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## Filing and Enforcement Under Revised Article 9

By Steven L. Harris and Charles W. Mooney, Jr.\*

### INTRODUCTION

After almost a decade of work, Revised Article 9 of the U.C.C. is here.<sup>1</sup> It was approved by its sponsors, the ALI and NCCUSL, in 1998 and, as of this writing (July 1999), has been adopted by six states<sup>2</sup> and introduced into thirteen other legislatures. All indications are that the revised Article will become law in most, if not all, U.S. jurisdictions on the uniform effective date of July 1, 2001.<sup>3</sup>

This Article offers only a brief sketch of Revised Article 9 as a whole.<sup>4</sup> Instead of a more detailed overview, it focuses primarily on two aspects of secured transactions on which Revised Article 9 will have a significant impact: perfection by filing and enforcement. These important topics give rise to issues that lawyers must consider in a very broad range of transactions, and thus attracted the major portion of the Drafting Committee's attention.

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1. Preliminary memoranda concerning the possible revision of Former Article 9 were written in 1989. In 1990, the Permanent Editorial Board for the Uniform Commercial Code appointed a Study Group to consider whether Former Article 9 should be revised. In 1992, after a two and one-half year study, the Study Group recommended the formation of a Drafting Committee to revise the Article and offered dozens of specific recommendations for the revision. See PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 9 REPORT (Dec. 1, 1992) [hereinafter REPORT]. For background on the Study Group, including its organization and methodology, see REPORT, *supra*, at 1-16.

2. The six states are Arizona, Maryland, Montana, Nebraska, Nevada and Texas.

3. To minimize the difficulties of transition from Former Article 9 to the revised Article, Revised Article 9 is designed to become effective on the same date (July 1, 2001) in every jurisdiction that adopts it. See U.C.C. § 9-701 (1999).

4. The official comments to revised U.C.C. §§ 9-101 and 9-102 contain a more thorough overview. See also Barkley Clark & Barbara Clark, *Special Report: New Article 9*, 31 UCC L.J. 243 (1999) (highlighting significant changes in Revised Article 9).

Those who are familiar with its predecessor, Former Article 9, will instantly be familiar with much that is found in Revised Article 9. The two Articles follow the same general approach to providing a comprehensive scheme for the regulation of security interests in personal property and fixtures. They contain many of the same terms and concepts. A person who grants a security interest is a “debtor”;<sup>5</sup> a person in whose favor a security interest is granted is a “secured party”;<sup>6</sup> property subject to a security interest is “collateral.”<sup>7</sup> Under both Articles, a security interest “attaches” when it becomes enforceable—that is, when the debtor has agreed to create a security interest, the agreement is manifested in a particular way (typically by a signed security agreement), value has been given, and the debtor has rights in the collateral.<sup>8</sup> A security interest attaches automatically to “proceeds” of the collateral.<sup>9</sup>

Both Articles provide that a security interest is a perfected security interest when it has attached and when all the applicable requirements for perfection have been satisfied.<sup>10</sup> The principal method of perfecting a security interest continues to be the filing of a “financing statement” in the public record.<sup>11</sup>

Many of the priority rules likewise are carried forward. An unperfected security interest is subordinate to most conflicting claims to the collateral, including that of a judicial lien creditor, the debtor’s trustee in bankruptcy, and most buyers of collateral.<sup>12</sup> Buyers in ordinary course of business take free of security interests created by their sellers, even if the security interests are perfected.<sup>13</sup> Conflicting security interests in the same collateral generally rank according to the “first-to-file-or-perfect” rule.<sup>14</sup> The secured party’s remedies, too, are basically the same as under Former Article 9. Upon default, the secured party may repossess the collateral peacefully and dispose of it in a “commercially reasonable” manner,<sup>15</sup> collect collat-

5. U.C.C. § 9-102(a)(28) (1999); *id.* § 9-105(1)(d) (1995).

6. *Id.* § 9-102(a)(72) (1999); *id.* § 9-105(1)(m) (1995).

7. *Id.* § 9-102(a)(12) (1999); *id.* § 9-105(1)(c) (1995).

8. *Id.* § 9-203(a), (b) (1999); *id.* § 9-203(1), (2) (1995).

9. *Id.* § 9-203(f) (1999); *id.* § 9-203(3) (1995). “Proceeds” is defined in *id.* § 9-102(a)(64) (1999) and *id.* § 9-306(1) (1995).

10. *See id.* § 9-308(a) (1999); *id.* § 9-303(1) (1995).

11. *Id.* § 9-310(a) (1999); *id.* § 9-302(1) (1995). “Financing statement” is defined in *id.* § 9-102(a)(39) (1999) to mean “a record or records composed of an initial financing statement and any filed record relating to the initial financing statement.” *Cf. id.* § 9-402(4) (1995) (providing that a “financing statement” ordinarily means the original financing statement and any amendment).

12. *See id.* § 9-317 (1999); *id.* § 9-301 (1995).

13. *See id.* § 9-320(a) (1999); *id.* § 9-307(1) (1995).

14. *Id.* § 9-322(a)(1) (1999); *id.* § 9-312(5)(a) (1995).

15. *Id.* § 9-609 (1999) (repossession); *id.* § 9-610 (disposition); *id.* § 9-503 (1995) (repossession); *id.* § 9-504 (disposition).

eral such as rights to payment,<sup>16</sup> or agree with the debtor to accept the collateral in satisfaction of the secured obligation.<sup>17</sup> As under Former Article 9, the debtor enjoys certain rights and the secured party has certain duties that cannot be waived or modified.<sup>18</sup>

Yet, in many ways, Revised Article 9 is a “new, improved” version of its predecessor. Together with accompanying official comments, the revised Article resolves many issues of interpretation that arose under the former Article. It contains new provisions designed to facilitate contemporary and future transactions and the use of modern technology. Lawyers who venture only occasionally into the world of secured transactions, as well as those who can cite Former Article 9 chapter and verse, will find the revised Article easier to navigate. It has been substantially reorganized, its language has been updated and simplified, and its subsections have been shortened and separately captioned—all with a view toward making the law more readily accessible and comprehensible.<sup>19</sup>

Revised Article 9 offers much to consider and analyze. Among the noteworthy changes is a relatively modest expansion in scope. As revised, Article 9 now covers security interests in deposit accounts (other than in consumer transactions) as original collateral<sup>20</sup> and contains special choice-of-law, perfection, priority, and enforcement rules applicable to this type of collateral.<sup>21</sup> It also applies to commercial tort claims<sup>22</sup> and to rights

16. *Id.* § 9-607 (1999); *id.* § 9-502 (1995).

17. *See id.* § 9-620 (1999); *id.* § 9-505 (1995).

18. *See id.* § 9-602 (1999); *id.* § 9-501(3) (1995).

