security interest in that collateral,” but the real clarification comes in comment 5(a) to the section.

279. R9-301 (emphasis added).

R9-301(1) and the other Article 9 rules already provide (i.e., that if a secured creditor fails to perfect correctly, he may lose a priority fight with another creditor, a trustee in bankruptcy, or a buyer).²⁸⁰ The phrase “the effect of perfection or nonperfection” is only a redundant linguistic flourish restating this principle.²⁸¹

D. Protection for Purchasers of Chattel Paper

Under old Article 9, protection for purchasers of chattel paper or instruments was fairly straightforward.²⁸² Section 9-308 gave certain purchasers of chattel paper and instruments who took possession of the paper priority over perfected secured creditors.²⁸³ This section was divided into two subsections.²⁸⁴ Subsection (a) dealt with a purchaser who was doing battle with a prior perfected secured creditor who was not claiming the instrument or chattel paper merely as a proceed of inventory.²⁸⁵ Subsection (b) dealt with battles with prior perfected secured creditors who were claiming the chattel paper or instrument merely as proceeds of inventory.²⁸⁶ The difference between the two subsections boiled down to whether the purchaser had knowledge that the specific paper or instrument was subject to a security interest. Such knowledge prevented the purchaser from winning in the first instance but not in the second.²⁸⁷

New Article 9 keeps much of the substantive law the same. However, the drafting of the new section turns a fairly easy matter into an unnecessarily complicated mess. The revised section repeats (in truly convoluted language) the distinction of the old 9-308 between perfected secured creditors claiming the paper merely as proceeds of inventory versus those claiming the paper under other circumstances.²⁸⁸ After working through the complex language of the two sections and a new

280. *Id.*

281. Compare R9-301, with 9-103. I thank Professor Steven Walt for reminding me of this piece of ugly drafting-carryover from old Article 9 and for stating so well the superfluous nature of this phrase. Professor Walt nominates this piece of drafting for the “ugly plus” award and reports that, according to rumor, some members of the drafting committee were unsure what the phrase meant or what it added to the rule but felt sufficiently insecure to delete it. E-mail from Steven Walt, Professor of Law, University of Virginia Law School, to Jean W. Burns, Professor of Law, Brigham Young University (Dec. 4, 2000) (on file with author).

282. 9-308.

283. *Id.* In addition to taking possession, to prevail, the purchaser had to give new value and purchase such paper in the ordinary course of his business. See *id.* In Section 9-309, old Article 9 protected holders in due course of instruments, holders of negotiable documents of title, and purchasers of securities. R9-331 continues this protection.

284. See 9-308(a)–(b).

285. See 9-308(a).

286. See 9-308(b).

287. See 9-308(a), (b).

288. R9-330(a)–(b). R9-330(a) governs when a purchaser of chattel paper is doing battle with a creditor who is claiming the chattel paper merely as a proceed of inventory. R9-330(b) governs other cases. In both cases, to prevail, the purchaser must take possession of the paper, give new value, act in good faith, and purchase in the ordinary course of his business.

section defining “knowledge” in this setting,²⁸⁹ however, one realizes that there is now very little difference between the two situations. One wonders why the drafters did not just eliminate the distinction altogether.²⁹⁰

VIII. THE ABSENT: UNANSWERED QUESTIONS

With all the time spent on new Article 9 and all the detail contained in the revised article, one might have expected that in the non-consumer area,²⁹¹ all the open questions under old Article 9 would have been answered. While many are answered, many others are not.²⁹² This leads to lesson number ten of this chronicle: life will always have some ambiguities and probably needs them to stay interesting. Among the questions new Article 9 does *not* answer are:

(1) If a security agreement fails to include an after-acquired property clause for inventory or accounts, should a court find that it was implicit?²⁹³

(2) When does a debtor have “rights in the collateral”?²⁹⁴

289. R9-330(f) provides that, for purposes of battles between purchasers and perfected secured creditors who do not claim the chattel paper merely as proceeds (i.e., those under R9-330(b)), a purchaser is deemed to have knowledge of a violation of a security interest if the chattel paper has been marked to show an assignment to the creditor.

290. The distinction comes down to a small difference in the knowledge test. If the creditor is claiming the paper merely as a proceed of collateral, a purchaser prevails if the paper does not indicate that it has been assigned. See R9-330(a)(2). This is a change from the old Article 9 where such a stamp would not have protected the secured creditor claiming the paper merely as a proceed of collateral. See 9-308 cmts. 2-3. If the creditor is *not* claiming the paper merely as proceeds of collateral, to prevail, the purchaser must show *both* that the paper was not marked with an indication of assignment (because of new section (f)) and that he acted without knowledge that the purchase violated the rights of the secured party. Thus, the distinction boils down to whether the trier of fact looks beyond the paper to determine the purchaser's knowledge. Under R9-330(a), the trier of fact looks at the paper to determine knowledge. Under R9-330(b), the trier of fact considers both the paper and any other evidence of the purchaser's knowledge.

