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The Impact of Revised UCC Article 9 on the Law of Secured Transactions in West Virginia

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THE IMPACT OF REVISED UCC ARTICLE 9 ON THE LAW OF SECURED TRANSACTIONS IN WEST VIRGINIA

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I. INTRODUCTION

On July 1, 2001, West Virginia joined forty-five other states and the District of Columbia in implementing a revised Article 9 of the Uniform Commercial Code (“UCC”) governing secured transactions.¹ The four remaining states adopted the revised Article 9 but chose to make it effective later than July 1, 2001.² This legislation, which was approved by its sponsors back in 1998, included a delayed uniform effective date of July 1, 2001.³ The two sponsors

¹ See *A Few Facts About Revised UCC Article 9, Secured Transactions (1999)* at http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucca9.asp (last visited July 24, 2001)(copy on file with the *West Virginia Law Review*).

² *Id.* The effective date in Connecticut is October 1, 2001, and the effective date in Alabama, Florida, and Mississippi is January 1, 2002. *Id.*

³ 2 BARKLEY CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM

were the American Law Institute and the National Conference of Commissioners on Uniform State Laws, and the American Bar Association endorsed the legislation.⁴ The delayed effective date was included in an effort to have all states adopt a uniform date for the revised article, and West Virginia followed the trend in adopting the deferred date.⁵ Except for the four states that adopted later effective dates, uniform rules began to apply to secured transactions throughout the nation as of July 1, 2001. Part V of this Note discusses transition rules concerning security interests existing as of July 1, 2001.

The purpose of Article 9 is to provide a statutory framework to govern transactions involving the granting of credit secured by personal property.⁶ Revised Article 9 retains the basic framework of the current Article 9, which was last revised in 1972.⁷ However, the revised article has been “reorganized, renumbered, and rewritten.”⁸ There are 126 sections in the revised article, of which thirty-six are new and seventy-one contain language not found in the current Article 9.⁹ The numerous sections in the revised Article 9 are broken down into seven parts.¹⁰ The main categories of change are: 1) an expanded scope, 2) revised perfection rules, 3) a modernized filing system, 4) choice of law, 5) enhanced consumer protection, and 6) modified default and enforcement rules.¹¹ This Note discusses in some detail these revisions that will affect practicing West Virginia lawyers.

II. BRIEF OVERVIEW OF ARTICLE 9

Article 9 of the UCC generally applies to “[a] transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract.”¹² A security interest is a creditor’s interest in a debtor’s personal property

COMMERCIAL CODE ¶ 15.01 (rev. ed. 2000).

⁴ *A Few Facts About Revised UCC Article 9, Secured Transactions* (1999), *supra* note 1.

⁵ *See* W. VA. CODE § 46-9-701 & cmt. (2001).

⁶ *A Few Facts About Revised UCC Article 9, Secured Transactions* (1999), *supra* note 1.

⁷ *Id.*

⁸ JULIAN B. McDONNELL, *UNIFORM COMMERCIAL CODE 1998 REVISED ARTICLE 9: TEXT, COMMENTS, AND ANALYSIS 1* (1999).

⁹ *Id.*

¹⁰ The parts are as follows: Part 1. General Provisions; Part 2. Effectiveness of Security Agreement, Attachment of Security Interest, Rights of Parties to Security Agreement; Part 3. Perfection and Priority; Part 4. Rights of Third Parties; Part 5. Filing; Part 6. Default; and Part 7. Transition. W. VA. CODE ch. 46, art. 9 (2001).

¹¹ *Summary: Uniform Commercial Code Revised Article 9, Secured Transactions* (1999), at http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-uccra9st1999.asp (last visited August 26, 2001)(copy on file with the *West Virginia Law Review*) [hereinafter *Summary*].

