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Survey of Cases Decided Under Revised Article 9:
There's Not Much New Under the Sun

Margit Livingston*

I. INTRODUCTION

After the Uniform Commercial Code1 was first promulgated in the 1950s2 and began to be widely adopted in 1960s,3 Article 9 governing security interests in personal property was hailed as the outstanding achievement of the commercial law codification process.4 It unified the formerly fractured legal world of personal property security devices by creating a single framework for secured transactions, regardless of their form or the type of collateral involved.5 Although Article 9 was not without its problem areas, it remained a testament to the drafters' ingenuity in simplifying and clarifying the impenetrable tangle of the preceding laws.

Revised Article 9 represents the first major overhaul of Article 9 since 1972. The drafters spent the better part of the 1990s studying the flaws of former Article 9 and reworking it to "build a better mousetrap." Among their several goals, the revisers6 sought to ex-

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1. One scholar extolled the Uniform Commercial Code as "probably the most important piece of business legislation ever prepared in the United States, if not in the world." Frederick K. Beutel, The Proposed Uniform Commercial Code as a Problem in Codification, 16 LAW & CONTEMP. PROBS. 141, 141 (1951).

2. See, e.g., Donald J. Rapson, Default and Enforcement of Security Interests under Revised Article 9, 74 CHI.-KENT L. REV. 893, 893 (1999) (stating that "Article 9 has been rightfully lauded as the 'jewel' of the Uniform Commercial Code").


4. Id. at 9-11.

5. See also Karl N. Llewellyn, Why We Need the Uniform Commercial Code, 10 U. FLA. L. REV. 367, 379 (1957) (observing that "the whole of Article 9 brings into simplified and workable form the law of all chattel security").
pand Article 9 to encompass some transactions formerly excluded: Because Article 9 had worked so well as a legal model, expanding its scope would bring a larger number of transactions the benefits of its elegance and workability. The revisers also wanted to address several problematic issues that had arisen under the 1972 version of Article 9. They sought to clarify some of the priority rules and simplify the filing rules to make perfecting security interests more straightforward and less costly. In addition, many of the revisions seemed geared toward allowing secured creditors an easier time in bankruptcy—principally, by permitting security interests to stand up more frequently against lien creditors.

Two years after July 1, 2001, the uniform effective date for Revised Article 9, the courts have had some chances to apply the new law to both bankruptcy and non-bankruptcy cases involving security interests. Revised Article 9's transition rules state that unless an exception applies, the new law applies "to a transaction or lien within its scope, even if the transaction or lien was entered into or created before this [Act] takes effect." Additionally, the transition rules state that the new law "does not affect an action, case, or proceeding commenced before [the new law] takes effect."

This Article summarizes the most significant cases decided under new Article 9 and considers the impact of the new law on the courts and the outcome of decided cases. Part I of this Article describes cases dealing with the scope of Revised Article 9. Part II examines cases resolving attachment and perfection issues. Part III reviews cases that consider proceeds and priorities questions, and default and


8. U.C.C. § 9-701 (Official Text 2001). All citations to Article 9 in this article will be to Revised Article 9 unless indicated otherwise. Former Article 9 (Official Text 1995) will be indicated as such.


10. Id. (c). See In re AvCentral, Inc., 289 B.R. 170, 171 n.3 (Bankr. D. Kan. 2003) (noting that because the case before the court was filed after July 1, 2001, the effective date of Revised Article 9 in Kansas, the new law applied); In re Wiersma, 283 B.R. 294, 299 (Bankr. D. Idaho 2002) (applying Revised Article 9 because the debtor had filed for bankruptcy after the new law's effective date).
foreclosure cases are the subject of Part IV. Finally, I conclude that despite its relatively sweeping changes, new Article 9 has yet to have a significant impact on the outcome of decided cases. This perceived lack of impact does not mean, however, that the new law is not affecting how secured transactions are being set up and enforced outside of the litigation context.

II. **Scope and Preemption Issues**

One of Revised Article 9's stated goals was to bring within its fold a greater number of secured transactions. Thus, the new law governs agricultural liens\(^{11}\) for the first time as well as sales of promissory notes and payment intangibles,\(^{12}\) security interests in deposit accounts,\(^{13}\) and consignments.\(^{14}\) Given the success of former Article 9 in simplifying and clarifying the law in this area, the revisers sought to extend the benefits of the Article 9 scheme to certain transactions formerly excluded.\(^{15}\) Along with the expanded scope of new Article 9, however, the drafters retained the preemption provisions of the old law, deferring to specific federal and state statutes governing particular types of transactions.\(^{16}\) The handful of preemption cases decided under the new law continues to recognize this deference to non-Article 9 schemes.

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11. It should be noted that not all cases decided under former Article 9 have become obsolete with the revision's enactment. There are several recent cases decided under the old version of Article 9 still have considerable relevance under the new law, especially with respect to provisions that the revisers left untouched or ambiguous. *See, e.g.*, Shelby County State Bank v. Van Diest Supply Co., 303 F.3d 832, 839 (7th Cir. 2002) (limiting the supplier's security interest to products sold to the debtor by the supplier, rather than all inventory, based on the parties' intention as inferred from "ambiguous" clause in the security agreement); *In re QDS Components*, Inc., 292 B.R. 313, 345-46 (Bankr. S.D. Ohio 2002) (holding that lease agreements were true leases, not disguised security agreements, because the lessor retained a "meaningful reversionary interest" in the leased equipment).

12. U.C.C. § 9-102(a)(5) (2001). "Agricultural liens" are defined as non-possessory, statutory liens in farm products in favor of a supplier of goods or services furnished in connection with the debtor's farming operation or in favor of a lessor of real property leased in connection with the debtor's farming operation. *Id.*

13. *Id.* § 9-109(a)(3).

14. *See id.* § 9-109, cmt. 16 (noting that Revised Article 9 now includes security interests in deposit accounts).

15. *Id.* § 9-109 (a)(4). Small-scale and consumer consignments are still excluded as well as consignments to a merchant who "is . . . generally known by its creditors to be substantially engaged in selling the goods of others." *Id.* § 9-102 (a)(20).

A. Preemption

In *In re AvCentral, Inc.*, the secured party, Joda LLC ("Joda") took security interests in two DC-9 aircraft owned by the debtor, AvCentral, Inc. ("AvCentral"), along with the airplanes' engines and propellers.\(^{17}\) Joda perfected its security interests by filing the parties' security agreements with the Federal Aviation Administration, as required by federal law.\(^{18}\) The debtor later filed for relief under Chapter 7 of the Federal Bankruptcy Code.\(^{19}\)

The bankruptcy trustee argued that Joda's security interests were unperfected by virtue of Joda's failure to file an Article 9 financing statement in the appropriate state.\(^{20}\) Although the debtor purchased the aircraft intact, it then disassembled them into component parts for resale. As such, the trustee asserted that the parts became inventory within the scope of Article 9, and thus subject to Article 9 filing requirements.\(^{21}\)

After noting that new Article 9 applied to this conflict, the court then analyzed its preemption provisions. Like former Article 9, the new law provides that it does not apply "to the extent that a statute, regulation or treaty of the United States preempts it."\(^{22}\) The Federal Aviation Act, the court observed, creates a central recording system for security interests in civil aircraft.\(^{23}\) Generally, however, the Aviation Act does not cover security interests in aircraft parts, unless they are maintained by or for an air carrier.\(^{24}\) Given the debtor's disassembling of the aircraft into component parts held for sale, the trustee had a plausible argument that Article 9 applied.\(^{25}\) The court ultimately concluded that the federal recording scheme controlled "because the aircraft were whole and intact at the time the security interests were granted and the instruments recorded."\(^{26}\)

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17. See U.C.C. § 9-109(c)(1) (2001) (excluding transactions in which federal law preempts Article 9); id. (c)(2), (3) (excluding transactions in which another state statute governs security interests created by a governmental entity); U.C.C. § 9-311(a)(2), (3) (2001) (deferring to state certificate-of-title laws for titled vehicles).
19. Id. (citing 49 U.S.C. § 44107 (a)(1), (a)(2)).
20. Id.
21. Id.
23. Id. at 172 (citing to Kansas' version of Revised U.C.C. §§ 9-109(c)(1), 9-311(a)).
24. Id. (citing 49 U.S.C. § 44107(a)(1), (a)(2)(A) - (D)).
25. Id.
26. The court noted that under U.C.C. § 9-311(d) "while collateral is inventory held for sale by a person in the business of selling goods of its kind, section 9-311 does not apply to a security interest created by that person." Id.
While the *AvCentral* case focused on the federal preemption of Article 9's filing requirements, Article 9 also contemplates that some transactions may be excluded in their entirety because of federal preemption.\(^{27}\) In *Surgicore, Inc. v. Principal Life Insurance Co.*,\(^{28}\) several patients had assigned their rights to health insurance benefits to Surgicore, a medical service provider.\(^{29}\) The insurer, Principal Life Insurance ("Principal"), denied all or part of each patient's claim, and Surgicore, as an assignee, brought suit to enforce its rights in these receivables.\(^{30}\)

Moving to dismiss Surgicore's state law claims, Principal asserted that ERISA, as a federal statute, pre-empted state law in the area of health care insurance receivables.\(^{31}\) Surgicore responded that the Article 9 provision addressing the rights of an assignee to payment under an insurance policy is all-encompassing with regards to the type of insurance payment, and thus ERISA is not at issue.\(^{32}\) Surgicore further argued that, as an assignee, it was not required to file a financing statement to perfect its security interest in the right to payment.\(^{33}\)

The court found that ERISA pre-empted state law. State laws that "relate to" employee welfare benefit plans implicate the ERISA pre-emption provision.\(^{34}\) Article 9, since it purports to govern assignments of health-care-insurance receivables, including those under an ERISA plan, had a "connection with" the ERISA plans at issue.\(^{35}\)

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\(^{27}\) *Id.* at 173.

\(^{28}\) Compare Revised U.C.C. § 9-109(c)(1) (excluding transactions to the extent that "a statute, regulation, or treaty of the United States preempts this article") with *id.* § 9-311(a)(1) (stating that "the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to . . . a statute, regulation, or treaty of the United States . . . ").


\(^{30}\) *Surgicore*, 2002 WL 1052034, at *1-2.

\(^{31}\) *Id.* The plaintiff brought claims under both state law (Article 9) and federal law (the Employee Retirement Income Security Act, "ERISA").

\(^{32}\) *Id.* at *3.

\(^{33}\) *Id.*

\(^{34}\) *Id.* The court did not elaborate on the basis for Surgicore's claim that it need not file a financing statement even though Article 9 arguably applied to the transaction. Under the expanded definition of "account" in new Article 9, health-care-insurance receivables are considered accounts. Revised U.C.C. § 9-102(a)(2) (2001). The patients' right to receive payment from Principal would be a health-care-insurance receivable and thus an account. See *id.* (46) (defining health-care-insurance receivable as "an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided or to be provided"). Under Revised U.C.C. § 9-309(5), assignments of health-care-insurance receivables to the health-care goods or services provider are automatically perfected upon attachment. Thus, Surgicore was correct that if Article 9 governed, it did not need to file a financing statement to perfect its interest.

\(^{35}\) *See Surgicore*, 2002 WL 052034, at *4 (stating that a state law "relates to" a plan if it "(1) has a connection with or (2) reference to such a plan").
Because Article 9 sets out requirements for such assignments, it affects the manner in which benefits are distributed under the ERISA plan, and thus creates a potential conflict with federal law. As such, the federal law must prevail, and the court dismissed Surgicore's Article 9 claim to enforce the assignment of insurance benefits to it.

In *Crestmark Bank v. United States (In re Spearing Tool and Manufacturing Co.)*, the secured party, Crestmark, attempted to contest the validity of a previously filed federal tax lien. Before advancing additional funds to the debtor under their security agreement, the creditor had submitted a lien search to the State of Michigan, using the debtor's registered name, "Spearing Tool and Manufacturing Co." The search results indicated no liens, and Crestmark lent the debtor additional monies. Previously, the Internal Revenue Service had filed two notices of a federal tax lien with the Michigan Secretary of State, using the name "Spearing Tool & MFG Company, Inc." After the debtor filed for chapter 11 bankruptcy protection, Crestmark filed a complaint to determine priority to certain pre-petition accounts receivable collections. The secured party argued that new Article 9 essentially allows searching parties to use only the debtor's precise legal name in their searches. If such a search does not reveal a filing, the filing is invalid.

Although not specifically labeling the issue as one of preemption, the court held that federal, not state, law dictated the form of the notice that must be filed by the IRS asserting a tax lien against a particular taxpayer. Treasury regulations under the federal tax lien statute required only that the lien notice "identify the taxpayer." The court found that the name used by the IRS sufficiently identified the tax-

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36. *Id.*
37. *Id.*
38. *Id.* The court held, however, that Surgicore was properly an assignee for ERISA purposes and therefore had standing to sue under the federal statute to enforce its rights as an assignee. *Id.* at *3.*
40. *Id.* at 580.
41. *Id.*
42. *Id.*
43. Crestmark argued that under Revised Article 9, a financing statement must use the debtor's official legal name. *Id.* at 582 (citing Michigan's version of Revised U.C.C. § 9-503(1)(a)). If the financing statement sets forth the debtor's name incorrectly, then it is invalid unless "a search of the records of the filing office . . . using the filing office's standard search logic, if any, would disclose [the] financing statement . . ." *Id.* (citing Michigan's version of Revised U.C.C. § 9-506(2), (3)).
44. *Id.* at 582-3.
payer since it was close to the debtor’s legal name and contained a commonly used abbreviation for “Manufacturing.”

This decision, though not surprising, has ramifications for secured or would-be secured creditors attempting to ascertain the existence of prior interests in the debtor’s property. Undoubtedly, Revised Article 9 has simplified the search process for inquiring parties, but those parties will still need to think creatively about the debtor’s name in conducting searches for federal tax liens. Anticipating common variant spellings (e.g., “MFG” for “Manufacturing”) and using truncated portions of the debtor’s name (e.g., “Spearing Tool”) will continue to be useful searching techniques.

In addition to acknowledging federal preemption, Revised Article 9, like the former statute, defers to state certificate-of-title laws as well as “any non-Uniform Commercial Code central filing statute.” In Farmer v. LaSalle Bank (In re Morgan), the secured party had refinanced the debtor’s car loan, but waited two years to apply to have its lien noted on the vehicle’s certificate of title. In the meantime, the debtor filed a voluntary petition under chapter 7 of the Bankruptcy Code. Using its status as a hypothetical lien creditor, the bankruptcy trustee attempted to avoid the creditor’s security interest as unperfected.