291. The inability of the new Article 9 drafters to reach consensus on many consumer-transaction issues has been well noted. See, e.g., Marion W. Benfield, Jr., *Consumer Provisions in Revised Article 9*, 74 CHI.-KENT L. REV. 1255, 1256 (1999); Jean Braucher, *Deadlock: Consumer Transactions Under Revised Article 9*, 73 AM. BANKR. L.J. 83, 83 (1999); see also James J. White, *Work and Play in Revising Article 9*, 80 VA. L. REV. 2089, 2093-2102 (1994) (arguing that the consumer issues should be excluded from Article 9).

292. With respect to the questions open under the old Article 9 that are answered by the new Article 9, see *supra* Part IV.

293. See CLARK, *supra* note 66, ¶ 2.02[3][a], at 2-26 & n.84 (discussing the issue and collecting cases); WHITE & SUMMERS, *supra* note 54, § 31-4, at 117-18 & n.40 (same).

294. Under both the old and new Article 9, a debtor must have “rights in the collateral” for the security interest to attach. Compare 9-203(1)(c), with R9-203(b)(2). Because this term was not defined in the old Article 9, courts were left to case-by-case decisions. See CLARK, *supra* note 66, ¶ 2.04 (discussing “rights in the collateral”); WHITE & SUMMERS, *supra* note 54, § 31-6a, at 125 & n.9 (discussing the issue and collecting cases). New Article 9, like the old Article 9, provides little guidance to the courts in defining this term. The new Article 9 provision is worded slightly differently to say the debtor must have “rights in the collateral or the power to transfer rights in the collateral.” R9-203(b)(2). The phrase “or the power to transfer rights” is intended to deal with those cases in which a debtor has the power to transfer another person's rights to a certain class of transferees. See R9-203 cmt. 6; see also Margit Livingston, *Certainty, Efficiency, and Realism: Rights in Collateral Under Article 9 of the Uniform Commercial Code*, 73 N.C. L. REV. 115, 116-17 (1994) (discussing this failure).

(3) If a debtor signs a blank security agreement, and the secured creditor completes the form in accordance with the parties' oral agreement, is the security agreement valid?²⁹⁵

(4) If a secured creditor knows at the time it files a financing statement that the debtor intends to change its name in the near future, does the secured creditor have a "good faith" duty to file under the new name as well as the old name?²⁹⁶

(5) How strict is the "strict tracing" rule for a lender PMSI?²⁹⁷

(6) Does possession of keys to a yacht or a safe-deposit box satisfy "possession" for purposes of perfection?²⁹⁸

(7) What is the proper test for determining when there is automatic perfection for an assignment of accounts?²⁹⁹

(8) Is a lien creditor definitely outside the definition of "purchaser"?³⁰⁰

(9) If a PMSI in inventory never delivers the goods to the debtor but the debtor nonetheless has "rights" in them, does the PMSI have super-priority over a prior perfected secured creditor?³⁰¹

295. See WHITE & SUMMERS, *supra* note 54, § 31-5, at 122 n.13 (collecting cases).

296. The language of the old Article 9 did not specifically require a secured creditor with such knowledge to file under both the new and old names. See 9-402(7). However, some courts imposed such a duty under the general good faith requirement of Article 1. See, e.g., *In re Kalamazoo Steel Process, Inc.*, 503 F.2d 1218, 1221-22 (6th Cir. 1974); *Woods v. Bath Indus. Sales, Inc.*, 549 A.2d 1129, 1131-32 (Me. 1988). New Article 9 adds a new definition of "good faith" for purposes of Article 9, see R9-102(a)(43), but does not resolve this question. See WHITE & SUMMERS, *supra* note 54, § 31-19, at 213 (noting that the writers of the treatise disagree themselves over the proper outcome in such cases).

297. Both the old and new Article 9 require that, for a lender to have PMSI status, its money must be used to acquire rights in the collateral in question. Compare 9-107(b), with R9-103(a)(2). However, under old Article 9, some courts relaxed the rule in certain cases. See, e.g., *N. Platte State Bank v. Prod. Credit Ass'n*, 200 N.W.2d 1, 3-6 (Neb. 1972). But see *In re Brooks*, 29 U.C.C. Rep. Serv. 660, 666 (Bankr. Me. 1980) (denying PMSI status where security interest taken several months after loan made). See also CLARK, *supra* note 66, ¶ 3.09[2][a] (collecting cases). Although R9-103 comment 3 states that "[t]he concept of [PMSI] requires a close nexus between the acquisition of collateral and the secured obligation," the drafters do not indicate to what extent they approve or disapprove of the less-than-strict tracing decisions.

298. See CLARK, *supra* note 66, ¶¶ 2.06[2], 7.07[1] (discussing possession).

299. WHITE & SUMMERS, *supra* note 54, § 31-10 (describing the problem under the old Article 9 and collecting cases); WHITE & SUMMERS, *supra* note 11, § 22-7, at 89 (noting that the new Article 9 does nothing to resolve the confusion).