¹² W. VA. CODE § 46-9-109(a)(1) (2001).

or fixtures, known as collateral, in order to secure payment or performance of an obligation.¹³ A debtor must often grant such an interest to induce a creditor to extend financing to the debtor. If a debtor defaults on an obligation secured by personal property, then the creditor is entitled to repossess and sell the property in order to satisfy the debt.¹⁴

Two of the key concepts in creating a security interest under Article 9 are attachment and perfection. Attachment occurs when the security interest in the collateral becomes enforceable against the debtor.¹⁵ A security interest attaches to collateral and becomes effective when value has been given, when the debtor has rights in the collateral, and when a valid security agreement involving the collateral has been made.¹⁶ Perfection takes place when the secured party has taken extra steps to maximize its priority over other creditors.¹⁷ The most common perfection method is the filing of a financing statement in the public record so that subsequent creditors are put on notice that a prior security interest exists.¹⁸ Usually, the first secured creditor to file a financing statement has priority.¹⁹ In the event of default, that creditor is entitled to repossess and sell the collateral in an effort to satisfy its debt first.²⁰ All secured creditors have priority over unsecured, non-lien holding creditors.²¹

III. REASONS FOR CHANGE TO ARTICLE 9

The operation of Article 9 is anything but simple, due to many exceptions to the general rules stated above and to various methods of attachment and perfection.²² "In fact, no area of commercial law has been so heavily litigated as Article 9 of the UCC, and one of the purposes of the revision is to cut down on litigation in the future."²³ West Virginia has had its share of notable cases involving Article 9 of the UCC.²⁴

¹³ § 46-1-201(37) (2001).

¹⁴ *Summary, supra* note 11.

¹⁵ § 46-9-203(a).

¹⁶ § 46-9-203.

¹⁷ *See* §§ 46-9-308 to -314.

¹⁸ *Summary, supra* note 11; *see* § 46-9-310(a).

¹⁹ § 46-9-322(a)(1); *Summary, supra* note 11.

²⁰ *See Summary, supra* note 11.

²¹ *Id.*; *see* § 46-9-201(a).

²² *Summary, supra* note 11.

²³ 2 CLARK, *supra* note 3, ¶ 15.01.

²⁴ *See, e.g.,* Cadle Co. v. Citizens Nat'l Bank, 490 S.E.2d 334 (W.Va. 1997); Transamerica Commercial Finance Corp. v. Blueville Bank of Grafton, 438 S.E.2d 817 (W.Va. 1993); Bank of Chapmanville v. Workman, 406 S.E.2d 58 (W.Va. 1991); Daniel v. Stevens, 394 S.E.2d 79

Revised Article 9 makes numerous substantive and procedural changes. In addition to trying to reduce litigation, the revised law seeks to achieve greater certainty for secured transactions than under prior law.²⁵ Greater certainty should be achieved by broadening the scope of transactions covered by Article 9 and by simplifying and clarifying the rules governing security interests.²⁶ Two other goals of the revised Article 9 are to make security interests easier to create and perfect and to adapt the law of secured transactions to electronic commerce.²⁷ Achievement of these goals should lead to lower transaction costs and less costly financing.

IV. MAJOR AREAS OF CHANGE MADE BY REVISED ARTICLE 9

A. *Widening of Scope*

One area of change under revised Article 9 is that its scope has been expanded. Additional secured transactions now fall within Article 9. Therefore, more legal certainty should be available for those transactions covered by the UCC, as compared to the less-predictable common law.²⁸ More types of collateral are also covered; there are twenty-five separate categories of collateral in revised Article 9.²⁹ Article 9 continues to apply to transactions that, regardless of their form, create a security interest in personal property or fixtures by agreement.³⁰ The economic reality of a transaction, rather than the form or label attached to it, determines whether a security interest subject to Article 9 is created.³¹ For example, parties may categorize a transaction as a sale or a lease, but if in reality the transaction is intended to give the transferor a security interest,

(W.Va. 1990); *Peerless Packing Co., Inc. v. Malone & Hyde, Inc.*, 376 S.E.2d 161 (W.Va. 1989); *General Elec. Credit Corp. v. Timbrook*, 291 S.E.2d 383 (W.Va. 1982); *Duncan Box & Lumber Co. v. Applied Energies, Inc.*, 270 S.E.2d 140 (W.Va. 1980); *Wachovia Bank and Trust Co. v. McCoy*, 270 S.E.2d 164 (W.Va. 1980); *Cox v. Galigher Motor Sales Co.*, 213 S.E.2d 475 (W.Va. 1975).