The creditor argued that, as an assignee of the original secured party, it was entitled to stand in the original secured party’s shoes through the doctrine of equitable subordination. The original secured party had its security interest properly noted on the automobile’s certificate of title. Citing to U.C.C. § 1-103, the creditor argued that the court was free to consider general equitable principles, such as equitable subordination, in deciding Code cases.

The court in Morgan, however, held otherwise. Given Revised Article 9’s specific deference to state certificate-of-title laws, the court stated that the perfection of security interests in motor vehicles was completely outside of the Uniform Commercial Code. Further, the

45. Id. at 583. (citing Treas. Reg. § 301.6323(f)-1(d)(2)).
46. Id.
49. See id. (noting that the debtor filed her bankruptcy petition on Mar. 27, 2001, and the creditor applied for the notation of its lien on the automobile’s certificate of title on May 10, 2001).
50. See id. at 797 (citing 11 U.S.C.A. § 544 (West 1993 & Supp. 2002)).
51. Id. at 799.
52. Id. at 798.
court stated that "[t]here is nothing in the Tennessee Certificate of Title Statute that allows a court to supplement the Statute with equitable principles."54 In the same vein, the court held that the creditor could not, in essence, "piggyback" on the original secured party's lien that was still noted on the vehicle's title when the debtor filed for bankruptcy.55 As such, the creditor's security interest was unperfected at the time that the bankruptcy petition was filed, and the trustee could avoid it.56

Although the holding in Morgan may ultimately be correct, the court spoke perhaps too hastily when it stated that the creditor could not "piggyback" on the original secured party's perfection. Revised U.C.C. § 9-310 (c) expressly states that the assignee of an original perfected security interest need not reperfect "to continue the perfected status of the security interest against creditors of and transferees from the original debtor."57 One of the Official Comments to that section indicates that the provision applies to assignments of security interests perfected through complying with a certificate-of-title statute, unless "the statute expressly provides to the contrary."58 In other words, the creditor in Morgan was entitled to rely on the notation of the original secured party's lien on the title as adequately perfecting its security interest as an assignee unless the Tennessee title law specifically provided otherwise.

Because the court did not address this point, the case does not supply any information about the precise terms of the Tennessee title law with respect to assignments.59

B. Other Scope Cases

As mentioned previously, the revisers significantly expanded the scope of new Article 9 to include types of transactions previously excluded.60 Two of these types include consignments and security inter-

54. Id. at 801-02.
55. Id. at 801.
56. Id. at 803 (setting forth the creditor's argument that because the original secured party "never released its perfected lien on the Automobile, perfection was continuous between the two entities . . ."). The court emphasized that it was the second creditor's "responsibility to get the title from [the first secured party] or to obtain a duplicate title . . ." Id.
57. Id. at 804-05.
59. Id. cmt. 4.
60. The Tennessee certificate-of-title statute is somewhat ambiguous about whether an assignee must have its security interest noted on the title to maintain its perfected status. See TENN. CODE ANN. 55-3-124 (2003). The statute states that an assignee "shall" apply to have its lien noted on the certificate of title. Id. (a). At the same time, it specifies that "[t]he assignee of any lien shall be entitled to the same priority among the outstanding lienors and have all the
ests in commercial tort claims. In In re Valley Media, Inc., the debtor, before the filing of its chapter 11 bankruptcy petition in November 2001, was the largest wholesale supplier of entertainment software products in the United States. In 1997, the debtor, Valley Media, Inc., had acquired Distribution North America ("DNA") for the purpose of aiding in its distribution activities. At all times, DNA was an unincorporated subsidiary of Valley Media, and DNA had no officers or directors of its own.

As a distributor for Valley Media, DNA entered into several distribution agreements with vendors whereby the vendors gave DNA certain products on consignment. Following the filing of its chapter 11 bankruptcy petition, Valley Media filed a motion to sell its own inventory and that held by DNA on a consignment basis. Several of DNA's vendors brought objections to Valley Media's motion, arguing that as consignors, they held title to the consigned goods and could thus reclaim them from the debtor.

In considering whether to apply former or Revised Article 9 to the dispute, the bankruptcy court pointed out that resolution of the dispute would be the same under either version of Article 9. The court observed, however, that the approach of Revised Article 9 to consignments was "slightly different" from that of the old law. The new statute brings all transactions that fit the statutory definition of "consignment" within the scope of Article 9 and makes them equivalent to a purchase money security interest in inventory. As such, consignments are subject to Article 9 filing requirements.

To escape inclusion within Article 9 and its filing requirements, consignors may try to show that their transactions do not fit the statutory definition. In Valley Media, the consignors attempted to prove that DNA was a merchant who was "generally known by its creditors to be

61. See supra notes 11-14 and accompanying text.
63. Id.
64. Id. at 115 (observing that "[u]nder a consignment arrangement, the title to the inventory remains with the vendor and the goods are not paid for until the distributor sells the products.").
65. Id. at 111-12.
66. Id. at 121.
67. Id. at 123.
68. Id. at 124 n.33.
69. See U.C.C. § 9-109(a)(4) (2001) (stating that Article 9 applies to consignments); id. § 9-109, cmt. 6 (stating that a consignor's security interest in goods is "a purchase-money security interest in inventory").
substantially engaged in selling the goods of others" and thus was excluded from the Article 9 consignment definition. In applying this standard, the court first found that DNA, as an unincorporated, wholly owned subsidiary of Valley Media, had no legal existence of its own. Thus, because it was not a legal entity operating separately from Valley Media, it could not have creditors of its own, and thus could not be generally known by them as a merchant who sold the goods of others.

The court next considered whether the consignors had proven that the parent company, Valley Media, satisfied the Article 9 standard for exclusion of certain consignment transactions. The standard, according to the court, comprises two elements, each of which must be satisfied: (1) the consignee must be "substantially engaged" in selling others' goods, and (2) that fact must be "generally known by its creditors." The court found that, as a factual matter, neither element was demonstrated. At any given time, the consigned goods constituted no more than seventeen percent of Valley Media's total inventory, "which is below the 20% threshold set by case law on the issue" for the "substantially engaged" element. In addition, there was simply no evidence that the "vast majority" of creditors had actual knowledge of Valley Media's consignment arrangements.

Thus, the consignments at issue were subject to Article 9, and since the consignors had not perfected their interests through filing, the debtor-in-possession could use its avoiding powers under the federal

70. See id. § 9-109, cmt. 6 (noting that the rules relating to perfection apply to consigned goods).
71. See Valley Media, 279 B.R. at 124-25 (applying U.C.C. § 9-102(a)(20) (2001)). Revised Article 9's definition of "consignment" requires that the consigned goods be delivered to a "merchant for the purpose of sale" and "the merchant... is not generally known by its creditors to be substantially engaged in selling the goods of others." U.C.C. § 9-102(a)(20)(A)(iii) (2001).
72. Valley Media, 279 B.R. at 127.
73. Id. at 128-9.
74. Regarding the burden of proof issue, the court suggested that Revised Article 9 implicitly placed the burden of showing that a consignment was included within Article 9 on the challenging party (e.g., the bankruptcy trustee). Id. at 131, n.54. In contrast, the former law had allocated the burden in the opposite fashion—i.e., the consignors had to rebut the presumption that their transactions were a "sale or return." Id. The court stated that no matter which way the burden of proof was allocated, the evidence suggested that the consignment was included within Article 9. Id.

One could certainly disagree with the court's conclusion regarding the burden of proof issue under Revised Article 9. Because most consignments will probably fit the Article 9 definition, it would seem more appropriate to place the burden on the consignor to show that it is excluded.
75. Id. at 124-25.
76. See id. at 132 (citing Heller Fin., Inc. v. Samuel Schick, Inc. (In re Weldo Holdings, Inc.), 248 B.R. 336, 342 (Bankr. N.D. Ill. 2000)).
Bankruptcy Code to set aside their interests. From a planning perspective, the holding in Valley Media reinforces the idea that consignors should always file precautionary financing statements to protect their interests. Particularly now that Article 9 brings most commercial, large-scale consignments within its purview, it behooves most consignors to assume that their transactions will be subject to filing requirements.

As alluded to earlier, the revisers of Article 9 expanded the statute’s scope to include transactions and types of collateral previously excluded. Former Article 9, for example, did not cover security interests in any tort claims. The new law brings within its scope security interests in commercial tort claims. In In re Wiersma, the bankruptcy court faced the question of whether settlement proceeds that the debtors received from a suit against a contractor that performed inadequate electrical work at the debtors’ dairy were included within a pre-revision security agreement covering general intangibles but not tort claims.

The court first noted that the definition of “general intangibles” under Revised Article 9 excludes commercial tort claims. Commercial tort claims are in fact their own category of collateral under the new statute. Thus, if the settlement proceeds fit the definition of commercial tort claim (or proceeds of such a claim), they could not constitute general intangibles. Carefully parsing the statutory definition, the court observed that to be a commercial tort claim, a claim had to arise in tort. The court then looked to Idaho case law to determine the nature of the debtors’ suit against the electrical contractor. The suit was premised on breach of the contract between the parties but also contained causes of action for negligence, fraud, and

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77. Id. at 131-32.
78. Valley Media, 279 B.R. at 133. The court also alluded to the fact that under Revised Article 9, consignees in unperfected consignments are deemed to have the same rights in the consigned goods in its possession as the consignor, “for purposes of determining the rights of creditors of, and purchasers for value of goods from, a consignee ...” U.C.C. § 9-319(a) (2001). As a result of this section, “creditors of the consignee can acquire judicial liens and security interests in the goods.” Id. cmt. 2. This section then underscores the bankruptcy trustee’s ability as a hypothetical lien creditor to avoid unperfected consignment interests.
79. See supra notes 11-14 and accompanying text.
83. Id. at 300.
84. See id. (citing Idaho’s version of U.C.C. 9-102(13)).
violations of the Idaho Consumer Protection Act. The court concluded that the suit "is primarily premised on a contract" between the parties. In addition, the appended tort claims are "integrally related to the contract" and "do not change the fundamental nature of the action and its genesis in contract law."

Thus, the debtors' claim against the contractor was not a commercial tort claim. In fact, as a "thing in action," the claim fell squarely within the Article 9 definition of general intangible. As such, the claim and the settlement proceeds from it were subject to the creditor's security agreement. Under both former and Revised Article 9, contract claims were subject to Article 9, and therefore, the court undoubtedly reached the right result in holding that this claim was properly described in the security agreement as a general intangible.

One issue that this case does not reach, however, is whether a pre-revision security agreement covering "general intangibles" could be read post-revision as covering a commercial tort claim. Under old Article 9, the category of "general intangibles" was a catch-all and included "any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, investment property, rights to proceeds of written letters of credit, and money." Hence, theoretically, commercial tort claims would have been "general intangibles" under the old law. At the same time, since security interests in tort claims were excluded from former Article 9, secured transactions in such property would have been covered by other law. After the effective date of Revised Article 9, security interests in commercial tort claims are subject to the new law. The secured party might attempt to argue that its security agreement covering general intangibles should be adequate to pick up commercial tort claims, at least for the one-year grace period provided by the transition rules.

One of the Official Comments to Revised Article 9 suggests, however, that this argument should not be successful. The comment indicates that the security agreement reflects the parties' intent at the time

85. Id. Under new Article 9, a commercial tort claim "means a claim arising in tort with respect to which: (A) the claimant is an organization; or (B) the claimant is an individual and the claim: (i) arose in the course of the claimant's business or profession; and (ii) does not include damages arising out of personal injury to or the death of an individual." U.C.C. § 9-102(a)(13) (2001).
86. Wiersma, 283 B.R. at 302.
87. Id.
88. Id.
89. Id. at 303.
90. Id.
92. Id. § 9-104 (k).
of contracting. At that time, both debtor and creditor presumably understood the term "general intangibles" not to include tort claims of any kind because of former Article 9's exclusion of security interests in such claims. In addition, new Article 9 prohibits descriptions of commercial tort claims by "only by type of collateral" and bans after-acquired property clauses relating to commercial tort claims. Thus, a given commercial tort claim must be in existence at the time that the parties enter into the security agreement. The security agreement must also describe the claim with some degree of specificity.

III. ATTACHMENT AND PERFECTION ISSUES

Attachment is equivalent to the enforceability of a security interest. A security interest "attaches to collateral when it becomes enforceable against the debtor with respect to the collateral." New Article 9 essentially preserves the three steps for attachment required under former Article 9: (1) the secured party has to have given value to the debtor; (2) the debtor has to have rights (or the power to transfer rights) in the collateral; and (3) the debtor "has authenticated a security agreement that provides a description of the collateral." The secured party may enforce the security interest against the debtor and third parties only after the three steps of attachment have been satisfied.

93. Revised Article 9's transition rules provide for one-year grace periods in a number of situations involving changes in the mechanisms of attachment and perfection. See U.C.C. §§ 9-703(b), 9-704(1), 9-705(a) (2001).
94. Id. § 9-703, cmt. 3.
95. Id. § 9-108(e)(1).
96. Id. § 9-204(b)(2).
97. Id. § 9-108, cmt. 5.
98. See id. (suggesting that a description such as "all tort claims arising out of the explosion of debtor's factory" would be adequate).
99. U.C.C. § 9-203(a) (2001). The parties may postpone the time of attachment by agreement. Id.
100. U.C.C. § 9-203(b)(1) (2001). "Value" is defined broadly in Article 1, and includes "a binding commitment to extend credit" as well as "any consideration sufficient to support a simple contract." U.C.C. § 1-204 (Official Text 2002) [former § 1-201(44) (Official Text 2001)]. Article 1 was extensively amended in 2002, and all references to Article 1 will be to the revised version of it. To date, only Virginia, Texas, and the Virgin Islands have adopted new Article 1. Nat'l Conference Comm'rs Unif. State Laws, Revised Uniform Commercial Code Art. 1, Gen. Provisions (2001), at http://www.nccusl.org/nccusl/uniformacts_factsheets/uniformacts-fs-uccl.asp (last visited Nov. 9, 2003).
Beyond enforceability, every secured party seeks to have its security interest perfected. Perfection, of course, allows security interests to survive the bankruptcy trustee's avoiding power under the so-called "strong arm" clause of the federal bankruptcy code, and first-in-time perfection permits the secured party to have priority over later claimants in both bankruptcy and non-bankruptcy settings. The basic concept of perfection involves giving notice to the world of the existence of possible security interests in certain collateral of a particular debtor. The most common method of perfection is filing of a financing statement in a public recording office—usually the appropriate jurisdiction's Secretary of State office.

One of the notable achievements of new Article 9 is its simplification of the filing rules. Under the revised law, the debtor's location almost always controls the place of filing whereas under former Article 9, a set of virtually impenetrable choice-of-law rules determined the appropriate jurisdiction in which to file. In addition, Revised

102. U.C.C. § 9-203(b)(3)(A) (2001). If the collateral consists of standing timber, the security agreement must also include a description of the land involved. Id. Revised Article 9 provides for alternatives to the authenticated security agreement for certain types of collateral. Id. (B) (possession of the collateral by the secured party pursuant to the debtor's security agreement); id. (C) (delivery of collateral consisting of a certified security to the secured party pursuant to the debtor's security agreement); id. (D) (secured party's control of deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights pursuant to the debtor's security agreement).