300. Under the old Article 9, most courts and leading commentators took the position that "purchaser" did not include lien creditors (or trustees in bankruptcy). See WHITE & SUMMERS, *supra* note 54, § 31-21, at 224-25 & n.24. This view is based on the last phrase in the definition of "purchase": "or any other *voluntary* transaction creating an interest in property." 1-201(32) (emphasis added). Because a lien creditor's seizure is not voluntary, the argument goes, a lien creditor does not "purchase." See WHITE & SUMMERS, *supra* note 54, § 31-21, at 224-25 & n.24. However, some courts disagreed and interpreted the term as including lien creditors. See, e.g., *Prairie State Bank v. IRS*, 745 P.2d 966, 971-72 (Ariz. Ct. App. 1987). The ambiguity arises because the "purchase" definition, under both the old version and the revised version, includes "taking by . . . lien." See 1-201(32); R1-201(32). Unfortunately, while the drafters of the new Article 9 concluded that "purchaser" does *not* include lien creditors or bankruptcy trustees, they did not specify this in the revised definition of "purchase." See R1-201(32). Instead, they tucked their opinion into a comment to a different section. R9-316 cmt. 3.

301. See *Kunkel v. Sprague Nat'l Bank*, 128 F.3d 636, 644 (8th Cir. 1997).

(10) What is included in the “and the like” part of the “cash proceeds” definition?³⁰²

(11) If a PMSI in consumer goods relies on automatic perfection, does the automatic perfection continue into proceeds that are also consumer goods?³⁰³

(12) What is a “breach of the peace” for purposes of repossession?³⁰⁴

(13) Why did the drafters continue to use the words “authorized” and “knows of” in different senses in different sections?³⁰⁵

(14) Is a non-negotiable order to pay an instrument or an account?³⁰⁶

CONCLUSION

No doubt, as the drafters have stated, the “substantial increase in the sophistication of secured transactions” and a desire for more certainty caused some of the complexity in new Article 9.³⁰⁷ However, no matter how pure the intentions of the drafters, there is also no question that new Article 9 is a formidable beast to master. While the drafters may not have “set out to make the Article more complex,”³⁰⁸ they most certainly did, at least in the short-to-medium run, as creditors and lawyers struggle to learn the paths through the forest and discover the locations of the land mines.

302. Under the old Article 9, many courts held that negotiable instruments, other than checks, were not included. *See supra* note 88 and accompanying text. But that, of course, left the question of what is included? The only light that the new Article 9 sheds on this question is R9-102(a)(9) comment 13, which states that “some money market accounts” may be included in this term.

303. R9-315(d)(1) suggests the answer is no because there is no filed financing statement covering the original collateral. *See* R9-315(d)(1)(A).

304. Both the old and the new Article 9 prohibit repossession if the action will “breach the peace.” *See* 9-503; R9-609(b). There were legions of cases under the old Article 9 regarding what activity constituted a breach of the peace. *See* WHITE & SUMMERS, *supra* note 54, § 34-7, at 415 (collecting cases and noting that “the phrase . . . has been the subject of countless judicial opinions”). The new Article 9 does nothing to clarify the matter but leaves it, as before, to a case-by-case determination.

305. Under old Article 9, the confusion arose because of the use of these terms, in different senses, in Sections 9-402(7) and 9-306(2). *See, e.g., In re Cohutta Mills*, 108 B.R. 815, 818 (Bankr. N.D. Ga. 1989). The matter was sufficiently confusing that the Permanent Editorial Board modified comment 3 to 9-306 and issued PEB Commentary No. 3, dated March 10, 1990, to clarify the seeming contradiction. PERMANENT EDITORIAL BD., cmt. 3, *reprinted in* UNIFORM COMMERCIAL CODE (West 2001). Despite this confusion, the drafters continue using these terms to mean different things in different sections of the new Article 9. *See* R9-315(a)(1); R9-507(a).

306. The new Article 9, like the old Article 9, fails to resolve the question of whether *non-negotiable* orders to pay are instruments. *See* M.M. Landy, Inc. v. Nicholas, 221 F.2d 923, 928 (5th Cir. 1955) (holding that some non-negotiable orders to pay may be instruments); CLARK, *supra* note 66, ¶ 7.09 (collecting cases). Because a secured creditor can now file for instrument as well as accounts, the question is not as important as it previously was in terms of perfection. R9-312(a). However, the issue is still important in classifying collateral for purposes of the security agreement.

307. Harris & Mooney, *supra* note 4, at 1397.

308. *Id.* at 1396-97. However, the drafters' credibility on this point is cast into doubt by their next statement: “Nor did we.” *Id.* at 1397. This second sentence is a flat-out lie.

No. 1]

THE GOOD, THE BAD, AND THE UGLY

69

This particular voyager into the hitherto unknown darkness of new Article 9 survived, but the trip was not easy, fast, or without surprises. When finished, one inevitably queries whether the revisions were worth the trouble and confusion that they will cause. Not only is there no clear answer to this question, but it is one of those philosophical issues that can be debated forever, yet whose answer will not affect the real world. New Article 9 is here to stay. Anyone practicing, teaching, or studying in this area will have to learn it. I hope the tale of my travels will ease the burden on those who follow.

APPENDIX A

TACKLING THE THICKET OF POST-FILING NAME CHANGES, MERGERS,
AND TRANSFERS OF COLLATERAL

After much coffee and hair pulling, the author believes (but does not guarantee)³⁰⁹ that the following is the path through the thicket of name changes, business restructurings, transfers of collateral, and mergers.