19. Those who wish to determine where a particular provision of Former Article 9 is now found should consult the Table of Disposition of Sections in Former Article 9 and Other Code Sections, which accompanies the official text of the revised Article. The official comment to each section of the revised Article indicates the source of that section. A table indicating the sources of all the sections accompanies the official text. *See also* Eldon Reiley, *The Article 9 Revision Process and Interpretation of Original Article 9*, 31 UCC L.J. 261, 310-17 (1999) (tracing sections in Former Article 9 to Revised Article 9 and sections in Revised Article 9 to Former Article 9). For a discussion of efforts to simplify the language and presentation of Revised Article 9, see Louis F. Del Duca et al., *Simplification in Drafting—The Uniform Commercial Code Article 9 Experience*, 74 CHI.-KENT L. REV. (forthcoming 1999).

20. *See* U.C.C. § 9-109(a), (d)(13) (1999); *see also infra* note 74 (quoting the definition of “consumer transaction” in revised U.C.C. § 9-102(a)(26)). The inclusion of deposit accounts as original collateral follows the Study Group’s Recommendation III.A.7.A. *See* REPORT, *supra* note 1, at 68-71.

21. *See* U.C.C. § 9-102(a)(29) (defining “deposit account”); *id.* § 9-304 (explaining choice of law); *id.* § 9-314(a) (explaining perfection); *id.* § 9-327 (explaining priority); *id.* § 9-607(a)(4), (5) (explaining enforcement). For a detailed discussion of Revised Article 9’s deposit account provisions, see Bruce A. Markell, *From Property to Contract and Back: An Examination of Deposit Accounts and Revised Article 9*, 74 CHI.-KENT L. REV. (forthcoming 1999).

22. *See* U.C.C. § 9-102(a)(13) (defining “commercial tort claim”); *id.* § 9-109(a), (d) (excluding from application of Revised Article 9 assignments of claims arising in tort, other than commercial tort claims). The inclusion of certain assignable tort claims follows the Study Group’s Recommendation III.A.4.A and following comments. *See* REPORT, *supra* note 1, at 58-59.

under an insurance policy for payment for health-care goods or services provided.<sup>23</sup> It governs the relative rights of holders of security interests and holders of nonpossessory, statutory agricultural liens on farm products.<sup>24</sup> It reclassifies rights to payment by expanding the category of “accounts” to include many payment streams formerly classified as “general intangibles” (for example, rights to payment from the license or sale of intellectual property or real property), leaving sales of interests in loans (including loan participations) in a residual category of rights to payment, denominated “payment intangibles.”<sup>25</sup> The revised Article applies to virtually all sales of rights to payment, including rights to payment evidenced by a negotiable or non-negotiable promissory note.<sup>26</sup> It reflects the increasing importance of intangible property by introducing special rules for two new subcategories of electronic collateral: electronic chattel paper and software.<sup>27</sup>

23. See U.C.C. § 9-102(a)(46) (defining “health-care-insurance receivable”); *id.* § 9-109(a), (d)(8) (excluding from application of Revised Article 9 transfers of interests in and assignments of claims under insurance policies, other than assignments of health-care-insurance receivables by or to health-care providers). The inclusion of insurance claims consisting of health-care-insurance receivables is consistent with, but stops considerably short of, the Study Group’s Recommendation III.A.3. That recommendation urged the Drafting Committee to give serious consideration to including most forms of business insurance and some forms of personal insurance. See REPORT, *supra* note 1, at 56-57.

24. See U.C.C. § 9-102(a)(5) (defining “agricultural lien”); *id.* § 9-109(a)(2) (explaining the scope of Revised Article 9); *id.* § 9-322(a), (g) (explaining priority). Revised Article 9 also governs priorities between agricultural liens and holders of judicial liens, see *id.* § 9-317(a)(2), and between holders of agricultural liens and buyers, see, for example, *id.* § 9-317(b). The inclusion of agricultural liens follows the Study Group’s Recommendation III.C.24.A.(1) and following comments. See REPORT, *supra* note 1, at 181-83.

25. U.C.C. § 9-102(a)(2) (defining “account”); *id.* § 9-102(a)(61) (defining “payment intangible”). A payment intangible is a “general intangible.” See *id.* § 9-102(a)(42) (defining “general intangible”); *cf. id.* § 9-106 (1995) (defining “account” and “general intangible”). The expansion of the definition of “account” and the inclusion of sales of payment intangibles generally follows the Study Group’s Recommendation III.A.1.A and following comments. See REPORT, *supra* note 1, at 43-48.

26. See U.C.C. § 9-109(a)(3) (1999). One must not infer from the fact that Revised Article 9 applies to a sale of an account or other right to payment or the fact that it refers to a sale as creating a “security interest” that the seller (Article 9 debtor) retains any rights in the property sold. To the contrary, to the extent that a right to payment has been sold, the seller retains no interest whatsoever in it. See *id.* § 9-318(a) cmt. 2. The same was true under Former Article 9.

27. Electronic chattel paper is a record or records consisting of information stored in an electronic medium (i.e., it is not written). See *id.* § 9-102(a)(31) (defining “electronic chattel paper”). Perfection of a security interest in electronic chattel paper may be by filing or control. See *id.* § 9-312(a) (providing for perfection by filing); *id.* § 9-314(a) (providing for perfection by control). “Control,” as applied to electronic chattel paper, is a unique concept, not to be confused with “control” of deposit accounts or investment property. Compare *id.* § 9-105 (explaining control of electronic chattel paper), with *id.* § 9-104 (explaining control of deposit account), and *id.* § 9-106 (explaining control of investment property). It is analogous to possession of tangible chattel paper. See *id.* § 9-330 (providing that a purchaser who has control of electronic chattel paper or possession of tangible chattel paper may achieve priority

The official comments to revised sections 9-101 and 9-102 highlight these and other improvements and explain the new definitions and classification of collateral.<sup>28</sup> Analyses of the revised Article already have begun.<sup>29</sup> No doubt the authors and other commentators will have much (some might say, too much) to say about the Article over the next few years.<sup>30</sup> For now, the authors offer an overview of some of the most significant changes in two areas of the revised Article that virtually every transaction governed by the revised Article may encounter—filing and enforcement.

### **PERFECTION BY FILING**<sup>31</sup>

The filing system remains the heart of Article 9. To prevail over most conflicting claims to the collateral, a security interest must be perfected.<sup>32</sup> The filing of a financing statement is a method of perfecting a security

over a security interest perfected by filing). For a discussion of Revised Article 9's electronic chattel paper provisions, see Jane Kaufman Winn, *Electronic Chattel Paper Under Revised Article 9: Updating the Concept of Embodied Rights for Electronic Commerce*, 74 CHI.-KENT L. REV. (forthcoming 1999).

"Software" is a subcategory of general intangibles. See U.C.C. § 9-102(a)(75) (defining "software"). Security interests in software are governed by the rules applicable to general intangibles; however, Revised Article 9 contains a few special provisions that reflect the growing practice of financing goods and related software in a single transaction. See, e.g., *id.* § 9-103(c) (providing for purchase-money security interests in goods and related software); *id.* § 9-102(a)(11) (defining "chattel paper" to include a record or records that evidence both a monetary obligation and "a security interest in specific goods and software used in the goods"). Also, Revised Article 9 takes account of the fact that software has become part of an ever-increasing variety of goods by including as "goods" (and not as "software") embedded computer programs that either are associated with the goods in such a manner that they customarily are considered part of the goods or rightfully may be used by a person who becomes the owner of the goods as a consequence of that person's becoming the owner. See *id.* § 9-102(a)(44).