103. See 11 U.S.C. § 544(a) (2003) (granting the trustee in bankruptcy the status of a hypothetical creditor with a judicial lien on all of the debtor's non-exempt property at the time of the commencement of the bankruptcy case). By virtue of this section and its interplay with Article 9 priority rules, the trustee can avoid unperfected security interests. See In re Mill Concepts Corp., 123 B.R. 938, 943 (Bankr. D. Mass. 1991) (noting that the "strong-arm clause was added to the [bankruptcy] statute in 1910 in order to avoid 'the evil of secret liens'").

104. As under old Article 9, most of the new Article 9 priority rules allow a perfected secured party to have priority over a later secured party, lien creditor, or non-ordinary-course buyer. See U.C.C. §§ 9-322(a)(1) (ranking conflicting security interests "according to priority in time of filing or perfection"); 9-317(a) (providing that an earlier perfected or filed security party trumps a later lien creditor); 9-317(b) (2001) (not allowing non-ordinary-course buyers to take free of prior perfected security interests).

105. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 763 (1995) (stating that the Article 9 drafters “believed that, to have the rights of a perfected secured creditor, normally one should undertake some action, either filing or possession, which would put a diligent searcher on notice of the secured party’s claim.”).

106. See U.C.C. § 9-310(a) (2001) (stating that “[e]xcept as otherwise provided . . . a financing statement must be filed to perfect all security interests and agricultural liens.”).

107. See U.C.C. § 9-301(1) (2001) (providing that “while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral”). The debtor's location for Article 9 purposes varies depending upon whether the debtor is an individual, an unregistered organization, or a registered organization. See § 9-307(b)(1) (2001) (stating that individuals are located at their principal residence); id. (b)(2), (3) (stating that an organization is located at its place of business
Article 9 has eliminated dual filing requirements and extinguished county filing,\textsuperscript{108} except with respect to certain real-estate related collateral.\textsuperscript{109} Almost all financing statements will be filed with the Secretary of State in the state where the debtor is located.

The revisers streamlined not only the choice-of-law rules but also pared down information required on the financing statement itself. Under former Article 9, a financing statement needed the names and addresses of both the debtor and the secured party, a description or indication of the collateral, and the debtor's signature.\textsuperscript{110} New Article 9 demands only the barest minimum of information on a financing statement: the debtor's name, the name of the secured party or its representative, and an indication of the collateral.\textsuperscript{111} Although the filing officer may, and in fact must, reject a financing statement that does not contain certain additional information,\textsuperscript{112} a financing statement complying with the statutory minimum is sufficient if it makes its way into the public record.\textsuperscript{113}

The courts have decided just a few cases under Revised Article 9 that deal directly with attachment and perfection issues. As with many of the cases rendered since the new law went into effect, some of these decisions touch on the impact of the transition rules. Revised Article 9's transition rules dictate to what extent the new law governs particular transactions and to what extent actions, particularly with regard to perfection, remain effective after July 1, 2001.

\textbf{A. Attachment}

As mentioned earlier, Revised Article 9 retains the standard three steps for attachment that existed under the prior law.\textsuperscript{114} As before,

\begin{itemize}
\item see former U.C.C. § 9-103 (1995).
\item See also Robert L. Jordan et al., Secured Transactions in Personal Property 96 (5th ed. 2000) (noting that "9-103 cannot be counted a success . . . . [p]roblems continue to arise, and it has been one of the most litigated provisions of the Code.").
\item See U.C.C. § 9-501(a)(1) (2001) (requiring filing in real estate mortgage records for "as-extracted collateral or timber to be cut" or fixture filings).
\item See U.C.C. § 9-502(a) (2001). For real-estate-related filings, additional information is required, including a description of the real property involved. Id. (b).
\item See U.C.C. § 9-520(a) (2001) (requiring the filing officer to reject a record that does not comply with § 9-516(a) and § 9-516(b) (4), (5) (requiring a financing statement to contain the debtor's and secured party's mailing addresses, a designation of the debtor as an individual or an organization, and if the debtor is an organization, certain information about the organization).
\item See U.C.C. §§ 9-520(c), 9-502, cmt. 4 (providing that if the filing officer accepts the record with the minimal information, "it is effective nevertheless.").
\end{itemize}
any security must contain a description of the collateral.\textsuperscript{115} The revised statute reiterates the old law's standard for sufficiency of descriptions: "a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described."\textsuperscript{116} In addition, the new law adds types of descriptions that are presumptively sufficient.\textsuperscript{117}

As did former Article 9, the new statute "rejects any requirement that a description is insufficient unless it is exact and detailed (the so-called 'serial number' test)."\textsuperscript{118} Unfortunately, for one would-be secured creditor, even this liberal description requirement did not prevent it from failing to attach its security interest. In \textit{Deere Credit, Inc. v. Pickle Logging, Inc. (In re Pickle Logging, Inc.)}, Deere Credit, Inc., had attempted to take a security interest in a particular piece of the debtor's equipment, namely a 548G skidder with a specific serial number.\textsuperscript{119} Both the security agreement and the financing statement, however, listed the collateral as a 648G skidder with a serial number that was one digit off the correct number.\textsuperscript{120}

The bankruptcy court in analyzing the description issue did not make it clear whether the issue is different depending on whether one is judging a security agreement or a financing statement. The court appeared to apply a unitary analysis that comprised both documents. Of course, in the end, it did not matter whether the description is sufficient on one document and not the other. Both unperfected and unattached security interests are avoidable in bankruptcy.\textsuperscript{121}

In reaching its conclusion that the description was inadequate, the court delineated the basic function of a description of collateral: "The description merely needs to raise a red flag to a third party indicating that more investigation may be necessary to determine whether or not an item is subject to a security agreement."\textsuperscript{122} The court went on to

\begin{itemize}
\item \textsuperscript{115} See supra notes 98-101 and accompanying text.
\item \textsuperscript{116} U.C.C. § 9-203(b)(3)(A) (2001).
\item \textsuperscript{117} Id. § 9-108(a).
\item \textsuperscript{118} Descriptions may identify the collateral by "(1) specific listing; (2) category; (3) . . . a type of collateral defined in [the Uniform Commercial Code]; (4) quantity; (5) computational or allocation formula or procedure; or (6) . . . any other method, if the identity of the collateral is objectively determinable." Id. (b).
\item \textsuperscript{119} Id. cmt. 2.
\item \textsuperscript{120} 286 B.R. 181, 182-83 (Bankr. M.D. Ga. 2002). The model 548G skidder in question bore the serial number DW548GX568154. Id. at 183.
\item \textsuperscript{121} Both documents listed the collateral as a model 648G skidder with a serial number of DW648GX568154. Id.
\item \textsuperscript{122} The trustee in bankruptcy (or the debtor-in-possession in a chapter 11 reorganization) may avoid unperfected security interests using its hypothetical lien creditor status given by the "strong arm clause." 11 U.S.C. § 544(a) (2003). Unattached security interests will be unperfected as well since attachment is a prerequisite to perfection under state law. U.C.C. § 9-
find that dual errors regarding the serial number and the model number of the skidder were fatal to the creditor. Because the erroneous serial number incorporated the erroneous model number (i.e., 648), the two numbers were consistent with one another, and an inquiring party would not notice anything amiss. Adding to the confusion, the debtor in fact owned at least two model 648G skidders along with some 548G skidders.

The secured party in Pickle Logging is certainly not the first creditor to create problems for itself by being too specific. Both old and new Article 9 encourage creditors to use general descriptions, especially on financing statements. In this case, the security interest would probably have survived in the debtor’s bankruptcy if the creditor had described the collateral on the financing statement as “skidder” or even “equipment.” To adequately serve the description’s evidentiary function on the security agreement, the creditor would probably have had to get at least the model number of the skidder and part of the serial number correct, given that the debtor had more than one 548G skidder.

In In re Stout, the bankruptcy court confronted a seeming lacuna in Revised Article 9’s transition rules, namely, whether a security agreement that was insufficient under former Article 9 could become sufficient merely through the enactment of Revised Article 9. The court ultimately concluded no, although one might quarrel with the result. Under Kansas’s former Article 9, for an interest in crops to become attached a security agreement had to contain a description of the land on which the crops were grown.

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308(a) (2001). In addition, an unattached security interest is unenforceable against the debtor and third parties. Id. § 9-203(a), (b).

123. Pickle Logging, 286 B.R. at 184.

124. Id. (stating that “[a] potential purchaser of the 548G skidder in dispute here could easily assume that the skidder is not covered by either the security agreement or the financing statement.”).

125. Id.

126. See, e.g., Shelby County State Bank v. Van Diest Supply Co., 303 F.3d 832, 839 (7th Cir. 2002) (holding that creditor’s security interest was restricted to only the products it sold to the debtor rather than all inventory because of a modifying clause added to the collateral description); Citizens Bank & Trust Co. v. Gibson Lumber Co., 96 B.R. 751, 754-55 (W.D. Ky. 1989) (holding that an omnibus description clause coupled with a specific listing of items created an ambiguity regarding the property that the parties intended to encumber).

127. See U.C.C. § 9-504(2) (allowing supergeneric collateral descriptions on financing statements).

128. See id. § 9-108, cmt. 2.

vised Article 9 dispensed with the requirement that a security agreement contain such a description.  

First National Bank ("Bank") provided Sam and Debra Stout ("debtors") financing for their farming operation, taking a security interest in the debtors' crops. Two security agreements were entered into and signed by the parties before the enactment of Kansas's Revised Article 9. Ultimately, the debtors filed a petition under chapter 12 of the Bankruptcy Code. As debtors under chapter 12, they became debtors-in-possession and thereby acquired all the avoiding powers of a chapter 11 trustee in bankruptcy. As such, they were entitled to use the "strong arm clause" to avoid any unperfected security interests.

The parties agreed that neither security agreement conformed to the requirements of former Article 9, and that therefore the Bank's security interests in the crops were not attached under former Article 9. As unattached security interests, the Bank's interests would be subordinated to the interests of a lien creditor and thus avoidable by the debtors under the strong arm clause. The Bank argued, however, that upon the enactment of Revised Article 9 its interests in the crops attached, and became perfected. The Bank asserted that the change in the law cured the infirmities of the security agreement, and that therefore attachment occurred at the time the new law was enacted.

The court noted that no case law, either inside or outside the jurisdiction, nor scholarship provided guidance on resolving this transitional issue. Therefore, the court focused solely on the transitional rules under Part 7 of Revised Article 9 to resolve the dispute. The court found that the transition rules applied specifically to three situa-

132. Id.
133. These agreements covered growing crops and were executed on February 26, 1993, and May 2, 2000, respectively. Id.
134. 284 B.R. at 511-512.
137. In re Stout, 284 B.R. at 512.
138. The parties had no disagreement over the adequacy of the Bank's financing statements. Id. at 511-12. Rather, the core dispute was whether enactment of Revised Article 9 operated to attach (and thus perfect) the Bank's security interest.
139. 284 B.R. at 512. The Bank argued that as attachment occurred at the time of new Article 9's enactment, as a secured creditor, it had priority to the crops of the debtor. The Bank argued that its interest was superior to that of the Stouts, the debtors-in-possession, at the time of the debtors' bankruptcy filing.
140. Id. at 512-13.
tions, not including the one before the court, and that "[u]nfortunately for the Bank, . . . the transition rules suggest that, while faulty pre-enactment perfection is remediable, failed pre-enactment attachment is not." The court believed that the drafters' failure to address the issue of what occurs to a security interest that was un-attached pre-enactment, but would become attached post-enactment indicated that indeed the security interest must remain unattached. Therefore, the Bank's interest was unattached and thus unperfected, and the debtors' status as lien creditors trumped the Bank's interest.

Though the court in Stout painstakingly analyzes the transition rules in an attempt to achieve a statutorily sound result, one may question the court's ultimate conclusion. Revised Article 9's default transition rule basically states that unless an exception applies, the new law applies to all transactions within its scope. All of the specific transition rules cited by the court relate to security interests that are enforceable immediately before the new law's effective date. As the court pointed out, the drafters did not address the issue of security interests that were unenforceable under former Article 9. From this omission, the court concluded that "the Kansas legislature did not intend to cure defective pre-enactment attachments by the enactment of the revision."

One could just as readily conclude, on the other hand, that the Article 9 revisers believed that they had dealt with the issue through the default transition rule. In other words, the new law applies to all transactions unless a specific transition rule specifies otherwise. It is doubtful that the revisers anticipated many situations in which unenforceable pre-enactment security interests would become enforceable post-enactment. After all, the requirements for attachment are basi-

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141. 284 B.R. at 513 (citing KAN. STAT ANN. § 84-9-701 (Supp. 2001)).
142. 284 B.R. at 514 (describing the three "permutations" covered by the transition rules as follows: "(1) a security interest that is enforceable pre-enactment and post-enactment [§ 9-703(a)]; (2) a security interest that is enforceable pre-enactment but not enforceable post-enactment [§ 9-703(b)]; and (3) a security interest that is enforceable pre-enactment but is unperfected pre-enactment [§ 9-703(c)].").
143. 284 B.R. at 513.
144. 284 B.R. at 513 (stating that "the drafters of the revised law did not directly address this topic and this omission, in this Court's view, seals the Bank's fate.").
147. Stout, 284 B.R. at 514 (citing §§ 9-703(a), (b), 9-704).
148. Id. at 514-15.
cally identical under the old and new versions of Article 9. In addition, it is important to consider the legislative purpose in requiring a land description for growing crops in the security agreement. The Official Comment to former § 9-203 indicates that the drafters thought that such a description would be an aid to identifying the specific crops subject to the security interest. Although nothing in the new law indicates why the land description requirement was dropped for crops, but not for timber, one might speculate that the revisers thought that crops, in some cases, could be sufficiently described without a reference to land—for example, “all the debtor’s growing corn crop” would seem to be sufficient to identify the collateral without a land description. Rather than mechanically concluding that the old security agreement was lacking a land description and was thus unenforceable, the court might have more appropriately considered whether the security agreement sufficiently identified the crop collateral in question.

Revised Article 9 continues to require that the debtor have rights in the collateral (or the power to transfer rights) as a necessary element for attachment of the secured party’s security interest. As with former Article 9, the new statute leaves the phrase “rights in collateral” basically undefined and leaves the issue to the courts for further development. In Arcadia Financial, Ltd. v. Southwest-Tex Leasing, Co., Inc., the court held that the debtor never acquired sufficient rights in the collateral for the creditor’s security interest to attach.