(a) Name Changes. Post-filing name changes are fairly easy to handle. The secured creditor does not need a new security agreement because a mere name change would not release the debtor from its obligations under the security agreement.³¹⁰ However, the perfected secured creditor likely will want to file a new financing statement if the debtor changes its name in a substantial way so that a search under the new name would not reveal the old financing statement.³¹¹ Assuming such a substantial change in the debtor's name, new Article 9, like the old Article 9, gives the perfected secured creditor a four-month grace period to refile, if the creditor wants to be perfected in any collateral acquired after the four-month period.³¹² If the perfected secured creditor is not interested in being perfected in collateral acquired by the debtor more than four months after the name change, the perfected secured creditor does not have to refile at any time; its now-misleading financing statement is effective to perfect a security interest in the collateral the debtor had at the time of the name change or acquired four months after the name change.³¹³ However, to be perfected in any collateral the debtor acquires more than four months after the name change, the secured creditor must file a new financing statement under the debtor's new name.³¹⁴

(b) Changes in the Debtor's Organizational Structure. New Article 9's approach to a debtor's change in organization is governed by a different section than name changes, yet functions much the same.³¹⁵ By law, contract, or by assuming the debts and acquiring substantially all the assets of the original debtor, the new organization will likely be a "new

309. See *supra* note 9 and accompanying text.

310. See R9-203(d)–(e).

311. If the name change is so slight that a search under the new name would disclose the old financing statement, the old financing statement is fully effective and no new one is necessary. See R9-506.

312. See R9-507(c). This section repeats the rule of the second sentence of old 9-402(7): if the debtor's new name renders the old financing statement seriously misleading, the secured creditor must file a new financing statement within four months of the name change if the secured creditor wishes to be perfected in collateral acquired by the debtor after the four-month period.

313. See R9-507(b), (c)(1).

314. See R9-507(c)(2). The secured creditor need not get new authorization from the debtor to do so. See R9-509(b).

315. See R9-508.

debtor.”³¹⁶ If so, the secured creditor does not need a new security agreement to cover collateral transferred to, owned by, or later acquired by the “new debtor.”³¹⁷ With respect to the need for a new financing statement under the name of a new organization, the analysis is basically the same as with a name change, but with a twist. Here, one must ask: (1) whether the “new debtor” is in the same jurisdiction as the old debtor, and (2) whether the new debtor’s name is sufficiently different from that of the old debtor so that the old financing statement is rendered seriously misleading.³¹⁸

(i) *New Debtor—Same Jurisdiction.* If the new debtor is located in the same jurisdiction as the original debtor *and* the name of the new debtor is so similar to the old debtor’s name that a search under the new name would turn up the old financing statement, then the secured creditor does not need a new financing statement for either collateral transferred to the new debtor or acquired thereafter by the new debtor.³¹⁹ If the new debtor has a significantly different name (but is located in the same jurisdiction as the original debtor), however, the secured creditor has a four-month grace period to file a new financing statement under the new debtor’s name to be perfected in collateral obtained by the new debtor more than four months after the transfer to the new debtor.³²⁰ As with name changes, the perfected secured creditor’s old (now misleading) financing statement remains effective with respect to any collateral of the original debtor at the time of the organizational change or acquired by the new debtor in the four months after the change.³²¹

(ii) *New Debtor—Different Jurisdiction.* The twist comes if the new debtor is located in a different state than the old debtor. The analysis regarding the security agreement is the same as outlined above. In this instance, however, to be fully protected, the secured creditor needs a new financing statement in the new jurisdiction, regardless of how close the name of the new debtor is to that of the old debtor. For collateral that the original debtor possessed and in which the secured creditor was perfected *at the time of the transfer to the new debtor*, the secured creditor has a one-year grace period to reperfect in the new jurisdiction.³²² If the creditor fails to reperfect within this period, its perfection lapses and it is deemed never to have been perfected as against a purchaser of the col-

316. R9-102(a)(56) (defining “new debtor” as a person who “becomes bound as [a] debtor under Section 9-203(d)”). Under R9-203, an entity *does* become bound by a prior security agreement if so provided under the security agreement, by operation of law, or by generally assuming the obligations and assets of the original debtor. R9-203(d). Note that in the third instance, the transferee must generally assume *both* the assets and the obligations of the transferor. See R9-508 cmts. 2–3; Harris & Mooney, *supra* note 4, at 1390–91 (discussing this section).

317. R9-203(e).

318. See R9-507; R9-508(b).

319. See R9-508(a) & cmt. 4; R9-503.

320. R9-508(b).

321. See R9-508(a), (b)(1).

322. See R9-316(a)(3).

lateral.³²³ There is *no* grace period, however, for filing a new financing statement in the new jurisdiction for collateral that the new debtor acquires (and in which the creditor has a security interest) *after* the move.³²⁴

(iii) *Assumption that a New Organizational Structure is Deemed to Be the Same Entity.* Conceivably, a court could deem a change in organizational structure of a debtor to involve no new entity.³²⁵ In that case, there would be no second debtor (“new” or not), and the secured creditor’s security agreement would remain effective, regardless of the name of the debtor after the restructuring.³²⁶ However, the name-change rules outlined in section (a) of this appendix would apply. Furthermore, if the reorganization also involved a movement of the debtor to a new jurisdiction, the secured creditor has four months to reperfect in the new jurisdiction for any collateral that the debtor had at the time of the movement to the new jurisdiction.³²⁷ Here again, the secured creditor needs to remember that there is *no* grace period for filing in the new jurisdiction for collateral the debtor acquires after the move.³²⁸