28. *Id.* §§ 9-101 cmts. 4, 9-102 cmts. 2-26.

29. See, e.g., Clark & Clark, *supra* note 4; *Uniform Commercial Code Symposium*, 73 AM. BANKR. L.J. 1-310 (1999).

30. See Steven L. Harris & Charles W. Mooney, Jr., *Reflections of the Reporters: How Successful Was the Revision of UCC Article 9?*, 74 CHI.-KENT L. REV. (forthcoming 1999). This article will appear as part of a symposium discussing many aspects of Revised Article 9. *Symposium on the Uniform Commercial Code Revised Article 9*, 74 CHI.-KENT L. REV. (forthcoming 1999).

31. The revised filing rules follow or draw on many of the general suggestions made in the Study Group's Recommendation III.C.11 and following comments. See REPORT, *supra* note 1, at 88-90. For a fuller discussion of Revised Article 9's filing provisions, see Harry C. Sigman, *Twenty Questions about Filing under Revised Article 9: The Rules of the Game under New Part 5*, 74 CHI.-KENT L. REV. (forthcoming 1999).

32. See, e.g., U.C.C. § 9-317 (explaining that lien creditors and certain buyers, lessees, and licensees have priority over unperfected security interests).

interest in nearly every type of collateral, both tangible and intangible.<sup>33</sup> Following the lead of the 1994 revisions to Articles 8 and 9, Revised Article 9 provides that filing is a permissible method of perfecting a security interest even in instruments.<sup>34</sup>

### WHERE TO FILE

When the collateral is tangible (for example, "ordinary goods"), the choice of law rules of Former Article 9 are, for the most part, keyed to the location of the collateral.<sup>35</sup> The choice of law rules for intangible collateral and mobile goods are keyed to the location of the debtor.<sup>36</sup> Thus, if the collateral is inventory and accounts, the secured party must file in every jurisdiction in which some inventory is located, as well as (if different) the jurisdiction in which the debtor is located. Moreover, Former Article 9 invites jurisdictions to establish both a central filing office (for example, the Secretary of State) and local filing offices (for example, the County Recorder).<sup>37</sup> In most states, a filer must examine each transaction to determine whether to file centrally or locally. Some states require both a central and a local filing under certain circumstances.<sup>38</sup> The net effect of the rules can be to require a substantial expenditure of time and money to determine the offices in which filings must be made, search the records of all the relevant filing offices, prepare financing statements sufficient to meet the (sometimes idiosyncratic) requirements of each filing office, transmit the financing statements to the filing offices, and pay the filing fees.

By designating as the filing office a single office in only one jurisdiction, Revised Article 9 makes it possible to perfect a security interest in virtually all types of collateral by filing a single financing statement.<sup>39</sup> It thereby

33. Filing a financing statement does not perfect a security interest in money, letter-of-credit rights (except when the rights support the payment of other collateral), deposit accounts, goods covered by a certificate of title, or property excluded from Revised Article 9. Certain security interests are perfected when they attach, without the need for an additional step. *See id.* § 9-309. Alternative methods of perfection (e.g., possession) are available for certain types of collateral and may afford better protection to the secured party. *See, e.g., id.* § 9-328(1) (providing that a security interest in investment property perfected by control has priority over a security interest perfected by another method); *id.* § 9-334(d) (providing that a purchase-money security interest perfected by fixture filing has priority over certain encumbrances on real property).

34. *See id.* § 9-312(a) (providing that a security interest in instruments may be perfected by filing); *cf. id.* § 9-115(4)(b) (1995) (providing that a security interest in investment property may be perfected by filing).

35. *See id.* § 9-103(1) (1995).

36. *See id.* § 9-103(3).

37. *See id.* § 9-401(1) (stating the Second Alternative and Third Alternative).

38. *See id.* (stating the Third Alternative).

39. Filing is not effective to perfect a security interest in a few types of collateral. *See supra* note 32. In addition, when the collateral is timber to be cut, one must file in the jurisdiction in which the timber is located. *See U.C.C.* § 9-301(3)(B) (1999). When the collateral is "as-

reduces the costs of filing and the risk of being unperfected. The jurisdiction in which to file is the one in which the debtor is located.<sup>40</sup> For purposes of Revised Article 9's choice-of-law rules, individuals are located at their principal residence; "registered organizations"<sup>41</sup> are located in the state under whose law they are organized; and other organizations are located at their chief executive office.<sup>42</sup> Gone is the need to determine whether goods are "ordinary" or "mobile," whether the debtor's office is on one side or the other of the county line, and whether goods or other tangible collateral have been moved to another state.

### WHAT TO FILE: MEDIUM-NEUTRALITY

Revised Article 9 reflects the fact that substantial transactions increasingly occur without the use of paper. It is "medium-neutral"; that is, it makes clear that parties may use virtually any medium for communicating with one another and memorializing their agreements. In most circumstances in which Former Article 9 contemplated a "writing,"<sup>43</sup> Revised Article 9 speaks in terms of a "record."<sup>44</sup> Where Former Article 9 referred to a "signed" agreement or notification,<sup>45</sup> Revised Article 9 generally requires the agreement or notification to be "authenticated."<sup>46</sup> This approach is reflected in the fact that Revised Article 9 explicitly permits filing

extracted collateral" (i.e., oil, gas, other minerals, or accounts arising out of their sale at the minehead or wellhead), one must file in the jurisdiction in which the minehead or wellhead is located. *See id.* § 9-301(4). If these locations differ from the location of the debtor, then more than one filing may be required in particular transactions. A filing in the location of the debtor will perfect a security interest in fixtures. To obtain the added benefits of perfecting by a "fixture filing," however, one must file in the office in which a mortgage on the related real property would be recorded. *See id.* § 9-501(a)(1).

40. This change follows the Study Group's Recommendation III.B.9.A. *See* REPORT, *supra* note 1, at 74-78.

41. "'Registered organization' means an organization organized solely under the law of a single State or the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized." U.C.C. § 9-102(a)(70). Examples include an Illinois corporation and a Pennsylvania limited partnership.

42. *See id.* § 9-307(b). If, under the normal debtor-location rules, a debtor would be located in a jurisdiction that lacks a filing or registration system for nonpossessory security interests, the debtor is deemed to be located (and a financing statement would be filed to perfect) in the District of Columbia. *See id.* § 9-307(c).

43. "'Written' or 'writing' includes printing, typewriting or any other intentional reduction to tangible form." *Id.* § 1-201(46) (1995).

44. "'Record' . . . means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form." *Id.* § 9-102(a)(69) (1999). Examples include information found on paper and computer disks.

45. "'Signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing." *Id.* § 1-201(39) (1995).