Advantage Rent-A-Car (“Advantage”) entered into an agreement with Lone Star Used Cars (“Lone Star”), under which Advantage agreed to sell cars to Lone Star. Lone Star would inspect the cars over a two- to three-week period, provide Advantage with its approval.
proval of the cars, and thereafter receive title and provide Advantage with payment. Arcadia Financial ("Arcadia") provided retail financing for Lone Star’s customers.\(^{156}\) Arcadia and Lone Star’s agreement provided that Lone Star warranted that title to the cars was held by Lone Star, free of any liens and that Lone Star give Arcadia the title to the vehicle at the time of the sale to its customer.\(^{157}\)

In July and August 1998, Lone Star purportedly sold four vehicles that it had acquired from Advantage, and Arcadia accepted assignment of the retail installment contracts Lone Star entered into with the customers.\(^{158}\) But Lone Star never provided Advantage with payment for the automobiles, and the transfer of title to Lone Star was never effectuated.\(^{159}\) Hence, Arcadia never took the titles to the vehicles when it accepted the installment contracts.\(^{160}\)

When Lone Star went out of business soon thereafter, Arcadia demanded that Lone Star repurchase the installment contracts on the vehicles.\(^{161}\) When Lone Star refused, Arcadia asked Advantage to provide it with the titles to the vehicles so that Arcadia could perfect its security interests in the installment contracts.\(^{162}\) Advantage refused, and Arcadia brought suit against Advantage, alleging that Advantage had converted its security interests in the vehicles.\(^{163}\)

On appeal, Arcadia argued that Lone Star did acquire sufficient ownership of the vehicles for attachment to occur.\(^{164}\) The Texas Court of Appeals, however, held otherwise: “the purported sale of the vehicles to Lone Star was incomplete because Lone Star failed to pay Advantage for the vehicles pursuant to their agreement,” thus failing to acquire ownership.\(^{165}\) The appellate court acknowledged that under the U.C.C. title normally passes from seller to buyer upon physical delivery of the goods.\(^{166}\) Since Advantage had delivered the four vehicles to Lone Star, arguably title to them passed to Lone Star. How-

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156. Id. at 621.
157. Arcadia was given an assignment of retail installment contracts entered into between Lone Star and its customers. Id.
158. Id.
159. Arcadia Financial, 78 S.W.3d at 621.
160. Id.
161. Id. Lone Star instead “provided letters of guarantee of title, representing to Arcadia that the original Texas certificates of title would be submitted within thirty days.” Id.
162. Id.
163. Id. at 621-22.
164. Arcadia Financial, 78 S.W.3d at 622. The District Court for Travis County, Texas, ruled in favor of Advantage, and Arcadia appealed the judgment.
165. Id. at 623.
166. Id. at 625. Arcadia’s argument that it was a buyer in the ordinary course of business also failed since the evidence showed that Arcadia was aware during its relationship with Lone Star that at different points Lone Star did not possess title to the vehicles. Still, Arcadia agreed to the
ever, both the Texas certificate of title law and the agreement between Advantage and Lone Star suggested that title did not pass until transfer of the certificate of title and payment in full of Advantage.

Relying on the certificate of title statute and the terms of the Lone Star-Advantage agreement, the court held that the ownership of the vehicles remained with Advantage at all relevant times.\(^\text{167}\) Thus, Lone Star did not have sufficient rights in the vehicles to support attachment of Arcadia’s security interest.\(^\text{168}\) On its face, the court’s holding conflicts with the U.C.C. Under § 2-401(1), a seller’s retention of “title” in goods delivered to a buyer is deemed to be the reservation of a security interest only.\(^\text{169}\) Hence, Lone Star would have acquired ownership of the vehicles delivered to it.

On the other hand, the state certificate of title law forbids subsequent sales of motor vehicles “unless the owner designated in the certificate of title transfers the certificate of title at the time of the sale.”\(^\text{170}\) Because Advantage had not transferred the certificates to Lone Star, Lone Star could not sell the vehicles to its customers. Given that most parties in transactions involving motor vehicles would demand to see a certificate of title before assuming that one in possession of a vehicle owned it, the court was probably correct in holding that Arcadia’s security interest did not attach.

B. Perfection

In contrast to Stout’s somewhat inflexible reading of new Article 9, three recent bankruptcy cases interpreting perfection requirements have embraced the liberality of the revised law and sanctioned financing statements with technical errors. In Grabowski v. Deere & Co. (In re Grabowski), Ronald and Trenna Grabowski (“debtors”) secured loans from two separate banks, Bank of America and South Pointe Bank.\(^\text{171}\) Bank of America perfected a security interest in the debtor’s “[i]nventory, [c]hattel [p]aper, [a]ccounts, [e]quipment, and [g]eneral [i]ntangibles” by filing a financing statement on December 31, 1998.\(^\text{172}\) In its financing statement, Bank of America listed the debtors person-

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\(^\text{167}\) See id. at 623 (citing Texas’s version of U.C.C. § 2-401(2)).

\(^\text{168}\) Id. at 623-624 (noting that the parties had stipulated that “the sale of any vehicle to Lone Star was contingent upon Advantage’s receipt of payment in full from Lone Star.”).

\(^\text{169}\) Id. at 624.


\(^\text{171}\) TEX. TRANSP. CODE ANN. § 501.071(a) (Vernon 1995).

\(^\text{172}\) 277 B.R. 388, 389 (Bankr. S.D. Ill. 2002). Interestingly, the court applied new Article 9 to this case even though the debtors filed their chapter 11 petition in April 2001. Id. at 390.
ally along with their business address. Thereafter, South Pointe Bank provided the debtors with a loan, taking and perfecting a security interest in the Grabowskis' equipment described on the lender's financing statement as "JD 1995 9600 combine, JD 925 Flex Platform, JD 4630 Tractor, JD 630 Disk 28' 1998." South Pointe's financing statement listed the debtors' location as their personal address.

The Grabowskis filed a chapter 11 bankruptcy petition and moved to determine the validity of the two banks' security interests in the items of equipment listed in South Pointe's financing statement. South Pointe asserted that it was entitled to priority in the items of equipment based on the vague nature of Bank of America's description of collateral and its listing of the business address as the debtors' location. South Pointe argued that "a subsequent lender would reasonably conclude that Bank of America's intended security was the personal property of the debtors' business rather than equipment used in the debtors' [personal] farming operation."

The bankruptcy court found that Bank of America had priority due to its first-in-time financing statement, and was entitled to the disputed equipment. The court stated that Bank of America's financing statement was consistent with the "exceedingly general standard for describing collateral in a financing statement, which is new to the UCC under revised Article 9." With regards to the disputed address, the court found that the debtor's address was not meant to be indicative of the location of the collateral, but rather "merely provided a means by which subsequent lenders could contact the debtors to inquire."

The court, at several points throughout its decision, acknowledged the "inquiry notice function" of describing collateral. According to the court, a financing statement served this function under both the old and new versions of Article 9. In addition, the court observed that Revised Article 9 has even further liberalized the description requirement for a financing statement by allowing creditors to use

173. Id. at 389. The bank's description of the collateral in the security agreement was identical to that in the financing statement.
174. Id.
175. 277 B.R. at 390. South Pointe's security agreement with the debtors described the collateral more generally as "Equipment: All equipment including . . . farm machinery and equipment."
176. Id. at 389.
177. Id. at 390.
178. Id. at 391.
179. Id. at 392.
180. Grabowski, 277 B.R. at 391.
supergeneric descriptions such as "all assets" and permitting descriptions by "type" or "category." This relaxed standard harmonizes with the general purpose of a filed financing statement.

Another bankruptcy case decided under Revised Article 9 reflects similar recognition of the new law's liberal filing requirements. In *Hergert v. Bank of the West (In re Hergert)*, Neil and Marie Hergert ("debtors") obtained three loans from Pacific One Bank ("Pacific One") for operation of their farming business. Two of the loans were commercial in nature, granting Pacific One a security interest in the debtors' equipment, inventory, crops, and other assets. To perfect the interests under these two loans, Pacific One filed both UCC-1 and UCC-1F (farm products) financing statements. The third loan granted Pacific One a security interest in the debtors' manufactured home, and its interest was noted on the certificate of title to the home. Both the UCC-1 and the certificate of title stated a Portland, Oregon mailing address for Pacific One. Further, the UCC-1 statement listed an additional address for acknowledgment purposes in Nampa, Idaho, and the UCC-1F (farm products) financing statement gave only the Nampa address for Pacific One. As part of a merger in 1998, Pacific One became Bank of the West ("Bank"), and the new entity acquired all of Pacific One's assets. The Bank continued to use the Portland address.

The debtors filed a chapter 12 bankruptcy petition in 2001, and brought an adversary proceeding to declare the Bank's security interests unperfected. The debtors, as debtors-in-possession, argued that the Bank's failure to correct the secured party's name and address on the original certificate of title and financing statements caused its security interests to become unperfected. The bankruptcy court quickly disposed of this issue with respect to the certificate of title for the debtors' manufactured home. It stated that where an assignee succeeds to a lienholder's interest, it need not amend the certificate of title to reflect the assignment if the interest it succeeds to

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181. *Id.*
182. *Id.* (citing U.C.C. §§ 9-504(2) (2001)).
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 60-61.
189. *In re Hergert*, 275 B.R. at 60.
190. *Id.* at 61. At some point after the merger, the Bank ceased to use the Nampa address. *Id.*
191. *Id.* at 60.
is the same as the original lienholder's. Thus, Bank of the West remained perfected as to Pacific One's interest in the manufactured home.

Exercising an abundance of caution, the court then analyzed the sufficiency of the two financing statements under both old and new Article 9 even though it correctly concluded that new Article 9 governed the issue. The court easily determined that Bank of the West remained perfected in the non-farm assets under Pacific One's original UCC-1 financing statement. The merger of Pacific One into Bank of the West occurred when old Article 9 was still in effect, and the court stated that even under the old law, a change in the secured party's name and/or address did not necessarily render the filed financing statement seriously misleading. The court pointed out that the listing of the Portland address still would lead an inquiring third party to the correct secured party. Once new Article 9 went into effect, no further action was required under the revised law to maintain perfection, and thus, the Bank's security interest continued to be perfected.

Regarding the UCC-1F (farm products), Bank of the West faced the problem that, at some point, the Nampa, Idaho, address became ineffective for purposes of reaching the secured party. As such, the UCC-1F became seriously misleading, and Bank of the West's security interest would have become unperfected under Idaho's former Article 9.

In discussing the sufficiency of the original UCC-1F (farm products) under new Article 9, the court was forced to integrate Idaho's non-uniform amendment to Revised Article 9, requiring farm products financing statements to contain the secured party's name, address, and signature. The court noted that the absence of the secured party's address and signature is grounds for a filing office to reject the statement, but under the new law, only the parties' names and an indica-

192. Id. at 61 n.1 (stating that "this dispute relates solely to the issue regarding the accuracy of the names and addresses shown for the secured party" on the date of the bankruptcy petition).
193. Id. at 61-62.
194. In re Hergert, 275 B.R. at 62-65 (citing Idaho's version of Revised U.C.C. § 9-702(a)).
195. Id. at 63.
196. Id. at 63 n.6.
197. Id. at 64.
198. Id.
199. Id. at 64. Former Idaho Code § 28-9-402(9) stated that "(9) [a] financing statement for farm products is sufficient if it contains the following information: (a) The name and address of the debtor; (b) The debtor's signature; (c) The name, address, and signature of the secured party." Id.
tion of the collateral are required for a sufficient filing. Thus, the court found that as the failure to provide an address of the secured party no longer renders such a financing statement filed for farming products ineffective, one that has provided a misleading address is likewise effective.

Another recent bankruptcy case, *Nazar v. Bucklin National Bank (In re Erwin)*, focuses on the all-important question of the debtor’s name on the financing statement. Because inquiring parties ordinarily start with the debtor’s name in undertaking a search of the public records, Article 9 demands that the filing secured party set forth the debtor’s name correctly on the financing statement to gain perfection of its security interest. Clarifying the old law, new Article 9 states that “a financing statement that fails sufficiently to provide the name of the debtor . . . is seriously misleading.” The new statute then provides a loophole that saves financing statements with errors in the debtor’s name. If “a search of the records of the filing office under the debtor’s correct name, using the filing office’s standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor . . . , the name provided does not make the financing statement seriously misleading.”

In the *Erwin* case, the debtor’s legal name was “Michael A. Erwin,” and the secured party, Bucklin National Bank, had filed a financing statement setting forth the debtor’s name as “Mike Erwin.” In the debtor’s bankruptcy, the trustee tried to avoid the Bank’s security in-

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200. See *In re Hergert*, 275 B.R. at 65 (citing *Idaho Code* § 28-9-502(e)).

201. *Id.* at 67 (stating that “[t]he structure of New Article 9 makes the absence of a name or address grounds for the filing officer to reject the statement, but if accepted for filing it will be effective.”).

202. *Id.* at 67-68. The court’s analysis of the change in the secured party’s name from Pacific One to Bank of the West tracked its earlier discussion of that issue with respect of the non-farm UCC-1. However, again the court had to grapple, at least briefly, with another of Idaho’s non-uniform amendments to Revised Article 9—this one requiring farm products financing statements to be amended within three months of any material changes. *Id.* at 68 (citing *Idaho Code* § 28-9-502 (f)). Because the debtors’ bankruptcy petition was filed within three months of the effective date of Idaho’s Revised Article 9, the court stopped the clock and held that it need not reach the question of whether the changes were material. *Id.*

The court also alluded to the possibility that an error in the secured party’s name could “give rise to an estoppel in favor of a particular holder of a conflicting claim to the collateral.” *Id.* at 66 (citing *Idaho Code* § 28-9-506, cmt. 2). In other words, if a particular searcher could show that it detrimentally relied on the wrong name of the secured party in the financing statement, such a searcher might be able to estop the earlier party from asserting its priority. See Harry C. Sigman, *Twenty Questions About Filing Under Revised Article 9: The Rules of the Game*, 74 CHI.-KENT L. REV. 861, 866 (1999) (discussing the estoppel issue).


205. *Id.* (c).
terest as unperfected because the debtor's name was listed incorrectly. The court held that the secured party's financing statement was valid, even though an electronic search of the filing records under the name "Michael A. Erwin" did not reveal the financing statement.

The court stated that the traditional "reasonably diligent searcher" test survived the enactment of Revised Article 9, at least with respect to debtors who are individuals. Article 9, the court noted, does not define "correct name" or even "name" for individual debtors, and there is no reason to think that the drafters necessarily meant "legal name" when they required filing parties to place the debtor's name on a financing statement. In this case, the debtor frequently used the name "Mike Erwin," and the court held that his nickname was in fact one of his "names" or a "correct name" for him. As such, it was sufficient for use on a financing statement. Searchers could fairly be required to use "reasonable diligence" in seeking out financing statements naming the debtor, and such diligence demanded searches under "Erwin" or "M. Erwin," both of which would have revealed the Bank's financing statement.