(iv) *Assumption that Restructuring Creates a New Entity That Is Not a “New Debtor.”* In the unlikely event that a court finds that a newly organized business is a different entity from the original debtor but is *not* a “new debtor,” the transaction will be treated as an unauthorized transfer of collateral, which is described in the next section.³²⁹

(c) Unauthorized Transfer of Assets Where Transferee Is Not a New Debtor. Assume the debtor (OldCorp) sells some assets to a transferee (NewCorp) who does not qualify as a “new debtor.”³³⁰ Assume also that Bank has a perfected secured interest in OldCorp’s property and did not authorize the transfer.

Here, one first goes to the buyer sections to see if NewCorp cuts off Bank’s security interest under one of these sections.³³¹ If not, Bank’s security interest continues in the collateral that OldCorp transferred to NewCorp.³³² Moreover, Bank’s security interest survives perfected and, *if* OldCorp and NewCorp are located in the same jurisdiction, Bank does not need to file a new financing statement, regardless of how different NewCorp’s name is from OldCorp’s.³³³

323. See R9-316(b); *see also supra* Part V.E.

324. See *supra* notes 165–67 and accompanying text.

325. See *supra* notes 163–64 and accompanying text.

326. If there is no second debtor involved in the restructuring, then the secured creditor is dealing with the same “debtor” who authorized the original security agreement.

327. R9-316(a)(2).

328. See *supra* notes 165–67 and accompanying text.

329. The new entity will still be a “debtor” because it has an interest in the collateral. See R9-102(a)(28)(A). Presumably, if the secured creditor authorizes the transfer, the creditor will insist that the newly organized entity become a “new debtor” under R9-203(d).

330. For when a transferee will be a “new debtor,” see R9-203(d). See *also supra* note 316 and accompanying text.

331. See R9-317(b); R9-320; R9-321.

332. See R9-315(a)(1)–(2).

333. R9-507(a). This was also the result under the third sentence of old 9-402(7).

However, if NewCorp is located in a *different* jurisdiction than OldCorp, Bank does not need a new security agreement, but within one year it must file a new financing statement where NewCorp is located.³³⁴ If Bank fails to refile in NewCorp's jurisdiction, Bank's security interest will no longer be perfected (although Bank will remain a secured creditor in the collateral).³³⁵

Now assume that, at the time of the transfer, Finance had a perfected secured interest in NewCorp's assets, existing and after acquired. Bank still does not need a new security agreement, and if OldCorp and NewCorp are located in the same jurisdiction, Bank does not need a new financing statement.³³⁶ Moreover, Bank has priority over Finance in the *transferred* collateral, even if Finance filed its financing statement before Bank.³³⁷ The rationale is that Finance could have investigated the source of the transferred collateral and discovered Bank's filing.³³⁸ Bank's priority (and security interest), however, extends only to the collateral transferred by OldCorp to NewCorp.³³⁹ Finance will have the only security interest in the assets that NewCorp (i) owned at the time of the transfer from OldCorp, or (ii) acquired thereafter.

To add another layer of complexity, assume the same facts as in the last paragraph but also assume NewCorp is located in a *different* jurisdiction than OldCorp. Again, Bank does not need a new security agreement.³⁴⁰ However in this case, Bank must file a new financing statement within one year in the state in which NewCorp is located to preserve its perfected status in the transferred collateral.³⁴¹ If Bank fails to refile within one year, its perfection lapses and Bank is deemed never to have been perfected as against a purchaser of collateral.³⁴² If this happens,

334. See R9-316(a)(3), (b). Bank files in NewCorp's name (and does not need NewCorp's authorization to do so) because, having the collateral, NewCorp is now the "debtor," although not a "new debtor." See R9-102(a)(28); R9-509(c).

335. R9-316(b). Bank does not have to worry about the no-grace-period-for-after-acquired-collateral aspect of the one-year rule (R9-316(a)) because, under the assumption that NewCorp is not a "new debtor," the Bank's only interest is in the collateral actually transferred from OldCorp to NewCorp. See R9-315(a)(1).

336. See *id.*; R9-507(a).

337. See R9-325. The result is the same if Finance was a PMSI with respect to NewCorp's purchase of the assets from OldCorp. See R9-325 cmt. 3. R9-325 is intended to codify the result in *Bank of the West v. Commercial Credit Financial Services, Inc.*, 852 F.2d 1162 (9th Cir. 1988), which reached the R9-325 result under the old Article 9. See WHITE & SUMMERS, *supra* note 11, at 879-80. The drafters, however, left the courts wiggle room in this area for "the wide variety of other contexts in which the problem may arise." R9-325 cmt. 6.

338. See R9-325 cmt. 3.

339. R9-325. Moreover, Bank has priority only if its security interest in the transferred collateral was perfected at the time NewCorp acquired it. See R9-325(b), cmt. 4.

340. See R9-315(a)(1).

341. R9-316(a)(3). For reasons explained previously, Bank does not have to worry about filing immediately in NewCorp's location. See *supra* note 335 and accompanying text.