²⁵ THE NEW ARTICLE 9, UNIFORM COMMERCIAL CODE 1 (Corinne Cooper ed., 2d ed. 2000) [hereinafter THE NEW ARTICLE 9].

²⁶ *Id.*

²⁷ MCDONNELL, *supra* note 8, at 1-2.

²⁸ 2 CLARK, *supra* note 3, ¶ 15.03.

²⁹ *Id.* ¶ 15.02. These 25 categories are identified by Clark as: accessions, accounts, as-extracted collateral, chattel paper, commercial tort claims, commingled goods, consumer goods, deposit accounts, documents, equipment, farm products, fixtures, general intangibles, health care insurance receivables, instruments, inventory, investment property, letter of credit rights, manufactured homes, money, payment intangibles, proceeds, software, standing timber, and supporting obligations. *Id.*

³⁰ W. VA. CODE § 46-9-109(a)(1) (2001).

³¹ THE NEW ARTICLE 9, *supra* note 25, at 19.

then Article 9 applies.³² Revised Article 9 continues to exclude landlord's liens, non-agricultural statutory liens for services or materials, assignments of compensation claims, sales of intangibles as part of the sale of the related business, assignments of receivables for collection only, real property liens, and assignments of consumer deposit accounts.³³

Types of collateral and transactions newly subject to Article 9 under the revised statute include outright sales of payment intangibles and promissory notes,³⁴ health-care-insurance receivables,³⁵ consignments,³⁶ commercial tort claims,³⁷ and commercial deposit accounts.³⁸ Revised Article 9 also clarifies that a seller of accounts retains no interest in the property sold,³⁹ thereby overruling a Tenth Circuit case that had held to the contrary.⁴⁰ The expansion of sources of collateral, especially the ability of banks to secure an interest in non-consumer bank deposit accounts, should facilitate secured transactions. Creditors should be more willing to extend loans if borrowers have more types of collateral available to secure those loans.

B. *Perfection of Security Interests*

The second area of change under revised Article 9 is perfection of security interests, which establishes a creditor's priority in collateral in relation to other secured creditors and lien holders. Changes are made in all four methods of perfection: by filing, by automatic operation, by possession, and by control.⁴¹ The perfection method to be used depends primarily on the type of collateral involved in the secured transaction.⁴² Filing a financing statement remains the most common perfection method.⁴³ The next two sections of this Note discuss changes in the filing system.

³² *Id.*

³³ W. VA. CODE § 46-9-109(d).

³⁴ § 46-9-109(a)(3) & cmt. 4. A "payment intangible" is defined as "a general intangible under which the account debtor's principal obligation is a monetary obligation." § 46-9-102(a)(61).

³⁵ §§ 46-9-102(46), -109(d)(8) & cmt. 4.

³⁶ § 46-9-109(a)(4) & cmt. 6.

³⁷ § 46-9-109(d)(12) & cmt. 15.

³⁸ § 46-9-109(d)(13) & cmt. 16.

³⁹ § 46-9-318(a).

⁴⁰ *See* Octagon Gas Sys., Inc. v. Rimmer, 995 F.2d 948 (10th Cir. 1993); 2 CLARK, *supra* note 3, ¶ 15.03[1].

⁴¹ 2 CLARK, *supra* note 3, ¶ 15.05.

⁴² *Id.*

⁴³ *See* § 46-9-310(a); *Summary, supra* note 11.