In sum, the bankruptcy courts in both Grabowski and Herbert accurately read Revised Article 9 as requiring only a minimum amount of information on a filed financing statement—the barest essentials necessary to set a searching party on a trail of inquiry. They also appropriately applied the Revised Article 9's transition rules to allow

207. Id. at *3.
208. Id. at *12.
209. Id. at *8. Interestingly, the court applied Revised Article 9 in judging the sufficiency of the Bank's financing statement even though it was filed in 1999. Referring to one of the new law's transition rules, the court stated that "if the pre-enactment security interest did not satisfy the perfection requirements of revised Article Nine, the creditor had one year from enactment, or until July 1, 2002, to satisfy the perfection requirements of revised Article Nine." Id. at *1 (citing Kansas' version of U.C.C. § 9-703(b)(3)). The court ignored, however, the transition rule that allows pre-enactment financing statements to remain effective for the normal five-year period without refiling by the creditor. U.C.C. § 9-705(c) (2001). Arguably, the Bank's financing statement should be have been evaluated by old Article 9 standards. Given that the court employed the "reasonably diligent searcher" standard in any event, its reliance on new Article 9 did not determine the case's outcome.
211. Id. at *10.
212. The debtor's name on all of the Bank's loan documents was "Mike Erwin," including the W-9 tax form request for the debtor's taxpayer identification number and certification. Id. at *2.
213. The court emphasized that nothing in Article 9 mandates the use of an individual debtor's full legal name on a financing statement. Id. at *10. In fact, the Kansas administrative regulations implementing new Article 9 suggest "human judgment still plays a role in searches for individual debtor names 'that are not automated.'" Id. at *7.
financing statements potentially invalid under the old law to become valid under the liberalized rules of the new law. The holding in the Erwin case is more problematic. It is fairly clear that the revisers sought to decrease the number of valid financing statements with errors or variations of the debtor's name. By stating that an error in the debtor's name renders a financing statement seriously misleading unless a search under the "correct name" could find it, the drafts were seemingly easing the burden on searchers to try different possible iterations of the debtor's name. By allowing a debtor's nickname to be sufficient on a financing statement, the court in Erwin is essentially requiring searchers to search under names other than the debtor's full legal name, at least in the case of individual debtors. Where the debtor has an extremely common last name (e.g., Smith) and lives in a populous jurisdiction (e.g., California), a search under the debtor's last name (or the debtor's last name plus first initial) might produce hundreds of financing statements to sort through. In addition, the debtor may have more than one nickname that he/she commonly uses. By permitting deviations from the debtor's legal name, the court arguably augmented the burden on searchers beyond that anticipated by the revisers of Article 9.

IV. PROCEEDS AND PRIORITIES ISSUES

Revised Article 9 has left in place, albeit renumbered, many of the priorities and proceeds provisions that existed under former Article 9. One sees in the new law the familiar priorities rules: the first-in-time priority rule between two or more secured parties, the purchase money superpriority rules for inventory and other goods financiers, the priority of lien creditor over unperfected security interests, the superpriority afforded chattel paper purchasers, the special status given buyers in the ordinary course of business, and so forth. Similarly, the proceeds sections remain largely the same, permitting secured parties a carryover interest in all identifiable pro-

214. ld. at *2.
215. See U.C.C. § 9-322(a)(1) (2001) (providing that "[c]onflicting perfected security interests . . . rank according to priority in time of filing or perfection.").
216. See id. § 9-324(b) (allowing purchase money secured parties to have priority over earlier inventory secured parties if they comply with certain perfection and notification requirements).
217. See id. (a) (giving perfected purchase money secured parties with security interests in non-inventory, non-livestock goods priority over earlier secured parties if they perfect before the debtor has possession of the goods or within twenty days thereafter).
218. Id. § 9-317(a)(2).
ceeds of the original collateral\textsuperscript{220} plus continued perfection if certain requirements are met.\textsuperscript{221}

The new law has tweaked some of these provisions to clarify them,\textsuperscript{222} bring them into harmony with state non-uniform amendments to the old statute,\textsuperscript{223} or provide greater flexibility to the parties,\textsuperscript{224} but the gist of the provisions remain generally the same. In the case of proceeds, the revisers expanded the old definition of proceeds\textsuperscript{225} and changed it to make some proceeds both proceeds and collateral.\textsuperscript{226} In addition, Revised Article 9 for the first time expressly allows secured parties to identify their proceeds from a mass of commingled property (such as a bank account) through traditional equitable tracing fictions.\textsuperscript{227}

A. Proceeds

Two cases decided under new Article 9 consider, respectively, what constitutes proceeds and what tracing fiction should be used in the case of a commingled account. In \textit{In re Stallings}, the debtors filed for chapter 12 bankruptcy relief in the spring of 2002 and sought to have a plan confirmed\textsuperscript{228} The creditor who held a security interest in the debtors' crops sought to enforce it against post petition payments from the federal government to compensate the debtors for crop damage that occurred because of the government's use of herbicides in the area.\textsuperscript{229} The creditor argued that the payments constituted "pro-

\textsuperscript{220} See \textit{id.} § 9-320(a) (permitting ordinary course buyers to take free of even perfected security interests).

\textsuperscript{221} See \textit{id.} § 9-315(a)(2) (stating that "a security interest attaches to any identifiable proceeds of collateral.").

\textsuperscript{222} See \textit{id.} (c), (d) (providing that perfection in proceeds continues for twenty days after the security interest attaches to the proceeds and beyond in certain circumstances).

\textsuperscript{223} See, \textit{e.g.}, U.C.C. § 9-330(a), (b), (f) (2001) (indicating that a notation that chattel paper has been assigned to an identified assignee will deprive the chattel purchaser of superpriority).

\textsuperscript{224} See, \textit{e.g.}, \textit{id.} § 9-324(a) (expanding the filing period for purchase money non-inventory, non-livestock financers from ten to twenty days, the period most states had adopted before the Article 9 revision).

\textsuperscript{225} See \textit{id.} § 9-317(a)(2)(B) (permitting secured parties to trump lien creditors if they have filed a financing statement and satisfied one of the steps in attachment).

\textsuperscript{226} See \textit{id.} § 9-102(a)(64) & cmt. 13 (noting the expanded definition of proceeds).

\textsuperscript{227} See \textit{id.} § 9-102(a)(12)(A) (defining collateral to include "proceeds to which a security interest attaches"). For example, if the debtor sold encumbered inventory for cash and then used the cash to buy a piece of equipment, the cash would be both proceeds (since it was received upon the sale of the collateral) and collateral (since it would be "proceeds to which [the] security interest attaches").

\textsuperscript{228} See U.C.C. § 9-315(b)(2) & cmt. 3 (2001) (recognizing equitable tracing fictions such as the lowest intermediate balance rule).

ceeds” of the creditor’s collateral, the crops, and thus were subject to the creditor’s security interest.\(^\text{230}\)

Although sympathetic to the creditor’s position, the court felt constrained by binding precedent in the Ninth Circuit\(^\text{231}\) to hold that these postpetition payments were not proceeds under federal\(^\text{232}\) or state law. The court recognized that Revised Article 9 had expanded the definition of proceeds, but even so, “it is too much of an interpretive stretch to view the [government] payment, which can be seen as a ‘gift’ from the government to [the] effected [sic] farmers, as falling within the UCC definition of proceeds.”\(^\text{233}\)

The court in *Stallings* alluded to the pre-revision split of authority as to whether government agricultural payments of this type are “proceeds” within the meaning of Article 9, but suggested that the revision of Article 9’s definition of proceeds did not change that ongoing debate.\(^\text{234}\) In fact, arguably the new law’s expanded definition is sufficient to embrace the government payments, using one of two approaches. Revised Article 9 includes as proceeds “whatever is collected on, or distributed on account of, collateral” and “rights arising out of collateral.”\(^\text{235}\) The government payments to the debtors for damage to their crops could be viewed as money “distributed on account of collateral,” or as “rights arising out of collateral,” i.e., the crops.\(^\text{236}\) In other words, the debtors would not have been eligible for these payments had they not been growing or attempting to grow sugar beets.

Separately, the creditor could have tried to argue that the government payments were proceeds of the debtors’ general intangibles, which were also subject to the security agreement.\(^\text{237}\) The damage to

\(^{230}\) Id. at 782-83.

\(^{231}\) Id.

\(^{232}\) Id. at 781 (citing Sliney v. Battley (*In re Schmitz*), 270 F.3d 1254 (9th Cir. 2001)).

\(^{233}\) Under the federal Bankruptcy Code, property acquired post petition is generally not subject to prepetition security agreements. 11 U.S.C. § 552(a) (2003). An exception applies to “proceeds, product, offspring or profits” of property subject to a prepetition security interest. Id. (b).

\(^{234}\) Stallings, 290 B.R. at 783, n.6.


\(^{236}\) U.C.C. § 9-102(a)(64)(B), (C).

\(^{237}\) In the Official Comment to this section, the drafters specifically note that this section “rejects the holding of FDIC v. Hastie, 2 F.3d 1042 (10th Cir. 1993) (postpetition cash dividends on stock subject to a prepetition pledge are not ‘proceeds’ under Bankruptcy Code Section 552 (b)), to the extent the holding relies on the Article 9 definition of ‘proceeds’.” Id. cmt. 13a. One could analogize post petition government payments to post petition cash dividends—both are paid “on account of” the underlying collateral.
the debtors’ crops occurred before the bankruptcy petition was filed. Arguably, the debtors’ rights to any subsequent government reimbursement plan accrued at the moment of damage. When the reimbursement plan was later enacted and monies paid out, those monies represented proceeds of a general intangible, namely the debtors’ prepetition right to be compensated for damage to their crops.

Perhaps the bankruptcy court believed, as a policy matter, that allowing the secured party an interest in the government payments would hinder the debtors’ efforts to get their farming business back on its feet through the chapter 12 process. However, if the debtors had actually grown the sugar beets that were destroyed by the government herbicide and then sold them postpetition, there is no question that the secured party would have been entitled to press its secured claim against the monies generated from the sale. Given that the government payments in essence represented a substitute for the crops injured or destroyed prepetition, they should have been considered proceeds as well under federal and state law.

Another federal case involving proceeds applied the newly validated equitable tracing rules in the context of a borrower seeking return of certain cash collateral held by the bankrupt lender. In Watts v. Stephenson (In re MJK Clearing, Inc.), the borrower (FBW) had pledged cash to the lender (MJK) in exchange for the loan of two million shares of a particular common stock. Eventually, the lender became the subject of a liquidation proceeding under the Securities Investor Protection Act (SIPA), and a trustee was appointed. FBW tendered the borrowed stock to the trustee and unsuccessfully sought return of its cash collateral. FBW then filed suit for a declaration that FBW’s cash collateral was not property of MJK’s estate.

In denying the plaintiff’s motion for declaratory judgment, the court, in an unusual application of Article 9 proceeds analysis, held that the plaintiff could not identify its cash collateral in the hands of

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238. See Stallings, 290 B.R. at 782 (noting that the creditor’s prepetition security agreement covered the debtors’ general intangibles).

239. See id. at 780 (stating that crop damage occurred in 2000 and 2001 whereas the bankruptcy petition was filed in the spring of 2002).

240. But see Stallings, 290 B.R. at 789-90 (observing that Congress clearly intended to protect certain secured creditors in the chapter 12 process).


243. Id. at 129 (citing 15 U.S.C. § 78(b) (2002)). SIPA incorporates certain provisions of the federal Bankruptcy Code, including subchapters I and II of chapter 7. Id.

244. Id. at 118.
the creditor, even using equitable tracing principles. In the typical secured transactions dispute, the creditor will be attempting to extend its security interest to proceeds of original collateral. If the proceeds happen to consist of cash that was commingled with other monies, the creditor will often try to identify its proceeds using tracing fictions. In this case, the debtor was seeking return of its pledged cash that had been mixed with other funds.

The court alluded to the plaintiff's reliance on Revised Article 9's recognition of standard tracing rules in commingled proceeds cases, and then went on to apply the lowest intermediate balance principle to the funds at issue. Under that principle, "[o]nce the traced proceeds are withdrawn, however, they are treated as lost, even though subsequent deposits are made into the account." The court found that the account to which the plaintiff's cash had been transferred subsequently "dipped to a negative balance," thus making plaintiff's funds untraceable.

Although the court's holding is undoubtedly consistent with general theories applicable to constructive trusts, Revised Article 9's rules on tracing proceeds do not literally apply to this situation. Here, the debtor sought to recover its original collateral (i.e., the pledged cash) as opposed to a secured party attempting to identify the proceeds of its collateral in the debtor's hands. One of the Official Comments to another section of Revised Article 9, however, suggests that the court's use of tracing fictions was appropriate. Revised U.C.C. § 9-207 specifically allows secured parties in possession of fungible collateral to commingle it and permits them to repledge collateral. In an example involving a repledge of investment property in the Official Comments, the drafters note that upon satisfying the secured obligation, the original debtor would have a right to redeem the collateral from the original secured party. But, the Comment states, "in the absence of a traceable interest, [the original debtor] would retain only

245. Id. at 120.
246. Id. at 122-23.
247. See, e.g., ITT Commercial Fin. Corp. v. Tech Power, Inc., 51 Cal. Rptr. 2d 344, 345 (Cal. Ct. App. 1996) (noting that the secured party was attempting to assert its security interest in inventory proceeds deposited in a commingled bank account).
248. See id. at 348 (applying lowest intermediate balance tracing rule).
250. Id. at 122.
251. Id.
253. Id. (c)(3).
a personal claim against [the original secured party]" if the latter failed to return the investment property to the debtor.\textsuperscript{254}

The lesson of \textit{MJK Clearing} and Revised U.C.C. § 9-207 seems to be that debtors who pledge fungible collateral, such as cash or securities, should consider whether to put a clause in the security agreement forbidding the secured party to repledge the collateral\textsuperscript{255} and requiring the secured party to segregate the debtor’s property from other similar property in the secured party’s possession. If the debtor’s property is segregated, it presumably remains traceable and thus identifiable. In the event of financial difficulties or bankruptcy on the secured party’s part, the debtor has increased its chances that it will be able to redeem its collateral from the secured party and not merely be left with an unsecured claim against the creditor.

\textbf{B. Priorities}

As mentioned earlier, Revised Article 9 retained the essence of the priorities rules of the old law, refining them here and there. The smattering of priorities cases decided under the new statute does not indicate any remarkable change in direction regarding these issues. In conflicts between secured parties and other claimants, the key, as always, to the secured party’s obtaining priority is prompt and correct perfection of its security interest.