46. "'Authenticate" means "to sign" or "to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record." *Id.* § 9-102(a)(7) (1999).



offices to accept financing statements and other records, and to communicate with filers, in any medium or media they choose.<sup>47</sup> Revised Article 9's medium *neutrality* does not *mandate* electronic filing. It leaves to each jurisdiction the task of determining what kinds of technology are appropriate for implementing its filing system.

### *WHAT TO FILE: REQUIREMENTS FOR A SUFFICIENT FINANCING STATEMENT*

The requirements for a sufficient financing statement have been reduced to four: (i) the name of the debtor, (ii) the name of the secured party or a representative of the secured party, (iii) an indication of the collateral, and (iv) an authorization by the debtor.<sup>48</sup> Unlike Former Article 9, which required the debtor's authorization to be part of the public record (in the form of the debtor's signature),<sup>49</sup> Revised Article 9 dispenses with a signature requirement. Instead, a financing statement may be authorized in any authenticated record.<sup>50</sup> The debtor's authentication of a security agreement is *ipso facto* authorization of the filing of a financing statement covering the collateral described in the security agreement.<sup>51</sup> The filing of an unauthorized financing statement is prohibited,<sup>52</sup> and any person who violates the prohibition is liable for actual damages caused and a statutory penalty.<sup>53</sup>

Revised Article 9 affords detailed guidance on how to meet the formal requirements for a financing statement. In doing so, it resolves many issues that have given rise to repeated litigation over the past several decades. For example, Revised Article 9: (i) specifies that the name of a debtor that is a registered organization (for instance, a corporation) is the name shown on the public record,<sup>54</sup> (ii) explains that a financing statement providing another name is seriously misleading unless the financing statement would

47. The same result can be inferred from Former Article 9. *See id.* § 9-402 cmt. 1 (1995); PEB Commentary No. 15: Electronic Filing Under Article 9 (1996).

48. *See* U.C.C. § 9-502(a) (1999) (listing the first three formal requirements); *id.* § 9-510(a) (explaining authorization).

49. *See id.* § 9-402(1) (1995).

50. A person may file an initial financing statement or an amendment that adds collateral or adds a debtor only if the debtor authorizes the filing. *See id.* § 9-509(a) (1999). The revised Article affords parallel protection to a secured party with respect to other amendments. With one exception, a person may file any other amendment of a filed financing statement (e.g., a continuation statement or a termination statement) only if the secured party authorizes the filing. *See id.* § 9-509(c). The exception permits a debtor to authorize the filing of a termination statement if the secured party has failed to file a termination statement that it is required to file under revised U.C.C. § 9-513(a) or (c) and the termination statement indicates that the debtor authorized the filing. *Id.*

51. *See id.* § 9-509(b).

52. *See id.* § 9-509(a).

53. *See id.* § 9-625(b), (e).

54. *See id.* § 9-503(a)(1).

be found in a search under the debtor's correct name using the filing office's standard search logic,<sup>55</sup> (iii) makes clear that a secured party's representative capacity need not be shown,<sup>56</sup> and (iv) provides that "all debtor's assets" and similar phrases are sufficient to indicate collateral.<sup>57</sup>

Former Article 9 required that a financing statement contain the addresses of the debtor and secured party.<sup>58</sup> This information is no longer required as a condition of perfection; however, it is required as a condition of acceptance by the filing office. That is, the filing office is required to reject a financing statement that lacks an address for the debtor, an address for the secured party, or certain other information concerning the debtor ("section 9-516(b)(5) information") that may prove helpful to subsequent searchers.<sup>59</sup> If the filing office wrongfully accepts a financing statement that lacks an address or any section 9-516(b)(5) information, the filing nevertheless is effective to perfect if it satisfies the three formal requirements of section 9-502(a) and is authorized by the debtor. If an address or section 9-516(b)(5) information is incorrect, the security interest may be subordinated to a conflicting perfected security interest held by a secured party who gives value in reasonable reliance upon the incorrect information and may be cut off by a buyer who reasonably relies.<sup>60</sup>

To assist filers in submitting financing statements and other records that are both legally sufficient and acceptable for filing, Revised Article 9 provides for uniform, national, written forms of initial financing statements and amendments.<sup>61</sup> These forms need not be used, but must be accepted by a filing office that accepts written records.<sup>62</sup>

### *FILING-OFFICE OPERATIONS*

Revised Article 9 contains several provisions designed to improve the operations of the filing office. Secured parties occasionally have been frustrated by a filing officer who, in an effort to assist the filer, rejects a filing that the filer thinks is legally sufficient. Revised Article 9 makes clear that

55. *See id.* § 9-506(b), (c).

56. *See id.* § 9-503(d).

57. *See id.* § 9-504(2). While sufficient for a financing statement, "all debtor's assets" is not a sufficient description of collateral for a security agreement. *See id.* § 9-108(e).

58. *See id.* § 9-402(1) (1995).

59. *See id.* §§ 9-520(a), 9-516(b) (1999). The filing office must reject a financing statement that does not indicate whether the debtor is an individual or an organization. If the financing statement indicates that the debtor is an organization, the filing office must reject the financing statement unless it also provides a type of organization (e.g., corporation) and jurisdiction of organization for the debtor, as well as an organizational identification number or an indication that the debtor has none. *See id.* § 9-516(b)(5).

60. *See id.* § 9-338.

61. As used in Revised Article 9, "amendment" includes assignments, continuation statements, and termination statements. *See id.* § 9-521(b).

62. *See id.* § 9-521(a).

the filing office's duties in this regard are largely ministerial. It prohibits the filing office from rejecting a financing statement or other record for a reason other than one of the few specified.<sup>63</sup> The specified reasons—for example, failure to provide a name for the debtor—relate primarily to the filing office's ability to process the filing and maintain the files. If a filing office rejects a filing, it must promptly inform the filer of the fact of and reason for the refusal and the date and time the record would have been filed had the filing office accepted it.<sup>64</sup>

To assist searchers, the filing office is obliged to link all subsequent records (assignments, continuation statements, etc.) to the initial financing statement to which they relate.<sup>65</sup> It may not delete a financing statement and related records from the files when a termination statement is filed. Rather, it must maintain the filed records for at least one year after the effectiveness of the financing statement lapses (normally five years after the filing date, unless a continuation statement has been filed in a timely manner).<sup>66</sup> The filing office must be able to retrieve a filed record by the name of the debtor and also by the file number assigned to the initial financing statement to which the record relates.<sup>67</sup> In this way, a searcher will discover all records that have been filed against the debtor in at least the past six years. If there have been amendments of various kinds (such as partial releases of collateral, multiple assignments, continuation statements, and termination statements), the filing office will provide all the raw data reflecting them. From these data, the searcher—not the filing office—will determine whether any filings remain effective against the property in question and, if so, who the secured party of record is.