Automatic perfection means that a security interest is perfected when it attaches and no further steps are required. Under the revised article, automatic perfection occurs in many of the same situations as under prior Article 9 and in some additional instances.⁴⁴ A major example of a security interest that continues to perfect automatically is a purchase-money security interest in consumer goods.⁴⁵ One new instance of automatic perfection is when a security interest in collateral is perfected by any method, then a security interest in a supporting obligation for the collateral, such as a letter or credit or guaranty, perfects automatically.⁴⁶ Other examples of security interests that begin to perfect automatically are outright sales of payment intangibles,⁴⁷ sales of promissory notes,⁴⁸ assignments of health-care-insurance receivables to the health-care provider,⁴⁹ interests created by a broker in investment property,⁵⁰ and interests created by assignment of a beneficial interest in a decedent's estate.⁵¹ In contrast, a security interest in a common law trust beneficial interest no longer perfects automatically as it did under the prior Article 9; filing is required to perfect such an interest.⁵²

Possession is the preferred method for perfecting a security interest in an instrument,⁵³ although perfecting an instrument by filing is permitted under the revised Article 9.⁵⁴ Possession continues to be the only way to perfect a security interest in money.⁵⁵ A security interest in collateral possessed by a third party does not perfect until the third party acknowledges with an authenticated record that it holds the collateral for the benefit of the secured party.⁵⁶ This acknowledgment rule replaces the prior rule that perfection occurred when the third party received notice of a security interest.⁵⁷ Because the revised statute

⁴⁴ See 2 CLARK, *supra* note 3, ¶ 15.05[1].

⁴⁵ § 46-9-309(1) & cmt. 3.

⁴⁶ § 46-9-308(d) & cmt. 5.

⁴⁷ § 46-9-309(3) & cmt. 4.

⁴⁸ § 46-9-309(4) & cmt. 4.

⁴⁹ § 46-9-309(5) & cmt. 5.

⁵⁰ § 46-9-309(10) & cmt. 6.

⁵¹ § 46-9-309(13).

⁵² THE NEW ARTICLE 9, *supra* note 25, at 32-33; § 46-9-309, cmt. 7.

⁵³ § 46-9-330(d); 2 CLARK, *supra* note 3, ¶ 15.05[2].

⁵⁴ § 46-9-312(a).

⁵⁵ § 46-9-312(b)(3).

⁵⁶ § 46-9-313(c) & cmt. 4. A "record" is defined as "information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form." § 46-9-102(a)(72).

⁵⁷ § 46-9-313, cmt. 4.

does not require the third party to make the acknowledgment,⁵⁸ the onus is on the secured party to obtain the required documentation in order to protect itself.

The control method expands to include deposit accounts,⁵⁹ letter of credit rights,⁶⁰ and electronic chattel paper,⁶¹ and it continues for investment property.⁶² Control is the *only* way to perfect deposit accounts and letter of credit rights.⁶³ Filing is an acceptable perfection method, although a less preferable method because of the lack of control, for electronic chattel paper and investment property.⁶⁴ A secured party controls a deposit account if the secured party is the depository bank, if the account is in the secured party's name, or if an agreement is reached between the parties so that the secured party may instruct the bank concerning the account without further consent by the debtor.⁶⁵ A secured party may still have control over the account even though the debtor retains the right to access the account.⁶⁶

C. *Simplified and Modernized Filing System*

A simplified and modernized filing system is the third important area of change under revised Article 9. The filing system is now both centralized and electronic.⁶⁷ The dusty file cabinets in county courthouses filled with paper financing statements will eventually be replaced by computerized records in each secretary of state's office. Uniform initial and amended financing statement forms that cannot be rejected by a filing office are provided in W.Va. Code Section 46-9-521, which took effect on July 1, 2001. Uniform filing fees are also provided.⁶⁸ The requirement in several states to file both locally and centrally has been eliminated. The only local filings now are for as-extracted collateral, timber to be cut, and fixtures, which are personal property that become attached to real estate.⁶⁹ Security interests for these three types of collateral are still to be

⁵⁸ See § 46-9-313(f).

⁵⁹ §§ 46-9-104, -314(a).

⁶⁰ §§ 46-9-107, -314(a).

⁶¹ §§ 46-9-105, -314(a). "Electronic chattel paper" is a new term in revised Article 9 defined as "chattel paper evidenced by a record or records consisting of information stored in an electronic medium." § 46-9-102(a)(31).