In \textit{Usinor Industeel v. Leeco Steel Products}, Leeco Steel Products ("Leeco") furnished steel to Caterpillar, Inc., for production of a number of lines of Caterpillar products.\textsuperscript{256} In connection with one of these lines, Leeco purchased steel from Usinor Industeel ("Usinor"), a French corporation, and in turn sold the steel to Caterpillar.\textsuperscript{257} The agreement between Leeco and Usinor provided that Usinor remained "the owner of the goods up to the complete and total payment of all sums due."\textsuperscript{258} In order to purchase the steel from Usinor, Leeco obtained a line of credit from LaSalle Bank ("LaSalle"), giving LaSalle a security interest in the steel.\textsuperscript{259}

\textsuperscript{254} \textit{Id.} cmt. 6.

\textsuperscript{255} \textit{Id.} (emphasis added).

\textsuperscript{256} See \textit{id.} cmt. 5 (stating that the secured party’s ability to repledge the collateral is "subject, of course, to any agreement by [it] not to give a security interest.").

\textsuperscript{257} 209 F. Supp. 2d 880, 881-82 (N.D. Ill. 2002). Although it is not entirely clear, the court apparently applied Revised Article 9 since the seller’s replevin action was commenced on January 23, 2002, after the effective date of Revised Article 9 in Illinois.

\textsuperscript{258} \textit{Id.} at 882.

\textsuperscript{259} \textit{Id.} The agreement between the parties also provided that any dispute arising out of the agreement and steel shipments would be resolved in the French court system.
During the course of performance of the agreement, Caterpillar informed Leeco that it was halting production of its line of products associated with the steel purchased from Usinor. At that time, Leeco had a large amount of steel in its possession, and owed Usinor nearly one million dollars for steel purchased under the agreement. Leeco thereafter defaulted on the obligation to Usinor, and Usinor brought suit to replevy the steel. LaSalle Bank intervened, asserting that its perfected security interest in the steel was superior to what amounted to an unperfected security interest held by Usinor.

Following an inquiry as to the appropriate choice of law, the court found that Illinois law applied to the agreement between the parties. Leeco and LaSalle argued that Usinor's purported retention of ownership of the goods in its contract with Leeco only amounted to the reservation of a security interest. Therefore, these parties argued that Usinor's failure to perfect this security interest rendered LaSalle as the lone perfected party with regards to the steel.

The court agreed that Usinor's reservation of title to the goods constituted reservation of a security interest only. In addition, the court stated that when Leeco took possession of the steel from Usinor, title to the steel passed to it, and thus, it had rights in the collateral sufficient for LaSalle's security interest to attach under U.C.C. §9-203. Since Usinor held only an unperfected security interest in the steel, and title had passed to Leeco, the possessory action of replevin was unavailable. LaSalle's perfected security interest in the steel, moreover, "prevails over the retained interest of Usinor in the Steel."

260. Id.
261. Id.
262. Usinor, 209 F. Supp. 2d 880, 882 (N.D. Ill 2002). Usinor asserted that the value of the steel in Leeco's possession was worth much less than what it owed under the agreement. In addition, Usinor brought suit under the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), arguing that the convention governed the agreement between two foreign parties, thus preempting Illinois law. The Court found that the CISG only governed contracts between two parties (i.e., buyer and seller) and that the CISG does not address agreements under which a third party has a security interest in the subject goods of the agreement. Id. at 885.
263. Id. at 883.
264. Usinor, 209 F. Supp. 2d at 886. The Court found that the situs of the goods at the time of the debtor's insolvency was controlling in determining the choice of law.
265. Id. at 883.
266. Id.
267. Id. at 887.
268. Id. at 888.
269. Id. The court observed that neither the result of the dispute, nor the issue of whether the CISG controlled the dispute would have come out differently under former U.C.C. Article 9.
Another seller fared better in a different case when it exercised its Article 2 right to withhold and stop delivery of goods to a buyer under certain circumstances. In *In re Kellstrom Industries, Inc.*, the seller had agreed to sell some aerospace components and parts to the debtors.\(^{270}\) Earlier the debtors had given a security interest in all of their assets to the secured party.\(^{271}\) Eventually, the debtors filed for chapter 11 bankruptcy protection, and the seller sought to withhold delivery of all goods in its possession.\(^{272}\) The secured party argued that its perfected security interest in the goods was superior to the seller’s right to withhold delivery.\(^{273}\)

The court first decided that the seller was entitled to withhold delivery of the goods still in its possession under U.C.C. § 2-702 (1).\(^{274}\) Regarding the secured party’s claim of a superior interest in the goods, the court noted that one of the Official Comments to Revised Article 9 explicitly stated that a secured party’s security interest can be no greater than the debtor’s rights in the collateral.\(^{275}\) Here, the collateral was subject to the seller’s right to withhold delivery, and thus, the secured party’s security interest was subject to it as well.\(^{276}\) If the secured party wished to obtain the withheld goods, it could have made a cash payment to the seller, just as the debtor could have.\(^{277}\)

The critical difference between the seller in *Usinor* and one in *Kellstrom* is that the former relinquished possession of the goods to the debtor whereas the latter did not. Sellers who retain physical possession of the goods still have the right to withhold delivery in the event of the buyer’s insolvency. Once the buyer gains possession of the goods, the seller will be left with simply a security interest in them, and to fully protect that interest, the seller should file a financing statement under Article 9.

Revised Article 9 expanded the grace period during which purchase money security parties may perfect their interests and still retain priority from ten to twenty days.\(^{278}\) Even with this additional time, however, one secured party ran afoul of the debtor’s bankruptcy trustee

\(^{270}\) *Usinor*, 209 F. Supp. 2d at 889. Although the court does not cite a relevant Code priority rule, it is clear that its conclusion is correct. See U.C.C. § 9-322(a)(2) (2001).


\(^{272}\) *Id.*

\(^{273}\) *Id.*

\(^{274}\) *Id.* at 791.

\(^{275}\) *Id.* at 790. Under U.C.C. § 2-702(1), “[w]here the seller discovers the buyer to be insolvent he may refuse delivery except for cash.”

\(^{276}\) *Kellstrom*, 282 B.R. at 792 (citing U.C.C. §§ 9-110, cmt. 5 & 2-403(1)).

\(^{277}\) *Id.* (citing 1A Peter F. Coogan, Secured Transactions Under the Uniform Commercial Code, § 7D.03[6][b], 7D-15 (2002)).

\(^{278}\) *Id.*
by failing to perfect its security interest within the allotted period. In *Forker v. American Honda Finance Corp. (In re Custer)*, the debtor had purchased an automobile from a South Dakota dealer and had taken possession of the vehicle on April 26, 2002. The dealer had the South Dakota certificate of title issued in its name. The dealer then mailed the title with the appropriate assignment to the debtor, who lived in Iowa, so that the debtor could obtain an Iowa certificate of title. The debtor had obtained financing from the lender in connection with the automobile purchase, and on May 31, 2002, the lender’s security interest was noted on the new Iowa certificate of title.

Unfortunately for the secured party, the debtor had filed a chapter 7 bankruptcy petition on May 9, 2002. Revised Article 9 allows holders of purchase money security interests to gain priority over a so-called “gap” lien creditor if they perfect their security interests within twenty days “after the debtor receives delivery of the collateral.” In this case, the trustee in bankruptcy, using its avoiding power under the “strong arm” clause, would qualify as a “gap” lien creditor—its interest arose between the time the lender security interest attached and the time of perfection. The bankruptcy court found that the secured party had not perfected its purchase money security interest within the twenty-day grace period allotted under state law. The debtor took delivery of the automobile on April 26, and perfection did not occur until May 31. Thus, the trustee was entitled to avoid the security interest as unperfected.

Although the chances of actual deception of third parties in this case were relatively small, the court applied the twenty-day rule strictly. To avoid this result, the secured party should have directed the South Dakota dealer to have the South Dakota title issued in the debtor’s name with the secured party’s security interest noted. Then, under Revised Article 9, when the vehicle was moved to Iowa, the

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281. *Id.* at *2.
282. *Id.* at *2-3.
283. *Id.* at *3.
284. *Id.*
286. The trustee acquired hypothetical lien creditor status on May 9, the date the bankruptcy petition was filed. 11 U.S.C. § 544(a) (2003). The lender’s security interest attached as early as April 25, the date the purchase took place, and it was perfected on May 31. *Custer*, 2003 Bankr. LEXIS at *1-3.
287. *Id.* at *8-9.
288. *Id.* at *2-3.
South Dakota certificate would continue to perfect the security interest until such time as the debtor received an Iowa certificate of title with the security interest noted. The secured party would have been able to maintain continuous perfection of its security interest in this way and avoid nullification of its security interest in bankruptcy.

Under both old and new Article 9, buyers in the ordinary course of business ("BIOCOBs") are one of the few types of claimants that trump even a senior perfected secured party. In a recent case, however, an Indiana appellate court found that a buyer did not qualify for BIOCOB protection because that protection only allows a buyer to take free of a security interest created by the buyer's own seller, and none other. In *Leasing One Corp. v. Caterpillar Financial Serv. Corp.*, Caterpillar took and perfected a security interest in a backhoe loader being sold on an installment basis to Boston Equipment Corporation ("Boston"). Without Caterpillar's knowledge, Boston apparently sold the backhoe to R & D Homes & Supply, Inc. ("R & D"). R & D received financing for this purchase through Meridian Leasing & Consultants, Inc., which assigned its interest to Leasing One.

Boston eventually defaulted on its obligation to Caterpillar, and Caterpillar sought to repossess the backhoe. Upon discovering the sale to R & D, Caterpillar asked R & D to surrender the backhoe, and R & D refused. Caterpillar then brought a replevin action against R & D and its financer, Leasing One. The trial court awarded partial summary judgment in favor of Caterpillar, awarding the backhoe to Caterpillar, and Leasing One appealed.

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289. Any third party dealing with the debtor regarding the automobile would have asked to see the certificate of title. At best, the debtor would have been able to produce a South Dakota title with an assignment from the dealer to the debtor, but also presumably with some indication of the lender's security interest.

290. See U.C.C. § 9-316(d) (providing that "a security interest in goods covered by a certificate of title which is perfected by any method under the law of another jurisdiction when the goods become covered by a certificate of title from this State remains perfected until the security interest would have become unperfected under the law of the other jurisdiction had the goods not become so covered."); Daneman v. Americredit (*In re Goncalvez*), 291 B.R. 441 (Bankr. S.D. Ohio 2003) (applying U.C.C. § 9-316(d) (2001)).


292. 776 N.E.2d 408, 409 (Ind. Ct. App. 2002). It is not clear whether Boston was actually purchasing the backhoe or was merely leasing it. But, as the court pointed out, whether the underlying transaction was a true lease or a disguised secured transaction, did not matter to the case's outcome. *Id.* at 413.

293. *Id.* at 409.

294. *Id.* at 409-10.

295. *Id.* at 410.

296. *Id.*

In a confusing opinion, the Indiana Court of Appeals held that R & D was not entitled the protection afforded BIOCOBs because the BIOCOB rule only allows buyers in ordinary course to take free of security interests created by their sellers. The court stated that "[b]ecause Leasing One, as assignee of R & D's commercial lease, purchased the backhoe from Boston, it does not take free of Caterpillar's security interest." In fact, Boston, as the buyer's seller, was the party who created the security interest in favor of Caterpillar. The BIOCOB rule, therefore, did apply to this situation.

A different but unaddressed question was whether R & D qualified as a buyer in the ordinary course of business. To be a BIOCOB, a buyer must buy goods from "a person . . . in the business of selling goods of that kind." The seller in this case is identified only as Boston Equipment Corporation. It is not entirely clear whether Boston was an equipment dealer or an entity that used backhoes in its business. One might assume that Boston was in fact an equipment dealer, given that Caterpillar manufactures equipment. If so, then R & D (and its successor-in-interest, Leasing One) would have been entitled to take free of Caterpillar's security interest under the BIOCOB rule.

V. DEFAULT AND FORECLOSURE ISSUES

The default provisions of former Article 9 were among the statute's most litigated—partly because the drafters left certain issues open and partly because some of the enforcement standards revolved around notions of "reasonableness," a heavily fact-bound

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298. Id.
299. Id. at 412.
300. Id.
301. See U.C.C. § 9-320(a) (2001) (providing that a BIOCOB "takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence").
302. U.C.C. § 1-201(9) (2002).
303. Leasing One, 776 N.E.2d at 409.
304. The plaintiff Caterpillar in this case was the financial services arm of Caterpillar Equipment Corp., which manufactures over 300 different types of equipment. See http://www.cat.com/products (last visited July 9, 2003).
305. See Robert M. Lloyd, The Absolute Bar Rule in UCC Foreclosure Sales: A Prescription for Waste, 40 UCLA L. REV. 695, 699 n.22 (1993) (noting that "[s]uits in which the secured party seeks a deficiency judgment, and the debtor uses the secured party's failure to follow the procedures as a defense, are the most common type of lawsuits under the UCC."); Donald J. Rapson, Deficient Treatment of Deficiency Claims: Gilmore Would Have Repented, 75 WASH. U. L.Q. 491, 508 (1997) (observing that "[d]isputes about the commercial reasonableness of the procedures followed by the secured party have turned out to be one of the most litigated issues under the [UCC].").
306. For example, Article 9 was silent as to the consequences of creditor misbehavior during the foreclosure process, and three distinct lines of judicial authority developed over the years:
question. Revised Article 9 has clarified the secured party’s obligations upon default by specifying who must receive foreclosure notices, by creating a safe-harbor period for giving notice, by detailing what is necessary and sufficient in foreclosure sale notices through expanded rules and sample forms, and by adopting the "rebuttable presumption" approach for misbehaving creditors’ punishment in non-consumer transactions. Unfortunately, the new law does not add much to our understanding of what is a “commercially reasonable” foreclosure sale, and as it turns, some of the early cases decided under Revised Article 9 involve that issue.

A. Post-Repossession: The Debtor’s Rights in the Collateral

Since Revised Article 9’s suggested effective date of July 1, 2001, there have been a number of bankruptcy cases deciding whether or not collateral that had been repossessed after the debtor’s default, but not disposed of, became property of the debtor’s estate in a subsequent bankruptcy filing. Although Revised Article 9 itself does not directly address this issue, several courts have inferred from certain language in the new law that it supports the notion of the debtor’s continued ownership of the collateral until completion of the foreclosure sale.

In In re Robinson, for example, the secured party seized the collateral, a 1996 Cadillac automobile, after the debtor’s payment delinquency. After notice of the foreclosure sale but before the actual sale, the debtor filed a voluntary chapter 13 petition. The secured party refused to comply with the debtor’s request to return the vehicle. The debtor then moved to require the secured party to turnover the absolute bar rule, the set-off approach, and the rebuttable presumption approach. WHITE & SUMMERS, supra note 104, at 933.