Revised Article 9 mandates performance standards for the filing office. Once the filing office receives a record for filing, then, within no more than two business days after receipt, the filing office either must index the record or, if the filing office rejects the record, must inform the filer of the fact of and reason for rejection.<sup>68</sup> Likewise, the filing office must comply with a search request within no more than two business days after receiving the request.<sup>69</sup> The filing office's response must be current to within three business days before the request was received.<sup>70</sup> Revised Article 9 requires the promulgation of filing-office rules, which address details best left out

63. *See id.* §§ 9-520, 9-516.

64. *See id.* § 9-520(b). The communication must be made at the time and in the manner prescribed by filing-office rule, but in no event more than two business days after the filing office receives the record. *See id.*

65. *See id.* § 9-519(c).

66. *See id.* § 9-522(a) (providing for maintenance of records); *id.* § 9-515(c) (explaining lapse).

67. *See id.* § 9-519(f).

68. *See id.* § 9-519(h) (requiring timely indexing); *id.* § 9-520(b) (requiring timely communication regarding rejection).

69. *See id.* § 9-523(e).

70. *See id.* § 9-523(c).

of the statute.<sup>71</sup> These rules may impose higher, but not lower, standards of performance.

### *TRANSITION*

The uniform effective date of July 1, 2001, affords ample time for those that extend secured credit to become familiar with the provisions of Revised Article 9. The transition provisions allow even more time with respect to filings in place as of the effective date. As mentioned above, Revised Article 9 classifies certain types of property differently from Former Article 9 and contains different choice of law rules. As a consequence, some financing statements that were effective under the former Article do not describe the collateral properly or are filed in the wrong jurisdiction under the revised Article. Secured parties are not required to amend these financing statements or file new financing statements in other jurisdictions under these circumstances. Instead, Revised Article 9 provides that financing statements properly filed under Former Article 9 before the effective date remain effective to perfect a security interest after the effective date, even if the revised Article places the collateral into a different category and requires filing in a different jurisdiction.<sup>72</sup>

### *ENFORCEMENT*

The provisions relating to enforcement have been revised extensively. Once Revised Article 9 becomes effective, the enforcement provisions will become applicable not only to transactions entered into thereafter, but also to transactions entered into under Former Article 9.<sup>73</sup> Many of the changes reflected in the revised Article clarify points that were uncertain under Former Article 9. Others reflect the view that enforcement of security interests in consumer transactions should be governed by somewhat different rules from commercial transactions.<sup>74</sup> Nevertheless, in many re-

71. *See id.* § 9-526(a).

72. *See id.* §§ 9-704(2), 9-705(c). For a more comprehensive discussion of Revised Article 9's transition provisions, see Bradley Y. Smith, *New Article 9 Transition Rules*, 74 CHI.-KENT L. REV. (forthcoming 1999).

73. *See* U.C.C. § 9-702(a).

74. “‘Consumer transaction’ means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes.” *Id.* § 9-102(a)(26). A consumer transaction in which the collateral includes consumer goods is a “consumer-goods transaction.” *Id.* § 9-102(a)(24). This Article uses the term “commercial transaction” to mean a transaction other than a “consumer transaction.”

spects the rights and remedies of the parties on default remain the same as under Former Article 9.<sup>75</sup>

### DISPOSITION OF COLLATERAL

As under Former Article 9, a secured party may enforce its security interest by disposing of collateral. Every aspect of the disposition must be commercially reasonable.<sup>76</sup> In addition, the secured party ordinarily must give reasonable notification of a disposition.<sup>77</sup>

The notification requirement has given rise to much litigation under Former Article 9. In particular, reported cases disagree over who is entitled to be given notification, what the notification must contain, and how much advance time is reasonable.<sup>78</sup> As we explain immediately below, Revised Article 9 resolves each of these uncertainties.

Revised Article 9 retains the requirement that the secured party give notification of the time of a disposition of collateral to the debtor.<sup>79</sup> Under Former Article 9, the identity of the "debtor" depended on the context in which the term appeared.<sup>80</sup> This context-dependent approach gave rise to uncertainty over whether the requirement to give notification to the debtor extended to guarantors and other secondary obligors.<sup>81</sup> Revised Article 9 distinguishes between the "debtor," defined to mean any person with a non-lien property interest in collateral, and an "obligor," who owes

75. Many of the enforcement-related revisions included in Revised Article 9 follow the Study Group's recommendation in Part III.D. of the *Report*. See REPORT, *supra* note 1, at 199-247. For a more comprehensive discussion of these revisions, see Donald J. Rapson, *Default and Enforcement of Security Interests Under Revised Article 9*, 74 CHI.-KENT L. REV. (forthcoming 1999); Timothy R. Zinnecker, *The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part I*, 54 BUS. LAW. 1113 (1999) [hereinafter Zinnecker, *Part I*]; Timothy Zinnecker, *The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part II*, 54 BUS. LAW. 1737 (1999).

76. See U.C.C. § 9-610(b) (1999); *id.* § 9-504(3) (1995).

77. See *id.* § 9-611(b) (1999); *id.* § 9-504(3) (1995). As under Former Article 9, notification need not be given if the collateral is perishable, threatens to decline speedily in value, or is of a type customarily sold on a recognized market. Compare *id.* § 9-611(d) (1999), with *id.* § 9-504 (1995).

78. Concerning (i) who is a "debtor" entitled to notification, see, e.g., *id.* §§ 9-101 cmt. 4(i), 9-611 cmt. 3 (1999); REPORT, *supra* note 1, at 225-27; (ii) contents of notification of disposition, see, e.g., REPORT, *supra* note 1, at 232; (iii) timing of notification, see, e.g., REPORT, *supra* note 1, at 231. See also Zinnecker, *Part I*, *supra* note 75, at 1121 & n.58; *id.* at 1162 & n.286 (who must be given notification); *id.* at 1171 & n.339 (contents of notification); *id.* at 1168 & n.318 (timing of notification).

79. See U.C.C. § 9-611(c) (1999); *id.* § 9-504(3) (1995).

80. If the person who owes payment of the secured obligation and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of Former Article 9 dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires. See *id.* § 9-105(1)(d) (1995).

81. See Annotation, *Construction of Term "Debtor" as Used in UCC § 9-504(3), Requiring Secured Party to Give Notice to Debtor of Sale of Collateral Securing Obligation*, 5 A.L.R.4TH 1291 (1981 & Supp. 1998).

the debt secured by the collateral.<sup>82</sup> It resolves the uncertainty under Former Article 9 by making clear that the duty to give notification of a disposition of collateral extends to secondary obligors.<sup>83</sup> Resolving another issue about which courts disagreed under Former Article 9, Revised Article 9 generally prohibits waiver by a secondary obligor of its rights under Revised Article 9.<sup>84</sup> Like a debtor, however, a secondary obligor may waive the right to notification of disposition of collateral by an agreement to that effect entered into and authenticated after default.<sup>85</sup>