342. R9-316(a)(3), cmt. 2 (noting that the section is not limited to "new debtors").

Bank will not have priority over Finance.³⁴³ Instead, the first-to-file rule will apply³⁴⁴ and Finance will win.

(d) Merger Into or Acquisition of Assets by New Debtor (Including Reincorporations). Assume that OldCorp merges into or transfers substantially all its assets and obligations to NewCorp (or reincorporates and becomes NewCorp) and that NewCorp is a “new debtor.”³⁴⁵ Assume again that Bank has a perfected secured interest in OldCorp’s assets.

In this case, Bank does not need a new security agreement, even if Bank did not authorize the merger, transfer or reincorporation. Because NewCorp is a “new debtor,” Bank’s old security agreement with OldCorp continues effective not only (i) in the collateral transferred by OldCorp to NewCorp but also (ii) in any property owned by or (iii) acquired afterwards by NewCorp (provided that the property fits within the collateral description in Bank’s security agreement with OldCorp).³⁴⁶

With respect to Bank’s financing statement, one needs to ask (1) whether OldCorp’s name is significantly different from NewCorp’s, and (2) whether OldCorp and NewCorp are located in the same jurisdiction.³⁴⁷ Assuming the two firms *are* located in the same jurisdiction, then one goes through the name change question, i.e., is the surviving entity’s name sufficiently similar to OldCorp’s that Bank’s existing financing statement is not seriously misleading. If so, Bank does not need a new financing statement.³⁴⁸ If the names are substantially different, Bank needs to file a new financing statement in NewCorp’s name within four months to cover collateral acquired by NewCorp after the four-month grace period.³⁴⁹

Assume now that NewCorp is located in a different jurisdiction than OldCorp. In this case, Bank must file a new financing statement in NewCorp’s jurisdiction, regardless of how close NewCorp’s name is to OldCorp’s.³⁵⁰ With respect to collateral transferred by OldCorp to NewCorp, Bank has a one-year grace period in which to file a new financing statement.³⁵¹ With respect to collateral owned by NewCorp at the time of the merger or acquired thereafter, Bank has no grace period for filing in NewCorp’s location.³⁵²

343. See R9-325(a)(3) (requiring continuous perfection by Bank to qualify for priority under R9-325).

344. See R9-322(a)(1).

345. See *supra* note 316. This section assumes that a court will, as suggested by the comments, treat a reincorporation as a transfer to a different entity. See *supra* notes 163–64 and accompanying text. If so, the reincorporated firm will almost certainly be a “new debtor” under state corporate law. See *id.*

346. See R9-203(e).

347. See R9-506; R9-507.

348. See R9-508(a).

349. See R9-507(b); R9-508(b).

350. See R9-301; R9-307.

351. See R9-316(a)(3).

352. See *id.*; see also *supra* notes 165–67 and accompanying text.

No. 1]

THE GOOD, THE BAD, AND THE UGLY

75

Now add Finance, NewCorp's preexisting perfected secured creditor. If NewCorp defaults on its loans with Bank and Finance, Bank (assuming it has taken the appropriate steps for perfection after the merger or transfer of assets) would have priority for (i) the collateral transferred by OldCorp.³⁵³ However, Finance would have priority for (ii) the collateral that NewCorp had at the time of the merger and (iii) any collateral that NewCorp acquired after the merger.³⁵⁴ The fact that Bank filed before Finance (or vice versa) is irrelevant.³⁵⁵

WHEW!

353. See R9-325.

354. See R9-326(a) cmt. 2. With respect to the assets that NewCorp had at the time of the merger or acquired thereafter, Bank's security interest, even if perfected, was "effective solely under Section 9-508." *Id.* R9-325 does not apply to this collateral because NewCorp did not acquire this collateral "subject to the security interest created by" OldCorp. See R9-325(a)(1). Therefore, under R9-326(a), Finance has priority for collateral that NewCorp had at the time of the merger or transfer or acquired thereafter.

355. See R9-326(a).

APPENDIX B

THIS AUTHOR'S BEST EFFORT TO WORK THROUGH THE MAZE OF R9-502, R9-516, R9-516(D), R9-520, AND R9-338

Here again, this represents the author's best efforts at working through a new Article 9 maze, but the author cannot guarantee 100% accuracy.

R9-502

Section R9-502 sets out the requirements for a sufficient financing statement: (a) the debtor's name; (b) the secured party's name; and (c) an indication of the collateral covered by the financing statement.³⁵⁶ If the financing statement fails to meet the requirements of R9-502, it is ineffective, regardless of whether the filing office accepts it or rejects it (unless a court finds the error or omission to be minor and not seriously misleading).³⁵⁷

R9-516(b)

Section R9-516(b) lists bases on which a filing office can refuse to accept a financing statement.³⁵⁸ The key to understanding R9-516(b) is to realize two things. First, R9-516(b) only permits a filing office to refuse a filing because of *omissions* of information.³⁵⁹ It does not authorize a filing office to consider the accuracy of any information in the financing statement or to reject a filing due to inaccuracy.³⁶⁰ Second, the list of R9-516 reasons includes some (but not all) of the information required by

356. See R9-502(a).

357. See *id.* ("[A] financing statement is sufficient only if [it meets the requirements of that section.]; R9-520(c) ("A filed financing statement satisfying Section 9-502(a) and (b) is effective . . ."). With respect to R9-506(a)'s "seriously misleading" test when applied to the debtor's name, see *supra* Part IV.C. With respect to errors in the secured party's name, R9-506 comment 2 states that "[i]nasmuch as searches are not conducted under the secured party's name, . . . an error in the name of the secured party . . . will not be seriously misleading." R9-506 cmt. 2. The comments do not discuss the result of the filing office accepting a financing statement that omits the secured party's name. While the same reasoning would seem to apply to missing and incorrect secured parties names (i.e., no one searches by these names), a court may well look less favorably on a financing statement that fails to give any name whatsoever.