⁶² §§ 46-9-106, -314(a).

⁶³ § 46-9-312(b)(1)-(2).

⁶⁴ §§ 46-9-312(a), -314(a); 2 CLARK, *supra* note 3, ¶ 15.05[3].

⁶⁵ § 46-9-104(a).

⁶⁶ § 46-9-104(b).

⁶⁷ *Summary*, *supra* note 11.

⁶⁸ See § 46-9-525.

⁶⁹ § 46-9-501(a)(1).

recorded in local real estate records.⁷⁰ All other filings are to be made only with the secretary of state's office.⁷¹

The revised article makes a few changes regarding the required content of financing statements. One major change is that in order to facilitate electronic filing, signatures are no longer required on the statements.⁷² However, the debtor must authorize the filing of an original or amended financing statement by signing a valid security agreement.⁷³ The revised article provides several remedies for unauthorized and incorrect filings.⁷⁴ As under prior law, financing statements need to show the legal registered name of the debtor; listing the debtor's trade name only is not sufficient.⁷⁵ If a standard computer search in the filing office using the debtor's correct name reveals the financing statement with the incorrect name, then the financing statement is effective.⁷⁶ Otherwise, a financing statement with an incorrect name is not legally effective.⁷⁷ The "minor error" rule continues to apply under the revised article, and it clearly covers both initial and subsequent filings.⁷⁸ Super-generic descriptions of collateral such as "all assets" or "all personal property" suffice for a financing statement but *not* for a security agreement.⁷⁹ The prior law requirement that the financing statement describe the underlying real estate for crop loans has been eliminated.⁸⁰

Filing offices are more ministerial under revised Article 9 than under prior law.⁸¹ "[T]he filing office is not expected to make legal judgments and is not permitted to impose additional conditions or requirements."⁸² Financing

⁷⁰ *Id.*

⁷¹ § 46-9-501(a)(2).

⁷² See § 46-9-502(a). This subsection provides that a financing statement is sufficient if it provides the name of the debtor, provides the name of the secured party or that party's representative, and indicates the collateral covered by the financing statement. *Id.* Unlike the current Article 9, the revised article contains no signature requirement, which will facilitate paperless filing. § 46-9-502, cmt. 3.

⁷³ § 46-9-509(a).

⁷⁴ See §§ 46-9-625 (providing damages for noncompliance); 46-9-518 (allowing the filing of a correction statement); 46-9-509(d) (allowing anyone to file a termination statement if the secured party fails to do so).

⁷⁵ § 46-9-503 & cmt. 2.

⁷⁶ § 46-9-506(c).

⁷⁷ § 46-9-506(b).

⁷⁸ § 46-9-506(a) & cmt. 2; 2 CLARK, *supra* note 3, ¶ 15.05[4][f]. The "minor error" rule provides that a financing statement in substantial compliance with requirements is effective even though it contains minor errors that are not seriously misleading. § 46-9-506(a).

⁷⁹ §§ 46-9-504(2), -108(c).

⁸⁰ 2 CLARK, *supra* note 3, ¶ 15.05[4][e]; see § 46-9-108.

⁸¹ Summary, *supra* note 11; see 2 CLARK, *supra* note 3, ¶ 15.05[4][j].

⁸² § 46-9-520, cmt. 2.

statements may only be rejected for a few limited reasons.⁸³ Most of the permitted reasons are those that prevent the filing office from processing the statement, such as omission of the debtor's name, failure to pay the required fee, and failure to communicate the statement by a method authorized by the filing office.⁸⁴ Other provisions regarding filing office operations include the fact that records of statements must be kept for at least one year after lapse,⁸⁵ and all subsequent filings must be linked to the original filing.⁸⁶ In addition, wrongful refusal of a statement by a filing office will not prevent it from taking effect, except against a subsequent purchaser of collateral who reasonably relies on the absence of a financing statement.⁸⁷