If the collateral is other than consumer goods, Revised Article 9 also requires a secured party to give notification of disposition of collateral to any other secured party or other lienholder that has filed a financing statement against the debtor covering the collateral or that has notified the secured party of its interest in the collateral.<sup>86</sup> This approach facilitates resolution of disputes among holders of conflicting security interests before disposition. A disposing secured party complies with the requirement of notifying those who have filed if it sends notification to each secured party or other lienholder indicated in the filing office's response to a search request. If it undertakes a search of the filing office and the filing office's response is unreasonably delayed, the secured party *ipso facto* complies with this requirement.<sup>87</sup>

To resolve uncertainty about what a notification must contain, Revised Article 9 specifies the contents of a sufficient notification of disposition and makes clear that no particular phrasing of the notification is required.<sup>88</sup> The revised Article includes "safe-harbor" forms of notification, each of which (when completed) provides sufficient information.<sup>89</sup> To resolve uncertainty about when notification must be sent, the revised Article provides that, except in consumer transactions, a notification sent ten days or more before the earliest time for disposition is sent within a reasonable time as a matter of law.<sup>90</sup>

82. See U.C.C. § 9-102(a)(28) (1999) (defining "debtor"); *id.* § 9-102(a)(59) (defining "obligor").

83. See *id.* § 9-611(c)(2). With the exception of revised U.C.C. § 9-616, as it relates to a consumer obligor, rights and duties under Revised Article 9 affect non-debtor obligors only if they are "secondary obligors." A "secondary obligor" is defined to include one who is secondarily obligated on the secured obligation, e.g., a guarantor, or one who has a right of recourse against the debtor or another obligor with respect to an obligation secured by collateral. *Id.* § 9-102(a)(71).

84. See *id.* § 9-602.

85. See *id.* § 9-624.

86. See *id.* § 9-611(c)(3). The 1962 official text imposed a similar duty that was eliminated by the 1972 revisions to Article 9. Compare *id.* § 9-504(3) (1962), with *id.* § 9-504(3) (1972).

87. See *id.* § 9-611(e) (1999).

88. See *id.* § 9-613(1)–(4) (pertaining to transactions not involving consumer goods); *id.* § 9-614(1), (2) (pertaining to consumer goods transactions).

89. See *id.* § 9-613(5) (containing the "safe-harbor" form for commercial transactions); *id.* § 9-614(3) (containing the "safe-harbor" form for consumer transactions).

90. See *id.* § 9-612(b).

### *TITLE ACQUIRED BY TRANSFEREE*

As under Former Article 9, a transferee of collateral at an enforcement disposition takes free of the debtor's rights, the security interest being enforced, and subordinate security interests and other liens.<sup>91</sup> Unlike under Former Article 9, a contract for an enforcement disposition of collateral under Revised Article 9 includes the warranties relating to title, possession, quiet enjoyment, and the like that would, as a matter of law, accompany a disposition of property of that kind.<sup>92</sup> The imposition of title and similar warranties provides incentives for the secured party to call the transferee's attention to the state of the title by disclaiming the warranties in the manner provided.<sup>93</sup> Law other than Revised Article 9 determines whether a contract includes warranties relating to the quality of the property, such as a warranty of merchantability or fitness for a particular purpose.

### *"LOW-PRICE" DISPOSITIONS: CALCULATION OF DEFICIENCY AND SURPLUS*

The law of both real property security (mortgages) and personal property security long has grappled with the problem of dispositions that comply with applicable legal requirements, but nevertheless fetch a low price. Revised Article 9 provides a special method for calculating a deficiency if a complying disposition of collateral to a secured party, a person related to the secured party, or a secondary obligor yields proceeds that are "significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought."<sup>94</sup> In these situations, there is reason to suspect that the enforcing secured party may have inadequate incentives to obtain a higher price. Consequently, instead of calculating a deficiency (or surplus) based on the actual net proceeds of the disposition, the deficiency (or surplus) is calculated based on the proceeds that would have been received in a disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor.<sup>95</sup>

91. *See id.* § 9-617(a); *id.* § 9-504(4) (1995).

92. *See id.* § 9-610(d) (1999). The 1995 official text of U.C.C. § 2-312, comment 5, suggested that a contract for a disposition under Former Article 9 did not include a warranty of title. That comment has been revised in conjunction with Revised Article 9 to conform with revised U.C.C. § 9-610(d).

93. *See id.* § 9-610(e), (f) (describing disclaimer of warranties).

94. *See id.* § 9-615(f). "Person related to" is defined in revised U.C.C. § 9-102(a)(62) with respect to an individual secured party and revised U.C.C. § 9-102(a)(63) with respect to a secured party that is an organization.

95. The calculation mandated by revised U.C.C. § 9-615(f) applies only when the disposition generating the low price is conducted in a commercially reasonable manner. If the disposition is not commercially reasonable, then revised U.C.C. § 9-625 governs the secured party's liability. It follows that the price received in a disposition is not a "term" that must be commercially reasonable under revised U.C.C. § 9-610.

### *TRANSFER OF RECORD OR LEGAL TITLE TO COLLATERAL*

Disposition of collateral that is covered by a certificate of title or is subject to a registration system may give rise to particular problems. A transferee of the collateral may require, as a condition of acquiring the collateral, that the certificate or registry reflect the new ownership. In many cases, this condition can be met only with the consent of the record owner. If the record owner is the debtor and, as may be the case after default, the debtor refuses to cooperate, the secured party may have great difficulty disposing of the collateral.

In some states, law other than Article 9 provides a means by which the secured party may make itself the record owner of certain types of collateral (for example, automobiles) or otherwise acquire the power to transfer record ownership to a transferee at an enforcement disposition.<sup>96</sup> Revised Article 9 provides such a mechanism for all types of collateral subject to a certificate of title or registration system.<sup>97</sup> It may be used to transfer record or legal title to a third party following a secured party's exercise of its enforcement remedies, or to transfer record or legal title to a secured party prior to the secured party's exercise of those remedies. Regardless of which mechanism (the one provided by Revised Article 9 or one provided by other law) is used, the transfer of record or legal title to a secured party prior to the secured party's exercise of its enforcement remedies is not itself an enforcement disposition under Revised Article 9.<sup>98</sup> The transfer merely puts the secured party in a position to pass legal or record title to a transferee following an enforcement disposition in the future.