358. R9-516(b).

359. *Id.*

360. R9-516(b)(3) refers to a record that "does not provide" a name of a debtor or, for an individual debtor, does not identify the debtor's last name. R9-516(b)(4) refers to a record that "does not provide" the secured party's name and mailing address. R9-516(b)(5) deals with a filing that does not "provide" or "indicate" certain other information. R9-520 comment 2 states that "[f]or the most part, the bases for rejection [in R9-516] are limited to those that prevent the filing office from dealing with a record that it receives—because some of the requisite information . . . is missing or cannot be deciphered . . ." With respect to *inaccurate* information, R9-516 comment 3 specifically states: "Neither this section nor Section 9-520 requires or authorizes the filing office to determine, or even consider, the accuracy of information provided in a record." *Accord* R9-338 cmt. 2 ("Section 9-520(a) requires the filing office to reject financing statements that do not contain information concerning the debtor as specified in Section 9-516(b)(5). An error in this information does not render the financing statement ineffective."). Along with not wanting filing offices making judgments as to the accuracy of information, the new Article 9 drafters may have assumed that states will program their computers to reject incomplete financing statements.

R9-502.³⁶¹ The majority of R9-516 requirements go beyond what R9-502 requires for financing statement sufficiency.³⁶²

(a) Proper R9-516 Rejections. If a financing statement omits any of the information required by any R9-516(b) subsection (including any which is *not* required by R9-502), the filing officer may properly reject it, and if the filing officer does so, there is no effective filing and no perfection.³⁶³ Thus, as a practical matter, a secured creditor must include in its financing statement not only the information required by R9-502 (which is technically the only information required for a financing statement's sufficiency) but also that listed in R9-516(b), the omission of which can lead to a rightful rejection and no effective filing or perfection.

(b) Wrongful R9-516 Rejections. If the filing office rejects a financing statement that provides the information required by R9-516(b)—i.e., a wrongful rejection—filing is nonetheless deemed to have been made.³⁶⁴ This is true even if the creditor does not resubmit it, admittedly an unlikely scenario.³⁶⁵ However, there is one limit to the wrongfully rejected (and unfiled) financing statement. Under R9-516(d), it is not effective “as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files.”³⁶⁶ Other than these R9-516(d) reliance purchasers, the financing statement, although rejected by the filing office, is fully effective.

(c) Wrongful R-516 Acceptances. If the filing office accepts a financing statement that omits any R9-516(b) information—i.e., a wrongful acceptance—then, under R9-516, the filing is effective.³⁶⁷ This is true regardless of what R9-516(b) information is omitted. Only *incorrect*, as opposed to omitted, information triggers the second sentence of R9-520(c).³⁶⁸

One caveat should be noted. If the filing office accepts a financing statement that omits information required by *both* R9-516(b) and R9-502

361. See R9-516. R9-516(b)(3) requires the name of the debtor and, for individual debtors, an indication of the debtor's last name. R9-516(b)(4) requires the name of the secured party. On the other hand, R9-502 requires an indication of the collateral but R9-516 does not.

362. See R9-516. For instance, R9-516(b)(4) requires the address of the secured party.

363. R9-516(b) (“Filing does not occur with respect to a record that a filing officer refuses to accept because [the filing lacks any of the required information].”); R9-502 cmt. 4 (noting that “the filing office must reject a financing statement lacking [R9-516] information”).

364. R9-516(d).

365. R9-516(a), (d).

366. R9-516(d). The “except” phrase of R9-516(d) will only come into play in the unusual case in which the creditor does not convince the filing officer to accept the filing. Under R9-520(b), the filing office must inform a creditor of a refusal to accept a financing statement. With respect to who may take advantage of the “except” phrase, see *infra* note 378 and accompanying text.

367. See R9-516 cmt. 9 (“[I]f the filing office accepts [a filing with omissions] . . . , the financing statement generally is effective if it complies with the requirements of Section 9-502(a) and (b)”); R9-520 cmt. 3 (“If the filing office accepts a financing statement that does not give [R9-516] information at all, the filing is fully effective.”); R9-502 cmt. 4 (“[I]f the filing office accepts the record [lacking R516 information], it is effective nevertheless.”).