D. *Choice of Law*

The fourth area of change, choice of law, alters the state in which many financing statements are to be filed. Previously, the law of the state where the tangible collateral was located controlled the rules of perfection and priority.⁸⁸ In contrast, the revised Article 9 provides that the law of the state where the debtor is located governs.⁸⁹ Because collateral generally moves more easily than a debtor, the new rule should provide a more certain place to perfect a security interest. "The new rule should reduce transactions costs and legal risk by enabling the secured party to 'package' all types of collateral into a single filing in the state where the debtor is located."⁹⁰

Revised Article 9 includes detailed rules to determine a debtor's location.⁹¹ The prior general rule continues in that a debtor's location is its place of business, or, if the debtor has more than one place of business, its chief executive office.⁹² An individual debtor continues to be located at his principal residence.⁹³ Foreign debtors located in a jurisdiction without a public notice filing system are considered to be located in the District of Columbia.⁹⁴

⁸³ § 46-9-520(a).

⁸⁴ § 46-9-516(b).

⁸⁵ § 46-9-522(a).

⁸⁶ § 46-9-519(c).

⁸⁷ § 46-9-516(d).

⁸⁸ § 46-9-103(1)(b) (1993 & Supp. 2000)(amended 2001).

⁸⁹ § 46-9-301(1) (2001).

⁹⁰ 2 CLARK, *supra* note 3, ¶ 15.05[4][a].

⁹¹ *See* § 46-9-307.

⁹² § 46-9-307(b)(2)-(3).

⁹³ § 46-9-307(b)(1).

⁹⁴ § 46-9-307(c).

The revised article provides one important exception to the general rule that a debtor is located at its place of business. "A registered organization that is organized under the law of a state is located in that state."⁹⁵ Therefore, financing statements for debtors that are corporations, limited partnerships, or limited liability companies should be filed in the state of their incorporation or organization. A registered organization's location will not change despite the suspension or elimination of its status as a registered organization.⁹⁶ The new "place of birth" test for organizations should provide more certainty than the previous "chief executive office" test,⁹⁷ because the state of birth is a matter of public record, while the chief executive office does not require an official designation.

E. *Consumer Transactions*

The fifth major change revised Article 9 makes is in the area of consumer transactions. Several special rules translate into enhanced consumer protection. Consumer secured transactions are those in which both the collateral and the secured obligation are primarily for personal, family, or household purposes, regardless of the dollar amount involved.⁹⁸ In contrast to the general rule, when listing consumer transaction collateral in a security agreement, a description of only the type of collateral is not sufficient.⁹⁹ Greater detail in agreements is required to properly notify the consumer of encumbered property. Consumer debtors are entitled to receive special foreclosure sale notices and deficiency calculation notices that provide more information than for non-consumer debtors.¹⁰⁰ Consumer debtors are not permitted to waive redemption rights in collateral,¹⁰¹ and a consumer buyer who pre-pays fully or partly has an enforceable interest in the purchased goods and may obtain them as a remedy.¹⁰² A secured party is not allowed to accept as collateral consumer goods that are already in the debtor's possession when the debtor agrees to give the goods as security.¹⁰³ Nor may a secured party accept collateral in partial satisfaction of a consumer debt.¹⁰⁴ Therefore, if a party accepts some collateral for a secured consumer debt, then the debt will be deemed to be fully satisfied.

⁹⁵ § 46-9-307(e).

⁹⁶ § 46-9-307(g).

⁹⁷ 2 CLARK, *supra* note 3, ¶ 15.05[4][a].

⁹⁸ § 46-9-102(a)(23)-(24).

⁹⁹ § 46-9-108(b)(3), (c)(2).

¹⁰⁰ *See* § 46-9-614, -616(b).

¹⁰¹ § 46-9-624(c).

¹⁰² *See* § 46-2-502, -716; *Summary, supra* note 11.

¹⁰³ § 46-9-620(a)(3).

¹⁰⁴ § 46-9-620(g).