### *STRICT FORECLOSURE*

In some circumstances, the debtor and secured party may find it advantageous for the secured party to acquire ownership of the collateral in exchange for an agreed-upon credit against the debtor's obligations, without conducting a sale or other disposition. Revised Article 9 reflects the view that the law should not artificially limit the parties' opportunity to enter into arrangements of this kind. Thus, whereas Former Article 9 contemplated strict foreclosure only when it resulted in satisfaction of the entire secured obligation, Revised Article 9 permits a debtor and secured party to agree to the secured party's acceptance (strict foreclosure) of collateral in partial satisfaction, as well as full satisfaction, of the obligations secured.<sup>99</sup> Similarly, whereas Former Article 9 contemplated that the se-

96. See, e.g., MINN. STAT. ANN. § 168A.11(2) (West Supp. 1999).

97. See U.C.C. § 9-619.

98. See *id.* § 9-619(c).

99. Compare *id.* § 9-505(2) (1995) (providing that the secured party may "retain the collateral in satisfaction of the obligation"), with *id.* § 9-620(a) (1999) (allowing parties to "accept collateral in full or partial satisfaction of the obligation"). Whereas the debtor's failure to object in a timely manner to a post-default proposal constitutes sufficient consent for a full strict foreclosure, the debtor must agree to the terms of a partial strict foreclosure in a record authenticated after default. See *id.* § 9-620(c) (1999).



cured party be in possession of collateral as a condition to strict foreclosure, an agreement concerning strict foreclosure under Revised Article 9 unambiguously extends to intangible as well as tangible property.<sup>100</sup>

The revised Article also recognizes that arrangements of this kind usually are the subject of give-and-take negotiations between the parties and so dispenses with the need for the secured party to commence the process with a proposal. Consistent with the idea that strict foreclosure occurs only by agreement of the parties, Revised Article 9 rejects the idea (sometimes called "constructive" strict foreclosure) that a secured party can be deemed to have retained collateral in satisfaction of the secured obligations by virtue of its unreasonable delay in the disposition of collateral.<sup>101</sup> Instead, delay is relevant when determining whether a disposition of collateral or a decision to hold repossessed collateral without disposing of it is commercially reasonable.

Because debtors may not have sufficient incentives to object to strict foreclosure of collateral in which they have no equity, Revised Article 9 requires that holders of junior security interests and other liens be given notification of, and the opportunity to object to and thereby prevent, a strict foreclosure.<sup>102</sup> The revised Article also clarifies the effects of a strict foreclosure on interests held by junior claimants.<sup>103</sup>

### *EFFECT OF NONCOMPLIANCE: "REBUTTABLE PRESUMPTION" TEST*

A secured party who fails to comply with Former Article 9 is liable for "any loss caused" by the noncompliance.<sup>104</sup> Different courts have construed this phrase in different ways.<sup>105</sup> A few have understood the phrase to mean that an aggrieved party must prove the amount of loss sustained

100. Compare *id.* § 9-505(2) (1995) (providing that a "secured party in possession" may propose to retain collateral), with *id.* § 9-620(a) (1999) (providing that a "secured party" may accept collateral). See also *id.* § 9-620(a)(3) (1999) (providing that a secured party may not accept consumer goods in the debtor's possession).

101. See *id.* § 9-620(b) (1999).

102. See *id.* §§ 9-621(a), 9-620(a). Secondary obligors are entitled to receive notification of, and to object to, partial strict foreclosures. See *id.* §§ 9-621(b), 9-620(a).

103. See *id.* § 9-622(a)(3), (4).

104. See *id.* § 9-507(1) (1995).

105. See, e.g., Robert M. Lloyd, *The Absolute Bar Rule in UCC Foreclosure Sales: A Prescription For Waste*, 40 UCLA L. REV. 695, 699-700 (1993). In fact, the same court sometimes has construed this phrase in different ways at different times. See, e.g., *Gurwitch v. Luxurest Furniture Mfg. Co.*, 214 S.E.2d 373, 374, 16 U.C.C. Rep. Serv. (Callaghan) 878, 879-80 (Ga. 1975) (adopting absolute bar rule); *Emmons v. Burkett*, 353 S.E.2d 908, 909, 3 U.C.C. Rep. Serv. 2d (Callaghan) 897, 898-99 (Ga. 1987) (adopting rebuttable presumption rule). Some courts have construed the phrase differently depending on the nature of the noncompliance. See, e.g., *Holt v. Peoples Bank*, 814 S.W.2d 568, 571, 15 U.C.C. Rep. Serv. 2d (CBC) 1400, 1403-04 (Ky. 1991) (adopting absolute bar rule for failure to give notice and rebuttable presumption rule for other noncompliance).

as a consequence of the secured party's noncompliance (the "offset" or "setoff" rule).<sup>106</sup> Others have held that the very fact of the secured party's noncompliance prevents the secured party from collecting a deficiency (the "absolute bar" rule), regardless of the extent of loss (if any) caused by the noncompliance.<sup>107</sup> Most of the courts that have considered the issue have adopted an intermediate position, often called the "rebuttable presumption" rule.<sup>108</sup>

Revised Article 9 resolves the uncertainty by adopting a version of the rebuttable presumption rule in commercial transactions (and, as discussed below, perhaps also for consumer transactions). Under this approach, the deficiency claim of a noncomplying secured party is calculated by crediting the obligor with (i) the actual net proceeds of a disposition or (ii) the amount of net proceeds that would have been realized if the disposition had been conducted in accordance with the revised Article, whichever is greater.<sup>109</sup> Thus, unlike the absolute bar rule, under which a secured party may lose a substantial deficiency claim as a consequence of an innocuous failure to comply, the rebuttable presumption approach matches the loss of deficiency to the actual harm caused.

### *CONSUMER AND CONSUMER-GOODS TRANSACTIONS*<sup>110</sup>

Former Article 9 contained two important debtor-protection provisions applicable to the enforcement of security interests in consumer goods.<sup>111</sup> One imposed minimum statutory damages for noncompliance with the enforcement provisions of the former Article,<sup>112</sup> and the other prohibited strict foreclosure of the debtor's interest in consumer goods in some instances by mandating disposition of the collateral when the debtor had paid at least sixty percent of the cash price or principal amount of the obligation secured.<sup>113</sup> Revised Article 9 retains these provisions, albeit with

106. *See, e.g.,* *Lavender v. AmSouth Bank*, 539 So. 2d 193, 195, 9 U.C.C. Rep. Serv. 2d (Callaghan) 425, 428 (Ala. 1988).

107. *See, e.g.,* *Herman Ford-Mercury, Inc. v. Betts*, 251 N.W.2d 492, 496, 21 U.C.C. Rep. Serv. (Callaghan) 684, 688 (Iowa 1977).

108. *See, e.g.,* *Liberty Bank v. Honolulu Providoring, Inc.*, 650 P.2d 576, 583, 34 U.C.C. Rep. Serv. (Callaghan) 1025, 1035 (Haw. 1982).

109. *See* U.C.C. § 9-626(a) (1999).

110. *See supra* note 74 for the definitions of "consumer transaction" and "consumer-goods transaction."

111. *See* U.C.C. §§ 9-505(1), 9-507(1) (1995).

112. *See id.* § 9-507(1) (providing for minimum statutory damages).