368. See R9-520(c). With respect to who benefits from R9-520(c), see *infra* note 381 and accompanying text.

(such as the name of the debtor or the secured party),³⁶⁹ the filing is made and effective under R9-516.³⁷⁰ However, it may be insufficient to perfect the security interest because of a failure to comply with R9-502 (unless a court finds the omission is minor and not seriously misleading).³⁷¹

(d) Proper R9-516 Acceptances. If a financing statement includes the information required in R9-516(b) and is accepted, it is effective,³⁷² with one exception. If the accepted filing provides all the R9-516 information but fails to provide R9-502 information that is not required by R9-516 (such as an indication of collateral), the filing is effective under R9-516,³⁷³ but may be insufficient to perfect the security interest (unless a court deems the omission to be minor and not seriously misleading).³⁷⁴

(e) Errors in Financing Statement Information. If a financing statement contains inaccurate (as opposed to missing) information, the filing office should accept it.³⁷⁵

Assume the filing office does accept the filing. To determine the extent of its effectiveness, one needs to look at the precise nature of the incorrect information and, in particular, what category of R9-516 information is erroneous. For purposes of incorrect (as opposed to omitted) R9-516 information, new Article 9 distinguishes between R9-516(b)(5) information and other R9-516(b) information.³⁷⁶ If the filing office accepts a financing statement with erroneous R9-516(b)(3)(C) information or erroneous R9-516(b)(4) information,³⁷⁷ the filing is fully effective.³⁷⁸ If an accepted financing statement has erroneous R9-516(b)(5) information, however, the filing is not effective as against those persons protected by R9-338.³⁷⁹

Again, one caveat should be noted. If the financing statement contains erroneous R9-516(b)(3) or (b)(4) information *and* the erroneous information is also required by R9-502 (such as the name of the debtor),

369. R9-502(a)(2) and R9-516(b)(4) both require this information.

370. See R9-516(a).

371. See R9-502(a); R9-506. The omission of the debtor's name or the failure to indicate the last name of an individual debtor is likely to make the filing seriously misleading. See *supra* Part VI.C. With respect to the omission of the secured party's name, see *supra* note 357.

372. See R9-516(a).

373. See *id.*

374. See R9-502(a); R9-506(a).

375. See *supra* note 360 and accompanying text.

376. See R9-520 cmt. 3.

377. Both sections require the name of the secured party. See R9-502(a)(2); R9-516(b)(4). However, R9-506 comment 2 states that errors in the name of the secured party should be deemed not seriously misleading. See *supra* note 357 and accompanying text. Thus, mistakes in the secured party's name or address will not cause an accepted financing statement to be ineffective. Moreover, such mistakes will not prejudice a later PMSI in inventory. See R9-516 cmt. 5 (noting that a later person relying on the erroneous address will be protected because, under 1-201(26)(b), a person "gives" notice when the notice is delivered to any "place held out to him as the place for receipt of such communications").

378. One reaches this conclusion because R9-520(c) (second sentence) and R9-338 only refer to incorrect information in the R9-516(b)(5) category. R9-520 comment 3 confirms this conclusion.

379. R9-520(c).

then although the accepted financing statement is effectively filed under R9-516, it may be insufficient to perfect the security interest (unless a court finds the error to be minor and not seriously misleading).³⁸⁰ Similarly, if a creditor presents a financing statement that contains all the information required by R9-516 to the wrong state, the filing office should accept it. However, even if it is accepted (and, therefore, is filed under R9-516), it will not be effective for perfection because it was “filed” in the wrong state.

(f) R9-516(d) and R9-338 Protection. When triggered, R9-516(d) and R9-338 protect some, but not all, later secured creditors and buyers. In particular, they protect later secured creditors and buyers who give value and reasonably rely on the absence of a filing or on the erroneous information in a filing.³⁸¹ Section R9-516(d) protects such reliance purchasers when the financing statement is missing because of a wrongful refusal.³⁸² Section R9-338 protects them in the case of a filed financing statement with erroneous R9-516(b)(5) information.³⁸³

380. See R9-506(a). Some R9-502 information is also required by R9-516(b). See *supra* note 361. However, none of the R9-516(b)(5) information is required by R9-502, and therefore, 9-520(c) will never be triggered in a case fitting within this hypothetical.

381. See R9-338; R9-516(d). R9-516(d) makes a wrongfully rejected filing ineffective against a later purchaser who gives value based in reasonable reliance on the absence of a filing. R9-516(d). “Purchasers” include secured creditors. See R1-201(32). R9-338(1) “subordinates” the secured creditor who filed the financing statement with erroneous R9-516(b)(5) information to the extent that the holder of a conflicting security interest gave value in reasonable reliance upon the incorrect information. R9-338(2) allows “a purchaser, other than a secured party, of the collateral [to] take[] free of the security interest . . . to the extent that, in reasonable reliance upon the incorrect information, the purchaser gives value and [for tangible collateral] receives delivery of the collateral.” Given the use of the term “purchaser” in both R9-516(d) and R9-338, it is unlikely that a lien creditor or a trustee in bankruptcy could use either section. See *supra* note 300 and accompanying text. Moreover, because lien creditors typically do not check Article 9 filings before lending, lien creditors (and bankruptcy trustees) are not likely to meet the “reasonable reliance” requirement of these sections. See R9-338 cmt. 2 (“A purchaser who has not made itself aware of the information in the filing office with respect to the debtor cannot act in ‘reasonable reliance’ upon incorrect information.”).

382. See R9-516(d).

383. See R9-338.