The good faith standard that applies to both consumer and non-consumer secured transactions under the previous Article 9 has become more objective. Prior law defined “good faith” for Article 9 purposes as “honesty in fact,”¹⁰⁵ while revised Article 9 defines it as “honesty in fact and the observance of reasonable commercial standards of fair dealing.”¹⁰⁶ This change attempts to introduce an element of fairness, but it may increase lender liability litigation, especially when lenders declare default in secured transactions.¹⁰⁷

F. *Creditor Enforcement of Security Interests*

The sixth and last area of change involves clarifying rules that govern creditor enforcement of security interests after a debtor defaults. Under the revised article, a secured party still must notify a secondary obligor, such as a guarantor, when a default occurs, and a secondary obligor is not permitted to waive certain rights prior to default if the debtor can not waive them.¹⁰⁸ A secured party who repossesses goods and sells them gives implied warranties of title unless they are disclaimed.¹⁰⁹ In a new rule, a foreclosing creditor must notify all other secured parties who have filed financing statements covering the collateral subject to the foreclosure sale.¹¹⁰ Notice must be sent within a reasonable time prior to disposition, and ten days is deemed to be a reasonable time for non-consumer transactions.¹¹¹ The statute provides a safe harbor notice form that, if utilized, will provide sufficient information to obligors.¹¹² These additional notice requirements should limit post-foreclosure disputes and encourage agreements between competing creditors.

Several new rules encourage the use of strict foreclosure, in which collateral is retained to satisfy the debt, in lieu of often futile foreclosure sales.¹¹³ These rules give a secured party the ability to accept collateral in partial satisfaction of a debt,¹¹⁴ eliminate the requirement that the secured party be in possession of collateral to use strict foreclosure,¹¹⁵ and allow the discharge of sub-

¹⁰⁵ § 46-1-201(19) (1993 & Supp. 2000)(amended 2001); see 2 CLARK, *supra* note 3, ¶ 15.10.

¹⁰⁶ § 46-9-102(a)(43) & cmt. 19 (2001).

¹⁰⁷ 2 CLARK, *supra* note 3, ¶ 15.10.

¹⁰⁸ See § 46-9-102(a)(59), -602; 2 CLARK, *supra* note 3, ¶ 15.08[1].

¹⁰⁹ § 46-9-610(d)-(e).

¹¹⁰ § 46-9-611(c) & cmt. 4.

¹¹¹ § 46-9-612.

¹¹² § 46-9-613.

¹¹³ 2 CLARK, *supra* note 3, ¶ 15.08[12].

¹¹⁴ See § 46-9-620. However, consumer transactions are specifically excluded from this rule by section 46-9-620(g).

¹¹⁵ See § 46-9-620, cmt. 7; 2 CLARK, *supra* note 3, ¶ 15.08[12].

ordinate liens by the acceptance of collateral in satisfaction.¹¹⁶ In order to avoid large deficiencies caused by the sale of collateral at a low price to an insider, the revised article provides what is known as the “Rapson Rule.”¹¹⁷ This rule states that the price that should have been realized in an arm’s-length sale, rather than the actual price, is to be used to calculate the deficiency.¹¹⁸

One of the most important changes requested and obtained by secured creditors in the revised article is the replacement of the “absolute bar” rule with the “rebuttable presumption” rule for creditor misbehavior during foreclosure.¹¹⁹ Under the rebuttable presumption rule, if a secured party is unable to prove that it complied with statutory collection provisions, then the debtor is credited with the greater of the actual disposition proceeds or the proceeds that would have been realized if the secured party had so complied.¹²⁰ The debtor is still liable for a deficiency represented by the excess of the secured debt over the greater of the two proceeds amounts.¹²¹ In contrast, the “absolute bar” rule forbids a misbehaving creditor from pursuing a deficiency regardless of harm caused.¹²² This change should eliminate “unfortunate situations where the misbehaving creditor is denied a multimillion-dollar deficiency against the borrower and guarantor because of some technical failure in holding a foreclosure sale on a \$50,000 piece of equipment.”¹²³ This change does not alter the law in West Virginia, where the rebuttable presumption rule already applied.¹²⁴

V. TRANSITION FROM CURRENT TO REVISED ARTICLE 9

Part 7 of revised Article 9 provides transition rules from prior law. In general, the revised statute applies to transactions within its scope even if they were entered into before the July 1, 2001 effective date.¹²⁵ Part 7 includes a few exceptions to this general rule. One exception is for transactions and liens that were not covered by prior Article 9 but that would be subject to the broader revised Article 9 if they had been entered into after July 1, 2001.¹²⁶ These transactions and liens may be terminated, completed, consummated, and enforced un-

¹¹⁶ § 46-9-622(a); 2 CLARK, *supra* note 3, ¶ 15.08[12].