113. *See id.* § 9-505(1) (providing for mandatory disposition of collateral). Both Former and Revised Article 9 give effect to the debtor's post-default agreement to waive the mandatory-disposition requirement. Former Article 9 required that the waiver be signed; Revised Article 9 requires that it be authenticated. *Compare id.* § 9-505(2), *with id.* § 9-624(b) (1999).

some modifications.<sup>114</sup> In addition, the revised Article codifies good practice by requiring a secured party in a consumer-goods transaction who undertakes to collect a deficiency in writing to provide the debtor with an explanation of how the deficiency was calculated.<sup>115</sup>

Certain of the enforcement provisions added by Revised Article 9 are inapplicable, or have been modified in their application, to consumer transactions. Perhaps the most significant modification relates to the consequences of the secured party's noncompliance. As discussed above, Revised Article 9 resolves the conflict in the cases construing Former Article 9 by adopting a rebuttable presumption test for commercial transactions.<sup>116</sup> The rebuttable presumption test may—but need not—apply to consumer transactions. Revised Article 9 leaves to the courts the rules governing the consequences of noncompliance in consumer transactions and explicitly permits the courts to “continue to apply established approaches.”<sup>117</sup> One might expect a court to reason that the limitation of the rebuttable presumption rule to non-consumer transactions means the legislature intended a different rule to apply in consumer transactions; however, Revised Article 9 prohibits courts from drawing any inference from that limitation.<sup>118</sup> Whether courts will heed this novel restriction remains to be seen.<sup>119</sup>

The Drafting Committee and the U.C.C.'s sponsors should not be faulted for failing to choose between the rebuttable presumption and absolute bar approaches to noncompliance in consumer transactions. Robust discussions over several years, both at the Drafting Committee and at its subcommittee on consumer issues, failed to generate a consensus on the proper approach. In light of these discussions, a strong consensus emerged on the Drafting Committee for *alternative* statutory provisions, which would allow each jurisdiction to choose whether to adopt a statutory rebuttable

114. Whereas former U.C.C. § 9-507(1) imposed minimum damages only for noncompliance with enforcement provisions, revised U.C.C. § 9-625(c)(2) imposes minimum statutory damages for noncompliance with any provision of Revised Article 9. Revised U.C.C. § 9-620(e) is substantially the same as former U.C.C. § 9-505(1).

115. See U.C.C. § 9-616 (1999).

116. See *supra* notes 104-09 and accompanying text.

117. U.C.C. § 9-626(b).

118. See *id.*

119. Although revised U.C.C. § 9-626(b) bars a court from drawing an inference as to “the proper rules in consumer transactions,” the applicability of the rebuttable presumption rule in commercial, but not consumer, transactions necessarily suggests to a court that the statute may be *consistent with* applying the absolute bar rule in consumer transactions. See *id.* § 9-626(b). In contrast, a plain reading of former U.C.C. § 9-507(1) leaves little room for the absolute bar approach. See *id.* § 9-507(1) (1995) (affording the debtor “a right to recover from the secured party any loss caused by a failure to comply”); Lloyd, *supra* note 105, at 723 (stating that “[t]he setoff rule is also the only one of the three rules that follows the express language of the statute”). Thus, revised U.C.C. § 9-626 may have the effect of promoting application of the absolute bar rule even in jurisdictions whose courts opted against that approach under former Article 9.

presumption rule or a statutory absolute bar rule.<sup>120</sup> It approved these alternatives as part of a larger package of reforms relating to an array of other consumer issues. Late in the process, however, a compromise among observers representing creditors and those representing consumers resulted in the approach ultimately reflected in Revised Article 9.

The other new consumer-related enforcement provisions give courts and lawyers somewhat more guidance than do the provisions relating to non-compliance. Several relate to the required notification of disposition.<sup>121</sup> Although ten days' notification of disposition is notification sent within a reasonable time as a matter of law in a commercial transaction, this safe harbor does not apply in a consumer transaction. Instead, whether the notification is sent within a reasonable time in a consumer transaction is always a question of fact.<sup>122</sup> The notification of disposition must contain more information in a consumer-goods transaction than in other transactions.<sup>123</sup> The safe-harbor form of notification for consumer-goods transactions reflects the additional required information and uses simpler language than the form for commercial transactions.<sup>124</sup>

Also worthy of note are two new consumer-related provisions concerning strict foreclosure. Revised Article 9 prohibits strict foreclosure of the debtor's interest in consumer goods if the debtor is in possession of the collateral,<sup>125</sup> and it prohibits partial strict foreclosure in every consumer transaction.<sup>126</sup>

## CONCLUSION

Completion of Revised Article 9 is a milestone in the uniform law process. Beginning with the preparation of preliminary memoranda in 1989 and ending with final approval of the U.C.C.'s sponsors in 1998 and final fine-tuning of the text and comments in early-1999, the process was the most lengthy of any U.C.C. project to date, save perhaps the promulgation of the original U.C.C. It also has been conducted with more public light on the substance and process than any other similar project completed to date.

The completed product reflects many successes, ranging from the resolution of troubling uncertainties under Former Article 9, to the improved organization and stylistic changes, to the detailed official comments. The

120. The U.C.C. contains several examples of alternative provisions designed for situations in which states are expected to disagree over policy. For example, Article 6, Alternative A, repeals the provisions of the 1987 official text regulating bulk transfers; Alternative B completely revises the provisions. *See* U.C.C. Art. 6 (1990).

121. *See, e.g., id.* § 9-611(b) (1999).

122. *See id.* § 9-612.

123. *See id.* § 9-614(1).

124. *See id.* § 9-614(3).

125. *See id.* § 9-620(a)(3) (referring to when the debtor may not be in possession).

126. *See id.* § 9-620(g) (disallowing partial strict foreclosure).

new filing provisions should result in greater certainty and lower costs of perfecting a security interest. Ideally, they will inspire filing offices to improve their filing systems and thereby further reduce the cost and increase the availability of secured credit. Most transactions do not require the secured party to resort to the enforcement provisions. By clarifying the secured party's duties and potential liability for failure to fulfill those duties, however, Revised Article 9 increases the likelihood that secured parties will comply with the statutory requirements and incur less cost in doing so.

The authors take great pride in the product, but close involvement with a project of this size, complexity, and duration inevitably has given rise to some disappointment as well. The Drafting Committee and the U.C.C.'s sponsors missed an outstanding opportunity to clarify and bring certainty to several important aspects of the enforcement of security interests in consumer transactions. The Drafting Committee abandoned a balanced package of reforms (which any legislature easily could have modified to suit its particular tastes) in order to mute threatened opposition from creditor and consumer observers and to improve the opportunity for legislative enactment.<sup>127</sup> In due course, a more comprehensive critique of the "consumer compromise"<sup>128</sup> may be offered. For now, the authors simply note lingering disappointment.

Revised Article 9 now faces its most substantial challenge to date—enactment by the legislatures. Even after widespread enactment is achieved, however, the greatest challenge will remain. Revised Article 9's real test will be in its application by counsel and courts and its impact on facilitating credit transactions and reducing uncertainty in litigation. The authors look forward to the outcome with anticipation.

127. As the Chair of the Drafting Committee, William M. Burke, observed:

This opposition, very strenuous opposition, particularly from the creditors who were part of this process, threatened the entire draft, since strong opposition from either of these groups and particularly from both of the groups . . . would have made it very difficult, if not impossible, to get the draft adopted by the state legislatures.

75 A.L.I. PROC. 242 (1998).

128. For a more comprehensive account of the compromise by one who helped develop it, see Marion W. Benfield, Jr., *Consumer Provisions in Revised Article 9*, 74 CHI.-KENT L. REV. (forthcoming 1999).