308. See U.C.C. § 9-611(c) (2001) (specifying that secondary obligors, among others, must receive foreclosure sale notices).

309. See id. § 9-612(b) (stating that ten days’ notice in a non-consumer-transaction is reasonable).

310. See id. §§ 9-613 & 9-614 (specifying the content of notification).

311. See id. § 9-626(a)(4) (stating that “the amount of proceeds that would have been realized [in a complying disposition] is equal to the sum of the secured obligation, expenses, and attorney’s fees unless the secured party proves that the amount is less than that sum.”).

312. See Jean Wegman Burns, New Article 9 of the UCC: The Good, the Bad, and the Ugly, 2002 U. ILL. L. REV. 29, 45 (asserting that Revised Article 9’s attempt at fleshing out the “commercially reasonable” standard consists mostly of “tautological restatements of the phrase ‘commercially reasonable.’”).


314. Id.
ver the vehicle and sought damages against the creditor for willful violation of the automatic stay.315

Building upon the United States Supreme Court's decision in *United States v. Whiting Pools, Inc.*,316 the bankruptcy court held that the debtor did have sufficient rights in the collateral post-default, post-repossession for the collateral to constitute property of the debtor's bankruptcy estate.317 The court noted that the Uniform Commercial Code has deemphasized the location of "title" to property as determinative of the parties' rights and remedies with respect to that property.318 Thus, according to the court, it is not helpful to determine who had "title" to the vehicle at the time of the bankruptcy filing. But the debtor, whether or not she had title to the vehicle, still had a number of specific rights with respect to the vehicle—namely, the right to notice of the foreclosure sale, the right to surplus proceeds from the sale, and the right to redeem the collateral.319 Applying the rationale of *Whiting Pools*, the court held that these rights were sufficient to make the collateral property of the debtor's bankruptcy estate.320

In reaching its conclusion, the court observed that new Article 9 specifically states that the debtor's rights in the collateral are transferred to a purchaser only upon completion of the foreclosure sale.321 Even though those rights may not amount to full "ownership" of the property, the debtor at a minimum has the state law right to redeem the collateral upon tendering fulfillment of all obligations to the secured party.322 That state law right is expanded by the federal bankruptcy law provisions that allow the debtor to modify the rights of secured creditors and to cure the default without acceleration of the entire debt.323

Using somewhat different reasoning, the bankruptcy court in *Tidewater Finance Co. v. Moffett* (In re *Moffett*)324 reached the same conclusion regarding a repossessed but unsold vehicle that the debtor was purchasing on an installment plan from the original secured party.

315. *Id.*
316. *Id.* at 733-34.
317. 462 U.S. 198 (1983). The Supreme Court in *Whiting Pools* held that a secured creditor (in that case, the Internal Revenue Service enforcing a tax lien) was required to turn over property seized from a reorganizing debtor pre-petition. *Id.* at 209.
319. *Id.* at 737 (citing Oklahoma's version of U.C.C. § 9-202).
320. *Id.*
321. *Id.* at 737-38.
322. *See id.* at 737 (citing Oklahoma Comments to UCC § 9-610).
323. *Id.* at 738.
Marlene Moffett bought a car from Hendrick Honda under an installment contract. The contract provided that the secured party had the right to peacefully repossess the vehicle. Hendrick assigned the contract to Tidewater Motor Credit. After complying with the terms of the contract for over a year, the debtor missed consecutive payments in the spring of 2002. On the same day that Tidewater repossessed the vehicle as a result of the missed payments, the debtor filed a chapter 13 bankruptcy petition. The debtor’s attorney demanded that Tidewater return the vehicle. Although Tidewater had not yet disposed of the vehicle, it nonetheless refused to return the car.

Tidewater argued that the debtor’s default and Tidewater’s repossession of the car extinguished the debtor’s rights to the collateral. According to the creditor, Virginia’s version of U.C.C. § 9-619 operated to divest a debtor of legal title to collateral upon repossession. In addition, even if the collateral were property of the debtor’s estate, Tidewater was not in violation of the automatic stay, it asserted, because “a creditor is not required to return the property until the creditor has been provided adequate protection for its security interest.”

In addressing whether the debtor’s rights to the vehicle were extinguished upon Tidewater’s repossession, the court held that Tidewater’s repossession “merely divest[ed] the debtor of the present right to use the vehicle, but did not immediately extinguish the debtor’s title.” The court stated that the whole process of foreclosure divests the debtor of legal title. Since the secured party here did not dispose of the collateral, nor take the necessary steps of notice, repossession alone did not divest the debtor of legal title.

Similar to the creditor’s argument in In re Robinson, Tidewater also argued that the debtor’s proposed redemption of the collateral under its chapter 13 plan was not allowed under state law. As in Robinson, the debtor proposed to go forward with payments to the secured creditor for the delinquent amount as well as the outstanding amount

326. Id. at 723.
327. Id. at 724.
328. Id.
329. Id. at 724 (stating that Tidewater filed a motion for relief from the automatic stay).
331. Id.
332. Id. at 727 (citing In re Young, 193 B.R. 620 (Bankr. D.D.C. 1996); In re Massey, 210 B.R. 693 (Bankr. D. Md. 1997)).
333. Id. at 729.
334. Id.
of the loan.\textsuperscript{335} And as in \textit{Robinson}, this court stated that the federal Bankruptcy Code allowed the chapter 13 debtors to modify the rights of secured creditors and to cure a default.\textsuperscript{336} Because the debtor's plan sufficiently compensated the creditor for the vehicle's ongoing depreciation, the debtor was allowed to exercise its right of redemption in chapter 13.\textsuperscript{337}

Although employing slightly different approaches, \textit{Robinson} and \textit{Moffett} are consistent with the post-enactment cases that have considered this issue.\textsuperscript{338} Revised Article 9 itself does not directly address the question of whether the debtor or the secured party "owns" the collateral once the creditor has repossessed it. Instead, the new law makes clear that the debtor has certain "rights" with respect to the collateral after default and repossession,\textsuperscript{339} such as the right of redemption,\textsuperscript{340} the right to any surplus received at a foreclosure sale,\textsuperscript{341} and the right to a commercially reasonable disposition of the collateral if a foreclosure sale is held.\textsuperscript{342} Buried in an Official Comment to a seemingly unrelated Article 9 provision, the revisers suggest, however, that the debtor does indeed continue to "own" the goods even after repossession.\textsuperscript{343} At a minimum, the \textit{Robinson} and \textit{Moffett} decisions seem consistent with the mindset of the Article 9 drafters. Those cases suggest

\textsuperscript{335} Id. at 731.

\textsuperscript{336} Id. (noting that the debtor's plan "preserves Tidewater's lien, provides for direct payment of the regular installments coming due, and cures the delinquent installment payments within a reasonable period of time.").

\textsuperscript{337} Id. (stating that "[t]he fundamental flaw in Tidewater's argument is that it assumes a debtor's rights in bankruptcy—and in particular, the method by which a debtor may exercise a right of redemption in chapter 13— are limited to those allowed under state law. . . . [T]he right in chapter 13 to cure a default and to reinstate an accelerated note is granted by federal bankruptcy law, and that right cannot be frustrated by the law of any state" (citing \textit{Anderson v. Associates Commercial Corp.}, 29 B.R. 563, 595 (Bankr. E.D. Va. 1983)).

\textsuperscript{338} \textit{In re Moffett}, 288 B.R. at 731.

\textsuperscript{339} \textit{See Motors Acceptance Corp. v. Rozier}, 290 B.R. 910, 913 (Bankr. M.D. Ga. 2003) (holding that title remained with the debtor after repossession of the collateral); \textit{In re Sanders}, 291 B.R. 97, 102 (Bankr. E.D. Mich. 2003) (holding that the repossessed vehicle itself, not just the debtor's right of redemption, was property of the debtor's estate); \textit{Atlantic Orient Corp. v. AOC Energy, LLC (In re Atlantic Orient Corp.)}, 290 B.R. 456, 465-66 (Bankr. D.N.H 2003) (holding that title did not pass from the debtor to the foreclosure sale purchaser until delivery of the balance of the purchase price).

\textsuperscript{340} \textit{See U.C.C. § 9-617(a)(1)} (2001) (stating that a foreclosure sale "transfers to a transferee for value all of the debtor's rights in the collateral"); § 9-619(a)(3) (allowing the secured party to create a "transfer statement" that indicates that "a transferee has acquired the rights of the debtor in the collateral").

\textsuperscript{341} Id. § 9-623.

\textsuperscript{342} Id. § 9-615(d)(1).

\textsuperscript{343} Id. § 9-610(b). In addition to providing the debtor with these rights, Article 9 does not permit the parties to waive a number of them, even by express agreement. \textit{See id. § 9-602} (disallowing waivers of the right to a surplus and the right of redemption, among others).
that creditors repossessing collateral from defaulting debtors who may be on the verge of bankruptcy move as quickly as possible to dispose of the collateral at a foreclosure sale. By selling the collateral, the secured party will transfer all of the debtor's rights to the purchaser and will presumably be able to retain the sale proceeds, minus the debtor's surplus.

B. Strict Foreclosure

Former Article 9 allowed the secured party to retain the repossessed collateral in full satisfaction of the debtor's obligation, a remedy known as "strict foreclosure." In recognition of the benefits that strict foreclosure can offer both parties, Revised Article 9 expands the remedy by permitting partial strict foreclosures and removing the requirement that the secured party have possession of the collateral, thus opening up strict foreclosure to intangible forms of collateral.

Strict foreclosures require the debtor's consent. For a partial strict foreclosure, the debtor must expressly consent by authenticating a record to that effect, post-default. In a full strict foreclosure, in addition to obtaining the debtor's express consent, the secured party can create a kind of implied consent by sending the debtor a notification of the creditor's proposal to retain the collateral in full satisfaction of the obligation. If the debtor does not object within twenty days, the debtor's consent is in effect presumed, and the full strict foreclosure accomplished.

344. See U.C.C. § 9-330, cmt. 10(a)(2). This comment gives a rather complex example involving an inventory secured party (SP-1), a chattel paper purchaser (SP-2), and two debtors (the original debtor and its customer). When the customer purchases goods from the original debtor (Dealer), SP-1's security interest in Dealer's inventory will be cut off under the rule protecting buyers in the ordinary course of business (BIOCOB). If the BIOCOB then defaults on its installment contract with the Dealer and the Dealer repossesses the goods, the comment states that "[t]he goods continue to be owned by the BIOCOB." Id. As such, SP-1's security interest in Dealer's inventory does not reattach because Dealer does not have sufficient rights in the collateral.


346. See Rapson, supra note 4, at 923 (commenting that strict foreclosure "provides a method of enforcement that is nonadversarial, requires lower transaction costs, and is not likely to result in litigation.").

347. See U.C.C. § 9-620(a) (2001) (stating that "a secured party may accept collateral in full or partial satisfaction of the obligation it secures.").

348. See id. cmt. 7 (stating that the new law "clarifies that intangible collateral, which cannot be possessed, may be subject to strict foreclosure.").

349. See id. (a) (providing that strict foreclosure occurs "only if (1) the debtor consents to the acceptance under subsection (c)"").

350. Id. (c)(1).

In *In re Cadiz Properties, Inc.*, the strict foreclosure issue affected who was entitled to file for chapter 11 bankruptcy protection on the debtor's behalf. Alford Refrigerated Warehouses, Inc. ("Alford") was the sole shareholder of Cadiz Properties ("Cadiz"). In 1997, Alford entered into a loan agreement with Canfina, AG ("Canfina"), pledging as collateral for the loan of $2,600,000 its shares of stock in Cadiz. As part of the agreement, Alford deposited the stock certificates with an escrow agent. Alford agreed that upon default, the escrow agent had the authority to release the stock to Canfina. The parties did not contest "that possession of the stock by the escrow agent perfected [Canfina's] security interest."

In 2001, Canfina, through a number of letters sent to Alford, purportedly notified the debtor of default, and demanded that the escrow agent release the Cadiz stock. Although the escrow agent never released the stock, Canfina, purportedly acting as Cadiz's sole shareholder, dismissed the incumbent board of directors and elected new directors. Three weeks later, pursuant to a resolution passed by the old board, Cadiz filed a chapter 11 bankruptcy proceeding. In response, Canfina brought a motion to dismiss Cadiz's bankruptcy proceeding. Canfina argued that as the sole shareholder of Cadiz stock, the Cadiz board of directors lacked the authority to initiate the bankruptcy proceeding.

The bankruptcy court had to decide whether the chapter 11 proceeding filed by Cadiz's old board of directors could go forward. The court stated that the issue of who was authorized to file bankruptcy turned on whether the creditor Canfina had in fact strictly foreclosed on the Cadiz stock. If it had, under Revised Article 9, all of the debtor's rights in the collateral would have been transferred to it.

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352. *Id.* (C).
354. *Id.* at 745.
355. *Id.*
356. *Id.*
357. *Id.*
359. *Id.* at 745.
360. *Id.*
361. *Id.* at 746.
362. *Id.* Canfina moved to dismiss the bankruptcy petition under 11 U.S.C. § 1112(b), arguing it was a party in interest in that it was now Cadiz's sole shareholder, and that the Board's lack of corporate authority constituted a cause for dismissal. Cadiz contended that the new directors it elected did not authorize the filing of the bankruptcy case. *Id.*
364. The court framed the issue as follows:
Although the court in *Cadiz Properties* left to the adversary proceeding the ultimate determination of the stock ownership, it analyzed the question briefly in considering Canfina's motion to dismiss the bankruptcy filing. The court had no trouble in concluding that, under Texas's version of Revised Article 9, Canfina had not complied with the requirements for strict foreclosure with respect to the Cadiz stock. In denying Canfina's motion to dismiss, the court stated that its analysis of the strict foreclosure issue "fortifies the court's application of the presumption that Cadiz had authority to file the bankruptcy petition."365

The court rejected Canfina's argument that the escrow arrangement represented a mutually agreed upon disposition method post-default and held that the specific Article 9 provisions governing strict foreclosures displaced the general provisions regarding commercially reasonable dispositions of collateral.366 Reviewing Revised Article 9's strict foreclosure provisions, the court noted that for a creditor to accept collateral in satisfaction of a debt, the debtor must consent to the acceptance.367 In order to consent,

The debtor must either agree to the terms of acceptance in a record authenticated "after default" or the secured creditor must send to the debtor "after default" a proposal describing its intention to accept collateral in satisfaction of the debt it secures. For the acceptance to become effective, the secured creditor must not receive a notification of objection authenticated by the debtor within twenty days after the proposal is sent.368

The court found that Canfina had neither obtained Alford's express consent to the stock transfer nor sent a strict foreclosure proposal to Alford, "thereby triggering the twenty day objection time."369 Therefore, Alford was still the owner of the stock and Canfina's motion to dismiss was denied.370

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367. *Id.* Additionally, the court could have cited to the provisions in new Article 9 that prohibit waivers of the debtor protection provisions in U.C.C. §§ 9-620, 9-621, and 9-622. U.C.C. § 9-602(10) (2001).
369. *Id.* at 748-49 (citing Texas's version of U.C.C. § 9.620(c)).
370. *Id.* at 749.
The holding in *Cadiz Properties* sends a clear message to secured creditors that pre-default escrow arrangements will not relieve them of their Article 9 duties post-default. Revised Article 9's strict foreclosure provisions, like the notice requirement for foreclosure sales, protect the debtor's equity of redemption as well as its right to receive a surplus. By having its consent solicited or receiving a notification of strict foreclosure, the debtor has the opportunity to redeem the collateral or to force a foreclosure sale at which a surplus might be generated.