¹¹⁷ 2 CLARK, *supra* note 3, ¶ 15.08[11].

¹¹⁸ See § 46-9-615(f); 2 CLARK, *supra* note 3, ¶ 15.08[11].

¹¹⁹ 2 CLARK, *supra* note 3, ¶ 15.08[13]; see § 46-9-626.

¹²⁰ § 46-9-626(a)(3) & cmt. 3.

¹²¹ *Id.*

¹²² 2 CLARK, *supra* note 3, ¶ 15.08[13].

¹²³ *Id.*

¹²⁴ See *Bank of Chapmanville v. Workman*, 406 S.E.2d 58, 64-65 (W. Va. 1991).

¹²⁵ § 46-9-702(a).

¹²⁶ § 46-9-702(b)(1).

der either prior law or revised Article 9.¹²⁷ Another exception exists for judicial proceedings begun before July 1, 2001; the revised article does not affect them.¹²⁸

Security interests perfected under the previous Article 9 before July 1, 2001 will remain perfected if the requirements for perfection and enforceability are also met under revised Article 9.¹²⁹ However, corrective filing action to ensure continued validity must be taken for certain security interests. For example, security interests perfected in West Virginia under the prior Article 9 that do not meet the perfection requirements under revised Article 9 will remain in effect for two years after July 1, 2001.¹³⁰ In order to extend those interests after July 1, 2003, the new perfection requirements must be satisfied before the two years expires.¹³¹ In contrast to the two-year provision in this state, the uniform Article 9 provides that such interests will remain in effect for only one year.¹³² A financing statement filed in the correct jurisdiction under prior law will remain effective for up to five years, even if it should be filed in another state under revised Article 9.¹³³ As a result, it may be necessary to search in two jurisdictions until July 1, 2006.

Lenders should incorporate changes into loan documents because of the revised Article 9. Examples of document changes are the addition of new collateral categories, the inclusion of the secured party's authorization to file financing statements, and representations regarding a corporate borrower's state of formation.¹³⁴ West Virginia attorneys who document secured loan transactions are advised to learn the changes made by revised Article 9 and to incorporate those revisions into their legal documents.

VI. CONCLUSION

The purpose of this brief summary of the revised Article 9 of the Uniform Commercial Code is to highlight the changes that will impact West Virginia attorneys who encounter secured transactions in their practices. Much more detailed information is available in the Official Comments to the new article and in published commentaries.¹³⁵ The basic framework of Article 9 is not

¹²⁷ § 46-9-702(b)(2).

¹²⁸ § 46-9-702(c).

¹²⁹ § 46-9-703(a).

¹³⁰ § 46-9-703(b).

¹³¹ *Id.*

¹³² U.C.C. § 9-703 (2001).

¹³³ W. VA. CODE § 46-9-705(c) (2001).

¹³⁴ See 2 CLARK, *supra* note 3, ¶ 15.12.

¹³⁵ See 2 CLARK, *supra* note 3, Ch. 15; McDONNELL, *supra* note 8; THE NEW ARTICLE 9, *supra* note 25.

changed by the revision, but numerous alterations are included in the largely rewritten article. Changes have been made to the law of secured transactions in the areas of scope, perfection, filing, choice of law, consumer protection, and rules for default and enforcement. The goals of these changes are to reduce litigation, to produce greater certainty for transactions, to adapt to electronic commerce, and to ease the creation and perfection of security interests. The determination of whether or not these goals will be achieved in West Virginia will have to be made well beyond the July 1, 2001 effective date of the revised Article 9. .

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