C. Foreclosure by Sale: Notice and Commercial Reasonableness

Like old Article 9, the new statute requires secured creditors to give reasonable notification of a foreclosure sale and to conduct the disposition in a commercially reasonable manner. In contrast to the former law, Revised Article 9 creates a safe-harbor window of ten days for giving notice in non-consumer transactions. Thus, a creditor giving at least ten days' notice of the impending disposition is deemed to have given reasonable notification.

What constitutes a commercially reasonable disposition remains, however, somewhat murky under the new law as it was under the old. The new Code regurgitates language from former Article 9, stating that a disposition is "commercially reasonable" if it is made "in the usual manner in any recognized market," or "at a price current in any recognized market," or "otherwise in conformity with reasonable commercial practices among dealers" in that type of property. As one might expect, the cases decided under Revised Article 9 continue to wrestle with this issue in the context of specific dispositions.

371. *Id.*

372. Under U.C.C. § 9-620(c) (2001), the debtor's express or implied consent to the strict foreclosure must be obtained "after default." The Official Comments to this section also note that secured parties, in pursuing the strict foreclosure remedy, are subject to the general good faith requirement imposed on all parties under U.C.C. § 1-203. *Id.* cmt. 11. In other words, the creditor could not in good faith attempt to retain collateral in full satisfaction of the debt if the creditor knew the collateral's value was many times greater than the debt. *Id.*

373. *See id.* § 9-623(c) (allowing the debtor to redeem the collateral until the creditor has accepted it in full or partial satisfaction of the debt).

374. *See id.* § 9-615(d)(1) (requiring the secured party to pay any surplus from the foreclosure sale to the debtor).


377. *Id.* (b)(2).
Although the notice provisions have been significantly clarified, at least one secured party still managed not to give the proper notification of disposition in a consumer-goods transaction. In *In re Downing*, the debtor purchased a BMW automobile on an installment plan and gave the secured creditor a security interest in the vehicle.\(^{378}\) Subsequently, the debtor filed a chapter 13 petition in bankruptcy, and under his proposed plan, he agreed to surrender the vehicle to the creditor.\(^{379}\) After surrender, the creditor sent the debtor notice of its intention to sell the vehicle no sooner than ten days after the notice date.\(^{380}\) The creditor then sold the car at a commercial auction and sought a hefty deficiency against the debtor.\(^{381}\) In response, the debtor argued that he had not received proper notice of the disposition.\(^{382}\)

In assessing the sufficiency of the creditor’s notice, the bankruptcy court carefully analyzed the newly added Article 9 provisions concerning the content of foreclosure sale notices. The court observed that under U.C.C. § 9-614, notice in a consumer-goods transaction is required to contain all of the information listed in § 9-613\(^{383}\) as well as the additional material specified in § 9-614 itself.\(^{384}\) After examining the creditor’s notice letter to the debtor, the court readily concluded that certain key pieces of information were missing: (1) the type of sale contemplated—i.e., public or private; (2) the debtor’s responsibility for a deficiency; (3) the debtor’s right to an accounting of his indebtedness; and (4) the amount of the claimed indebtedness.\(^{385}\) Given the mandatory content of the notice, the court found that the notice was insufficient.\(^{386}\)

Given that insufficiency, the court then had to decide the consequences to the creditor. Revised Article 9 expressly adopts the so-

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\(^{378}\) *Id.* (b)(3).


\(^{380}\) *Id.*

\(^{381}\) *Id.*

\(^{382}\) The creditor claimed a deficiency of $18,517.24. *Id.*

\(^{383}\) *Id.*

\(^{384}\) U.C.C. § 9-613 states that a notice is sufficient if it describes the debtor, the secured party, and the collateral; states the method of disposition and the debtor’s entitlement to an accounting; and states “the time and place of a public disposition or the time after which any other disposition is to be made.” U.C.C. § 9-613(1)(A) – (E) (2001).

\(^{385}\) Under U.C.C. § 9-614, in consumer-goods transactions, the creditor must give a notice of disposition containing all of the information in § 9-613 plus the following additional information:

A description of any deficiency liability; a telephone number from which the debtor can obtain the amount necessary to redeem the collateral; and a telephone number or mailing address from which the debtor can obtain additional information about the disposition and the secured obligation. *Id.* § 9-614 (1)(A) – (D).

\(^{386}\) *Downing*, 286 B.R. at 904.
called "rebuttable presumption" approach as the penalty for creditor non-compliance with the foreclosure requirements.\textsuperscript{387} The new statute, however, leaves open the penalties for creditor misbehavior in consumer transactions and further states that courts "may not infer from [the limitation of the rebuttable presumption approach to non-consumer transactions] the nature of the proper rule in consumer transactions and may continue to apply established approaches."\textsuperscript{388} Employing the "absolute bar" approach developed in earlier caselaw, the court in \textit{Downing} ultimately held that compliance with the notice provisions "is a prerequisite to the recovery of a deficiency following the sale of repossessed collateral."\textsuperscript{389} Because the creditor did not comply with the notice requirements, it could not recover any deficiency against the debtor.\textsuperscript{390}

Although only one case, \textit{Downing} suggests that courts may be inclined to enforce the notification requirements strictly, especially in consumer transactions. New Article 9 even provides model notification forms,\textsuperscript{391} and it certainly behooves any creditor to employ them and to fill them out accurately. The court in \textit{Downing} apparently latched on to the statutory directive to continue to use established common law approaches in deciding penalties for creditor misbehavior in consumer transactions. Unquestionably, the revisers could have ensured a greater level of uniformity by prescribing rules for consumer, as well as commercial, transactions, but it is well known that the various factions within the drafting circle could not agree on the proper approach for a number of consumer-related issues.\textsuperscript{392}

As mentioned earlier, the secured party’s disposition of collateral must be done in a "commercially reasonable" manner.\textsuperscript{393} Courts deciding cases under former Article 9, which contained the same re-

\textsuperscript{387} Id.
\textsuperscript{388} Under the rebuttable presumption approach, the amount of the debt owed at default is presumed to equal the value of the collateral, thus wiping out any deficiency. The secured party may then attempt to rebut that presumption by proving the extent to which the value of the collateral is less than the amount owed at default. U.C.C. § 9-626(a)(3), (4) (2001).
\textsuperscript{389} Id. (b).
\textsuperscript{390} Id. at 902.
\textsuperscript{391} Id. at 905.
\textsuperscript{392} U.C.C. §§ 9-613, 9-614 (2001).
\textsuperscript{393} See Marion W. Benfield, Jr., Consumer Provisions in Revised Article 9, 74 CHI.-KENT L. REV. 1255, 1255-59 (1999) (describing the deep differences of opinion between consumer and creditor representatives); Jean Braucher, Deadlock: Consumer Transactions under Revised Article 9, 73 AM. BANKR. L.J. 83, 83 (1999) (stating that "consumer advocates and consumer creditor representatives who participated as observers in the drafting process could not reach agreement on any significant changes"); 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 (1999) (noting that “[p]articularly lamentable . . . is the treatment—or lack thereof—of certain
quirement, tended to look at a combination of the price received and the procedures employed to determine whether a particular foreclosure sale was commercially reasonable. Some courts emphasized one element more than another in their analysis. Two cases decided under Revised Article 9 continue the "price/procedures" approach in resolving whether a particular disposition was commercially reasonable.

In Vornado PS, L.L.C. v. Primestone Investment Partners, L.P., the debtor defaulted on its obligations to the secured creditor. The lender sought to dispose of the collateral, units in a limited partnership ("Units"), at an open outcry auction. The only bidder at the auction, the lender ended up purchasing the Units. The creditor then sought a declaratory judgment that the foreclosure sale was conducted in a commercially reasonable manner and moved for summary judgment on that question.

The Delaware chancery court acknowledged that summary judgment will generally not be appropriate for determinations of commercial reasonableness. The parties will often dispute the precise facts surrounding the disposition. But the court stated that New York law allowed courts to grant summary judgment "when they found there was no genuine issue of material fact regarding the commercial reasonableness of a foreclosure sale."

During the course of its opinion, the court meticulously recounted the entire foreclosure sale process, including several auctions that had to be canceled at the last minute. The court noted that the creditor had employed an experienced firm to market the Units, had advertised the foreclosure sale in major daily newspapers, and had hired a licensed auctioneer to conduct the sale. Responding to the debtor's objection that the creditor used a public, rather than a private, sale,

aspects of consumer transactions" and that the rules in § 9-626 regarding creditor penalties resulted from a "compromise" and "a damage-control effort.").

395. See Former U.C.C. § 9-504 (3) (1995) (stating that every aspect of the disposition ... must be commercially reasonable).
397. See, e.g., Walker v. McTague, 737 N.E.2d 404, 410 (Ind. Ct. App. 2000) (stating that the "primary factor to be considered is the price received by the secured party").
399. Id.
400. Id.
401. Id. at 315.
402. Id.
403. Id. at 306-310.
the court stated that under the Code rules the secured party was allowed to bid on the collateral only at a public sale and that the creditor "was one of the most interested and able purchasers of the Units."404

The court in *Vornado* also spent considerable time reviewing the debtor's objection that the price received for the Units was "unreasonably low." Subject to certain conditions, the Units were exchangeable on a one-to-one basis with shares of PGE, a publicly traded company. The court noted that "[a]t the auction, the Units sold at a price equivalent to the closing price of PGE shares on the New York Stock Exchange on the date of the foreclosure sale." Given the conceded economic equivalency between the Units and the PGE shares, the court implied that the auction price was fair.405 Based on the thoroughness of the procedures employed and the fair price attained at the auction, the court granted the creditor's motion for summary judgment and held that the creditor "was entitled to a declaration that the foreclosure sale was conducted in a commercially reasonable manner."406

The court in a recent Oregon appellate case utilized a similar approach to determine whether a lessor's disposition of leased goods was commercially reasonable. Although true leases are not subject to Article 9, the court in *Allco Enterprises, Inc. v. Goldstein Family Living Trust* applied Article 9's commercially reasonable standard to a lessor's sale of leased property because the lease agreement specified that in the event of the lessee's default and the lessor's repossession of the goods, the lessor was to dispose of the goods in a commercially reasonable manner.407 Noting Oregon's extremely deferential standard for appellate review,408 the appellate court quickly upheld the trial court's judgment that the disposition was commercially reasonable.409

As in *Vornado*, the court reviewed both the price received at the disposition and the procedures employed. The court stated that there

405. *Id.*
406. *See id.* at 315 (citing the section in U.C.C. § 9-627(b) that states that a disposition is commercially reasonable if it is made "at the price current in any recognized market at the time of disposition."). The court also observed in a footnote that the creditor is not obligated to receive actual market value for collateral in a foreclosure sale and that New York caselaw has upheld bids as low as thirty percent of fair market value. *Id.* at n.43.
407. *Id.* at 316.
408. 51 P.3d 1275, 1278 (Or. Ct. App. 2002).
409. Oregon appellate courts are not permitted to overturn a trial court decision unless they "can affirmatively say that 'no evidence' supports it." *Id.*
was "no direct evidence that the equipment was sold for less than its value in any recognized market." Additionally, the court noted the evidence that at least twenty-five bidders attended the auction, one of the lessees attended the auction and even helped to select the auctioneer, and that claimed "paperwork irregularities" either were not material or were not adequately documented by the lessees.

Given Revised Article 9's adherence to the commercially reasonable standard for foreclosure sales, it is not surprising that recent cases have continued to examine in some detail the particular facts and circumstances of the challenged dispositions. In light of the enormous variation in the types of collateral involved—everything from cars to stocks to antiques—it may not have been possible for the revisers to have fleshed out the standard any more than they have. In the revision, the drafters, however, did clarify certain burden of proof issues. The new law states that the secured party does not need to prove that it complied with the enforcement provisions “unless the debtor or a secondary obligor places the secured party’s compliance in issue.” Once compliance issues are raised, the secured creditor has the ultimate burden to prove its compliance.

VI. Conclusion

This survey of cases decided under Revised Article 9 does not reflect a major "sea of change" in the law. The courts are seemingly surviving what could have been a bumpy ride through the transition period, which ends July 1, 2006, in most jurisdictions. Many of the same issues that existed under the old law have reemerged, such as the eternal question of what constitutes a commercially reasonable disposition of the collateral. But, at the same time, one can observe the effects of the revisers' attempts to clarify and simplify aspects of the former Article 9. The clarity provided by the foreclosure notice forms in new Article 9 has guided one court to the easy conclusion that the secured party's notification was inadequate. The new law's express approval of the equitable tracing fictions allowed another court to employ the lowest intermediate balance rule without hesitation. The

410. Id. at 1279.
411. Id.
412. Id. In dealing with the auctioneer's advertising costs, the trial court had deducted half of the claimed expenses in calculating the damages "because of its own apparent concerns about the strength of plaintiff's proof." Id. In other words, the appellate court thought that the trial court had adequately considered the questionable nature of some of the advertising expenses.
stripped down requirements for financing statements have permitted judges to validate filings with minimal information.

The revision process for Article 9 took nearly a decade and consumed the talents and energies of some of the most prominent commercial law scholars and practitioners. Even before most states adopted Revised Article 9, critics were quick to point out its cumbersome length, its sometimes impenetrable language, and its failure to address important consumer issues. In the end, the passage of time and additional judicial input may determine whether the Reporters for the new law were completely successful in achieving their goals.

414. Id. (a)(2).
415. See John L. McCabe & Arthur H. Travers, Introducing Revised Article 9 of the Uniform Commercial Code, 30 Colo. Law 9 (2001) (noting that the "Revision is substantially bulkier than its predecessor," resulting in some loss of "elegance.").
416. See Burns, supra note 311, at 61 (commenting that "in a number of places in new Article 9, the drafters used a language that looks like English but is totally incomprehensible.").